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REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this Reporter.]

Darby v. Anderson (Ind.) 77 N. E. 1083.

Kline v. Hagey (Ind.) 81 N. E. 209.

State v. Parks (Ind.) 81 N. E. 76.

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BALDWIN v. AMERICAN WRITING PAPER CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 21, 1907.)

1. APPEAL—ERROR WAIVED IN APPELLATE COURT—FAILURE TO URGE OBJECTIONS.

Exceptions not argued on appeal will be treated as waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

2. MASTER AND SERVANT—INJURIES TO SERVANT IN LINE OF EMPLOYMENT—QUESTIONS FOR JURY.

Where decedent, an apprentice in defendant's employ for the purpose of learning the business of a millwright, was killed while accompanying one of defendant's assistant millwrights, by the explosion of a steam pipe, the question whether he had voluntarily left the work on which he had been employed and accompanied the assistant, or not, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1004, 1005, 1068-1088.]

3. SAME.

Where, in an action against a master for death of an employé through the explosion of a steam pipe connected with an engine, it neither appeared that when employed nor at the time of the explosion decedent had any mechanical knowledge of the manner in which the engine was operated, the question whether he realized the peril of the situation was properly left to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068-1088.]

4. SAME—ASSUMPTION OF RISK—INCOMPETENT FELLOW SERVANT.

A servant does not assume the risk of injury arising from the carelessness of an incompetent fellow servant, of whose incapacity he is entirely ignorant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 567-573.]

5. SAME—EVIDENCE—BURDEN OF PROOF.

In an action against a master for death of a servant killed by the explosion of a steam pipe, the burden was on plaintiff to show that a fellow servant, through whose negligence in starting an engine the explosion occurred, was ordered by defendant's foreman to start the engine, and in obedience to the command executed the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 877-908.]

6. TRIAL—REQUESTS FOR INSTRUCTIONS—FURTHER OR MORE SPECIFIC INSTRUCTIONS.

A party, apprehensive that the jury might inadvertently be misled in applying instructions

to the different counts, should specifically direct the attention of the trial judge thereto and request further instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 628-641.]

Exceptions from Superior Court, Hampden County; John C. Crosby, Judge.

Action by Jennie Baldwin, administratrix, against the American Writing Paper Company. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

H. Spencer Haskell and Marvin M. Taylor, for plaintiff. Brooks & Hamilton, for defendant.

BRALEY, J. While the declaration contained 13 counts, the case was submitted to the jury on the second, sixth, twelfth and thirteenth, but as the defendant concedes that the verdict for the plaintiff was returned upon this count, only the second, declaring upon the alleged negligence of the acting superintendent under Rev. Laws, c. 106, § 71, cl. 2, with an assessment of damages under section 72, is material. The defendant's numerous requests for rulings were refused except as embodied in the instructions, but only the exceptions connected with this count having been argued, the others must be treated as waived. The questions thus presented relate to the scope of the intestate's contract of service, his failure to exercise due care, and whether there was evidence that his injuries and death were caused by the negligence of one Griswold while acting as the defendant's superintendent. In such an inquiry the weight of evidence has no place, and we proceed to ascertain if there was any testimony which warranted their submission to the jury.

The defendant in the operation of its manufactory among other means of supplying motive power used a horizontal stationary steam engine the cylinder of which was put in communication with the boilers from a higher plane by an iron pipe with lateral elbows. This pipe contained three valves. The first described as a gate valve near the boiler, admitted steam; the second a throttle valve at the end near the cylinder regulated the flow of steam to the engine, and the third a drip

valve set in the elbow nearest the engine upon being opened drained the pipe of accumulated water. There was evidence that the engine not being in daily use, the throttle valve was then left closed, with the gate valve open, while the drip valve remained shut, thereby causing cold water to accumulate from the condensation of steam until the entire pipe might become filled. It was unquestioned that when this state of things existed, if the operator starting the engine opened the drip valve with the gate valve remaining closed, steam from the boilers coming in contact simultaneously with the cold surface of the pipe, and of the water, would rapidly condense in the upper part, creating a draft of great velocity by the resistance of the water at the point of condensation, and there not being sufficient space for expansion, the pressure became so great that the pipe would burst. If an explosion followed, employes who were in sufficient proximity were likely to be scalded by escaping steam. It seems to have been equally unquestioned, or there was plenary evidence from which these facts could have been found, that because of certain conditions restricting the use of the water power with which the factory was equipped, it became necessary in the afternoon of the day of the accident that this auxiliary engine, after having been idle for more than three days with the throttle and drip valves closed, but with the gate valve open, should be put in commission. The defendant's servant, one Lajoie, who performed this work, without closing the gate valve opened the drip valve, and the steam passing into the pipe caused an explosion which resulted in the scalding of the plaintiff's intestate, who subsequently died from the injury.

It is claimed by the defendant that because the decedent stood in the doorway of the engine room apparently observing the mode of operation and nothing more, he was not at the time engaged in the performance of any duty, or was a mere volunteer. But while the evidence was conflicting, the jury were not obliged to accept the defendant's theory, that he voluntarily left the work on which he had been employed, and accompanied Lajoie, who for some considerable time had been entrusted with this duty. From the testimony of the defendant's witness, Griswold, the jury could find that the intestate had been hired by him "to learn the business of a millwright," and they further could find upon all the evidence so far as material that Lajoie was recognized as one of the company's assistant millwrights, even if he had not served an apprenticeship, but had become qualified from his experience in the the defendant's employment. Previously to their going to the engine room, they had been engaged upon a particular piece of work to which they had been called, but upon its completion, while Griswold testified that he gave "them directions to return to their own work," there was evidence that instead he

directed either Lajoie or both to start the engine. If both were sent, or Lajoie only, then from the nature of his service as an apprentice it cannot be said as matter of law that the intestate was not rightfully present. *Ferren v. Old Colony R. Co.*, 143 Mass. 197, 9 N. E. 608; *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 32 N. E. 161, 34 Am. St. Rep. 275. The argument as to his negligence or assumption of risk may be briefly noticed. It neither appears that when employed, nor at the time of the explosion he had any mechanical knowledge of the adjustment or the manner in which an engine of this description was operated, and while it could be found that he heard the warning of Tuttle, whether upon hearing the reply of Lajoie his inexperience was such that he failed to realize the peril of the situation was properly left to the jury. *Keeley v. Boston Elevated R. Co.*, 192 Mass. 487, 78 N. E. 490. It certainly could not have been ruled as matter of law that he knew and appreciated the danger that an explosion might happen, and with such knowledge voluntarily exposed himself to the chance of mortal injury. The seventh, seventeenth and nineteenth requests were rightly refused, and the instructions given were appropriate. *Maher v. Boston & Albany R. Co.*, 158 Mass. 36, 32 N. E. 950; *Garant v. Cashman*, 183 Mass. 18, 66 N. E. 599; *Wagner v. Boston Elevated R. Co.*, 188 Mass. 437, 74 N. E. 919; *Urquhardt v. Smith & Anthony Co.*, 192 Mass. 257, 78 N. E. 410; *Cooney v. Commonwealth Avenue St. Ry. Co. (Mass.)* 81 N. E. 905. Nor could the eighteenth request have been properly granted. If the explosion was caused by the incapacity of Lajoie, as the jury well might find upon evidence to which later we shall more fully recur, neither by his contract of employment, nor by subsequent conduct can the intestate be said to have assumed any risk of injury arising from the carelessness of an incompetent fellow servant, but of whose incapacity he is shown to have been entirely ignorant. *Hatt v. Nay*, 144 Mass. 186, 10 N. E. 807. This distinction also was fully covered by the instructions. But if the evidence justified the submission of the case to the jury on these issues the principal ground upon which the defendant endeavors to avoid liability is, that there was no evidence that the intestate was injured through any act of negligence on the part of the acting superintendent.

Of his representative position and competency as master millwright in charge of this portion of the motive power there seems finally to have been no dispute. But if controverted, it is sufficient to say, that the evidence was ample to warrant a finding that although there was a general superintendent employed by the defendant, Griswold hired the millwrights, and exercised supervision and control over them, and over this department. *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202, 43 N. E. 85; *Reynolds v. Barnard*, 168 Mass. 226, 46 N. E. 703; *Crowley*

v. Cutting, 165 Mass. 436, 43 N. E. 197; Mahoney v. Bay State Pink Granite Co., 184 Mass. 287, 288, 68 N. E. 234, and cases cited; Murphy v. New York, N. H. & H. R. Co., 187 Mass. 18, 72 N. E. 330; Reardon v. Byrne (Mass.) 80 N. E. 827. It is to be assumed from his evidence that he was familiar with the proper method of operating the engine after it had been at rest during the period and under the conditions previously stated, and upon all the evidence the jury further could have found that he knew, or in the exercise of reasonable care should have known, that to put it in use by opening the drip valve while the gate valve also remained open, was unskillful and dangerous. While he testified that Lajoie during his employment had proved to be very intelligent, and for this purpose was a competent millwright, the declarations of Lajoie who died before the trial, were introduced in evidence under Rev. Laws, c. 175, § 65, and if believed, the jury could find that he followed exact instructions previously given by Griswold, which constituted the only method he had been taught, or of which he had knowledge. They also would be warranted in finding not only that Lajoie was incompetent to perform this duty, but that Griswold ought to have known of his incompetency. Cooney v. Commonwealth Avenue St. Ry. Co., *ubi supra*. But the plaintiff was required to go further, as the defendant would not be responsible unless Lajoie was ordered by Griswold to start the engine, and in obedience to the command executed the order. Again this also was purely a question of fact. It was indeed denied by him that he gave the order, yet not only were his alleged admissions to the contrary introduced, but the evidence of Lajoie was unequivocal, that "Mr. Griswold sent me to start the engine." Upon conflicting testimony it was open to the jury therefore to reach the conclusion that the acting superintendent knowingly directed an incompetent servant, who obeyed the order, to perform this work, and by reason of his incompetency the decedent's injury and death were caused. Accordingly the defendant's seventh request so far as applicable to this issue, and the eighth request were rightly refused, and those given correctly stated the law. Solari v. Clark, 187 Mass. 229, 72 N. E. 958, 68 L. R. A. 243; McPhee v. New England Structural Co., 188 Mass. 141, 74 N. E. 303.

Among other instructions, the jury were told that if they found that Griswold had been given supervision of the engine, then as the engineer's license issued to him under the provisions of Rev. Laws, c. 102, § 78, had expired at the time of the explosion, the defendant's continuance of an unlicensed engineer was some evidence for their consideration of its negligence. Finnegan v. Winslow Skate Mfg. Co., 189 Mass. 580, 582, 76 N. E. 192, and cases cited. They were further instructed in substance that if the elbow which burst was defectively constructed his knowl-

edge, or means of knowledge of its condition also might be considered in connection with the same question. It is now contended by the defendant that these instructions were erroneous when applied to the second count, because the evidence failed to show that his license had expired, and as the plaintiff claimed that he was negligent in permitting the defective elbow to remain, the verdict may have been returned upon either of these grounds which were unsupported by the evidence. The argument, however, cannot be sustained as there was uncontroverted testimony given by Griswold himself, that under the provisions of section 81 his license had expired at least some months before, and notwithstanding the evidence of the defendant's witnesses, if the plaintiff's experts were believed, the elbow had been weakened by the insertion of the drip valve. But the full answer is, that a careful analysis of the entire charge makes it plain, that these instructions were intended, and must have been so understood by the jury as relating only to the counts at common law to which they would be applicable. Finnegan v. Winslow Skate Mfg. Co., *ubi supra*; Doe v. Boston & Worcester St. Ry. Co. (Mass.) 80 N. E. 815. Besides the general instructions being correct, if the defendant was apprehensive that the jury inadvertently might be misled in applying them to the different counts, it should specifically have directed the attention of the presiding judge to the distinctions now made, and requested further instructions. Cooney v. Commonwealth Avenue Street Ry. Co., *ubi supra*.

Exceptions overruled.

(196 Mass. 296)

ISELL v. PITTSFIELD ELECTRIC ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 15, 1907.)

1. CARRIERS—STREET RAILWAYS—PASSENGERS—RISK NOT ASSUMED.

A passenger does not assume the risk of injury from riding in a defective street car run at a dangerous rate of speed; the carrier being bound to exercise the highest degree of care consistent with the nature of its business to carry him safely.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1177.]

2. SAME—INSTRUCTIONS.

An instruction that when a carrier undertakes to carry a person it undertakes to carry him safely, and that he does not assume a risk because he knows of some defect which might cause an accident, is not objectionable, as meaning that a carrier is an insurer of its passengers' safety; the jury having been instructed that defendant carrier was bound to exercise the highest degree of care consistent with the nature of its business.

Exceptions from Superior Court, Berkshire County; Wm. F. Dana, Judge.

Personal injury action by Arthur A. Isbell against the Pittsfield Electric Street Railway Company. From a verdict for plaintiff, de-

fendant brings exceptions. Exceptions overruled.

M. B. Warner, for plaintiff. Walter F. Hawkins and Turtle & Casey, for defendant.

MORTON, J. This is an action to recover for personal injuries received by the plaintiff while being carried as a passenger in a car operated by the defendant. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the presiding judge to give certain rulings that were asked for and to certain instructions that were given.

There clearly was evidence warranting a finding that the car was out of repair and was run at an excessive rate of speed; in other words, of negligence on the part of the defendant. The principal contention of the defendant is that the plaintiff was not himself in the exercise of due care and assumed the risk of injury from the want of repair and the manner in which the car was operated, and that the presiding judge was in error in instructing the jury as he did "that, when a common carrier undertakes to carry a person it undertakes to carry him safely, and he does not assume a risk by the fact that he knows that there is some defect which might cause an accident. By inviting a person to become a passenger the obligations arise on the part of the defendant company to carry out the duties of a common carrier."

The defendant contends that the plaintiff assumed the risk because he continued to ride in the car after he discovered that it was out of repair and was run at a dangerous rate of speed, instead of getting off and taking another car. But there was evidence tending to show that the conductor assured him that the car was safe, and the jury could not therefore properly have been instructed, as the defendant in effect requested that they should be, that the plaintiff assumed the risk. Moreover the defendant could not thus throw upon the plaintiff the burden of its own negligence, but was bound, as the presiding judge in substance instructed the jury, to exercise the highest degree of care consistent with the nature of its business to carry him safely. Whether the plaintiff was in the exercise of due care in leaving his seat and going to the rear platform was under the circumstances which the evidence tended to show clearly a question for the jury and we see no error in the instructions or refusals to instruct of the presiding judge in relation to that matter.

The instruction that was excepted to and which is quoted above could not have been understood, we think, as meaning that the defendant was held to the liability of an insurer in respect to the safety of its passengers but only as stating generally the obligation of a common carrier to transport its passengers safely and that it was not ex-

cused from the performance of that duty by reason of the fact that the passenger knew of a defect which might cause an accident. The presiding judge had previously instructed the jury, as already observed, that the defendant was bound to exercise the highest degree of care consistent with the nature of its business. This distinctly negated the idea that its liability was that of an insurer.

We see no error in the manner in which the presiding judge dealt with the case.

Exceptions overruled.

(196 Mass. 300)

COMMONWEALTH v. HENCHEY et al.

(Supreme Judicial Court of Massachusetts,
Hampshire. Oct. 15, 1907.)

1. HIGHWAYS—WAY BY PRESCRIPTION—EVIDENCE.

In a prosecution for obstructing a highway, evidence held sufficient to warrant a finding of a way by prescription.

2. SAME—UNACCEPTED DEDICATION.

An attempted dedication of a highway which failed because of nonacceptance by the proper authorities did not prevent the establishment of a way by prescription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 10, 11.]

Exceptions from Superior Court, Hampshire County; John H. Hardy, Judge.

Dennis H. Henchey and others were convicted of creating and maintaining a nuisance by permanent obstruction of a highway in the city of Northampton, and they bring exceptions. Overruled.

Richard W. Irwin, for the Commonwealth.
John B. O'Donnell, for defendants.

MORTON, J. The only question in this case is whether the jury should have been instructed as requested by the defendants at the close of the testimony that there was not sufficient evidence to warrant the jury in finding a verdict of guilty, and that both defendants should be acquitted. "The court refused the request and submitted the case to the jury with full and appropriate instructions except as to said refusal." The jury returned a verdict against each defendant and the case is here on exceptions by the defendants to the refusal to rule as thus requested.

Whether the instruction requested should or should not have been given depends on whether there was or was not any evidence warranting the finding of a way by prescription. We think it is plain that there was such evidence. Witnesses for the commonwealth testified in effect that they had known the way for from thirty to fifty years, and that during all that time it had been used continuously and uninterruptedly by every one having occasion to use it until it was closed by the defendants about two years before the trial. There was also other evidence tending to show a way by prescription such as a declaration by a deceased owner of the

premises contained in a petition by him to the mayor and city council for the laying out of the way, that it had "been open to the public twenty-five years." The defendants introduced much evidence tending to show that there had not been a continuous user of the way but that it had been repeatedly interrupted by the erection of fences and other obstructions by a former owner of the premises now belonging to the defendants which it was contended included the way in question. They also introduced evidence tending as they claimed to show that, if there was a way, it was a way by dedication and that it had never been accepted by the proper authorities. But as said in effect in *Bassett v. Harwich*, 180 Mass. 585, 62 N. E. 974, the fact that there was an attempted dedication which failed would not prevent the establishment of a way by prescription. The exceptions recite that full and appropriate instructions were given and it is to be assumed therefore that the jury were correctly instructed as to what was necessary to establish a way by prescription and as to the effect if any to be given to the attempted dedication.

We think that it cannot be said that there was no evidence warranting the verdict, and the instruction requested was therefore rightly refused.

Exceptions overruled.

(196 Mass. 267)

FINLAY et al. v. CITY OF BOSTON et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 15, 1907.)

1. MANDAMUS—PLEADING—RETURN.

Under Rev. Laws, c. 192, § 5, providing that, on the return of an order of notice in mandamus, the person who is required to appear shall file an answer showing cause why the writ should not issue, the defendant in such proceeding may demur to the petition, if he so elects to finally put his case; but he may plead in his answer matters which would be the subject of an independent demurrer, in case he wishes to raise both the right of petitioner to relief on the facts pleaded and also the truth of such allegations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 344-353, 407.]

2. SAME—SCOPE OF RELIEF—ADEQUATE REMEDY.

Mandamus does not lie on petition of 12 citizens of a city to prevent it from enforcing an ordinance requiring the employment of union men to the exclusion of nonunion men in a city printing department "so far as it could legally do so," for the reason that the expenditure of the public money for the maintenance of such plant so operated would be an abuse of corporate power and unlawful; an adequate remedy being otherwise provided by petition filed under Rev. Laws, c. 25, § 100, declaring that, if a city or its corporate officers are about to expend money or incur obligations binding on the city without legal authority, the Supreme Judicial Court or the superior court may on proper petition restrain the unlawful exercise or abuse of such corporate power.

[Ed. Note.—For cases in point, see Cent. D.g. vol. 33, Mandamus, §§ 8, 9, 20-23.]

Case Reserved from Supreme Judicial Court, Suffolk County.

Petition for mandamus by Albert W. Finlay and others to restrain the city of Boston from putting in operation an ordinance of the city council approved April 4, 1901, amending Revised Ordinances 1898, c. 31, § 1, by requiring that all printed matter thereafter done for the city of Boston, so far as it could legally do so, should bear the imprint of the union label of the Allied Printing Trades Council of Boston, Mass. The petition was demurred to, and the issue thus raised was reserved for the full court. Petition dismissed.

J. J. Feely and Roger Clapp, for petitioners. Philip Nichols, for respondents.

LORING, J. We are of opinion that the demurrer to the petition must be sustained for the second reason stated in the third assignment, to wit: Because the petition is intended to prevent an illegal expenditure of public money and therefore the petitioner's only remedy is under Rev. Laws, c. 25, § 100.

The point has not been taken in the case at bar that a demurrer does not lie to a petition for mandamus. Doubts have arisen before this upon that point by reason of the provision of Rev. Laws, c. 192, § 5, that upon the return of the order of notice "the person who is required to appear shall file an answer showing cause why the writ should not issue."

A petition for mandamus is in many cases a petition which ought to be summarily heard and disposed of if the petitioner is to have what he is entitled to. And we are of opinion that this provision in Rev. Laws, c. 192, § 5, was inserted to ensure a speedy hearing on the merits, by requiring a completion of the pleadings on the return day, and that it was not intended to forbid the court's allowing the defendant to file a demurrer, if that is the ground on which he elects finally to put his case, or to set up in his answer the matters which would be the subject of an independent demurrer where he wishes to raise both the right of the petitioner to relief on the allegation of the facts contained in the petition and the truth of those allegations.

The substance of the complaint now before us is that the ordinance in question requiring the employment of union men to the exclusion of nonunion men in the city printing department, "so far as it can legally do so," is void, and that for this reason, in the words of the petition, "the expenditure of the public moneys for the maintenance of such a plant, run in such a manner, is an abuse of corporate power and unlawful."

The petition is in effect a petition to prevent the illegal expenditure of public money. The 12 citizens who bring this petition could have brought a petition under Rev. Laws,

c. 25, § 100. The cases of *Spaulding v. Peabody*, 153 Mass. 129, 26 N. E. 421, 10 L. R. A. 397, and *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610, indicate that such a petition could have been brought under the statute before the scope of it was enlarged by St. 1898, p. 445, c. 400, now Rev. Laws, c. 25, § 100. We are of opinion that the matter here complained of is ground for a petition under that act.

It is settled that mandamus does not lie where there is any other adequate and effectual remedy. The earlier cases are collected in *Selectmen of Gardner v. Templeton Street Ry.*, 184 Mass. 294, 297, 298, 68 N. E. 340. That case is not decisive against the right of these plaintiffs to maintain a petition for mandamus. The right which the plaintiffs in that case sought to enforce was a statutory one, while the right here in question is a right at common law.

But we are of opinion that it was the intention of the Legislature, in enacting Rev. Laws, c. 25, § 100, to make the remedy given by that act to 10 taxable inhabitants for cases covered thereby, exclusive of other remedies. It follows that mandamus does not lie. See in this connection *Jefferson v. Board of Education*, 64 N. J. Law, 59, 45 Atl. 775; *Ellison v. Raleigh*, 89 N. C. 125, 130; *State v. Board of Supervisors*, 29 Wis. 79.

Petition dismissed.

(196 Mass. 313)

HALLWOOD CASH REGISTER CO. v. PROUTY.

(Supreme Judicial Court of Massachusetts. Hampden. Oct. 15, 1907.)

1. TROVER AND CONVERSION—REMEDIES OF SELLER—EVIDENCE—ADMISSIBILITY.

In an action for the conversion of a cash register, sold by plaintiff under a conditional sale contract the terms of which had not been complied with, where it was shown that plaintiff had ceased to manufacture machines like that in controversy shortly after its sale to defendant, the court properly refused to allow defendant to show why this was done, since the reason for so doing was not a material fact as to its value.

2. TRIAL—RECEPTION OF EVIDENCE—OFFER OF PROOF.

In an action for the conversion of a cash register, sold by plaintiff under a conditional sale contract the terms of which had not been complied with, a former agent of plaintiff testified that plaintiff had ceased to manufacture machines like that in controversy shortly after its sale, and, in response to the question "if he knew why," the offer was made, "for the purpose of determining the value of a machine of this class at the time of conversion," to show that "the manufacture of this particular model had been discontinued by the plaintiff because it did not give satisfaction, that they had made improvements and had discontinued the sale of this model at the original price, but sold it at a reduced price, for which it could have been bought at the time of the conversion." *Held*, that the offer was properly excluded, since it was broader than the question and in large part not responsive thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 119.]

3. TROVER AND CONVERSION—EVIDENCE—ADMISSIBILITY.

In an action for the conversion of a cash register, in order to show the value of the machine at the time of the alleged conversion, it may be shown that, prior to the time of the conversion, such improvements had been made as to render the machine antiquated and of small value, and that its design was such that it could not operate smoothly, and that a new machine could then have been bought for much less than that for which this one had been sold.

4. TRIAL—RECEPTION OF EVIDENCE—OFFER OF PROOF.

A party cannot propound a question, incompetent in its substance and narrow in its scope, and then, by offering to prove irresponsible, though material, matters, thereby save a good exception to the exclusion of the inquiry.

5. SAME.

Evidence offered must be responsive to a competent question, in order that its exclusion be error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 119.]

6. TROVER AND CONVERSION—DAMAGES—VALUE OF PROPERTY—EVIDENCE.

In an action for the conversion of a cash register, evidence as to the average price for which a number of such registers were sold at the time of the conversion was properly excluded, where it was not shown that the sales were made under such similarity of conditions and circumstances of time, place, and market as to render the evidence helpful in determining the value of the article converted.

Exceptions from Superior Court, Hampden County; Loranus E. Hitchcock, Judge.

Action by the Hallwood Cash Register Company against Alfred D. Prouty for the conversion of a cash register, claimed by the plaintiff under a conditional sale or lease, the terms of which had not been complied with. Judgment for plaintiff, and defendant excepts. Exceptions overruled.

Willmore B. Stone, for plaintiff. H. A. Buzzell, for defendant.

RUGG, J. This an action of tort for the conversion of a cash register. The plaintiff introduced evidence of title in itself, value and conversion by the defendant. The defendant called a former district manager and sales agent of the plaintiff, who testified that the plaintiff had ceased to manufacture machines like that in controversy shortly after June, 1901 (the sale of this machine having been made in March, 1901). In response to the question "If he knew why" the offer was made "for the purpose of determining the value of a machine of this class at the time of the alleged conversion" to show that "the manufacture of this particular model had been discontinued by the plaintiff because it did not give satisfaction. They had made improvements, and had discontinued the sale of this model at the original price; that this model was sold by the plaintiff at a reduced price, and could have been bought at the time of the alleged conversion at a greatly reduced price."

The defendant's exception to the exclusion of this inquiry must be overruled. The question was incompetent. The reason why a

manufacturer ceased to make a particular machine is not a material fact as to its value. It might arise from financial reverses, failure to make a profit, bad management, or one of numerous other causes, none of which bear upon the value of the machine. Moreover, the offer was far broader than the question, and in large part was not responsive to it, and therefore properly excluded. Upon a proper inquiry it would have been material to prove that, prior to the time of conversion, such improvements had been made as to render the machine antiquated and of small value, and that its design was such that it could not operate smoothly, and that a new machine could then have been bought at price much less than that for which this one had been sold. But one cannot propound a question incompetent in its substance and narrow in scope, and then, by offering to prove irresponsible though material matters, thereby save a good exception. Evidence offered must be responsive to a competent question, in order that its exclusion be error.

The same witness, having testified that in May or June, 1902, he bought and sold a considerable number of cash registers of this particular style or model, was asked, "Will you state the average price that such registers brought?" Objection to this question was sustained against the defendant's exception. One ground for overruling this exception is that no offer was made of what the defendant expected to show in reply, and therefore it cannot be said that he has suffered any harm. But on broader grounds the ruling was right. While sales of other like articles in similar condition and under corresponding circumstances of time, place and market, have probative force upon the value of any article, an average of a number of sales has no worth as evidence. An average can only be struck where are differences. These differences may arise in the sales of articles of merchandise from a variety of reasons, any one of which might make the particular sale incompetent. In all cases where evidence of particular sales is offered, it must be determined by the court as a preliminary matter largely within its discretion, whether the circumstances of similarity are such as to render the proffered evidence helpful. There are no data upon which such determination may be based, where all that is before the court is an average of many sales.

Exceptions overruled.

(196 Mass. 329)

FAY et al. v. BOSTON & W. ST. RY. CO.

SAME v. SHAW et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. STREET RAILROADS—LIABILITY FOR FIRES—STATUTES.

Rev. Laws, c. 111, § 270, which creates an absolute liability on the part of railroad corporations for damages to property by fire communicated by their locomotive engines, consid-

ered in connection with the prior legislation on the subject (St. 1837, pp. 255-257, c. 226, §§ 6-10; St. 1840, p. 228, c. 85, § 1; St. 1864, p. 160, c. 229, § 34), applies only to locomotive engines used by a completed railroad, and not to a dummy engine while being used in construction of a street railroad.

2. PLEADING—AMENDMENTS TO DECLARATION—DISCRETION OF COURT.

The refusal to allow amendments to counts of a declaration for destruction by fire communicated by a locomotive operated on and over the location of a street railway in a certain town in the construction of said street railway, by the insertion after the words "operated upon and over said location" of the words "under a license from the town," is in the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 601, 676-683.]

3. SAME—DEMURRER—GROUNDS.

A demurrer to a declaration may not be founded on averments of facts which do not appear in the declaration or record, but amount to a plea of res judicata; this being matter for plea or answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 426.]

Appeal from Superior Court, Worcester County; F. A. Gaskill, Judge.

Two actions by Waldo B. Fay and others, executors of J. Henry Robinson, deceased; one against the Boston & Worcester Street Railway Company, and the other against James F. Shaw and others. From a judgment in the first action on the sustaining of defendant's demurrer, and from an order in the second action sustaining a demurrer to the declaration, plaintiffs appeal. Judgment affirmed. Order affirmed in part, and reversed in part.

The amendment of the declaration which was refused was the adding of the words "under a license from the town of Westboro" after the words "operated upon and over said location," in the seventh, eighth, and ninth counts, in the statement, after one that defendant railway company was constructing a railway over its location in the town, and that fire was communicated to plaintiff's property from a locomotive engine operated upon and over said location.

Henry R. Scott, for appellants. Guy Murchie, for appellees.

KNOWLTON, C. J. The most important question in these two cases involves an interpretation of Rev. Laws, c. 111, § 270, which creates an absolute liability, on the part of railroad corporations, for damages to property by fire communicated by their locomotive engines. The plaintiffs' tract of woodland is alleged to have been injured by fire from a dummy engine, used in the construction of a street railway for the defendant in the first action, by contractors who are the defendants in the second action. We are called upon to determine the meaning of the statute in its application to cases of this kind.

The first enactment touching the subject was in St. 1837, pp. 255-257, c. 226, §§ 6-10, which changed the common law by putting

upon a railroad company the burden of showing that it had used "all due caution and diligence," if it would relieve itself from liability for damages from a fire communicated by one of its locomotive engines. By St. 1840, p. 228, c. 85, § 1, this liability was made absolute. In St. 1864, p. 166, c. 229, § 34, the liability was extended to street railway companies. Except as there have been changes in the law relative to street railways, the provision has remained without material change since 1840.

It is contended by the defendants that the language of the statute, when construed in connection with the conditions to which it relates, applies only to locomotive engines used by a completed railroad or railway, in the exercise of a franchise which subjects property along the railroad to peculiar dangers. The argument is that it was never intended to change the law relative to a liability for injuries done in the construction of railroads; that, ordinarily, the peculiar dangers on account of which the statute was enacted would not arise, in any considerable degree, if at all, in the construction of a railroad, and that the statute was not directed to possible dangers so arising, for which the rule of the common law making parties liable for the consequences of their negligence is equitable and sufficient.

There is much to indicate that this contention is correct. The language of the original statute, which refers to a "fire communicated by a locomotive engine of any railroad corporation," seems to contemplate a corporation using engines upon a completed railroad, under its franchise. In the next section the corporation is given an insurable interest in property "along its route," which implies that it has a route, that is, a recognized course or way traveled over. The exercise of its franchise by the frequent passage of ordinary locomotive engines over a railroad creates danger which justifies an unusual provision for the protection of property owners along its line. This is the danger which moved the Legislature to enact the law. It is a danger which does not exist until the road is completed and in use. The possibility that some kind of a steam engine may be used in the work of construction, and that a spark may be emitted from it, can hardly be considered a danger to which the statute was directed.

The opinions of this court, although not decisive of the precise question before us, tend strongly to support the contention of the defendants. In *Hart v. Western R. R. Co.*, 13 Metc. 99-104, 46 Am. Dec. 719, Chief Justice Shaw said: "Railroad companies acquire large profits by their business, but their business is of such a nature as necessarily to expose the property of others to danger. * * * The manifest intent and design of this statute, we think, and its legal effect * * * are * * * to afford some indemnity against this risk to those who

are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it." Chief Justice Bigelow expressed a similar conclusion in: *Ross v. Boston & Worcester R. R. Co.*, 6 Allen, 87-90. In *Ingersoll v. Stockbridge & Pittsfield R. R.*, 8 Allen, 438, the court gave as a reason for holding the defendant liable, that the engine "was running upon the defendant's road, with their consent, in the transaction of the business for the accommodation of which their franchise was conferred." In *Eastern Railroad Co. v. Relief Ins. Co.*, 98 Mass. 420-423, the object of the statute is said to be to afford protection and indemnity to owners of property "against the dangers to which it is necessarily exposed from the conduct of the business which the railroad corporation is authorized by law to carry on for the benefit of the public and its own profit." Similar language is used in *Davis v. Providence & Worcester Railroad*, 121 Mass. 134-136, where the court enforced the liability against receivers in possession of a railroad, and gave as a reason, that "the mischief for which the statute is designed to provide a remedy is as incident to the operation of the road in their hands as in those of the corporation." All of these cases recognize the fact that the statute was intended to give indemnity for risks resulting from the maintenance and operation of a completed railroad in actual use, rather than risks arising in the construction of a railroad. We are of opinion that the use of the dummy engine in building the street railway did not create a liability under this statute.

It is also contended that, under the definition of a street railway in St. 1898, p. 737, c. 578, § 1, and in Rev. Laws, c. 111, § 1, as a railway "operated by any motive power other than steam," it is not to be assumed that the use of a locomotive engine upon a street railway is authorized by law or included within the provision of Rev. Laws, c. 111, § 270, unless it is averred that express authority was given by the selectmen of the town to use steam as a motive power under Rev. Laws, c. 112, § 51. The declarations in these cases contain no such avement. In view of our conclusion upon the other branch of the case, and of the fact that, under St. 1906, p. 599, c. 463, § 35, street railways are no longer allowed to use steam as a motive power, we do not deem it necessary to consider the question presented by this contention.

The refusal to allow the amendments was within the discretion of the court. *Payson v. Macomber*, 3 Allen, 69; *Augur Steel Axle Gearing Co. v. Whittier*, 117 Mass. 451-455; *Barlow v. Nelson*, 157 Mass. 395, 32 N. E. 359. The judge well might refuse to allow them on the ground that they were immaterial and for other reasons.

The demurrer to the third count of the declaration in the second case is founded on

averments of facts which do not appear in the declaration or in the record of the case. This part of the demurrer is in substance a plea of *res judicata*. This count is good at common law, and the defense relied upon cannot be made by a demurrer, but should be stated in a plea or answer. The demurrer to this count was erroneously sustained.

The judgment in the first action is affirmed, and in the second action the order sustaining the demurrer is affirmed as to the first two counts, and reversed as to the third count.

So ordered.

(196 Mass. 363)

LAPRE v. WORONOCO ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 15, 1907.)

1. MASTER AND SERVANT — LIABILITY FOR NEGLIGENCE OF FELLOW SERVANTS.

For the negligence of fellow servants of the watchman at a street car barn, in putting in coal into the cellar in such a manner that it was liable to fall, and a piece of which did fall, on him as he was going on his rounds, the master is not liable.

2. SAME—ASSUMPTION OF RISK.

Where coal is put into a bin, near which the watchman in a street car barn passes on his rounds, at irregular times and in varying quantities, without notice to him, he assumes the risk of its being put in in such quantity and manner that a piece of it may fall on him as he passes it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 567-573.]

3. SAME—FELLOW SERVANTS.

Where coal was put into the cellar of a street car barn in such quantity and manner that a piece of it was liable to fall, and did fall, on the watchman while he was making his rounds, any negligence of the street railway company's superintendent, who, having been told that the coal ought to be pushed back or no more could be put in, had gone in the cellar before the accident, and on returning merely said to the watchman that he would find there was plenty of coal for a good while, was that of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 427.]

Exceptions from Superior Court, Hampden County; William Cushing Wait, Judge.

Action by Louis Lapre against the Woronoco Street Railway Company for personal injuries sustained by plaintiff while in defendant's employ. There was a directed verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

The first count of the declaration was as follows:

"Plaintiff says he was in the employ of the defendant; that it was the duty of the defendant to furnish him with a reasonably safe and suitable place in which to work, and to give him proper and suitable instructions with reference to the dangers attending his work; that the defendant, disregarding the aforesaid duties, negligently failed to furnish the plaintiff with a reasonably safe and suitable place in which to work, and negligently failed to sufficiently

warn and instruct the plaintiff concerning the dangers attending his work, and negligently failed to furnish the plaintiff with reasonably safe and suitable instrumentalities with which to work; and that by reason of the negligent failures aforesaid, the plaintiff, while in the exercise of due care and while in the line of his employment, and in the performance of his duties, was severely injured, and as a result of said injuries, he, among other things, lost the sight of one eye, and that he has suffered great pain of body, and anguish of mind, and has been put to great expense for medicines, medical attendance and nursing."

Plaintiff was night watchman at the street car barn of defendant, and while he was passing on his rounds, near the coal bin in the cellar, a large piece of coal fell on him.

Shortly before the accident, and after the coal had been put in, an employé of the company told the superintendent that the coal ought to be pushed back from the window, or no more could be put in, and the superintendent went into the cellar, and after being there several minutes he returned, and merely said to plaintiff that he had been in the cellar, and had seen the coal in the bin, and that plaintiff would find they would have plenty of coal for a good while.

Brooks & Hamilton, for plaintiff. Green & Bennett, for defendant.

MORTON, J. The action is at common law, and only the first count is relied on.

The putting in of the coal was done by fellow servants of the plaintiff, and if the coal was put into and left in the bin in such a way that it was liable to fall upon and did fall upon the plaintiff and injure him, the negligence, if any, which caused the accident was the negligence of the plaintiff's fellow servants and the defendant is not liable therefor. Moreover we think that the risk was one of the obvious risks of the plaintiff's employment. Coal was not put into the bin at fixed times or in fixed quantities, but as it might happen, and no notice was given to the plaintiff. In other words he was left to find out for himself when and how much and in what manner the coal was put in and to govern himself accordingly. The fact that at this time more coal was put in than had been put in before was one of the incidents of the business, and if it was left carelessly piled in the bin, that, as already observed, was the act of fellow servants. It is not necessary to consider whether the plaintiff was himself in the exercise of due care in going down into the cellar without his lantern when the electric lamp was out and groping his way to the side of the bin where the key to his time clock was kept. If there was any negligence on the part of Savery, the superintendent, it was that of a fellow servant, and the defendant is not liable therefor.

Exceptions overruled.

(196 Mass. 353)

HIRST v. FITCHBURG & L. ST. RY. CO.
(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. MASTER AND SERVANT—STREET RAILROADS—INJURIES TO THIRD PERSONS.

Where a police officer was not appointed as a railway policeman under Rev. Laws, c. 108, § 21 et seq., nor under St. 1906, p. 501, c. 463, § 49 et seq., making such corporations responsible for the acts of special railway policemen appointed on their petition, the railroad company was not liable thereunder for an assault committed by such policeman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1212.]

2. SAME—MISCONDUCT OF SERVANT—POLICEMAN.

In an action for an assault committed on plaintiff by a policeman while plaintiff was visiting defendant's skating rink, evidence held to justify a finding that the policeman, at the time he committed the assault, was acting as defendant's servant, and not as a police officer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1272.]

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Action by Alexander C. Hirst against the Fitchburg & Leominster Street Railway Company. A verdict was rendered in favor of plaintiff, and defendant brings exceptions. Overruled.

John F. McGrath, for plaintiff. Chas. F. Baker, W. P. Hall, and Emerson W. Baker, for defendant.

MORTON, J. The sole question in this case is whether there was evidence warranting the jury in finding that Driesnack was acting as the servant of the defendant when he assaulted the plaintiff. Driesnack was a police officer of the town of Lunenburg and was on duty at Whalom Park in said town. The defendant operated a skating rink at said park. The alleged assault took place in the skating rink. Driesnack, who was called as a witness by the plaintiff, testified amongst other things, that he was taking tickets at the main entrance and saw something that looked like a disturbance in the skating rink, "and he immediately left his post at the gate and went into the skating rink and pushed his way through the crowd and saw quite a disturbance there; that his purpose in leaving the ticket job was to restore order; that there was a large crowd" and "he pushed right into the center of it where the disturbance was and he saw it was necessary for him to pull his stick and he used it; that the one who was hit seemed to him to be causing * * * a disturbance; that after he hit the man he began to clean out the crowd; did not use the stick any more; that he got the crowd cleaned out and peace and order restored." This and other testimony in the case would, if believed, have warranted a finding that in doing what he did Driesnack was acting as a police officer to restore and preserve peace and order as his duty as a police officer required him to

do, in which case the defendant would not have been liable for any assault committed by him even though it was committed upon its premises. But there was also evidence tending to show that notwithstanding he was a police officer of the town of Lunenburg he was in the employment of the defendant and that the assault was committed by him as such servant or employé. He was not so far as appears appointed a railway policeman under Rev. Laws, c. 108, § 21 et seq., or under St. 1906, p. 501, c. 463, § 49 et seq.; and neither those provisions nor the case of *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540, relied on by the defendant, have any thing to do with the case before us. Neither was there anything in the fact that he was a police officer of the town of Lunenburg to prevent his being employed by the defendant if it saw fit to employ him. He testified that he was employed and paid by it; that after the skating rink was built he collected tickets at the main entrance; and "that Memorial Day 1906 he did patrol duty in the forenoon and in the afternoon; 'they (meaning as could have been found, we think, the defendant) sent him to the skating rink,' where he collected tickets," thus tending to show that he was subject to defendant's orders. He also testified that Manager Gile of the skating rink gave him instructions in regard to letting in disorderly persons and in regard to putting people out and that in quelling the disturbance he felt that it was his duty under his appointment and "under the managers of the rink to go in and see what they were doing." We do not see how it can be said that this testimony did not warrant the jury in finding, as they must have found, that he committed the assault as a servant of the defendant and not as a police officer. See *St. Louis, etc., Ry. Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440. The case was left to the jury under instructions not objected to except on the ground that there was no evidence warranting a finding that the assault was the act of a servant or agent of the defendant. We think, as already observed, that there was such evidence, and that the exceptions must, therefore be overruled.

So ordered.

(196 Mass. 270)

GOULD v. WAGNER et al.
(Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 15, 1907.)

1. BOUNDARIES—WAYS.

A deed describing land conveyed as bounded on a way conveys title to the center thereof, if the grantor owns so far, whether the way is public or private.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 123, 131.]

2. SAME.

Proof that the distances stated in the description of a deed conveying land bounded on

a way do not extend to the center of the way is not enough to exclude the operation of the rule that a deed conveying land as bounded on a way conveys title to the center thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 123, 181.]

3. EASEMENTS—WAYS—CONVEYANCE.

An owner laid out a passageway along the easterly line of his tract. He subsequently conveyed the tract by mortgage, which described the land as "on a" way and gave courses and distances. He subsequently conveyed the way to a third person. *Held*, that the mortgages operated to convey to the center of the way, with a right of way over the other half, and that the third person had a half of the way, with a corresponding right of way over the other half.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, § 46.]

4. BOUNDARIES—EVIDENCE—ADMISSIBILITY.

In determining the boundary of land conveyed by deed describing it as "on a" way, evidence of the laying out of the way and the condition of the locality was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 153.]

5. SAME.

Where a conveyance described the land conveyed as on a way, and gave courses and distances, and it appeared that the way extended to a street, proof that the use of the way was of value to other land of the grantor and one claiming under him under a subsequent conveyance, if admissible, did not affect the proper construction of the conveyance, which conveyed to the grantee therein a half of the way.

Loring and Sheldon, JJ., dissenting.

Exceptions from Land Court, Middlesex County; Chas. T. Davis, Judge.

Petition for registration of title to land, pursuant to Rev. Laws, c. 128, and for registration of an alleged easement, pursuant to Acts 1906, p. 166, c. 249, by one Gould against one Wagner and another. There was a judgment determining the rights of the parties, and defendants bring exceptions. Overruled.

Weston & Weston, for petitioner. Adams & Blinn, for respondents.

MORTON, J. The questions in this case relate to the rights of the parties in a passageway 5 feet wide, extending from Bennington street to Newtonville avenue in Newton, and bounding easterly the lots belonging to the respondents. The passageway and lots formerly belonged to one John B. Gould, and constituted one lot known as lot 17 on plan of land belonging to one Granger. The passageway was laid out by Gould along the easterly line of lot 17. He did not own then and has not owned since any land easterly of and adjoining it on that side. The respondents claim title to the passageway under two mortgages executed by Gould to the Hingham Institution for Savings of the lots belonging to them respectively. The petitioner, who is the wife of said Gould, claims title to the passageway under a conveyance from her husband to her through a conduit of the passageway after the mortgages were given to the Institution for Savings.

The mortgage to the Institution for Savings of the lot belonging to the defendant

Barker described it as "northeasterly on Newtonville avenue 85 feet; southeasterly on a passageway 5 feet wide running through the grantor's land to Bennington street 117½ feet; southwesterly on other land of the grantor 85 feet, and northwesterly by lot 16 on said plan 117½ feet." That of the lot belonging to the respondent Wagner described it as "southeasterly on a passageway 5 feet wide running through grantor's land to Bennington street 82½ feet; southwesterly on Bennington street 85 feet; northwesterly on lot 16 on said plan 82½ feet, and northeasterly on other land of the grantor 85 feet." The two lots were each 90 feet on the street.

The principal question is whether the mortgages operated to convey to the westerly line of the passageway, or to the center of it, or to the easterly line. Upon that question the land court found and ruled, in substance, that the petitioner had title to the easterly half of the passageway, with a right of way over the westerly half, and that the respondents had a corresponding right of way over the easterly half. We think that this was correct.

The general rule is that a deed bounding on a way conveys the title to the center of the way if the grantor owns so far. *Boston v. Richardson*, 13 Allen, 146, 152. The reasons for this rule are stronger in the case of a public way than in that of a private way, but the rule applies to both public and private ways. *Motley v. Sargent*, 119 Mass. 231; *Fisher v. Smith*, 9 Gray, 441. The fact that the distances of the side lines do not extend to the center of the way is not enough to exclude the operation of the rule. *Clark v. Parker*, 106 Mass. 554; *McKenzie v. Gleason*, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566. The question is one of intention. If competent, the evidence which was admitted against the objection of the respondents would tend to show that it would be contrary to the intention of the grantor to construe the mortgage deeds as conveying title to the easterly line of the way. But independently of that, the question is settled, we think, in this commonwealth in favor of the ruling of the land court, though it has been decided differently in other jurisdictions. See *Haberman v. Baker*, 128 N. Y. 253, 28 N. E. 370, 13 L. R. A. 611; *Taylor v. Armstrong*, 24 Ark. 102; *In re Robbins*, 34 Minn. 90, 24 N. W. 356, 57 Am. Rep. 40; *Jones v. Water Lot Co.*, 18 Ga. 539; *Healey v. Babbitt*, 14 R. I. 533. In *Lemay v. Furtado*, 182 Mass. 290, 65 N. E. 395, a case very similar to this, it was held that the grantee took only to the middle of the way. It is true that what the court said on this point was in a sense obiter. But the point was considered and passed upon at the request of the parties with a view to disposing of the whole controversy, and the opinion is to be regarded, therefore, as deciding the question. The same question was considered in *Gray v. Kelley*, 80 N. E. 651, with

the same result as in *Lemay v. Furtado*, supra, and in *Hamlin v. Attorney General*, 81 N. E. 275, the question was again presented and a like conclusion arrived at. In *Gray v. Kelley*, supra, the doctrine laid down in the cases cited above from other states was distinctly repudiated, and this was repeated in *Hamlin v. Attorney General*, supra. See, also, *Everett v. Fall River*, 189 Mass. 513, 75 N. E. 946; *McKenzie v. Gleason*, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566; *Motley v. Sargent*, 119 Mass. 231.

The evidence in regard to the laying out and construction of the way and the condition of the locality was admissible (*Motley v. Sargent*, supra, 235; *Codman v. Evans*, 1 Allen, 443, 446); but we doubt whether the evidence in regard to the ownership by the petitioner and her husband of other lots on the other side of Bennington street, and that the use of the way was of value to their lots, that the way was used by residents on Bennington street, and that the petitioner's husband was paid for such use by some of the residents, was competent. If inadmissible, however, it does not affect the construction which, in our opinion, should be given to the mortgage deeds.

We doubt also whether the construction given by the land court to the quitclaim deed from the petitioner and her husband to the bank dated April 23, 1893, was correct. The deed was given to correct errors of description in the mortgage of the Wagner lot and in a subsequent quitclaim deed of the equity by said John B. Gould, and "to confirm the title conveyed by said John B. Gould to this grantee by mortgage aforesaid, and by deed of January 22, 1897" (the quitclaim deed referred to); and it may well be doubted whether it operated to convey any title on the part of the petitioner. *Scaplen v. Blanchard*, 187 Mass. 73, 72 N. E. 346. But no exception was taken to the ruling.

The appeal from the "supplemental memorandum and decision" has been waived. The result is that the exceptions must be overruled.

So ordered.

LORING and SHELDON, JJ., are of opinion that the mortgages of the Barker and Wagner lots made by Gould to the Hingham Institution for Savings on August 8, 1894, carried the fee in the whole of the passageway here in question and not in the westerly half only.

This passageway was originally laid out along the southeasterly boundary line of the grantor's land, and he at no time owned any land beyond it.

It is agreed by all that the mortgages in question, as matter of construction, did not stop at the westerly side line of the passageway. It is also agreed that there is nothing to indicate an intention that the southeasterly boundary of the lot not stopping at the side line of the way should go to the center

or to the further side of it. The case now before us is confessedly that of a conveyance of premises bounded by a way on the extreme limit of the grantor's land, but wholly upon it, where no intention can be gathered as to where the side line is to be beyond the fact that the lot is bounded by the way.

In every case in which this point has been up for decision it has been held that the fee in the whole of the passageway passed to the grantee. It has been so held in well-considered cases in New York, Rhode Island, Minnesota, Arkansas and Georgia. *Haberman v. Baker*, 128 N. Y. 253, 28 N. E. 370, 13 L. R. A. 611; *Healey v. Babbitt*, 14 R. I. 533; *In re Robbins*, 34 Minn. 99, 24 N. W. 356, 57 Am. Rep. 40; *Taylor v. Armstrong*, 24 Ark. 102; *Jones v. Water Lot Co. of Columbus*, 18 Ga. 539.

The question is an open one in this commonwealth. There is a dictum to the contrary in *Lemay v. Furtado*, 182 Mass. 280, 65 N. E. 395. The bill before the court in that case was a bill to restrain the defendant from trespassing on a way 20 feet wide which way was the easterly boundary line of the land conveyed to the defendant. It was held that "the defendant has a right of way over the whole tract." The court then adds: "This conclusion is enough for the decision of the case, but as the parties have requested us to do what we can to dispose of the whole controversy, we may add that we see no reason to doubt that the other part of the general rule of construction applies and that the defendant owns the fee to the middle line of the tract, subject of course to the plaintiff's easement of way." It appears from an inspection of the briefs in that case that no one of the five cases cited above was brought to the attention of the court and that the principle on which they rest was not argued. It may be doubted whether the point now under consideration was in the mind of any one of the judges. However that may be, the statement was obiter and does not conclude us from deciding the point the other way in case we are of opinion that it should be so decided. It was decided in *Gray v. Kelley*, 80 N. E. 651 (which was disposed of while the case at bar was under advisement), that as matter of construction of the deed there in question the boundary of the lot stopped at the side line of the way. The statement in that case of what would have been the boundary line if it had not stopped at the side line of the way is an expression of opinion which is even less decisive of the point now up for decision. The same is true of the subsequent case of *Hamlin v. Attorney General*, 81 N. E. 275. There also it was decided that the boundary of the lot stopped at the side line, and the statement of where it would have gone had it not stopped there is an obiter dictum not conclusive of the question which we are now called upon to decide.

As we have said, the question we have to consider is what the boundary line is where

the lot is bounded on a way wholly on land at the grantor, when he has no land on the other side of that way and where there is no evidence of an intention on his part as to how far that side of the lot shall extend.

Cases where the grantor owns not only the fee in the way but land on the other side of it belong to another class. It cannot be assumed in such a case that the grantor owning the land on both sides of the way intended that the grantee should fare better than he was to fare himself after the conveyance, and for that reason the grantee takes to the center of the way only.

Excluding these cases, the true rule is that a conveyance of land bounding on a way where as matter of construction the granted premises do not stop at the side line goes to the line of the ownership of the grantor. There is a presumption that he owns to the center. Consequently on its face a deed bounding on a way goes to the center. But this presumption may be rebutted. If it appears to be the fact that the grantor's title stops at the side line, his grant of land bounded on the way stops at the side line. On the other hand, if it appears to be the fact that the grantor's title extends to the other side of the way, the deed conveys to the grantee the fee in the whole of it.

The reason given in the decided cases for going to the center of the way when the grantor owns to the center is stated in these words by Gray, J., in *Boston v. Richardson*, 13 Allen, 146, 153: "But in the absence of words clearly manifesting an intent so to do, the law presumes that he did not intend to reserve the title in a strip of land, not capable of any substantial or beneficial use by him, after having parted with the land by the side of it, while the highway remains, nor ordinarily of any considerable value to him if the way should be discontinued, and the ownership of which by him might greatly embarrass the use or disposal, by his grantee, of the lot granted." To the same effect see *Shaw, C. J.*, in *Smith v. Slocumb*, 9 Gray, 36, 37, 69 Am. Dec. 274; *C. Allen, J.*, in *Gould v. Eastern Railroad*, 142 Mass. 85, 89, 7 N. E. 543.

This reason applies with still greater force to the further half of a way on which the grantor after the deed in question takes effect owns no land, and where for this reason the nearer half passes to the grantee. No reason has been and it is believed no reason can be enunciated for holding that the grantee who in such a case takes the nearer half of such way does not take also the further half.

The conclusion to which the court will be driven in similar cases is worthy of consideration. If the conveyance in the case at bar goes to the center of the way only, a conveyance by a wall on the extreme edge of the grantor's land but lying wholly on his land must of necessity go to the center and not include the whole wall. Surely that is a conclusion which should not be reached.

Again, no one has ever contended that a

deed of land bounded by the sea shore stopped half way down the beach. It is conceded there that it is the line of high or low water. See *Doane v. Willcutt*, 5 Gray, 328, 66 Am. Dec. 369; *Haskell v. Friend*, 81 N. E. 962. There is little, if any, more reason for stopping in the center of a way when the grantor owns the fee in the whole and the boundary as matter of construction of the deed does not stop at the side line, than there is for stopping half way down the seashore if, as matter of construction, the line of high-water mark is not the boundary line.

For these reasons, in the opinion of these judges, the exceptions should be sustained.

(196 Mass. 342)

COMMONWEALTH v. ASHEROWSKI et al.

(Supreme Judicial Court of Massachusetts.

Worcester. Oct. 15, 1907.)

1. CRIMINAL LAW—ACCESSORIES BEFORE THE FACT—PROOF OF PRINCIPAL CRIME.

To warrant conviction of defendants as accessories before the fact, under Rev. Laws, c. 208, § 10, declaring a punishment for one who, with intent to injure the insurer, burns insured goods, it is necessary to prove that some one committed the principal felony—that is, burned the goods with intent to injure the insurer thereof—and it would not be enough that some one burned them by procurement of defendants, if he was ignorant of the insurance and had no actual intent to injure the insurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 109.]

2. SAME — APPEAL — PRESUMPTION — INSTRUCTIONS.

The instructions given not being in the bill of exceptions, it will be presumed that full and accurate instructions were given on all questions raised at the trial, if it was proper to submit the case to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3032.]

3. FIRES—BURNING INSURED PROPERTY—ACCESSORIES BEFORE THE FACT—EVIDENCE.

Circumstantial evidence on a prosecution for being accessories before the fact to the crime denounced by Rev. Laws, c. 208, § 10, burning insured goods with intent to injure the insurer, held sufficient to go to the jury on the questions of the person setting the fire having knowledge of the insurance, intending to injure the insurer, and having acted by procurement of defendants.

Exceptions from Superior Court, Worcester County; John F. Brown, Judge.

Abraham F. Asherowski and another were convicted of crime, and bring exceptions. Exceptions overruled.

Herbert Parker, Webster Thayer, and Robert Walcott, for plaintiffs. George S. Taft, Dist. Atty., and Ernest I. Morgan, Asst. Dist. Atty., for the Commonwealth.

SHELDON, J. This case went to the jury only upon the third and fourth counts, and the jury convicted the defendants only upon the fourth count, which charged the defendants as accessories before the fact to a principal whose name was unknown to the grand jury; and the defendants' exceptions raise the question whether it was competent for

the jury to return a verdict of guilty upon this count. The count charges that some person unknown did burn certain cloth and garments which were insured in the Franklin Insurance Company against loss or damage by fire, with intent thereby to injure the said insurers; and that these defendants procured, etc., the said unknown person to commit that felony.

We agree with the defendants that in order to convict them it was necessary to prove that some person had committed the principal felony charged, had, that is to say, burned these goods with the specific intent to injure the insurers thereof. Rev. Laws, c. 208, § 10; Com. v. Goldstein, 114 Mass. 272; People v. Henderson, 1 Parker, Cr. R. (N. Y.) 560; Staaden v. People, 82 Ill. 432, 25 Am. Rep. 333; People v. Schwartz, 32 Cal. 160; Queen v. Bryans, 11 Up. Can. C. P. 161. The intent to injure the insurer is a necessary ingredient of the crime described in Rev. Laws, c. 208, § 10; and unless the person who did the burning is shown to have acted with that intent, the crime is not proved to have been committed. And these defendants, who are charged in the count before us only as accessories before the fact, could not be convicted unless it was proved that the principal offense was in fact committed in violation of the statute. Com. v. Adams, 127 Mass. 15, 17, 19; Com. v. Glover, 111 Mass. 395; Com. v. Phillips, 16 Mass. 423. Even though the defendants may have procured this fire to be set, yet if the person who set it, though acting by their procurement, was in fact wholly ignorant of the insurance, and had no actual intent to injure the insurer, he acted innocently so far as this charge is concerned, and could not be found to have committed the offense charged in the indictment. These defendants, in that event, very likely may have committed a substantive crime; it may well be that they could themselves be held to be guilty of the offense which they would thus have committed by an innocent hand. Com. v. Hill, 11 Mass. 136. But they could not be convicted as accessories before the fact to a felony which had not been actually committed.

The complaint now made by the defendants, however, is that the court refused to order their acquittal. None of the instructions actually given are stated in the bill of exceptions; and it must be presumed that full and accurate instructions were given to the jury upon all the questions raised at the trial, if it was proper to submit the case to them at all. Accordingly the only question before us is whether the jury had a right to return a verdict of guilty upon the fourth count of the indictment.

It is earnestly and ably argued by counsel for the defendant that there was absolutely no evidence that the person who set the fire had any knowledge that the property was insured, or had any intent by means of the fire to injure the insurer. Undoubtedly there was

no direct evidence of these facts; but if there was circumstantial evidence from which they might have been inferred by the jury, that was sufficient. Even in capital cases, convictions resting either entirely or mainly on circumstantial evidence have been sustained by this court; and it has been left to the jury to determine whether that evidence came up to the stringent standard contended for by the defendants under the rules laid down in Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; Com. v. Tucker, 189 Mass. 457, 76 N. E. 127, 7 L. R. A. (N. S.) 1056; Com. v. Best, 180 Mass. 492, 496, 62 N. E. 748; Com. v. Umilian, 177 Mass. 582, 59 N. E. 439; Com. v. Williams, 171 Mass. 461, 462, 50 N. E. 1035. This was substantially the ruling given in Com. v. Gilbert, 165 Mass. 45, 49, 42 N. E. 336, in which a conviction resting upon circumstantial evidence was sustained. As was said by Holmes, J., in Com. v. Doherty, 137 Mass. 245, 247: "When a material fact is not proved by direct testimony, but is left to be inferred from the facts directly sworn to, the inference need not be a necessary one. There is a case for the jury, unless the inference either is forbidden by some special rule or law, or is declared unwarranted because too remote, according to the ordinary course of events. If there is a case for the jury, they are at liberty to use their general knowledge in determining what inferences are established beyond a reasonable doubt; and the facts inferred by them are as properly proved as if directly testified to."

Upon the evidence stated in the bill of exceptions, the jury were fully warranted in finding that the fire set in the defendants' store shortly before 1 o'clock in the morning was of incendiary origin. The testimony as to the fire traps found in the basement was amply sufficient for this purpose. Indeed we do not understand the defendants to deny this. And in view also of the testimony as to the keys of the store; of the evidence that when the firemen arrived at the building all the doors were locked and all means of entrance to the building closed, and that there was nothing to indicate that a forcible entry had been made; that a large part of the defendants' stock in trade had been brought into the basement where the fire traps were set in such a manner as to make possible an inference that it had been intended to lay the foundation for a magnified claim of loss; that both the building and the stock, furniture and fixtures were insured much beyond their real value; that after the fire and before their arrest the defendants filed proofs of loss with the insurance company for a grossly exaggerated amount; and in view also of the conduct of both the defendants before and after the fire and of one of them while it was burning, it seems manifest to us that the jury had a right to draw the inferences that the defendants had a guilty connection with the fire; that they must either have set it themselves or procured

it to be set by some confederate. It might have been found not only that the defendants had ample opportunity to do this, but that no one else could have done it without their privy. *Com. v. Umillan*, 177 Mass. 582, 583, 59 N. E. 439. And if the jury accepted, as they had a right to accept, the claim of the defendants that neither one of them was present at the store when the fire was set, the inference might well be drawn that they had procured it to be set by another. Doubtless there was testimony also from which the jury might have drawn inferences more favorable to the defendants; but the only question before us is whether they could find against defendants, and we cannot consider any question of the weight of the evidence.

And we are of opinion that the jury might also find that the person who set the fire had knowledge of the insurance and acted for the purpose of injuring the insurer. There is a presumption that all men intend the natural and probable consequences of their acts. *Com. v. Hersey*, 2 Allen (Mass.) 173, 179. The jury might have found that whoever set this fire acted by the procurement of the defendants; that he knew that it was set on the premises of the defendants, where they carried on business as dealers in clothing, and for the purpose of destroying their stock and other property; that he made careful preparations, by the construction and location of six fire traps in the basement, for what he expected to be an immediate and furious outburst of fire; and that he brought into the basement, into contiguity with those fire traps, a large quantity of the defendants' stock in trade, so as to lay the foundation for the claim of a large loss of property; that these preparations must have consumed a considerable time, and indicated that the person who made them relied upon the defendants to see that he was not interfered with while making them; and that they were calculated to produce a large loss of property and probably would have so resulted but for the fact that in the construction of the fire traps an excessive quantity of oil had been brought into close juxtaposition with the matches used. It is difficult to account for what the jury might find to have been done by this unknown incendiary by any other explanation than that he was laying the foundation for a large and perhaps a largely fictitious claim upon insurers of the property; and the jury were warranted in finding that this was the explanation of his conduct, that he knew of the insurance and was doing what he did for the purpose of injuring the insurance company by leading it to pay to the defendants upon an unfounded claim to be made by them a large sum of money in pretended satisfaction for their loss. This was enough. His intent to injure the insurance company was no less real if he expected to compel it to pay money to the defendants than if he expected to receive it himself; nor is there anything at variance with this in *Heard v. State*,

81 Ala. 55, 1 South. 640, relied on by the defendants. Accordingly, we are of opinion that the jury were warranted in finding that the principal felony was committed as charged in the indictment, and that the defendants were accessories before the fact to its commission.

The exceptions to the refusal of the court to require the government to elect on which count it would rely, and to the refusal to rule as matter of law that the verdicts of guilty on the fourth count must be set aside and were not warranted by law, have not been argued; and we treat them as waived. Plainly neither of these exceptions could be sustained.

Exceptions overruled.

(196 Mass. 355)

BOUCHER v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. RAILROADS—GRADE CROSSING—DUTY TO MAINTAIN GATES.

The jury are authorized to find that the grade crossing, over nine adjacent railroad tracks, of a street along which five lines of electric street cars ran and many teams passed, was a dangerous crossing, at which it was the duty of the railroads owning the tracks to maintain gates and an agent to operate them, even though they had not received an order, under Rev. Laws, c. 111, § 192, so to do.

2. MASTER AND SERVANT—INDEPENDENT CONTRACTOR—EVIDENCE.

Evidence that at a dangerous grade crossing of a street over railroad tracks, part belonging to defendant and part to two other railroads, there were gates on each side of the tracks, operated by a gate tender from a house midway the crossing, between tracks belonging to defendant, authorizes a finding that the business of operating the gates was defendant's and that the gate tender was its agent and representative, and not that of an independent contractor, notwithstanding evidence that the gates were being operated under some arrangement between defendant and one of the other railroads, and that such other railroad hired and paid the gate tender.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1272.]

3. SAME—DANGEROUS BUSINESS.

The running of frequent railroad trains over a grade crossing in a crowded street is a business fraught with such danger to travelers that the railroad company cannot delegate to an independent contractor the operation of gates thereat and so escape liability for negligence of the gate tender.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1241, 1254.]

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Action by Joseph Boucher against the New York, New Haven & Hartford Railroad Company. Verdict was ordered for defendant, and plaintiff brings exceptions. Exceptions sustained.

Marvin M. Taylor, for plaintiff. John L. Hall, for defendant.

KNOWLTON, C. J. The plaintiff was injured at a grade crossing of the defendant's

railroad in Worcester. The undisputed evidence tended to show that he was driving down Front street, across the tracks of the defendant and of the Boston & Albany Railroad, directly in front of the union station; that the street crosses nine tracks at that point, the first five of which go under the arch of the station; that the first three of these are used by the New York Central & Hudson River Railroad Company under a lease from the Boston & Albany Railroad Company, and the fourth and fifth for the passenger service of the defendant's railroad; that the sixth, seventh and eighth are used for freight service, the sixth and eighth principally by the New York Central & Hudson River Railroad Company and the seventh by the defendant, and that the ninth was a spur track to the Bradley Car Works. There was evidence that five lines of electric cars run through the street and over these railroad tracks at this crossing, and that many teams pass there. Two gates were maintained on each side of the tracks, which were raised and lowered by a gate tender, whose gate house was near the center of the crossing at the east side of the street, between the fourth and fifth tracks. The plaintiff was driving southward, the gates were up on the north side of the crossing and he drove upon the tracks, but, before he got across them, the gates on the southerly side were seen to be down, and he stopped his horse. The evidence tended to show that, as he was driving upon the crossing, one of the defendant's trains was about to pass over it on the fifth track, and the gate tender started to put down the gates to exclude persons from the crossing. The gates on the northerly side were left up long enough to allow an electric car upon the crossing to pass off to the northward, and during that time the plaintiff and his companion drove on. Afterwards the gate tender raised the gates on the southerly side to let the plaintiff off, but lowered them again quickly, so that one of them came down between the horse and the plaintiff as he was sitting in the wagon, driving southward. The judge ruled, at the defendant's request, that the defendant was not liable for these acts of the gateman, and ordered a verdict for the defendant.

In the argument before us both parties have assumed, and we think rightly, that there was evidence for the jury on the questions whether the plaintiff was in the exercise of due care, and whether there was negligence on the part of the gateman. We must, therefore, consider the evidence bearing upon the relations of the gateman to the defendant.

We understand that the locations of the Boston and Albany Railroad and of the defendant's railroad are adjacent to each other at the crossing. The jury could hardly fail to find that this was a dangerous crossing, calling for great precaution for the safety of travelers on the street. Gates were main-

tained, to be raised and lowered by a gateman, to exclude travelers from the defendant's tracks while trains were passing. There was no evidence to show whether the defendant had been ordered to maintain gates and an agent to open and close them, under Rev. Laws, c. 111, § 192. If it had, it would be bound to obey the order, and would be liable for the negligence of its agent in the management of the gates. If there had been no such order, the jury well might find that it was the duty of the defendant to maintain such gates and a gateman for the protection of travelers on the street, and that it would be liable for accidents caused by its failure to do this. *Eaton v. Fitchburg Railroad Company*, 129 Mass. 364. The evidence tends strongly to show that, with or without an order under the statute, there were compelling motives of duty of pecuniary self-interest to induce the defendant to make provision for the operation of gates by the side of its tracks at this crossing. These gates were being operated at the time of the accident, and had been maintained and used for a long time. Without further evidence, the jury might well find that this business, being done on the defendant's premises, apparently in its interest, was the defendant's business. The evidence went further, and tended to show that it was being done under some arrangement made by the defendant with the New York Central & Hudson River Railroad Company, the nature of which was not disclosed. This strengthened the reasons for finding that the defendant owned and controlled the business, and that it was done in its interest, through the agency of the gate tender. Unless it appeared that the business had passed out of its control, so as to become, as to proprietorship and right of control, the business of another, the gate tender in doing it was, in reference to liability to third persons, its servant and agent. It appeared that he was hired and paid by the New York Central & Hudson River Railroad Company. But this circumstance is not inconsistent with an arrangement whereby he was furnished to the defendant to do its business in the protection of its tracks, as its representative, for whose negligence it would be liable. The lending of one's servant to another party to act in his business, subject to his control, is common. The law in relation to it is discussed in *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328, and in cases there cited. It was also considered in the opinions in *Dutton v. Amesbury National Bank*, 181 Mass. 154, 63 N. E. 405. In the first of these cases the determining facts are stated as follows: "The question in every case is whether the proprietor for whom the work is being done has given up his proprietorship of the particular business to an independent contractor, and has thus divested himself of the right of control, so that he has no longer a legal right to terminate the work or direct it. If he has done

nothing to limit his rights in regard to the business which is being done for his benefit, but retains his proprietorship of it, each man who works in it is legally subject to his control while so engaged, and in reference to the rights of third persons who are affected by the work, is his servant." We are of opinion that there was evidence from which the jury might have found that this business was never taken out of the proprietorship or right of control of the defendant, and that, in relation to third persons, the gate tender was its servant or agent.

The testimony is entirely consistent with the existence of such an arrangement as appeared in *Brow v. Boston & Albany Railroad Company*, 157 Mass. 399, 82 N. E. 362, in which it was shown that the Boston & Albany Railroad Company employed a gateman and paid him, and received a repayment of a part of his wages from the two other railroad corporations whose tracks were a part of the same crossing. Although the question was not before the court, it was intimated in the opinion that the jury might find that the three railroad companies jointly "employed a common agent, for whose torts, in the performance of his duty, each and all were responsible."

It was not necessary that the plaintiff should satisfy the jury under what arrangement the business of guarding its crossing was being done. It was enough if evidence was introduced from which an inference could be drawn that the business was the defendant's, and that the person doing it was its agent and representative.

The view most favorable to the defendant would be that, by the arrangement with the New York Central Company, that company became an independent contractor with the defendant, and undertook to do the business of protecting the defendant's railroad with gates, in such a way as to leave it with no right to control, direct or manage it. If that were the arrangement, the gate tender would not be the defendant's servant. But it does not follow that the defendant would not be liable for his failure to use due care for the protection of travelers at the crossing. If the gates were maintained in obedience to an order made under the Rev. Laws, c. 111, § 192, we think it plain that the corporation could not relieve itself from liability for negligence in the maintenance and management of them by an arrangement with an independent contractor. By the terms of the statute they are to be maintained by the corporation's agent, and the corporation is to be responsible for their proper maintenance. Even if there were no such order, and if the jury found that it was the defendant's duty to maintain them for the protection of the public, we are of opinion that it was a duty that could not be delegated, either to a contractor or to a servant, in such a way as to relieve the corporation from the obligation to see that due care was exercised

for the safety of travelers. It is a principle of law that, when one is conducting a business the necessary effect of which is to expose others to great danger, so that he ought to take precautions for their safety, he is responsible for the negligence of an independent contractor to whom he intrusts the performance of this duty. *Woodman v. Metropolitan Railroad Company*, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Blessington v. Boston*, 153 Mass. 409, 26 N. E. 1113; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640. We are of opinion that the running of frequent railroad trains, over a grade crossing in a crowded street in a great city is a business fraught with such danger to travelers as to impose upon the railroad corporation that runs them a duty to take precautions for the safety of the travelers, which comes within the principle just stated. This too is intimated, although not expressly decided, in *Brow v. Boston & Albany Railroad Company*, *ubi supra*.

Exceptions sustained.

(196 Mass. 373)

KING v. NORCROSS.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. NEGLIGENCE—ACTS CONSTITUTING NEGLIGENCE—USE OF LAND—FIRES.

Where a person builds a fire on his own premises, it is his duty to use reasonable care to prevent its escape, to the injury of the property of other persons, either on their own land or on his land by his invitation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 28.]

2. HIGHWAYS—RIGHTS OF ABUTTING OWNER—USE OF HIGHWAY FOR OTHER PURPOSES BY ABUTTING OWNER.

The owner of land through which a highway passes has a right to make any reasonable use of the highway which does not interfere with the enjoyment of the public easement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 299.]

3. NEGLIGENCE—DECLARATION—NEGATIVE UNLAWFUL ACT OF PLAINTIFF.

A declaration which averred that defendant built a fire on his premises, and so negligently managed it that plaintiff's wood, piled on the sides of the highway, adjacent to the premises, was destroyed, is not demurrable as showing that plaintiff was a trespasser in putting his wood upon the sides of the highway, since the wood may have been rightfully either upon the plaintiff's land, through which the highway passed, or the land of a third person within the boundary of the highway, or on the defendant's land, and plaintiff is not called upon to aver that he was not a trespasser, or that his conduct was lawful; the presumption in that respect being in his favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 186-193.]

4. SAME—NEGATIVES CONTRIBUTORY NEGLIGENCE.

Where a person negligently allows a fire set on his own premises to spread to the adjacent property of another, it becomes a nuisance to such property, and the rule that, where an action is for an injury caused by negligence under such circumstances that the conduct of

the plaintiff reasonably might be expected to enter directly into the conditions connected with the injury, the burden is upon the plaintiff to plead and prove that his own negligence was not a contributing cause of it, does not apply; and in a suit for damages he need only state the facts constituting the nuisance and allege the injury, his conduct having no such probable connection with the injury as to require him to aver negatively his freedom from fault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 186-193.]

Appeal from Superior Court, Worcester County.

Action by Benjamin F. King against Josiah Norcross to recover for the burning of plaintiff's wood. From a judgment for defendant, founded on an order sustaining his demurrer to the declaration, plaintiff appeals. Reversed, and demurrer overruled.

John R. Thayer, Henry H. Thayer, and Samuel B. Taft, for plaintiff. Henry F. Harris and Winfred B. Whiting, for defendant.

KNOWLTON, C. J. This case comes before us on an appeal from a judgment for the defendant, founded on an order sustaining his demurrer to the plaintiff's declaration. The declaration is as follows: "And the plaintiff says that on or about the 19th day of April, 1905, the defendant carelessly and negligently built a fire upon the premises of the defendant, within the limits of the turnpike, so called, leading from the town of Sutton to the town of Millbury in said county, and being a public highway, and did then and there burn a large quantity of brush; that owing to the gross carelessness and negligence of the defendant, said fire was so unguarded and cared for that said fire spread and communicated itself to certain cord wood of the plaintiff, to wit, 103 cords stacked and standing upon the sides of said highway, and wholly destroyed, consumed and burned up a great portion thereof, and injured, damaged and rendered worthless the balance thereof, to the great damage of the plaintiff."

If the defendant built a fire on his own premises to burn brush as alleged, it was his duty to use reasonable care to prevent its escape from his land to the injury of the property of other persons. If the property of other persons was on his land by his invitation, he would owe a like duty to keep the fire from injuring it. The declaration avers that he built the fire, that he was negligent in the management of it, and that the plaintiff's property was destroyed by reason of this negligence. This states a case of liability to the plaintiff.

The principal ground on which the demurrer is sought to be sustained by the defendant in the argument is that the plaintiff was a trespasser in putting his wood upon the sides of the highway. But the declaration does not show this. So far as appears, the wood may have been on the plaintiff's land through which the highway may have pass-

ed. The owner of land through which a highway passes has a right to make any reasonable use of it which does not interfere with the enjoyment of the public easement, and there are many places in sparsely settled parts of the state where wood might be piled temporarily within the limits of a public highway without obstructing travel or interfering with the use of the way for any public purpose. *Van O'Linda v. Lothrop*, 21 Pick. 292-297, 32 Am. Dec. 261; *Robbins v. Borman*, 1 Pick. 122; *Adams v. Emerson*, 6 Pick. 57-58. The plaintiff's wood may have been on the land of a third person, within the boundary of the highway, or it may have been on the defendant's land under some arrangement that imposed upon him a duty to use reasonable care to prevent its being burned.

The plaintiff was not called upon to aver that he was not a trespasser, or that he was not guilty of any wrong in the disposition of his wood. The law does not presume that his conduct was unlawful, but in that respect the presumption is in his favor.

Another subject which was not referred to in the demurrer nor in the argument before us properly may be considered as involved in the case. The averment is that the defendant negligently set a fire on his land and negligently guarded it, whereby the plaintiff's wood was burned. In actions, the gist of which is negligence, there is a conflict of authority as to whether a plaintiff must negative contributory negligence on his part. In England, in the federal courts of this country, and in a majority of the state courts it is held that he need not aver nor prove the negative. In this state and in other states it is held that, where the action is for an injury caused by negligence, under such circumstances that the conduct of the plaintiff reasonably might be expected to enter directly into the conditions connected with the injury, the burden is upon the plaintiff to show that his own negligence was not a contributing cause of it. Averments in the declaration should, therefore, be made accordingly. 5 Enc. Pl. & Pr. 4, and cases cited in the note; 7 Am. & Eng. Enc. of Law (2d Ed.) 453, and notes. But this rule does not apply to a case like the present. Although setting a fire on one's own land for a proper purpose is a lawful act, and there is no liability for it unless there is negligence in setting or caring for it, such a fire immediately becomes a nuisance to adjacent property if it is negligently suffered to send sparks or flames into combustible material on the property. The sending of sparks which kindle fires upon adjacent property is not strictly a trespass, but it is much like a trespass. The fire which sends them, if negligently suffered to burn, is strictly a nuisance. A neighbor claiming damages because his property is injured by it presents his case properly if he states the facts which constitute the nuisance, and alleges the injury. His own con-

duct has no such probable connection with such an injury as to require him to aver negatively his freedom from fault.

Judgment reversed.

Demurrer overruled.

(196 Mass. 369)

COMMONWEALTH v. WALSH.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. WITNESSES—IMPEACHMENT—CONVICTION OF CRIME.

Accused, testifying in his own behalf, is a "witness," within Rev. Laws, c. 175, §§ 20, 21, declaring that accused shall at his own request be allowed to testify, and providing that the conviction of a witness of crime may be shown to affect his credibility, and his prior conviction of crime cannot be proved on his cross-examination, but only by the record thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1142, 1148.]

2. COURTS—RULES OF DECISION—STARE DECISIS.

The doctrine of stare decisis does not prevent a re-examination of the question of the method of impeaching accused, testifying in his own behalf, by proof of a prior conviction of crime, and a correction of the previously declared law, if found erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 314-321.]

Exceptions from Superior Court, Worcester County; Loranus E. Hitchcock, Judge.

Peter J. Walsh was convicted of illegally selling intoxicating liquors, and he brings exceptions. Sustained.

George S. Taft, Dist. Atty., and Ernest I. Morgan, Asst. Dist. Atty., for the Commonwealth. John F. McGrath, for defendant.

RUGG, J. The defendant was tried upon a complaint for the illegal selling of intoxicating liquors. He offered himself as a witness in his own defense, and in cross-examination was asked, "Have you ever been convicted of illegally keeping intoxicating liquor for sale?" The defendant was compelled to answer the question, and replied in the affirmative. His exception to this ruling brings the case here.

In *Commonwealth v. Quinn*, 5 Gray (Mass.) 478, and *Commonwealth v. Sullivan*, 161 Mass. 59, 36 N. E. 583, questions were asked of witnesses other than the defendant, which were treated as an attempt to prove a conviction of crime, on cross-examination and without the production of the record, for the purpose of affecting their credibility. It was said in the first case that the question was improperly put to the witness, for the reason that it "involved the fact of a previous conviction, which could only be proved by record," and this decision was followed in the second case. The same practice apparently has been assumed to apply as well to a party offering himself as a witness in his own behalf as to other witnesses in *Commonwealth v. Green*, 17 Mass. 515-537, *Gertz v. Fitchburg R. R. Co.*, 137 Mass. 77, 50 Am. Rep.

285, *Commonwealth v. Ford*, 146 Mass. 131, 15 N. E. 153, *Lamoureux v. N. Y., N. H. & H. R. R. Co.*, 169 Mass. 338, 47 N. E. 1009, and *Commonwealth v. Quigley*, 170 Mass. 14, 48 N. E. 782. This was early held to be the law in England. *Rex v. Castell Carenlion*, 8 East, 77. It has been argued in behalf of the commonwealth that the rule should not be applied to parties, but should be confined to witnesses not parties. No such distinction can be drawn from the language of the statute. Rev. Laws, c. 175, §§ 20, 21. It is clear that the defendant in a criminal case is comprehended within the word "witness" as used in both sections.

It is next urged that these decisions should be overruled and the rule established permitting proof of such conviction by a cross-examination of the witness. *State v. Bartlett*, 98 Me. 432, 57 Atl. 588, *McGovern v. Hays*, 75 Vt. 104, 53 Atl. 326, *McLaughlin v. Mencke*, 80 Md. 83, 30 Atl. 603, *Clemens v. Conrad*, 19 Mich. 170, and *State v. Babcock*, 25 R. I. 224, 55 Atl. 685, are cited as authorities in support of this contention. The Massachusetts rule is supported by *Hall v. Brown*, 30 Conn. 551, *Kirschner v. State*, 9 Wis. 140, and *Newcomb v. Griswold*, 24 N. Y. 298. We see no sufficient reason for overruling *Commonwealth v. Quinn*, ubi supra. It has been an established rule of practice in this commonwealth for many years, and has its foundation in the common law of England. While the doctrine of stare decisis does not prevent re-examination and correction of principles previously declared, we have no question that the practice prevailing in this jurisdiction has been correctly expounded in the cases we are now asked to overrule. It is the province of the court to declare the law, and not to legislate. It is generally though not universally true, that, wherever such cross-examination is permitted, it is by virtue of a statute. See 2 Wigmore on Evidence, § 1270, note 5.

Exceptions sustained.

(196 Mass. 369)

COMMONWEALTH v. CONNECTICUT VALLEY ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 15, 1907.)

1. CARRIERS—STREET RAILROADS—FARE—SCHOOL CHILDREN—"PUBLIC SCHOOLS."

The schools referred to in Rev. Laws, c. 42, §§ 1, 2, requiring cities and towns to maintain certain schools, are open under proper regulations to all children of the city or town, as provided by chapter 44, § 3; and all children between the ages of 7 and 14 are obliged to attend such schools, unless they receive equivalent instruction outside of them, as provided by chapter 44, §§ 1, 2. *Held*, that Rev. Laws, c. 112, § 72, providing that street railway companies shall transport pupils of the "public schools" at half fare, while traveling to and from the schoolhouses in which they attend school, referred to those schools mentioned in chapter 42, §§ 1, 2, which are a part of the system of compulsory education for children, and did not include other schools maintained at

public expense, such as industrial schools, nautical schools, evening schools, etc., authorized by sections 10, 11, 12, 15, and 16.

2. SCHOOLS AND SCHOOL DISTRICTS—COMPULSORY ATTENDANCE—OTHER SCHOOLS.

Attendance on any one of the schools required to be maintained by Rev. Laws, c. 42, §§ 10, 11, 12, 15, 16, cannot take the place of the compulsory attendance on public schools established under sections 1 and 2.

3. CARRIERS—STREET RAILROADS—RATES—REGULATIONS—"PUPILS."

The word "pupils," as used in Rev. Laws, c. 112, § 72, requiring street railroads to transport the pupils of public schools at half rates, means children and youths attending the public schools, and does not include students in colleges and professional schools, nor young men or boys attending nautical or industrial schools, nor adults attending evening schools or evening high schools, nor children attending vacation schools.

4. SAME—PRIVATE SCHOOLS.

Rev. Laws, c. 112, § 72, requiring street railroads to transport "pupils of the public schools" at half rates, was amended by St. 1906, p. 653, c. 479, by the insertion of the words "or private" after the word "public." Held, that the word "private," as so used, included only such schools as were ejusdem generis with the public schools previously mentioned, namely, in which instruction was permitted to take the place of the compulsory instruction required in the public schools designated by Rev. Laws, c. 42, §§ 1, 2, and hence did not include education in a private business college.

Exceptions from Superior Court, Hampshire County; John A. Alken, Judge.

The Connecticut Valley Street Railway Company was indicted for alleged refusal to transport pupils of public or private schools at half rates. A verdict of guilty was rendered on direction of the trial judge, and plaintiff brings exceptions.

Richard W. Irwin, Dist. Atty., for the Commonwealth. Warren, Garfield & White-side and Clement R. Lamson, for defendant.

KNOWLTON, C. J. Under Rev. Laws, c. 112, § 72, street railway companies are required to transport "pupils of the public schools," while "travelling to and from the school houses in which they attend school," at a rate of fare not exceeding one-half the regular fare charged for the transportation of other passengers between the same points. By St. 1906, c. 479, this section was amended by the insertion of the words "or private," after the word "public," so that the requirement now applies to pupils of the public or private schools. The defendant refused to transport at this rate one Chapin, who was attending the Northampton Commercial College, which is an institution owned and conducted by a private person for his own profit, in which are taught, among other subjects, telegraphy, shorthand, typewriting, bookkeeping, office practice, phonography, commercial law, penmanship, letter writing, English grammar, arithmetic and rapid calculation. It had 180 students, of an average age of 16 to 19 years, the eldest being 50 years of age. Forty of these were from towns in which the defendant operates its railway, and these 40

were of the same average age. The eldest was 29 years of age. An indictment having been found against the defendant for a violation of the law, the question arose at the trial whether Chapin was a pupil of a private school, within the meaning of the statute.

A preliminary question is, What is meant by the words "public schools" in this statute? Do they include all schools that are supported by taxation and are open to the public under reasonable regulations, or are they limited to schools which are a part of our system of compulsory education for children, and which must be maintained by cities and towns and be open to all children of proper qualifications, and must be attended by all children unless they are properly instructed elsewhere? The general obligation of cities and towns to maintain schools of the latter description is set forth in Rev. Laws, c. 42, § 1. The special obligation of cities and large towns to maintain high schools is a part of the general obligation imposed by section one, and is stated specially in section two, of the same chapter. The schools referred to in these sections are open, under proper regulations, to all the children of the city or town. Rev. Laws, c. 44, § 3. All children between the ages of 7 and 14 years are obliged to attend these schools regularly, unless they receive equivalent instruction outside of them. Rev. Laws, c. 44, §§ 1, 2. These schools are, in a strict sense, our public schools for the education of children. In different parts of our statutes they are referred to as "the public schools," in distinction from other schools maintained for the public at the public expense. Towns may establish and maintain industrial schools, nautical schools, evening schools for the instruction of persons over 14 years of age, evening high schools for the instruction of such persons and schools in summer vacations. Rev. Laws, c. 42, §§ 10, 11, 12, 15, 16. Cities and towns containing a certain number of inhabitants are compelled by law to maintain some of these last mentioned schools. Sections 11, 12. Attendance upon any one or all of them cannot take the place of the attendance upon public schools required of children by the statute. See sections above cited. In the last part of section 10, an industrial school, although maintained for the public by taxation, is distinguished in terms from the public schools. There is a provision, in section 27 of this chapter, that the school committee "shall have the general charge and superintendence of all public schools, industrial schools, evening schools and evening high schools." Here again "public schools" are distinguished from these other schools maintained at the public expense for the public benefit.

The regularly established schools for the education of children and youth which must be maintained everywhere, according to the size and ability of cities and towns, and must be attended by all the children of school age,

unless they receive approved instruction elsewhere, constitute a system by themselves, and are referred to in different parts of the statutes as the public schools, in distinction from the others. They are the schools mentioned under that name in Rev. Laws, c. 42, § 49, which compels the maintenance of a sufficient number of schoolhouses "for all children who are entitled to attend the public schools." In many other sections of the statutes, attendants upon the public schools are referred to as children.

The statute which we are now to interpret provides only for "pupils." The word "pupils," by derivation and the definition of lexicographers, is properly applicable to children and youth. Students in colleges and professional schools are not called pupils. There is much to show that the pupils of the public schools, referred to in the act, are only the children and youth who attend the day schools maintained under Rev. Laws, c. 42, §§ 1, 2, 4, 8. The Legislature did not intend to provide in this chapter for the transportation of adults attending the evening schools or the evening high schools, nor for the "young men or boys" attending the nautical schools, nor for the persons attending the industrial schools, nor for the children attending vacation schools, in no one of which does attendance take the place of the regular attendance required by law in the public schools.

In the case of *Commonwealth v. Interstate Consolidated Street Railway Company*, reported in 187 Mass., at page 436, 73 N. E. 530, the constitutionality of this statute was considered, and the decision was put upon grounds inconsistent with the contention that the schools for adults, established and maintained at the public expense, are public schools, within the meaning of the act. The statute was treated as an act in aid of the education of children in the regularly established public schools.

The form of the amendment shows that the private schools now included are only those which are ejusdem generis with the public schools previously mentioned. There are schools of theology, schools of law, schools of medicine, schools of dentistry, schools of music, of art, of architecture, of agriculture, and many others, which, in a broad sense are private schools. Students in these schools are not in the same class with pupils in public schools in reference to the purpose of this enactment. The public schools referred to are intended to provide general instruction for all children and youth. Even if they cover a broad field, they are not intended to take the place of technical schools, or of colleges, or of others of the higher institutions of learning. In addition to the subjects specially designated in Rev. Laws, c. 42, § 1, the most advanced of the public schools are limited to such "subjects as may be required for the general purpose of training and culture, as well as for the purpose of preparing pupils for admission to the state normal schools,

technical schools and colleges." These latter institutions are here recognized as of a different class from the public schools referred to in the same section. In Rev. Laws, c. 44, § 2, there is a provision for the approval of private schools by the school committee, when they furnish instruction in the English language in all the studies required by law, and when the instruction equals that in the public schools in thoroughness, efficiency, and in the progress of the pupils under it. A private school, properly approved under this section is within the statute before us.

It is quite plain that colleges, technical and professional schools, and other institutions of learning which do not cover substantially the same field as the schools maintained under Rev. Laws, c. 42, §§ 1, 2, are not within the statute.

We are of opinion that the students in the Northampton Commercial College are not pupils of a private school, such as are referred to in St. 1906, c. 479.

Exceptions sustained.

(196 Mass. 316)

SMEDLEY v. JOHNSON et al

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 15, 1907.)

1. EQUITY—EXCEPTIONS TO MASTER'S REPORT.

Under chancery rule 31, requiring a master to prepare a draft of his report and to notify counsel, who may suggest alterations, and providing that if, thereafter, either party is not satisfied, he may within a specified time bring in written objections, and that no exception shall be allowed without a special order, unless founded on an objection made before the master, exceptions not founded on previous objections cannot be considered, in the absence of a special order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 905.]

2. SAME.

An exception to a master's report, in a suit for an accounting and settlement of the affairs of a partnership, that "plaintiff excepts to the admission of the evidence to show who constituted said copartnership," does not "briefly and clearly specify the matter excepted to and the cause thereof," as required by chancery rule 32, and cannot be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 910.]

3. SAME.

An objection, made during the hearing before the master, to the admission of evidence, is not such an objection as will support an exception to the master's report, within chancery rule 31; but the objection contemplated is a written objection to the report itself as finally made up, and an exception founded on an objection made during the hearing cannot be considered, unless allowed by special order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 906, 907.]

Exceptions from Superior Court, Hampden County; John O. Crosby, Judge.

Bill by Clark L. Smedley against Ira Johnson and others. Decree for defendants, and plaintiff brings exceptions. Affirmed.

E. H. Lathrop and L. M. Blydenburgh, for plaintiff. J. B. Carroll and W. H. McClintock, for defendants.

KNOWLTON, C. J. This bill in equity was brought by the plaintiff for an accounting and a settlement of the affairs of a partnership between him and the defendants. The defendants denied that he was a member of the firm, and the case was referred to a master who found that there was no partnership between these parties, whereupon the bill was dismissed and the plaintiff appealed. The question arises on exceptions to the master's report, four in number, which were overruled by the superior court.

The plaintiff failed to comply with the equity rules of the superior court numbered 31 and 32 in regard to the filing of objections and exceptions to a master's report. No written objections were ever filed under the first of these rules, and no formal objection appears ever to have been made as a foundation for exception 1 or for exception 4. Observance of the rules prescribing the method of raising questions of law upon the report of a master is important to secure orderly procedure and to preserve the rights of parties. It has been decided repeatedly that such questions cannot be considered by the court without a substantial observance of the rules, unless the delinquent party is relieved by a special order under rule 31. *Edwards-Hall Co. v. Dresser*, 168 Mass. 136, 46 N. E. 420; *Whitworth v. Lowell*, 178 Mass. 43, 59 N. E. 760; *Hillier v. Farrell*, 185 Mass. 434, 70 N. E. 424; *Huntress v. Hanley*, 194 Mass. —, 80 N. E. 946; *Huntress v. Allen*, 194 Mass. —, 80 N. E. 949. Under these decisions it is plain that exceptions 1 and 4 are insufficient because they are not founded upon a previous objection.

Exceptions 2 and 3 relate to the admission of evidence at the hearing before the master. The master's report shows that certain objections were made and certain exceptions were alleged when the evidence was received. If such an objection, appearing in the body of the master's report, might be considered a sufficient foundation for an exception to the master's report, without bringing in any written objections under rule 31, this second exception does not point out with distinctness the evidence referred to, but it seems to relate to all the evidence tending to show who constituted the partnership. It does not "briefly and clearly specify the matter excepted to and the cause thereof," in accordance with the requirement of rule 32. Exception 3 points directly to the admission in evidence of a certain memorandum in writing which the report shows to have been received against the defendants' objection, and which therefore raises the question whether an objection so taken, and so appearing, can be availed of as a sufficient ground for an exception to a master's report, without an objection in writing to the report itself. While this precise question was not involved in the decision of either of the cases above cited, the language in some of the opinions seems broad enough to cover it. The exceptions that may

be taken are to the report as finally made up, and not to rulings of the master during the hearing, that may have become immaterial. The rules contemplate objections in writing to the report after the draft of it has been settled, which objections are to be appended to the report. These are not the same as oral objections made during the hearing, but are more formal. We are of opinion that it is better, in the interest of justice, to apply these rules with some strictness, and to hold that exceptions cannot be allowed without a special order of the court, unless the objections on which they are founded were made in writing before the master as objections to the report itself. The purpose of this method is to show to the adverse party and the court, in a convenient form, the matters which are alleged to be erroneous. It follows that the second and third exceptions which relate to evidence that was admitted under objection, must be overruled, as well as the first and fourth.

It may not be improper to add, for the information of the parties, that the plaintiff does not appear to have suffered from this failure to file objections. There is nothing to indicate that the findings referred to in the first and fourth exceptions were not well supported by the evidence. The memorandum referred to in the third exception seems admissible under Rev. Laws, c. 175, § 66. *Hall v. Reinherz*, 192 Mass. 52, 77 N. E. 880. Most, if not all, of the oral evidence objected to was admissible under the same statute. See *Nagle v. B. & N. Street Ry. Co.*, 188 Mass. 38, 73 N. E. 1019.

Decree affirmed.

(196 Mass. 397)

TOOLE v. CRAFTS et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 16, 1907.)

1. EVIDENCE—PAROL EVIDENCE.

A written waiver of demand, without limitation, made by an indorser of a note after the time for it has expired, cannot be limited by parol evidence, which is competent only on the issue of fraud or mistake, or to aid the court to construe it in the light of the circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1799.]

2. BILLS AND NOTES—PROTEST—WAIVER—QUESTION FOR JURY.

In an action against an indorser on a note dated April 2d, payable on demand, it appeared that the indorsement was made June 27, 1904, and that by it the indorser waived "demand, notice, and protest." There was evidence that the indorsement referred to a protest which, if made within 60 days of the date of the note, would have fixed the liability of the indorser, within Rev. Laws, c. 73, § 88; and there was evidence that it referred to a future protest, which of itself would have been ineffectual to affect the rights of the parties. *Held*, that it was for the jury to determine which of the protests was the subject-matter of the indorsement, and its finding for the indorser was conclusive.

Exceptions from Superior Court, Hampden County; William Cushing Wait, Judge.

Action by James W. Toole against Howard A. Crafts and another. There was a judgment for defendants, and plaintiff brings exceptions. Overruled.

This was an action on a promissory note, dated April 2, 1900, payable to the order of plaintiff on demand, and signed by defendant Howard A. Crafts as maker and by defendant Linus D. Crafts as indorser. The indorsement was made June 27, 1904, and waived "demand, notice, and protest."

See 78 N. E. 775.

G. T. Callahan, for plaintiff. Green & Bennett, for defendants.

SHELDON, J. It is argued by the plaintiff that the oral evidence introduced at the trial was not competent and ought not to have been considered on any other question than the issues as to whether the defendant's waiver of demand, notice and protest had been procured by fraud or improper inducement, or was made under a mistake or in such ignorance of the material facts as not to be binding; and that the jury ought not to have been allowed to apply it to the question whether the waiver was of a past or of a future demand and notice, or even to consider that question at all. The plaintiff contends that this indorsement with the waiver which it contained constituted a completed agreement in writing, which could not be varied or controlled by oral evidence. It is not disputed on either side, as it could not be (see Rev. Laws, c. 73, § 126), that such a waiver may be made as well after as before the failure to make seasonable demand and notice; and the plaintiff claims that the effect of such a waiver, made without limitation, cannot be limited by oral evidence of the actual meaning of the parties either to an antecedent or to a subsequent failure to make proper demand and give proper notice. *Leonard v. Smith*, 11 Metc. 330; *King v. Nichols*, 138 Mass. 18, 23. This doctrine has been maintained in other actions upon promissory notes in our own decisions. *Torpey v. Tebo*, 184 Mass. 307, 68 N. E. 223; *Rowe v. Bowman*, 183 Mass. 488, 67 N. E. 636; *Equitable Marine Ins. Co. v. Adams*, 173 Mass. 436, 438, 53 N. E. 883; *Wright v. Morse*, 9 Gray, 337, 69 Am. Dec. 291. It has been upheld in other states in actions upon indorsements made with a waiver like that before us. *Iowa Valley State Bank v. Sigstad*, 96 Iowa, 491, 65 N. W. 407; *Lockwood v. Bock*, 50 Minn. 142, 52 N. W. 391; *Farmers' Exchange Bank v. Altura Co.*, 129 Cal. 263, 61 Pac. 1077. It is one of general application and ought not to be departed from. We agree accordingly with the plaintiff that the jury in the case at bar did not have the right to find that the defendant's liability was in any respect less than that imported by the words of the indorsement which he signed; nor do we find anything in the decision formerly made in this case and reported in 193 Mass. 110, 78 N. E. 775, to lead us to a different conclusion.

But it does not follow that the plaintiff's exceptions can be sustained. The parol evidence received was competent, not only upon the issues of fraud or mistake, but also for the purpose of applying the language of the written agreement to its subject-matter, and for the further purpose of showing the circumstances under which the agreement was made, and thus giving the court the light of those circumstances in ascertaining the true construction of the agreement. *Sutton v. Bowker*, 5 Gray (Mass.) 416; *Blanchard v. Page*, 8 Gray (Mass.) 281, 287, 288; *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499; *Scaplen v. Blanchard*, 187 Mass. 73, 72 N. E. 346; *Germania Fire Ins. Co. v. Lange*, 193 Mass. 67, 78 N. E. 746. And without stating this evidence in detail we are of opinion that the jury had a right to find upon it that in the conversation between Allyn and the defendant, which preceded and brought about his new indorsement, two protests of the note in question were in the minds of the parties; one, which, if it had been made within 60 days of the date of the note, would have fixed the liability of the defendant (Rev. Laws, c. 73, § 88; *Merritt v. Jackson*, 181 Mass. 69, 62 N. E. 987); and another, which the plaintiff's agent contemplated making in the immediate future, which of itself would have been wholly inefficacious to affect the rights of the parties. Under these circumstances it was for the jury to say upon the evidence which of these two separate protests (using this word to include demand and notice) was the subject-matter of the agreement, or in other words to which one of them the defendant's waiver related. *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775; *Fisk v. Fisk*, 12 Cush. (Mass.) 150. This was the question submitted to them by the court; and their finding upon it in favor of the defendant cannot now be reviewed.

The result is that the plaintiff's exceptions must be overruled; and it is

So ordered.

(196 Mass. 302)

CONKLIN v. CONSOLIDATED RY. CO.

(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 15, 1907.)

1. EVIDENCE—RELEVANCY—INTENT.

Evidence of a person's intention or preparation to commit a particular wrong, subsequently committed by him, is admissible against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 202.]

2. SAME.

To render proof of a threat of violence admissible, it is not necessary that it should be directed against the particular person on whom the wrong was subsequently committed, where there was such a general threat, or such an indication of a general malicious intent, as could be found to include such person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 177, 202, 211.]

3. SAME—RES GESTÆ—ADMISSIBILITY.

The declaration of a servant, not within the scope of his employment, is admissible against

his employer only when it is a part of the res gestæ, either accompanying the act, which is itself material, and which it tends to explain, or when it is itself a part of the transaction under investigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 308, 346, 354, 365, 367, 387.]

4. SAME.

The rule that the declaration of a servant, not within the scope of his employment, is admissible against his employer only when it is a part of the res gestæ, is applicable to declarations made before and after the event in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 308, 346, 354, 365, 367, 387.]

5. ASSAULT—EVIDENCE—ADMISSIBILITY.

In an action by a physician against a street railway company for an assault committed by its conductor, and for false arrest and malicious prosecution caused by the conductor, proof of the professional standing and reputation of plaintiff, and the nature and extent of his practice before and after the injury, is admissible on the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 44.]

6. WITNESSES—COMPETENCY—KNOWLEDGE OF SUBJECT-MATTER.

A witness, a physician, who testified that he knew plaintiff, a physician, and had known him for over 20 years, and had during that time been frequently in consultation with him professionally, was competent to testify with respect to the nature and extent of the practice of the physician.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 80, 81.]

7. TRIAL—EVIDENCE—INSTRUCTIONS.

Where, in an action against a street railway company for malicious prosecution instituted by its conductor, the jury might find that the prosecution was instituted by the conductor maliciously and without probable cause, and that he acted within the scope of his authority, and that the prosecution was made known to a manager of the company and was ratified by him, the refusal to charge that there was no evidence to sustain the action was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

8. CORPORATIONS—TORTS OF SERVANT—RATIFICATION.

In an action against a street railway company for malicious prosecution instituted by its conductor, evidence that subsequent to the institution of the prosecution the manager of the company stated that if plaintiff wanted to come to see him he could settle the matter, and if not he could go ahead, was evidence of ratification by the company of the act of the conductor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1717.]

9. ASSAULT—TRIAL—INSTRUCTIONS.

Where, in an action against a street railway company for assault, false arrest, and malicious prosecution, based on the act of its conductor in assaulting a passenger and causing his arrest and prosecution, an instruction that if the passenger was the aggressor, and made an unjustifiable assault on the conductor, he could not recover for malicious prosecution, nor for arrest and assault, was properly refused; for, though the passenger was the aggressor, and made an unjustifiable assault, the company was liable, if the conductor used excessive force.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 58.]

Exceptions from Superior Court, Hampshire County; John F. Brown, Judge.

Action by William H. Conklin against the Consolidated Railway Company. There was a judgment for plaintiff, and defendant brings exceptions. Sustained.

This was an action of tort in three counts, the first for an assault, the second for false arrest, and the third for malicious prosecution. Plaintiff was a physician, and while in a car of defendant he was assaulted by the conductor, and subsequently arrested and prosecuted. A witness, a physician, testified that he had known plaintiff for over 20 years, and had during that time been frequently consulted with plaintiff in a professional capacity, and stated that plaintiff had the most extensive and desirable practice at the place of his residence. Another witness testified that on the day after the arrest of plaintiff he had a conversation with the manager of defendant, and that the manager stated that he would have settled the matter, and that, if plaintiff wanted to come to see him, he could settle it; if not, he could go ahead. Defendant requested the following instructions: "(1) There is no evidence to sustain the allegation of the third count of the declaration, and the verdict must be for the defendant on that count." "(2) If the plaintiff was the aggressor, and made an unjustifiable assault on either motorman or conductor, he cannot recover on his count for malicious prosecution, nor on his count for arrest and assault."

Irwin & Hardy, for plaintiff. John C. Hammond, for defendant.

SHELDON, J. The witness Jacobs was allowed against the exception of the defendant to testify that the defendant's conductor Killoy, while on the defendant's car, had said in a talk with the witness that he would assault some one on the car before he got through. The plaintiff was not on this car, and the time of the talk is no further fixed than by the witness' statement that it was a "comparatively short time" before the alleged assault on the plaintiff. It was agreed on both sides that there was an encounter between the conductor and the plaintiff; but there was much contradictory evidence as to which of them was the aggressor. The jury were instructed to consider this testimony of Jacobs only upon the question whether the conductor did or did not begin the assault.

The plaintiff's counsel contend that this evidence was competent on the general doctrine that upon the issue whether a person has done an act, evidence of an intention or design in his mind to do that act is material, and that his contemporaneous acts and declarations tending to show that he has such intention are competent to show this fact. *Commonwealth v. Trefethen*, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235; *Inness v.*

Boston, Revere Beach & Lynn Railroad, 168 Mass. 433, 47 N. E. 193; Viles v. Waltham, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; Commonwealth v. Crowley, 165 Mass. 569, 43 N. E. 509. If this action were against the conductor himself, the plaintiff's contention would be well founded. A defendant's intention or preparation to commit the particular wrong which it is charged that he afterwards did commit may always be shown in evidence against him. There are many decisions to this effect. Commonwealth v. Williams, 2 Cush. (Mass.) 584; Commonwealth v. Choate, 105 Mass. 451; Commonwealth v. Chase, 147 Mass. 597, 18 N. E. 565; Commonwealth v. Quinn, 150 Mass. 401, 23 N. E. 54; Commonwealth v. Crowe, 165 Mass. 139, 42 N. E. 563. Nor is it necessary that a threat of violence such as was here in question should be directed against the particular person upon whom the wrong was afterwards committed, if there was such a general threat or such an indication of a general malicious intent as could properly be found to have included that person within its scope. Commonwealth v. Snell, 189 Mass. 12, 75 N. E. 75, 1 L. E. A. (N. S.) 1019; State v. Lapage, 57 N. H. 545, 24 Am. Rep. 69; Hopkins v. Commonwealth, 50 Pa. 9, 38 Am. Dec. 518; State v. Grant, 79 Mo. 113, 49 Am. Rep. 218; Dixon v. State, 13 Fla. 636; Shaw v. State, 102 Ga. 660, 29 S. E. 477; Burton v. State, 115 Ala. 1, 22 South. 585; People v. Craig, 111 Cal. 460, 44 Pac. 186.

But in our opinion the question of the admissibility of this evidence must be determined upon the principle that the mere declaration of a servant or agent, not within the scope of his employment or authority, is admissible against his employer or principal only when it constitutes a part of the res geste, when it either accompanies an act which is itself competent and material to be proved and which it tends to qualify, characterize or explain, or when it is itself a part of the transaction under investigation. It is conceded that this is the general doctrine both of our own decisions and of those of other jurisdictions. Lund v. Tyngsborough, 9 Cush. (Mass.) 36; Nutting v. Page, 4 Gray (Mass.) 581, 584; Brookfield v. Warren, 128 Mass. 287; Morrison v. Lawrence, 186 Mass. 456, 458, 72 N. E. 91; New Jersey Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Vicksburg & Meridian Railroad v. O'Brien, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; Patterson v. Wabash, St. Louis & Pacific Railway, 54 Mich. 91, 19 N. W. 761; Chicago & Northwestern Railway v. Filmore, 57 Ill. 265; Marion v. Chicago, Rock Island & Pacific Railway, 64 Iowa, 568, 21 N. W. 86; Forsee v. Alabama Great Southern Railroad, 63 Miss. 66, 56 Am. Rep. 801; Alabama Great Southern Railroad v. Frazier, 93 Ala. 45, 9 South. 303, 30 Am. St. Rep. 28; Alabama Great Southern Railroad v. Hawk, 72

Ala. 112, 47 Am. Rep. 403. We perceive no logical difference in the application of this principle between declarations made before and those made after the event in question. Mobile & Montgomery Railroad v. Ashcroft, 48 Ala. 15; San Antonio & Aransas Pass Railway v. Robinson, 73 Tex. 277, 11 S. W. 327; Louisville & Nashville Railroad v. Stewart, 56 Fed. 808, 6 C. C. A. 147. And the very argument made here, that such declarations, even though not in themselves binding upon the master, are yet competent to show the state of mind or the intention of the servant who made them, has been held to be unavailing. Newson v. Georgia Railroad, 66 Ga. 57; International & Great Northern Railroad v. Telegraph & Telephone Co., 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 45. It is no more competent for a mere servant to make evidence against his employer by an antecedent statement or manifestation of his feelings than by any other admission which he may be willing to make.

We need not consider whether this evidence would have been admissible if the declaration had been made while the plaintiff was on the car and with direct reference to him. Under the circumstances before us, the question presented is almost exactly the converse of that which was considered in Bonino v. Caledonia, 144 Mass. 299, 402, 11 N. E. 98, and must be governed by the reasoning of that case. We are unable to avoid the conclusion that this evidence ought not to have been admitted; and it undoubtedly must have been prejudicial to the defendant.

The exception to the admission of Dr. Russell's testimony cannot be sustained. It was competent to prove the professional standing and reputation of the plaintiff and the nature and extent of his practice before and after the injury, upon the question of damages. Wheeler v. Hanson, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408; Rooney v. New York, New Haven & Hartford Railroad, 173 Mass. 222, 53 N. E. 435; Harmon v. Old Colony Railroad, 168 Mass. 377, 47 N. E. 100; George v. Haverhill, 110 Mass. 506. And the judge properly might find that the witness had sufficient acquaintance with the plaintiff's practice to answer the questions put to him. Pierce v. Boston, 164 Mass. 92, 41 N. E. 227; Amory v. Melrose, 162 Mass. 556, 39 N. E. 276; Prendible v. Connecticut River Manuf. Co., 160 Mass. 131, 35 N. E. 675; Lawrence v. Boston, 119 Mass. 126; Lawton v. Chase, 108 Mass. 238; Moulton v. McOwen, 103 Mass. 587. The witness' knowledge was greater than that of the witnesses whose testimony was excluded in Nelson v. Boston & Maine Railroad, 155 Mass. 356, 29 N. E. 586. If specific objection had been taken to the witness' answers a more difficult question might have been presented; but this is not shown to have been the case. Putnam v. Harris, 193 Mass. 58, 62, 63, 78 N. E. 747. Nor does it

appear whether any or what additional testimony was offered upon the subject. We cannot say that there was error in this ruling. *Lund v. Tyngsborough*, 9 Cush. (Mass.) 36; *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Stone v. Commonwealth*, 181 Mass. 438, 63 N. E. 1074.

There was no error in refusing the defendant's sixth request for rulings. The jury had a right to find that the prosecution was instituted by its conductor and its servant Judge maliciously and without probable cause, and that they acted within the scope of their authority from the defendant in what they did. *Krulevitz v. Eastern Railroad*, 140 Mass. 573, 575, 5 N. E. 500. They might also find on the evidence of Cook that before trial the prosecution was made known to Punderford, a manager or superintendent of the defendant, and was ratified by him. The evidence of such a ratification by assenting to the prosecution and intimating a readiness on his part either to settle it or allow it to go on, was stronger than that which was held to be sufficient in *White v. Apsley Rubber Co.* (Mass.) 80 N. E. 500, 8 L. R. A. (N. S.) 484.

The defendant's ninth request undoubtedly contains a correct statement of the law as to the count for malicious prosecution, although plainly it could not have been given in full, for the defendant of course would have been liable on the first count although the plaintiff was the aggressor and made an unjustifiable assault on the motorman or conductor, if the defendant's servants then used excessive force upon him. *Brown v. Gordon*, 1 Gray (Mass.) 182; *Coleman v. New York & New Haven Railroad*, 106 Mass. 160; *Collins v. Wise*, 190 Mass. 206, 76 N. E. 657. But the plaintiff contends that, so far as it applied to the count for malicious prosecution, this instruction was given in substance. As, however, there must be a new trial on account of the admission of the testimony of Jacobs, and as the question is hardly likely to arise again in exactly the same way, it is unnecessary to consider this exception further.

The many other exceptions taken by the defendant have not been argued and we treat them as waived.

Exceptions sustained.

(196 Mass. 336)

LAMMI v. MILFORD PINK GRANITE QUARRIES.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. MASTER AND SERVANT—PROVIDING SAFE PLACE TO WORK.

Where the condition of premises in reference to provision for the safety of men working there was under the control of the employer's superintendent, the latter was chargeable with conditions within his observation of which he might have known with the exercise of reasonable care.

2. SAME—INJURY TO EMPLOYÉ—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

Whether an employé in a quarry was injured through the negligence of the employer's superintendent *held*, under the facts, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1051-1067.]

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether an employé in a quarry was at the time of his injury exercising proper care *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

4. SAME.

An employé in a quarry, when obeying orders of the employer's superintendent, may rely on the experience and authority of the superintendent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 778.]

5. SAME—ASSUMPTION OF RISK.

An employé does not assume a risk caused by the negligence of the superintendent of the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 567-573.]

6. APPEAL—EXCEPTIONS—WAIVER.

An exception not argued will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4256.]

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Alfred Lammi against the Milford Pink Granite Quarries. There was a judgment for plaintiff, and defendant brings exceptions. Overruled.

William A. Pew, Jr., and Daniel F. Gay, for plaintiff. Frank Bulkeley Smith, T. H. Gage, Jr., and Frank F. Dresser, for defendant.

KNOWLTON, C. J. The plaintiff, while working in a quarry, was injured by a large stone which slipped, and slid against his leg and foot. The questions before us are whether there was evidence of negligence of the defendant's superintendent and of due care on the part of the plaintiff in their relations to the accident.

The stone weighed about five tons. It was in the pattern yard of the quarry, a short distance from the edge of the pit out of which it had been raised by a derrick. At the place where it rested the bed of the yard was a sloping surface of solid rock, and upon it was a quantity of loose stone chips, of different sizes from small fragments to pieces nearly two feet in diameter. Chips were cleared off and carried away from time to time, but at the time of the accident they had accumulated to a considerable depth. One Peavy was a superintendent, having general charge of the business, and spending a considerable portion of his time in that part of the quarry. The evidence tended to show that the stone was taken out of the pit by Peavy's direction, that he was within ten yards of it when it was lifted upon the chips

in the pattern yard, and that it remained in the same place a week or ten days before the accident, during which period Peavy was frequently there. He ordered the plaintiff and three other men to get a stick or log which lay near the lower side of the stone, and use it for a fender for a stone that other men were raising from the pit. The other men working with the plaintiff, lifted one end of the log away, so that it lay at an angle of about 35 degrees with the side of the stone, and the plaintiff undertook to lift the log while standing between it and the stone. The stone slipped and caught his foot and broke his leg. Peavy was standing within ten feet while the work was going on. There was no testimony that any one touched the stone, in the attempt to move the log, or did anything different from that which might have been expected in moving the log.

We are of opinion that the jury properly might find the superintendent negligent in allowing the stone to be placed and to remain a long time on this sloping bed of stone chips, where it might slip and slide from a slight disturbing cause, or possibly without any visible disturbance. The work of removing the log which lay at its side would be likely to disturb the bed of chips, and the jury might have found that, when the superintendent directed the four men to remove it, he should have given directions or taken precautions for their safety. The condition of the yard in reference to provision for the safety of the men working there was under his supervision and control. He was charged with a duty in regard to it, and while many details of the work properly could be intrusted to servants, he could not shut his eyes to conditions and results which were within his observation, or which he might know with the exercise of reasonable care. While the evidence of negligence in the present case may not be so strong as in *Mahoney v. Bay State Pink Granite Co.*, 184 Mass. 287, 68 N. E. 234, the two cases are much alike, and the same principles are applicable to both. We are of opinion that there was evidence for the jury on this branch of the case.

We are also of opinion that the question whether the plaintiff was in the exercise of due care was rightly submitted to the jury. Until a short time before the accident, when he came to work for the defendant, the plaintiff's only experience in quarries had been in drilling in the pit, and he testified that before the accident he had never seen a stone slip in the pattern yard. He properly might trust something to the experience and authority of the superintendent, and he was acting in obedience to orders. *Meagher v. Crawford Laundry Machinery Co.*, 187 Mass. 586, 73 N. E. 853. While he assumed the ordinary risks of the business, he did not assume the risk of injury from the negligence of the superintendent. *Mahoney v. Bay State Pink Granite Co.*, *ubi supra*.

The exception to the admission of the testi-

mony of the plaintiff's expert has not been argued by the defendant.

Exceptions overruled.

(196 Mass. 323)

BARNES v. HOSMER.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 13, 1907.)

1. FIXTURES—RESERVATION PRIOR TO AFFIXING.

A building once affixed to real estate becomes a portion of it, unless there was a prior written or oral agreement with the owner of the land that it should remain personal property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, §§ 1-5.]

2. SAME — ACTIONS — EVIDENCE — SUBSEQUENT RECOGNITION OF RESERVATION.

An original agreement that a building affixed to real estate should remain personal property may be shown by inference from the subsequent recognition of rights which could only result from its existence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fixtures, § 74.]

3. FRAUDS, STATUTE OF—CONVERSION OF FIXTURES INTO PERSONALTY.

When a building has become affixed to realty without a previous agreement that it should remain personal property, it cannot be converted into personal property by any subsequent parol agreement with the owner of the land without a severance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 86.]

Exceptions from Superior Court, Hampden County; William Cushing Wait, Judge.

Action by William A. Barnes against William W. Hosmer. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

H. N. Cross, for plaintiff. F. A. Ballou, for defendant.

RUGG, J. It was agreed by the parties at the argument that the house, for the conversion of which this action is brought, stood upon land of the Woronoco Paper Company. Its title came by a chain of six deeds, which were in evidence as far back as 1881, no one of which contained any reservation, exception, or mention of the building. It had stood about thirty years, but there was no evidence as to the circumstances under which it was constructed or placed, nor as to who was the owner of the land, nor whether it was done by the owner or a stranger to the title, and if by a stranger, what his relations were to the owner of the freehold, nor anything to show that at or near that time anybody treated it as personal property. A building once affixed to the real estate becomes a portion of it, unless prior to its being so affixed there is a written or oral agreement with the owner of the land that it shall remain personal property. *Aldrich v. Husband*, 131 Mass. 480; *Gibbs v. Esty*, 15 Gray, 587; *Morris v. French*, 106 Mass. 326; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Hartwell v. Kelly*, 117 Mass. 235.

Such an original agreement or understanding may be shown by inference from the subsequent recognition of rights, which can only result from its existence. *Morris v. French*, 106 Mass. 326, 327; *Howard v. Fessenden*, 14 Allen (Mass.) 124; *Korbe v. Barbour*, 130 Mass. 255. There is no evidence warranting such an inference in this case. Attributing its utmost weight to all the evidence introduced, it goes no farther than to show at most a subsequent parol recognition of an undefined privilege existing in the person who assumed to own the building. The evidence covers only the few years last past, and shows that the Woronoco Paper Company asserted the right to assent to any transfer of interest in the building in order to give such transfer any validity, and a recognition of this claim by most of the parties in interest. No conveyance of the building by the owner of the land was shown. When a building has become affixed to the realty, without any previous agreement that it should remain personal property, it cannot thereafter be converted into personal property by any parol agreement with the owner of the land without a severance. There was no evidence of any severance. *Burk v. Hollis*, 98 Mass. 55; *Poor v. Oakman*, 104 Mass. 309; *Guernsey v. Wilson*, 134 Mass. 482; *Dudley v. Foote*, 63 N. H. 57, 56 Am. Rep. 489; *Leonard v. Clough*, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305. To give effect to any such oral agreement or any course of conduct indicating such a subsequent oral agreement would be in contravention of the statute of frauds. The instruction, therefore, that the jury must return a verdict for the plaintiff in the event that it was found that the Woronoco Paper Company owned the land was correct. Neither of the prayers for instructions presented by the plaintiff were in accordance with the principles of law we have stated, and were therefore properly refused.

Exceptions overruled.

(196 Mass. 376)

COLBURN v. MARBLE.

(Supreme Judicial Court of Massachusetts.
Norfolk. Oct. 16, 1907.)

1. BREACH OF MARRIAGE PROMISE—CHASTITY—EVIDENCE OF REPUTATION.

Defendant having merely attempted to show specific acts of unchastity of plaintiff, and not having attacked her reputation, plaintiff may not in rebuttal prove her good reputation for chastity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 36.]

2. EVIDENCE—CHARACTER OR REPUTATION.

Character may not be shown by specific acts, but only by evidence of reputation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 187.]

3. BREACH OF MARRIAGE PROMISE—INDECENT AND IMMODEST CONDUCT.

While actual unchastity of a woman, either before or after her engagement, not waived, justifies the man in breaking his engagement, her mere immodest and indecent conduct ur-

fore her engagement does not justify him in so doing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 4.]

4. SAME—MITIGATION OF DAMAGES.

Evidence of specific immodest and indecent acts of a woman before her engagement, not known to the man till after the engagement, on learning which he ceased his relations with her, are not admissible in mitigation of damages for his breach of promise; but, at most, evidence of her character is admissible for this purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 45.]

5. SAME—REASON FOR BREAKING PROMISE—EVIDENCE.

Defendant may not testify that it was because of what another told him that he ceased going to plaintiff's house, most of the matters told him not justifying him in breaking his engagement, so that it was immaterial whether his conduct was based on them; but, he being permitted to testify to all that he did after the information was given him, this is all he is entitled to.

6. SAME—UNCHASTITY BEFORE PROMISE.

Where plaintiff was guilty of unchastity before defendant's promise to her, and did not inform him, and he did not know of it till after action brought, she cannot recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 4.]

7. SAME—FRAUD.

Mere silence on the part of a woman, without inquiry by the man she is engaged to, though resulting in the concealment of matters which would have broken the engagement, if known, does not constitute fraud on her part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 4.]

8. SAME—INSTRUCTIONS—WAIVER OF DEFENSE.

An instruction that, if defendant abandoned plaintiff for any reason other than her fornication with another, such fornication would be no defense, though he would have been justified at the time of his abandonment in breaking his promise because of such fornication, if he had then known of it, is erroneous, so far as concerns any act of fornication not then known to him, and which, therefore, he could not have waived.

9. APPEAL—HARMLESS ERROR.

Any error against defendant in an instruction, in an action for breach of promise, that, if defendant abandoned plaintiff for any reason other than her fornication, such fornication would be no defense, is harmless; defendant having relied only on testimony as to plaintiff's condition at a certain time, which the jury must have found was due to him, and on his claim relative to her relation with another, which the jury expressly negatived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4225-4228.]

10. BREACH OF MARRIAGE PROMISE—INSTRUCTIONS—FORNICATION.

A requested instruction, that evidence of fornication by plaintiff could be considered in mitigation of damages, is too broad, in not excluding fornication with defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Breach of Marriage Promise, § 45.]

11. APPEAL—WAIVER OF EXCEPTIONS—FAILURE TO ARGUE.

An exception to refusal to define a word, not having been argued, will be treated as waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256, 4259.]

Exceptions from Superior Court, Norfolk County; John C. Crosby, Judge.

Action by Grace Colburn against Charles E. Marble for breach of promise and seduction. The answer specifically averred that, if defendant ever made such promise, which defendant denied, he was justified in breaking it. He testified that he never promised or intended to marry plaintiff, but had repeated intercourse with her, and gave her money, till a conversation he had with one Wilson, after which he did not go to her house or have anything to do with her. There was a verdict for plaintiff, and defendant brings exceptions. Exceptions sustained.

H. T. Richardson, for plaintiff. Elisha Greenwood, for defendant.

SHELDON, J. In our opinion the plaintiff ought not to have been allowed to prove in rebuttal her good reputation for chastity. The general principle is that in civil actions evidence of character or reputation is not admissible for the purpose of meeting evidence of specific acts of misconduct. *Day v. Ross*, 154 Mass. 13, 27 N. E. 676. Cases in which the character of the plaintiff is put directly in issue, as in slander or libel, or in which evidence of general reputation may be received as bearing upon a question of notice or of probable cause, are not really exceptions to the rule. This rule is clearly stated with a full citation of authorities, in *Geary v. Stevenson*, 169 Mass. 23, 31, 47 N. E. 508. It was applied to an action for breach of promise of marriage, by the Supreme Court of Pennsylvania in *Leckey v. Bloser*, 24 Pa. 401. It has been applied in England to the analogous case of an action by a parent for the seduction of a daughter. *Bamfield v. Massey*, 1 Camp. 460; *Dodd v. Norris*, 3 Camp. 519. The defendant had merely attempted to show specific acts of unchastity on the part of the plaintiff; he had not, by attacking her reputation, opened the field to her to offer evidence to support it, as in *Smith v. Hall*, 69 Conn. 651, 38 Atl. 386. So far as the decisions in some other states go beyond the doctrine here adopted we do not regard them as sound. The defendant's exception upon this subject must be sustained.

The defendant also offered to prove certain instances of immodest and indecent conduct of the plaintiff in 1902, prior to his alleged promise, together with evidence that he did not learn of these things until 1906, and that he then ceased his relations with her. This evidence, so far as it did not tend to show actual unchastity on her part, was excluded; and the defendant's exception to this ruling raises the next question to be considered.

There is much authority for saying that the defendant had the right to show, if he could do so, that the plaintiff's reputation for chastity was bad before the making of his promise. *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122; *Woodard v. Bellamy*, 2 Root (Conn.) 354; *Von Stroch v. Griffin*, 77

Pa. 504; *Capehart v. Carradine*, 4 Strob. (S. C.) 42; *Morgan v. Yarnborough*, 5 La. Ann. 316; *Burnett v. Simpkins*, 24 Ill. 264; *Butler v. Eschleman*, 18 Ill. 44; *Denslow v. Van Horn*, 16 Iowa, 476; *Stewart v. Smith*, 92 Wis. 76, 65 N. W. 736; *Kantzler v. Grant*, 2 Ill. App. 236. But the evidence offered by the defendant could not have been admitted upon that ground; for it is settled in this commonwealth that character is not to be shown by evidence of specific acts, but only by evidence of reputation. *McCarty v. Coffin*, 157 Mass. 478, 32 N. E. 649; *Miller v. Curtis*, 158 Mass. 127, 131, 32 N. E. 1039, 35 Am. St. Rep. 469, and cases there cited. There is nothing inconsistent with this in *Sullivan v. Lowell & Dracut Ry.*, 162 Mass. 536, 39 N. E. 185; and the rule as to human beings is recognized in *Palmer v. Coyle*, 187 Mass. 136, 139, 72 N. E. 844.

Actual unchastity, either before or after the making of a promise of marriage, if there has been no waiver of the objection, will justify a defendant in breaking the engagement for that reason. *Young v. Murphy*, 3 Bing. N. C. 54; *Irving v. Greenwood*, 1 Car. & P. 350; *Bench v. Wemick*, 1 C. & K. 463; *Snowman v. Wardwell*, 32 Me. 275; *Foster v. Hanchett*, 68 Vt. 319, 35 Atl. 316, 54 Am. St. Rep. 886. But these and the many other decisions which might be cited to the same effect do not help the defendant; for he was allowed to offer testimony of this kind, and none of the offers which were excluded went further than the claim that the plaintiff's actions had been immodest and indecent (*Fry v. Leslie*, 87 Va. 269, 12 S. E. 671); and conduct of this kind prior to the engagement never has been held to justify a breach of promise. Indeed, the mere fact that the plaintiff in a suit like this has in some respects violated the criminal law would not be enough for this purpose. *Berry v. Bakeman*, 44 Me. 164.

The defendant however contends that the evidence was competent in mitigation of damages; and it has been held in some other states that indelicate, immodest, or indecent conduct on the part of the plaintiff in a suit of this character, though not amounting to actual unchastity, is yet to be considered by the jury in assessing damages. *Palmer v. Andrews*, 7 Wend. (N. Y.) 142. *Stewart v. Smith*, 92 Wis. 76, 65 N. W. 736; *Stratton v. Dole*, 45 Neb. 47, 63 N. W. 875. And in *Boynton v. Kellogg*, 3 Mass. 189, 3 Am. Dec. 122, the defendant was allowed at the trial to give in evidence any instances of misconduct and even of indelicacy in the plaintiff; but the decision of the full court was only that the defendant could not prove in mitigation of damages her general bad character after the promise and before the breach. The somewhat broader statements of this decision made in *Butler v. Eschleman*, 18 Ill. 44, and in the dissenting opinion of *Davies, J.*, in *Johnson v. Jenkins*, 24 N. Y. 252, 258, are not to be supported.

The argument on which these cases were decided seems to have been that a woman of loose conversation and immodest demeanor would suffer less from a breach of an engagement to marry than one of purer mind and more reserved bearing; a supposition which we think it would be difficult to justify. And it is not without significance that these decisions were made in states in which exemplary or vindictive damages are allowed in some instances to be given; and there was perhaps greater reason for allowing it to be shown that the plaintiff's conduct had not been morally blameless than would be the case in this commonwealth, where no greater damages can be given than a compensation for the injury actually sustained. Nor does the argument seem to go further than to leave it to the jury to say what damages should be given to a woman of the character that they might find to be indicated by what was shown to have been her conduct. But if this is so, the evidence of her specific actions would be material only as throwing light upon her character; and we have already seen that in this commonwealth, although a different rule prevails in some other states, character can be proved only by evidence of reputation.

Accordingly we find no error in the rulings refusing to admit the evidence which has been spoken of.

Nor has the defendant any right of exception to the ruling refusing to allow him to testify that it was because of what Wilson told him that he stopped going to the plaintiff's house. It may be that the question which he put was excluded by reason of its form; and the defendant at the argument before us waived his exception to the exclusion of a similar question put in a correct form. But we are of opinion that the evidence was incompetent in substance. The defendant's claim was that what Wilson told him included all the matters which had previously been excluded, and which we have already seen were incompetent. It may be granted that the defendant in a suit like this may show in defense that he broke off the contract to marry by reason of material misconduct in the other party. *Sheahan v. Barry*, 27 Mich. 217; *Snowman v. Wardwell*, 32 Me. 275; *Espy v. Jones*, 37 Ala. 379. But this did not entitle the defendant either to introduce incompetent evidence under the guise of showing the reason for his acts, or to show that he had broken off his relations with the plaintiff for reasons which did not justify him in so doing. As most of the matters communicated to him by Wilson were incompetent and could not themselves be testified to, it was immaterial whether his conduct was based upon them. He was permitted to testify to all that he did after this conversation, and that under the circumstances was all that he was entitled to. Moreover, even if it could be supposed that what he did was based wholly on material misconduct by the plaintiff, the most that he could have testi-

fied to upon his story would have been that he himself ceased committing fornication with the plaintiff because Wilson told him that she had previously committed the same offense with some one else. This reason could not have fitted any claim of his so as to constitute a defense. Nor could the jury have disconnected this alleged reason from the setting in which the defendant would have used it, and attached it to an entirely different set of facts, the very existence of which the defendant denied. The defendant's state of mind could have applied to the facts only as he then understood them to be; it might or might not have been his state of mind upon other and different facts. Accordingly, the evidence was rightly excluded.

The judge ruled that if the plaintiff was guilty of unchastity before the defendant's promise to her, and did not inform him and he did not know of it until after action brought, the verdict must be for him. This was correct. The judge also added at the request of the plaintiff that "mere silence on her part, without inquiry by him, though resulting in the concealment of matters which would have broken the engagement if known, would not constitute fraud on her part"; and the defendant excepted to this. But this too was correct. *Van Houten v. Morse*, 162 Mass. 414, 416, 38 N. E. 705, 28 L. R. A. 430, 44 Am. St. Rep. 373. The parties have argued the case as if this amounted to a withdrawal of the ruling first made; and, if that were so, it would be erroneous for the reasons heretofore stated. But we do not so understand it. And the further ruling given, that if the defendant abandoned the plaintiff "for any reason other than her fornication with another, such fornication would now be no defense to this action, even though he would have been justified at the time of such abandonment in breaking his promise by reason of such fornication if he had then known of it," although supported by *Sheahan v. Barry*, 27 Mich. 217, was erroneous, so far as it applied to any act of fornication which was not then known to him, and which accordingly he could not be said to have waived. The true rule was that which had been previously stated to the jury. But the defendant has not suffered by this error; for he relied only upon the testimony concerning the plaintiff's condition in September, 1903, which the jury must have found to have been due to the defendant himself, and upon his claim relative to Martin, which the jury have expressly negatived.

The defendant also excepted to the judge's refusal to instruct the jury that evidence of fornication on the part of the plaintiff could be considered in mitigation of damages. But this request was too broad. It included fornication committed with the defendant, and so could not have been given. *Espy v. Jones*, 37 Ala. 379; *Johnson v. Smith*, 3 Pittsb. R. (Pa.) 184. Nor, for the reasons above stated,

has the defendant suffered by its not having been given.

The exception to the refusal of the judge to define the word "seduced," as requested by the defendant, has not been argued and we treat it as waived.

Exceptions sustained.

(156 Mass. 326)

COMMONWEALTH v. PORN.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. PHYSICIANS AND SURGEONS — PRACTICE WITHOUT LICENSE—MIDWIFERY.

Where a trained nurse practiced obstetrics and used printed prescriptions for alleviating suffering and other conditions incident thereto, together with the usual obstetrical instruments when they were necessary, she, not being licensed to practice medicine, was guilty of violating Rev. Laws, c. 76, § 8, providing that whoever, not being lawfully authorized to practice medicine, shall attempt to practice medicine in any of its branches, shall be punished, etc.

2. SAME—CONSTITUTIONAL LAW.

Rev. Laws, c. 76, § 8, prohibiting the practice of medicine or surgery without a license, is not unconstitutional, in so far as it prohibits the unlicensed practice of midwifery by the use of instruments and the giving of prescriptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Physicians and Surgeons, §§ 1, 2.]

Exceptions from Superior Court, Worcester County; John A. Alken, Judge.

Hannah Porn was convicted of illegally practicing medicine, and she brings exceptions. Overruled.

George S. Taft, Dist. Atty., and Ernest I. Morgan, Asst. Dist. Atty., for the Commonwealth. Francis Bergstrom, for defendant.

RUGG, J. This is a complaint charging that the defendant "did practice medicine" and "hold herself out as a practitioner of medicine," contrary to Rev. Laws, c. 76, § 8. After the case was before us in 194 Mass. —, 81 N. E. 305, the defendant was again tried in the superior court upon an agreed statement of facts, the substance of which was that at the time mentioned in the complaint, and for some years prior, the defendant held herself out as a midwife and practiced midwifery, but did not claim to be a general practitioner of medicine, nor was she lawfully authorized to practice medicine as provided by Rev. Laws, c. 76, § 8. She delivered many women in childbirth for compensation, and carried with her to her patients the usual obstetrical instruments, which she used rarely on occasions of emergency, but never if a physician could be called in time. She used six printed prescriptions or formulas in treating her patients, which contained directions for their application, and the purposes for which they were used, as follows: "For vaginal douche," "For post partum hemorrhage," "To prevent purulent ophthalmia in the new-born," "For after-pains," "For uterine inertia," and "For painful hemorrhoids or piles." She used no

other prescriptions or formulas. She was a trained nurse of experience, and was a graduate of the "Chicago Midwife Institute," from which she received a diploma which stated that she had received theoretical and practical instruction in the art of midwifery for a period of six months, and was declared a graduated midwife. Upon these facts the superior court ruled that the jury would be authorized to find the defendant guilty, and the defendant's first exception relates to this ruling. When the facts are undisputed, it is generally a question of law whether they constitute a violation of the statute. Commonwealth v. Porn, 194 Mass. —, 81 N. E. 305. Both medical and popular lexicographers define midwife as a female obstetrician, and midwifery as the practice of obstetrics. Rev. Laws, c. 76, § 7, mentions obstetrics as one of the subjects of examination for the purpose of testing an applicant's fitness to "practice medicine." This goes far toward showing that obstetrics is a branch of the practice of medicine. It requires no discussion to demonstrate that, when, in addition to ordinary assistance in the normal cases of childbirth, there is the occasional use of obstetrical instruments, and a habit of prescribing for the conditions described in the printed formulas which the defendant carried, such a course of conduct constitutes a practice of medicine in one of its branches. Although childbirth is not a disease, but a normal function of women, yet the practice of medicine does not appertain exclusively to disease, and obstetrics as matter of common knowledge has long been treated as a highly important branch of the science of medicine. In Higgins v. McCabe, 126 Mass. 13, 30 Am. Rep. 642, it is intimated that treatment of eyes of the infant (for which one of the prescriptions of the defendant was employed), is not within the duties of midwifery. In view of all the agreed facts, there was no error in submitting the case to the jury.

The defendant also offered expert evidence to prove that the practice of the defendant, as shown in the agreed facts, was not the practice of medicine in any of its branches, and that the conduct of the defendant was not holding herself out as a practitioner of medicine. This offer of evidence was excluded against the objection and exception of the defendant.

The former decision of this case said that expert medical evidence was admissible to prove "what a midwife does or is expected to do as such, so that the court may see whether her acts or any of them are regarded as the practice of medicine in any of its branches. * * * Whether upon such evidence it would appear that the ministrations of a midwife are those of a physician or rather of an attendant nurse and helper would ordinarily be a question of fact, or if the facts were not in dispute a question of law." 194 Mass. —, 81 N. E. 306. At the

present trial the facts were agreed. All that the defendant sought to show was that these facts in the opinion of experts did not constitute the practice of medicine. But as the facts were not in dispute, within the former decision, the question was not one for expert evidence, but for the court. Moreover, on all the facts shown as to the use of prescriptions and the pains they were stated to alleviate and the use of obstetrical instruments, as well as attendance and service at childbirth by the defendant, it would be contrary to the plain intent of the statute and flying in the face of the common use of words to permit experts to testify that the language employed in the statute did not comprehend the acts confessedly performed by the defendant. We are far from saying that it would not be within the power of the Legislature to separate by a line of statutory demarcation the work of the midwife from that of the practitioner in medicine. See *Midwives Act 1902*, 2 Edw. 7, c. 14, and collection of statutes in 1 Witthaus & Becker *Med. Jurispr.* 137 et seq. The statute now under consideration does not make such separation. *State v. Welch*, 129 N. C. 579, 40 S. E. 120. Whatever hardship there may be upon the defendant who is a woman of good character and reputation as shown by the agreed facts comes from the scope of the statute.

The defendant contends that the statute as thus construed is unconstitutional. Its validity cannot be questioned on this ground. The maintenance of a high standard of professional qualifications for physicians is of vital concern to the public health, and reasonable regulations to this end do not contravene any provision of the state or federal Constitution. *Hewitt v. Charier*, 16 Pick. 358; *Brown v. Russell*, 166 Mass. 14, 23, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357; *Decle v. Brown*, 167 Mass. 290, 45 N. E. 705; *Hawker v. New York*, 170 U. S. 189, 18 Sup. Ct. 573, 42 L. Ed. 1002; *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 300, 47 L. Ed. 563; *Meffert v. Packer*, 195 U. S. 625, 25 Sup. Ct. 790, 49 L. Ed. 350.

Exceptions overruled.

(196 Mass. 371)

EARLE v. WHITING.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. MONEY RECEIVED—TRANSFER OF BANK ACCOUNT.

Where a person obtained a transfer of a bank account of another to herself under an order which such other had drawn, but had not delivered, directing payment to her of his deposit and dividends, an action for money had and received would lie, though the person so obtaining the transfer never received the money, but merely a right to demand the same of the bank.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, §§ 1-5.]

2. SAME—CONDITIONS PRECEDENT—DEMAND.

Where a person obtained a transfer of a bank account of another to herself under an or-

der which such other had drawn, but never delivered, directing payment to her of his deposit and dividends, an action for money had and received would lie, without previous demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, § 36.]

3. INTEREST—MONEY WRONGFULLY OBTAINED.

Where a person obtained a transfer of a bank account of another to herself under an order which such other had drawn, but had not delivered, directing payment to her of his deposit and dividends, she was liable for interest from the time the money was so misappropriated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Received, § 23.]

Exceptions from Superior Court, Worcester County; John A. Aiken, Judge.

Action by Samuel H. Earle against A. Le Roy Whiting, executor of the will of Ella M. Whiting, deceased. Finding for plaintiff on the second count of the declaration, and defendant excepts. Exceptions overruled.

E. H. Vaughan and Edward J. McMahon, for plaintiff. William C. Mellish and George W. Tebbetts, for defendant.

MORTON, J. The only question in this case is whether the court should have ruled as requested by the defendant that there was no sufficient evidence to warrant a finding for the plaintiff on the second count in the declaration which was for money had and received by the defendant's testatrix to the plaintiff's use. The only evidence in the case was the auditor's report. The auditor found in substance that the plaintiff, who was blind, received in June, 1904, \$500 from one Bassett in payment of the balance due on a mortgage and handed it to his daughter, the defendant's testatrix, directing her to deposit it for him in the Webster Five Cents Savings Bank and to bring him back the book; that she deposited the money as thus directed but at the same time caused all deposits and dividends, including the \$500, standing to the plaintiff's credit in the bank, amounting to \$612.50, to be transferred to herself under an order which the plaintiff had drawn in the spring of 1903 on the treasurer of the bank directing him to pay to her all deposits and dividends due him on account, but which he had never delivered to her and which had remained as he supposed in his custody. How it came into her possession except that it never was delivered by him to her does not appear. The auditor found that defendant's testatrix by such transfer converted to her own use the sum thus transferred, namely the \$612.50 aforesaid, and the court, on the evidence thus before it, found for the plaintiff and assessed the damages in the sum thus converted and interest.

The defendant contends that an action for money had and received will not lie because his testatrix never received any money and that all that she obtained by the transfer was a right to demand from the bank the amount transferred, in other words, a chose in action. But the transfer of the deposit

and dividends from the plaintiff to herself was the same in legal effect as if she had actually withdrawn the money and had re-deposited it in her own name. In such a case it is plain that an action for money had and received would lie. See *Randall v. Rich*, 11 Mass. 494; *Emerson v. Bayles*, 19 Pick. (Mass.) 55; *Henchey v. Henchey*, 167 Mass. 77, 44 N. E. 1075; *Sullivan v. Sheehan*, 173 Mass. 361, 53 N. E. 902. No demand was necessary and interest was due from the time when the money was fraudulently misappropriated by defendant's testatrix. *Hill v. Hunt*, 9 Gray (Mass.) 66; *Manufacturers' Bank v. Perry*, 144 Mass. 313, 11 N. E. 81.

Exceptions overruled.

(196 Mass. 339)

BAKER v. HARRINGTON et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1907.)

APPEAL—REVIEW—DISCRETION OF LOWER COURT—PERSONAL INJURY—EVIDENCE—OBSERVATIONS—SIMILARITY OF CONDITIONS.

Where, in a personal injury action, there was an issue whether the stairs down which plaintiff fell were sufficiently lighted, the trial court's exercise of discretion in receiving statements as to observations made by witness after the accident under substantially similar conditions will not be disturbed; it not appearing the discretion was abused, and the instructions having carefully guarded the jury from making any improper use of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3849.]

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Personal injury action by Mary A. Baker against Chauncey G. Harrington and another. Verdict for defendants, and plaintiff brings exceptions. Exceptions overruled.

H. L. Parker, Jr., for plaintiff. Parker & Milton and George A. Gaskill, for defendants.

RUGG, J. A material dispute between the parties at the trial was the amount of light thrown upon the hallway and stairs where the plaintiff fell, by lights after nightfall from the neighboring streets and stores, the plaintiff claiming that the hallway was so dark that she could not distinguish the head of the stairs. The defendant thereupon called witnesses, who were permitted to testify, against the exception of the plaintiff, that the light from these outside sources illuminated the hall, so that the head of the stairs could be plainly seen along the course of the plaintiff's footsteps immediately preceding her fall. This testimony was based upon observations made by the witnesses a considerable time after the accident. The trial court must have determined, as a preliminary question, before admitting the evidence, that the conditions were substantially the same at the time of the observations testified to as they were at the time of the injury. But he

82 N.E.—3

further instructed the jury as follows: "I admitted evidence of certain tests or certain observations on a Sunday night not far back. Now, those tests are of no importance unless the conditions under which they were made are precisely the same as the conditions existing at the time of the accident. There is some contradiction as to how many lights on the opposite side of the street were lighted at that time, possibly as to how many there were in front of Easton's store, and you have heard Mr. Smith, * * * who told you when they were put in and all of them prior to [the date of the accident]. Mr. Knight has testified, and others have, with reference to the arc light. * * * So, too, it is not a question as to one who has exceptionally good eyesight, but it is one who has practically the same eyesight as the person using the stairs at the given time. So, gentlemen, I instruct you, unless you find the condition existing on the Sunday night when [the witnesses] made their observation, precisely the same as at the moment when Mrs. Baker went through the hall and fell down the stairway, you are to disregard it." In *Dow v. Bulfinch*, 192 Mass. 281, 78 N. E. 416, it was said by Hammond, J.: "The question whether evidence of experiments shall be admitted must be largely left to the discretion of the trial judge, and that discretion will not be interfered with unless in its exercise he clearly appears to be wrong." *Commonwealth v. Tucker*, 189 Mass. 457-478, 78 N. E. 127, 7 L. R. A. (N. S.) 1056. Observations and experiments made at times other than the main occurrence at issue have been frequently received and not infrequently rejected, often but not universally, in the discretion of the trial court. *Commonwealth v. Goodman*, 97 Mass. 117; *Hunt v. Lowell Gas Co.*, 8 Allen, 169, 85 Am. Dec. 697; *Hodgkins v. Chappell*, 128 Mass. 197; *Baxter v. Doe*, 142 Mass. 559, 8 N. E. 415; *Brierly v. Davol Mills*, 128 Mass. 291; 1 Wigmore on Evidence, § 460. See *Bemis v. Temple*, 162, Mass. 342, 38 N. E. 970, 26 L. R. A. 254, and *Johnstone v. Tuttle*, 194 Mass. —, 81 N. E. 886. There is nothing to show in the present case that the superior court was plainly wrong in the exercise of its discretion, and the instructions carefully guarded the jury from making any improper use of the evidence.

Exceptions overruled.

(196 Mass. 280)

COMMONWEALTH v. STEVENS.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 15, 1907.)

1. MARRIAGE—VALIDITY.

Defendant's first wife was granted a divorce from him in Massachusetts, which did not become absolute until March 11, 1901, prior to which, but after the decree nisi had been granted to the wife, defendant married T. in Georgia. Held that, defendant's first wife not having been completely divorced at the time of his second

marriage, such marriage was illegal and void, as provided by Civ. Code Ga. 1895, §§ 2412, 2416.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 30.]

2. EVIDENCE—LAWS OF ANOTHER STATE—PRESUMPTIONS.

In the total absence of evidence, the common or unwritten law of another state will be presumed to be the same as the law of the forum; but the statute or written law of a foreign state can only be considered in so far as it is proved at the trial.

3. MARRIAGE—COHABITATION AFTER DIVORCE.

Where defendant was married to another in Georgia before his first wife's Massachusetts decree of divorce had become absolute, the invalidity of such second marriage was not cured by the subsequent cohabitation of defendant and his second wife after such decree became absolute, under the common law of Massachusetts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 108.]

4. SAME—STATUTES—APPLICATION.

Rev. Laws, c. 151, § 6, provides that if a person, during the life of a husband or wife with whom the marriage is in force, contracts a subsequent marriage with legal ceremony followed by cohabitation, and one of the parties acted in good faith, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to be legally married from and after the removal of such impediment. *Held*, that such section contemplated a case where it could take effect instantly on the removal of the impediment, so that, where defendant married a second wife in Georgia before a divorce granted to his first wife in Massachusetts had become final, and continued to reside in Georgia with his alleged second wife until long after his first wife's divorce decree became final, when he, with his second wife, removed to Massachusetts, the statute was ineffective to validate the Georgia marriage.

Report from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

F. E. Stevens was charged with polygamy. He requested the court to rule that he was not guilty, whereupon a verdict of guilty was returned by the jury, and the case, at defendant's request, was reported to the Supreme Judicial Court. Verdict set aside, and new trial granted.

John S. Richardson, Asst. Dist. Atty., for the Commonwealth. James F. Creed, for defendant.

HAMMOND, J. This is an indictment for polygamy. At the trial it appeared that the defendant was married on September 18, 1895, to Grace P. Batchelder, in whose favor, on September 10, 1900, a decree nisi for divorce was granted, which decree was made absolute on March 11, 1901. These events occurred in this commonwealth. On January 26, 1901, the defendant, then having been living four months in Georgia, married there Minnie C. Tourtellotte (she entering into the marriage in good faith and in the full belief that his former marriage had been annulled by divorce), and lived with her for six months after the marriage, at Atlanta in that state, and then separated from her. The defendant and the said Minnie both came to

this commonwealth, but not at the same time, and subsequently cohabited here as husband and wife under the Georgia marriage until March, 1904, no further marriage ceremony between them having at any time been performed. On August 16, 1905, the defendant married Jeannette H. Smyth in this commonwealth, and subsequently lived with her in Boston. The three women were alive at the time of the trial.

To show the law of Georgia, the defendant introduced in evidence "the third title, chapter 1, article 1 of Domestic Relations of the Code of the state of Georgia; article 1 of Marriage and Divorce and all sections of the article on Marriage and Divorce relevant to the case at bar, particularly the section 'Essentials of Marriage,' and the section on what constitutes void marriages under the Georgia Code"; and also the following decisions of the Supreme Court of that state, namely: *Equitable Life Assurance Society of the United States v. Paterson*, 41 Ga. 359, 5 Am. Rep. 535, *Clark v. Bassidy*, 62 Ga. 411, *Wrye v. State*, 95 Ga. 466, 22 S. E. 273, and *Wilson v. Allen*, 108 Ga. 275, 33 S. E. 975.

The case is before us upon a report, and the question is whether at the time of his marriage to Smyth, the defendant was the lawful husband of the woman between whom and him the ceremony of marriage in Georgia took place.

It is plain that, since at the time of that ceremony he had not been completely divorced from his first wife, the ceremony was illegal and void. Civ. Code Ga. 1895, §§ 2412, 2416. It is argued, however, by the commonwealth, that by the cohabitation in Georgia between the parties as husband and wife subsequent to the absolute decree of divorce between the defendant and his first wife, a valid marriage was established under the law of that state. This contention makes it necessary to examine that law.

The law of another state is to be proved like any other fact. We cannot take judicial cognizance of it. In the total absence of any evidence whatever, the common or unwritten law of another state may be taken here to be the same as the law of this state. But the statute or written law must be proved, and we are confined to the proof introduced in evidence at the trial. *Hackett v. Potter*, 35 Mass. 349, 350, and cases cited.

Inasmuch as the marriage ceremony in question was illegal and void because of the fact that the defendant then had another wife, it is plain that if the common law of Georgia is the same as that of Massachusetts, the difficulty was not cured by the cohabitation after the defendant had been fully divorced from his first wife. The solemnization of the second marriage being unlawful, the cohabitation was unlawful in the beginning, and could become lawful only upon a new solemnization after the impediment had been removed. *Thompson v. Thompson*, 114 Mass. 566. It is argued, however, by the attorney for the

commonwealth, that in this respect the common law of Georgia is different from that of Massachusetts, in that a new solemnization in a case like this is not necessary to validate the marriage, and he has cited upon his brief some decisions of the Supreme Court of Georgia (including *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362) which lead to the suspicion that upon a full investigation of its law his view would appear to be correct; but the difficulty is that in considering this matter we are confined, as before stated, to the statutes and decisions which were introduced in evidence at the trial. Cases which are in the nature of marginal notes to statutes are not brought before us simply by a citation of the statutes. They should be put specifically in evidence. Confining ourselves to the evidence, we do not find the contention of the commonwealth sustained. So far as respects the question of cohabitation after the complete decree of divorce between the defendant and his first wife, there is nothing in the statutes and decisions introduced at the trial which would justify a finding or ruling that by such cohabitation in Georgia a lawful marriage relation was created.

It is however urged by the commonwealth that even if no lawful marriage existed while the parties lived in Georgia, yet when they afterwards cohabited in Massachusetts they became husband and wife by virtue of Rev. Laws, c. 151, § 6, which reads as follows: "If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by divorce, or without knowledge of such former marriage, they shall after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents."

This statute of course can have no extra-territorial force. It could not have affected the status of the parties to the marriage ceremony in Georgia while they continued to reside in that state. The "impediment" was removed several months before they left that state. The statute validates the marriage "from and after the removal of such impediment." The plain inference from this is that it applies only to cases where, upon the removal of the impediment, it can instantly take effect. As stated by this court in *Turner v. Turner*, 189 Mass. 373, 375, 75 N. E. 612,

613, 109 Am. St. Rep. 643. The purpose of the statute "is to provide that the marriage ceremony, illegal at first by reason of the existence of an impediment, shall be regarded as taking place at the time this impediment is removed. * * * It is immaterial whether the removal of the impediment is known or unknown. Whether known or not, the marriage ceremony becomes operative upon the removal, if the parties continue to live together as husband and wife in good faith on the part of one of them." In the case at bar all the conditions of the statute existed for months before the parties left Georgia. Manifestly the statute could not apply. The parties were not within the jurisdiction of the statute when by its terms the time came for it to take effect. It must take effect then if at all. The case therefore is not within the statute.

According to the terms of the report the verdict should be set aside and a new trial granted.

So ordered.

(196 Mass. 349)

AYERS et al. v. FARWELL et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 15, 1907.)

1. BANKRUPTCY — ADJUDICATION — SUBSEQUENT ACTION IN STATE COURT.

One may maintain replevin in a state court to obtain possession of the property of a bankrupt after an adjudication in bankruptcy, but before anything else has been done to obtain possession of his property in the federal courts.

2. COURTS—STATE AND FEDERAL—PRIORITY OF JURISDICTION.

Where a question of the title, with the right of possession to property, arises both in a state court and a federal court, the court which first obtains possession of the property under its process acquires jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1346.]

3. SALES—RIGHT TO RECLAIM GOODS.

To authorize a seller to recover from the buyer the goods delivered, for fraud of the buyer, it must be shown that the buyer formed an intent not to pay for the goods at the time they were received, or prior thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 93.]

4. SAME.

A receipt of goods by a buyer in the usual course of business several months after giving his order therefor does not warrant a finding that he entertained a fraudulent intent not to pay for them merely from the fact that he was then insolvent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 142, 143.]

5. SAME.

Evidence considered, and held insufficient to establish fraud essential to enable a seller to reclaim the goods from the buyer.

6. FRAUD—EVIDENCE—PRESUMPTIONS.

Fraud is never presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 46, 47.]

Exceptions from Superior Court, Worcester County; William Cushing Walt, Judge.

Replevin by Louis H. Ayers and others against Charles R. Farwell and another, co-

partners. There was a judgment for defendants, and both parties bring exceptions. Overruled.

Charles F. Baker, Walter Perley Hall, and Emerson W. Baker, for plaintiffs. Wyman & Brier, for defendants.

KNOWLTON, C. J. This writ of replevin was brought to recover property in the possession of a bankrupt firm, five days after an adjudication of bankruptcy against it, but before the appointment of a trustee, and before anything had been done to obtain actual possession of the property for the benefit of the creditors. The case is before us on two bills of exceptions, the first filed by the defendant to set aside a ruling that the writ was properly issued, and the second filed by the plaintiff on his objection and exception to the ruling that, upon all the evidence, the plaintiff was not entitled to recover.

The first question is whether, after an adjudication in bankruptcy and before anything else has been done to obtain possession of the bankrupt's property, a plaintiff can maintain an action of replevin in a state court, to obtain his property in the bankrupt's possession. We are of opinion that he can. There is a question as to the title to property and the right of possession of it. The general rule is that, when such a question arises both in a state court and a court of the United States, the court which first gets possession of the property, under its process, acquires jurisdiction. *Taylor v. Carryl*, 20 How. (U. S.) 583, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. In *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, the court considered questions very similar to that now before us, the principal difference being that, in that case, after the adjudication in bankruptcy the referee ordered the property to be locked in a building to await the appointment of a trustee, and it was being so kept under his order when the writ of replevin was issued. The court held that it was in the actual possession of an officer of the law, who held it for creditors under the adjudication of the court, and that this control left the state court with no jurisdiction to take it by a writ of replevin. As we understand the decision, the case is made to turn upon the possession so acquired, and there is no intimation that, without such possession, the mere adjudication would put the property beyond the jurisdiction of a state court to take it under a proper process as the property of a person other than the bankrupt. There are broad statements, in opinions in some of the District and Circuit Courts of the United States, to the effect that an adjudication of bankruptcy is a caveat to all the world, with the effect of an attachment and injunction, and that possession of all property in the peaceable posses-

sion of the bankrupt is forthwith vested in the bankruptcy court. But we have found no adjudication to that effect in a case like the present, where the property of a third person was involved, and where nothing had been done to acquire possession, other than to make the adjudication. Similar language, used by Chief Justice Fuller in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, was held in the later case of *York Manufacturing Company v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, to have been used in reference to the facts of that case, and not to be of universal application. We are of opinion that the court had jurisdiction.

The plaintiff's exceptions raise the question whether there was evidence to warrant a finding that the property in question was bought by the bankrupts fraudulently, with an intention not to pay for it. The law in reference to the general question of what constitutes a fraud of this kind, in a purchase by an insolvent person, was discussed at length, with a citation of cases in *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117.

In the present case the contract for purchase was made eight or ten months before the adjudication of bankruptcy. It does not appear, and the evidence would hardly warrant a finding, that the purchasers were then insolvent. It could not be found that at the time of making the contract, they intended not to pay for the goods. The plaintiffs were the manufacturers of the blankets which were replevied, and which were delivered under the order of purchase in the last days of August, from five to eight months, as we understand, after the order was given. Unless the evidence would warrant a finding that the purchasers formed an intention not to pay for them at the time when they were received, or previously, it is plain that the plaintiff cannot recover. Whether such an intention, formed at that time, in reference to goods which were honestly ordered long before and were delivered in pursuance of the order, would be such a fraud as would entitle the plaintiffs to a rescission of the contract, we do not find it necessary to decide; for if we assume that it would, we do not find evidence of the existence of the intention. As to the defendant, Farwell, it is plain that there is no such evidence. The uncontradicted testimony is that "he was very little at the store; that he was in charge of another department of the business in another place; that his partner, Clafin, had full charge of all the bookkeeping, banking, and the entire financial part of all the business of the firm" and that, until September 1, 1906, Farwell supposed they were financially solvent.

As to the other partner, Clafin, there is nothing in the financial condition of the firm on which to found as argument that, in the last part of August, when the goods were delivered, he intended not to pay for them. He

was then in charge of the business. The blankets had been ordered by him in the early part of the year, in the ordinary course of the firm's business, for fall delivery. About September 1st, he went to Greenfield, N. H., and it appeared, soon after, that the firm's assets were \$12,000 or \$13,000 and its direct liabilities \$18,000 or \$20,00, with a contingent liability of \$15,000 for indorsements. While the firm was financially embarrassed and insolvent, it does not appear that, before the end of August, he had given up the hope and expectation of continuing the business and ultimately paying all his debts. Often the proprietors of such a business fail to realize how deeply they are involved, until a crisis comes which results in a full disclosure. The receipt of these goods in the usual and ordinary course of business, which had been ordered many months before in the ordinary course of business, does not warrant a finding that he entertained a fraudulent purpose in regard to them, merely from the fact that the firm was then insolvent, as the evidence shows.

It does not appear that either of the defendants had knowledge which left them with no reasonable expectation of paying for the goods when they were received. The facts relied upon are very different from those that appear in *Watson v. Silsby*, *ubi supra*. As fraud is never to be presumed, they fall short of establishing the wrongful conduct which the plaintiffs endeavored to prove.

Exceptions overruled.

(196 Mass. 319)

CORBETT v. CRAVEN.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 15, 1907.)

1. JUDGMENT—RES JUDICATA—COLLATERAL ATTACK.

Evidence that the plaintiff in a prior suit in equity and the plaintiff, who acquired his rights, were ignorant and mistaken as to the material facts involved in such prior suit, as stated in the pleadings and determined by the final decree, offered for the purpose of avoiding the effect of such decree as *res judicata*, was objectionable as a collateral attack on the decree in an action at law.

2. EQUITY—WRIT OF REVIEW—SCOPE OF REMEDY—VACATION OF JUDGMENT.

The ordinary remedy, when a decree is improperly entered, is by bill of review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1078-1094.]

3. JUDGMENT—VACATION—INJUNCTION.

If the bill of review or other remedy is unavailable to vacate an erroneous judgment, relief may be had by suit in equity, aided by injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 764-771.]

4. SAME—ACTION AT LAW.

Equitable relief against a judgment alleged to have been erroneously entered can be given in an action at law only in the cases and in the manner prescribed by Rev. Laws, c. 173, §§ 28-32.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 859-862.]

5. SAME—PLEADING.

A defendant wishing to set up an equitable defense, or a plaintiff desiring to claim equitable rights, as against a judgment, as authorized by Rev. Laws, c. 173, §§ 28-32, must show by his pleadings that he seeks equitable relief, which is otherwise not open to him in such action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 879-886.]

6. SAME—MISTAKE.

A mistake, which is available as a ground for equitable relief against a judgment, must be a mutual mistake of both parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 821.]

7. SAME—FORMER ADJUDICATION—MERITS—EVIDENCE.

In order for a party to avail himself of a plea of former adjudication of an issue in another suit on a different cause of action, it must appear, either from the record alone, or from the record supplemented by other evidence, that the issue was then determined by the court on the merits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1008, 1162.]

Exceptions from Superior Court, Hampden County; Jabez Fox, Judge.

Action by William J. Corbett against Michael Craven. Judgment for defendant, and plaintiff brings exceptions. Overruled.

C. T. Callahan, for plaintiff. C. L. Gardner, C. G. Gardner, and E. S. Gardner, for defendant.

KNOWLTON, C. J. In the decision of this case, reported in 193 Mass. 30, 78 N. E. 748, it was held that, upon the conceded facts, the plaintiff's cause of action was barred by an adjudication in a suit in equity brought by the plaintiff's predecessor in title. In a second trial the plaintiff sought to avoid the effect of this adjudication by evidence that the plaintiff in the suit in equity, and he himself who acquired his title soon after the suit was brought, were ignorant and mistaken as to material facts involved in the case as it was stated in the pleadings and determined by the final decree. This was an attempt to obtain relief from an adverse decree in equity, not by proceedings to set aside the decree, but by a collateral attack upon it in an action at law. This on its face was irregular. The ordinary remedy, when a decree is improperly entered, is by a bill of review. If, through lapse of time or for other reasons, this remedy is not available, there may be relief by way of an injunction in equity, if justice demands it, and there is no other way open. *Currier v. Esty*, 110 Mass. 536; *Amherst College v. Allen*, 163 Mass. 178, 42 N. E. 570. Instead of bringing a bill in equity, the plaintiff filed a replication averring the facts relied on. Equitable relief can be given in an action at law only under Rev. Laws, c. 173, §§ 28-32. A defendant who wishes to set up an equitable defense, or a plaintiff who wishes to claim equitable rights by a replication under this statute, should put his pleadings in such a form as to show that he seeks equitable re-

lief which otherwise would not be open to him in such an action. *Sherman v. Galbraith*, 141 Mass. 440-442, 5 N. E. 838; *Mason v. Mason*, 140 Mass. 63-65, 3 N. E. 19; *Barton v. Radclyffe*, 149 Mass. 275-280, 21 N. E. 374. If, under a liberal construction of the statute, we hold that this replication is sufficient in this particular, we come to other considerations.

The matters relied on amount to nothing more than that the plaintiff in the first suit was ignorant of some of the facts when he filed his bill, and that the bankrupt, whose title he took as trustee, declined, by advice of counsel, to give him information, and that afterwards the defendant made some statements which proved to be incorrect. There was no offer to prove that these statements were made fraudulently, there is no suggestion that there was any accident in connection with the bringing, or the trial, or the decision of the case, such as would constitute a ground for equitable relief, nor any mutual mistake of the parties that entered into any action which they took together. The case is very different from *Currier v. Esty*, 110 Mass. 536, on which the plaintiff relies. In that suit the judgment was founded on an agreed statement of facts, believed by the court to be true, which was incorrect in a very important particular, about which the parties, when they made their agreement and for a long time after the entry of the judgment, were mutually mistaken. In the present case, as in *Amherst College v. Allen*, 165 Mass. 178, 42 N. E. 570, the facts show no ground for interference with the decree. If misunderstanding or ignorance of some of the material facts, by one of the parties, and the refusal of the other to give information, upon inquiry, were a ground for setting aside judgments rendered after a trial in court, the doctrine *res judicata* would be of little practical importance. The ruling on this part of the case was correct. The kind of mistake which is a foundation for equitable relief is a mutual mistake of the parties, not a mistake of one of them. *Page v. Higgins*, 150 Mass. 27, 22 N. E. 63, 5 L. R. A. 152, and cases cited.

The bill of exceptions states that the plaintiff offered "the record of the judgment in the equity suit of *Corbett v. Craven*," and certain other evidence connected with it. There is no previous reference to any such suit in the bill of exceptions, nor anything to show what the suit was about, if there was such a suit. The record offered in evidence and excluded is not made a part of the bill of exceptions, and, construing the bill strictly, there is nothing before the court which gives us any important information about it. The only previous reference to it in the record is found in the plaintiff's replication, as follows: "And now comes the plaintiff, and in reply to that part of the defendant's answer which sets up a former judgment as a bar, says that the defendant is precluded from pleading said for-

mer judgment in this action, because, in a former proceeding between the same parties, to wit, a bill in equity brought by the plaintiff against the defendant, in this court, involving title to goods and chattels sued for in this action, the defendant, after putting such former judgment in evidence, asked the court for a ruling that it was a bar to said bill in equity, and because it was adjudicated and decreed by said court that said former judgment was not a bar, and the defendant abided by said adjudication and decree." At the argument the clerk, in the presence of counsel, handed us a certified copy of the record of such a suit, and if we treat as a part of the bill of exceptions, we are to consider the offers of proof numbered 2, 3 and 4, in connection with it. If the proof had been established, the court would have had before it a bill in equity filed and finally disposed of, later than the bill referred to in 193 Mass. 30, 78 N. E. 748, involving the title to certain machinery, no part of which is the subject of the present suit, but which was a part of that covered by the sale to the plaintiff upon which he relies for his title to the property described in this action. It would appear that, at the trial of the equity suit of *Corbett v. Craven*, the defendant offered the judgment in the earlier suit as evidence, and examined two witnesses as to the description of the property, that he then asked the judge to rule that the former judgment—meaning, we suppose, the decree in the earlier suit in equity—was a bar to the later suit in equity, that the judge declined so to rule and ruled to the contrary, and the defendant did not appeal from the subsequent adjudication and decree for the plaintiff. This offer of evidence in the present suit was an attempt by the plaintiff to avoid the effect of the adjudication in the first suit, as a bar to the present claim, by showing that, in a later suit involving similar questions, there was a decision that the adjudication was not a bar.

In the first place, the copy of the record of the second suit, handed us by the clerk, shows that the defendant failed to plead the former adjudication, and that his answer contains no reference to it. This would be a sufficient reason for ruling that the adjudication could not be considered and was not a bar to the second suit. Moreover, it does not appear that, in the trial of the second case, it was proved that the machinery in question was a part of that included in the sale on which the plaintiff now relies. The offer in the last trial was to prove that it was a part of it. But as to what occurred at the trial of the second suit, the only offer was to show that two witnesses were examined in regard to the description of the property. For both of these reasons the offer failed to show that the court, at the trial of the second suit, determined the same issue which was involved in the trial of the present case.

In order to avail one's self of a former adjudication on an issue in another suit upon a

different cause of action as a bar to an opposite adjudication in a pending case, it must appear, either from the record alone or from the record supplemented by other evidence, that the issue was considered and determined by the court upon the merits. *Foye v. Patch*, 132 Mass. 105. The plaintiff's offer of proof did not go far enough to establish that proposition.

We do not find it necessary to consider the question whether, when the record fails to show that the issue determined in a former case was the same as that to be determined in the case before the court, and this can be proved only by parol evidence, a party can avail himself of a former adjudication, if the testimony introduced to show what it was proves that it was erroneous in law. Exceptions overruled.

(196 Mass. 395)

MILLER v. BURT et al.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 16, 1907.)

1. FRAUDS, STATUTE OF—CONTRACT TO SELL LAND—SUFFICIENCY OF MEMORANDUM.

A memorandum reciting the receipt by defendant of \$10 as part payment on land, the remaining \$40 to be paid on delivery of the deed, is an insufficient memorandum of the contract to sell the land, under the statute of frauds, since it fails to describe the land; it not appearing that the subject of the contract was the only land owned by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, *Frauds*, *Statute of*, §§ 225-236.]

2. SPECIFIC PERFORMANCE—PLEADING—DEMURRER.

It appearing from a bill to specifically perform a contract to sell land that there was no sufficient memorandum of the contract within the statute of frauds, a demurrer is proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, *Specific Performance*, § 361.]

Appeal from Superior Court, Franklin County; Hitchcock, Judge.

Bill by George Clayton Miller against Don Wells Burt and another. From a decree dismissing the bill, plaintiff appeals. Affirmed.

The memorandum referred to in the opinion reads as follows:

"Zoar, Mass., Feb. 26, 1907.

"Received of A. F. Truesdell ten dollars in part payment of lot sold to him; he to pay balance, forty dollars, on delivery of the deed.
D. W. Burt."

Hugh E. Adams and Homer Sherman, for plaintiff. William A. Davenport, for defendants.

SHELDON, J. The demurrer rightly was sustained; and, as the plaintiff apparently did not desire to make any amendment, the bill properly was dismissed.

1. It is abundantly settled by the decisions of this court that the memorandum signed by the defendant was not sufficient to take the case out of the statute of frauds. It utter-

ly failed to describe or identify in any manner, or by any reference, the land intended to be conveyed. *Whelan v. Sullivan*, 102 Mass. 204. There was no such fraud or part performance averred as would entitle the plaintiff to avoid the statutory bar. *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Harrell v. Sonnabend*, 191 Mass. 310, 77 N. E. 764. Nor was there any averment that the land which was the subject of the bargain was the only land owned by the defendant, so as to bring the case within the rule stated in *Doherty v. Hill*, 144 Mass. 465, 467, 11 N. E. 581. See the cases there cited.

2. It sufficiently appears by the bill that the agreement between the parties was an oral one, and that no written memorandum except the one annexed to the bill was relied on by the plaintiff. This affords ground for demurrer in equity. *Campbell v. Brown*, 129 Mass. 23; *Ahrend v. Odiorne*, 118 Mass. 261, 10 Am. Rep. 449. It may be that if there had been no demurrer and if the statute of frauds had not been set up in avoidance of the action (see *Harrell v. Sonnabend*, 191 Mass. 310, 77 N. E. 764; *Livingston v. Murphy*, 187 Mass. 315, 318, 72 N. E. 1012, 105 Am. St. Rep. 400), the defendant might have put in parol evidence to show that the defendant owned no other land than that bargained for; but no such case is now before us.

The decree sustaining the demurrer and dismissing the bill must be affirmed.

So ordered.

(196 Mass. 286)

COMMONWEALTH v. KRONICK.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 15, 1907.)

1. RECEIVING STOLEN GOODS—INSTRUCTIONS.

In a prosecution under Rev. St. c. 208, § 51, for receiving stolen goods, an instruction that defendant should be convicted "if he either knew or believed the property was stolen property at the time it came into his possession, or at any time while it was in his possession he ascertained that it was stolen property, and he undertook to deprive the owner of the rightful use of it," does not signify that a conviction is authorized if defendant's knowledge of the prior larceny came to him only after his dealings with the goods in question.

2. SAME.

Where the evidence was that the defendant received the goods from the thief, and kept them in his store for several days, and afterwards either purchased them from the thief and resold them to R., or acted as a friendly intermediary in a sale made by the thief to R., and the court had explained fully the bearing of this testimony and stated the contention of the parties, and had said that it must be proved that defendant had either bought, or received, or aided in the concealment of, the property, an instruction that "if defendant either knew or believed the property was stolen at the time it came into his possession, or at any time while it was in his possession he ascertained that it was stolen property, and he undertook to deprive the owner of his rightful use of it," was not erroneous, as substituting for the specific acts named in the stat-

ute a mere undertaking to deprive the owner of his rightful use of the property.

3. CRIMINAL LAW—TRIAL—MANNER OF GIVING REQUESTED INSTRUCTIONS.

It is not necessary to give a requested instruction in the language in which it is framed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2014.]

4. SAME—INSTRUCTIONS—CALLING ATTENTION TO PARTICULAR TESTIMONY.

It is not error to refuse to call the jury's attention to any particular piece of testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1969-1973.]

5. RECEIVING STOLEN GOODS—BUYING FOR SELF OR ANOTHER.

In a prosecution for receiving stolen goods, it makes no difference whether the accused bought the goods, acting for himself, or merely as agent for another.

Exceptions from Superior Court, Berkshire County; John C. Crosby, Judge.

Hyman H. Kronick was convicted of receiving stolen goods, and excepts. Exceptions overruled.

John F. Noxon, for complainant. Mark E. Couch and John E. Magenis, for defendant.

SHELDON, J. The defendant's counsel have not argued that any one of their first three requests for instructions should have been given as it was framed. But it is contended that under the charge of the court the jury may have convicted the defendant without sufficient proof of a guilty knowledge on his part that the goods in question had been stolen; that they may have found that the defendant's knowledge of the prior larceny came to him only after whatever dealings he had with the goods in question. If this contention is well founded, manifestly the defendant has been aggrieved. There is only one crime described in Rev. Laws, c. 208, § 51, upon which this indictment was drawn, although that crime may be committed in either one of the specific modes described in that statute. *Stevens v. Commonwealth*, 6 Metc. (Mass.) 241. Accordingly, as was held in that case, the defendant could be convicted upon this indictment if it appeared that he, knowing that the goods have been stolen, either bought or received them, or aided in their concealment. But it needs no citation of authorities to show that no offense is committed unless the defendant has that guilty knowledge at the time at which he commits the act either of buying, or receiving, or aiding to conceal the stolen goods, with the qualification, to which the defendant did not object, that if the goods have been actually stolen it is enough if the defendant believed this to be the case, even though he may not have had full and complete knowledge. *Com. v. Finn*, 108 Mass. 466; *Com. v. Leonard*, 140 Mass. 474, 478, 479, 4 N. E. 96, 54 Am. Rep. 485.

But the defendant's contention does not appear to be well founded. The final instruc-

tion to the jury, given in the stead of what had been previously said upon that subject, was that the defendant could be convicted "if he either knew or believed this property was stolen property at the time it came into his possession, or at any time while it was in his possession he ascertained that it was stolen property and he undertook to deprive the owner of his rightful use of it." This plainly meant that the defendant's undertaking to deprive the owner of the use of the property must have been subsequent to his ascertaining that it was stolen property. This was enough; for the offense was complete although he may have received the property innocently, if he subsequently, with the guilty knowledge that it was stolen property, bought it or aided in its concealment.

The defendant argues, however, that this instruction was erroneous, because it substituted for the specific acts named in the statute a mere undertaking to deprive the owner of his rightful use of the property. But when the instruction is considered in connection with the evidence and the contentions made at the trial the claim is without merit. The evidence was that the defendant received the goods from the thief and kept them in his store for several days, and afterwards either purchased the goods from the thief and resold them to one Rosenthal or acted as a friendly intermediary in a sale made by the thief to Rosenthal. The judge had already fully explained the bearing of this testimony to the jury, and had stated to them the contentions of the parties. He had plainly said to them that it must be proved that the defendant either had bought, or received, or aided in the concealment of the property; and this never was withdrawn or modified. The final instruction now under consideration was expressly given with reference only to the defendant's knowledge of the prior larceny. The jury could not have understood that they were at liberty to convict unless the defendant either had bought, or received, or aided in the concealment of the stolen property, with a guilty knowledge that it was stolen property at the time he committed the specific act for which he was convicted.

Nor was the judge bound to give the defendant's fifth request in the language in which it was framed, or to call the jury's attention to one particular piece of the testimony. The question whether the sale was made to the defendant or to Rosenthal was left directly to the jury; and they were properly told that if the former alternative was proved, that is, if the defendant himself bought the goods, it made no difference whether he bought them acting for himself or as agent for Rosenthal. There is nothing in *Com. v. Remby*, 2 Gray (Mass.) 508, inconsistent with this.

Exceptions overruled.

(196 Mass. 284)

GIBNEY v. OLIVETTE.(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 15, 1907.)**1. GAMING—WAGERING CONTRACTS.**

A contract to purchase stocks on margins, without an intent on either side that any stock should be actually delivered and paid for, though not prohibited by any statute imposing a penalty, is illegal and void at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 25.]

2. SAME—STATUTES.

The right to recover money lost in gaming, given to the loser by Rev. Laws, c. 99, § 4, and amendments, depends on the fact that the contract is illegal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 57-61.]

3. SAME—LOANS FOR GAMBLING PURPOSES—RIGHTS OF LENDER.

The lender of money to be used in an illegal purchase of stocks on margins, without any intent that any stock should be actually delivered, cannot recover the money loaned from the borrower.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 86-88.]

Report from Superior Court, Berkshire County; John O. Crosby, Judge.

Action by Lawrence F. Gibney against James I. Olivette. A verdict was rendered in favor of defendant, and the case was reported to the Supreme Court. Judgment on verdict.

James O'Brien and Herbert O. Joyner, for plaintiff. Arthur H. Wood, for defendant.

KNOWLTON, C. J. This is an action to recover money paid by the plaintiff to the defendant's use. The plaintiff received from the defendant certain money to be used in buying stocks on a margin, and purchased with it twenty shares of the stock of the Union Pacific Railroad Company. Afterwards the stock so depreciated in price that the plaintiff was called upon to advance and did advance other money, from time to time, to prevent it from being sold out by the broker with whom he dealt. Finally, when further advancements were demanded, he permitted it to be sold at a loss, and he afterwards brought this suit to recover the amount of his payments.

Upon the findings of the court, if the transactions had been legal and proper, the defendant would be bound to reimburse the plaintiff for his advancements. But the judge also found "that at the time the plaintiff purchased the stock for the defendant, it was speculation pure and simple, with no intention on the part of the plaintiff or defendant of having the stock delivered, or of having any certificate of stock actually issued." In making the first ruling requested by the defendant, the judge also decided that, on the evidence, the money was paid "on wagering contracts." In granting the second request he interpreted the evidence in the same way, and under each request he ruled that the

contract was illegal and that the plaintiff could not recover.

The finding that the purchase of the stock was a wagering contract was a decision upon matters of fact which we have no reason to question. It has been decided repeatedly in this commonwealth that such a contract, although not prohibited by any statute imposing a penalty, is illegal and void at common law, so that no recovery can be had under it. *Harvey v. Merrill*, 150 Mass. 1, 22 N. E. 49, 5 L. R. A. 200, 15 Am. St. Rep. 159; *Rice v. Winslow*, 182 Mass. 273-275, 65 N. E. 386; *Northrup v. Buffington*, 171 Mass. 468, 51 N. E. 7; *Farnum v. Whitman*, 187 Mass. 381, 73 N. E. 473. The right to recover, given to a loser, by St. 1890, p. 479, c. 437 (Rev. Laws, c. 99, § 4), and the amendments thereto, depends upon the fact that such a contract is illegal. *Lyons v. Coe*, 177 Mass. 382, 59 N. E. 59.

It is also well settled that one who has advanced or lent money, to be used in an illegal transaction of this kind, stands no better than the principals in the transaction, and is an aider and abettor of a wrong, who is remediless if he seeks to recover the amount advanced. *Stebbins v. Leowolf*, 3 Cush. 137; *White v. Buss*, 8 Cush. 448; *Barnes v. Smith*, 159 Mass. 344, 34 N. E. 403. Judgment for the defendant.

(196 Mass. 284)

DEVINE v. STILLINGS.(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 15, 1907.)**ARREST—CIVIL ACTION—DISCHARGE—PAYMENT FOR SUPPORT OF PAUPER PRISONER.**

Under Rev. Laws, c. 168, § 49, providing that, when a prisoner for debt claims support as a pauper, the jailer may demand of the creditor or his attorney payment or security for the prisoner's support, and if the creditor fails to comply within 24 hours of the demand the prisoner shall be discharged, where an attorney for the creditor agreed with the jailer to be responsible for the prisoner's support, and subsequently gave him a check, drawn on the law firm's account, in payment for past and future support, which arrangement was satisfactory to the jailer, the prisoner cannot insist on being discharged, especially where the creditor has directed the attorney to pay for the support.

Exceptions from Supreme Judicial Court, Suffolk County.

Mandamus by Michael Devine against Charles O. Stillings. Writ refused, and plaintiff excepts. Exceptions overruled.

William O. Ford, for petitioner. John P. Sweeney, H. R. Dow, and L. S. Cox, for respondent.

KNOWLTON, C. J. The petitioner for a writ of mandamus in this case was arrested on an execution, and duly committed to jail under the provisions of Rev. Laws, c. 168. Section 49 of this chapter is as follows: "If the defendant or debtor, confined in jail on mesne process or execution in a civil action, claims support as a pauper, the jailer shall

furnish his support at the rate of one dollar and seventy-five cents per week, to be paid by the plaintiff or creditor who, in such case, shall, if required by the jailer, either from time to time advance the money necessary for the support of the prisoner, or give the jailer satisfactory security therefor. If the plaintiff or creditor neglects so to do for twenty-four hours after demand, the jailer shall discharge the prisoner. Such demand may be made of the officer who made the commitment, or of the plaintiff or creditor or his attorney, at any time after the prisoner has claimed such support." The prisoner claimed support as a pauper under this section, and he contends that the respondent, the jailer, should be commanded to discharge him on account of neglect of the execution creditor to advance money or give security for his support.

The respondent, on the day after the commitment, had a conversation with the attorney of the creditor, in which the attorney agreed to be responsible for the support of the petitioner in jail, and the respondent told the attorney that he should look to him for the board. This arrangement was satisfactory to the respondent. Afterwards the attorney gave him a check for \$15, drawn on the bank account of the law firm of which he was a member, in payment for past support, and as an advance for support in the future. This, too, was satisfactory to the respondent. The single justice who heard the case found that the respondent's demand was complied with, and ruled that the writ ought not to be issued.

This ruling was correct. All that the creditor was bound to do was to give security satisfactory to the jailer. His attorney authorized the jailer to support the petitioner on the attorney's account, and afterwards gave a good and proper check, satisfactory to the jailer, in payment. That this was done by the attorney, who was legally authorized to represent the execution creditor in the business, was as effectual as if it had been done by the creditor personally. The statute expressly provides that the demand may be made upon the attorney, and impliedly authorizes the attorney to act for the creditor in the business. Besides, it appears that the creditor in the present case, before the commitment to the jailer, directed his attorney to pay for the petitioner's support by the jailer.

Exceptions overruled.

(196 Mass. 365)

STEBBINS v. POLICE COMMISSION OF CITY OF SPRINGFIELD.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 15, 1907.)

1. MUNICIPAL CORPORATIONS—POLICE OFFICERS—REMOVAL.

Under Springfield City Charter (St. 1852, p. 54, c. 94) § 8, providing that the administration of police shall be vested in the mayor and

aldermen, who shall have exclusive power to appoint police officers "and the same to remove at pleasure," the mayor and aldermen had the absolute power to remove the city marshal and his assistants, without notice or hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 497.]

2. SAME—TRANSFER OF POWER.

Springfield City Charter (St. 1852, p. 54, c. 94) § 8, authorized the mayor and aldermen of the city to appoint all police officers and remove them at pleasure. St. 1902, p. 94, c. 134, § 1, provided that such power might be exercised by the city council or through the agency of a board whom it might designate, subject to such limitations as it might by ordinance determine. The council established a police commission to deal with the police department, and vested in such commission the management of the officers and members of the department, with power to make such rules as they deemed proper; section 8 of which provided that the commission should annually elect a marshal, to hold office until his successor was elected or qualified, unless sooner removed. *Held*, that the commission had power to remove the marshal at pleasure, without notice or hearing; such office not being within the civil service statutes and rules.

3. SAME—NOTICE.

Springfield City Ordinance 1902, as amended 1904, establishing a police commission, section 13 of which provides that the commission may for cause, after due hearing, and except as provided in Rev. Laws, c. 19, punish any night or day watchman, reserve, or police officer for insubordination or neglect of duty, by fine, discharge, etc., and the marshal may suspend from office for cause, etc., provided that, when he does so, he shall report the facts to the commission, who shall investigate the charge and within two weeks continue such suspension or reinstate in office the person so suspended. *Held*, that the marshal, as a police officer, was not entitled under such section to a notice of hearing before being removed by the commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 498.]

Report from Supreme Judicial Court, Hampden County.

Petition by George M. Stebbins for mandamus against the police commission of the city of Springfield. On report, for hearing before the whole court. Petition dismissed.

J. B. Carroll and W. H. McClintock, for petitioner. Jas. L. Doherty and W. G. Brownson, for respondent.

MORTON, J. The respondents constitute the police commission of the city of Springfield. On the 16th of July, 1907, said commission passed a vote in effect removing the petitioner from the office of city marshal to which he had been appointed by the commission in the preceding January, "for the term of the current municipal year, * * * to continue in office until his successor is appointed and qualified, unless sooner removed." This is a petition by him for a writ of mandamus to compel the commission to reinstate him in the office from which he was thus removed. The case was heard by a single justice "upon the petition and answer and the agreement that the city marshal of Springfield is not within the descriptive words of the statutes and rules relating to the civil service, and that, if notice and

hearing were required as prerequisite to removal of the petitioner from the office of city marshal by the respondents, no valid notice and hearing had been given him." The single justice ruled as matter of law that the petition could not be maintained and ordered it to be dismissed and the petitioner appealed. Thereupon at the request of the petitioner the case was reported to this court upon the petition, answer and the agreements aforesaid, such disposition to be made of it as law and justice may require.

We think that the ruling was right. The city charter of Springfield provides, so far as now material, that " * * * the administration of police * * * shall be vested in the mayor and aldermen. * * * The mayor and aldermen shall have full and exclusive power to appoint a constable and assistants, or a city marshal, and assistants with the powers and duties of constables, and all other police officers, and the same to remove at pleasure." St. 1852, p. 54, c. 94, § 8. Under this provision the mayor and aldermen had an absolute power to remove the city marshal and his assistants without any notice or hearing. *Williams v. Gloucester*, 148 Mass. 256, 19 N. E. 348. This is conceded by the petitioner. By St. 1902, p. 94, c. 134, § 1, it was provided that "the powers and duties conferred and imposed by chapter ninety-four of the Acts of the year eighteen hundred and fifty-two (the city charter) upon the mayor and aldermen of the city of Springfield in relation to the establishment and maintenance of a police department, the appointment of a constable, or a city marshal and assistants, and all other police officers, may be exercised and performed by the city council in such manner as it may from time to time prescribe, and wholly or in part through the agency of any persons acting as a board whom it may from time to time designate, and with such limitations of power as it may by ordinance determine." By virtue of this statute the powers and duties conferred by the charter upon the mayor and aldermen in regard to the police department were transferred to the city council. Acting under the authority thus conferred the city council passed an ordinance in 1902 establishing a police commission. This ordinance was revised and re-enacted in 1904 and it was under and by virtue of the provisions of the ordinance as thus revised and re-enacted that the removal was made. And the question is, therefore, whether this ordinance does or does not transfer to the commission the power of removal; or to state it in another way whether the power of summary removal formerly vested in the mayor and aldermen has by virtue of the statute of 1902 and the ordinance passed thereunder been vested in the commission?

We think that it has. The ordinance is comprehensive in its scope and undertakes to deal with the whole subject of the police department. No intention is manifested by the city council to reserve to itself any powers except such as are specified in the ordinance, amongst which the power of removal is not included. The ordinance makes the commission the executive head of the police department and confers upon it, "The management and control of the officers and members of the police department with power to make such lawful rules for their government and discipline * * * as they deem proper." There is no limitation express or implied in respect to the power of removal of the management and control thus given. Section 8 provides that the commission shall annually elect in January a marshal, assistant marshal and other members of the force who "shall continue in office until their successors are elected and qualified, unless sooner removed." "Unless sooner removed" by whom? Manifestly, we think, by the commission. As already observed, no intention is manifested by the city council to reserve to itself any power of suspension or removal, for the reason, no doubt, that the council recognized that the divided responsibility which would ensue would tend to impair the efficiency and discipline of the force. Without undertaking here to review the various provisions of the ordinance we think that the fair inference from its terms and scope is that the city council intended to and did divest itself of executive responsibility for, and active participation in, the management of the police department, reserving to itself only certain powers respecting the appropriations and the sale of property and the further power to determine the number of day and night watchmen. It follows that the summary powers of suspension and removal not only in regard to minor officers and members of the force but in regard to the marshal and assistant marshal was transferred to and vested in the commission.

It is agreed that the office of city marshal of Springfield does not come within the civil service statutes and rules. The petitioner is not, therefore, entitled to a notice and hearing under them.

The conclusion to which we have come in regard to the power of the commission to remove the petitioner renders it unnecessary to consider other questions that have been argued, further than to observe that there is nothing in the petitioner's contention that his acceptance of the office constituted a contract between him and the city of Springfield for a year, or in his contention that as a police officer he was entitled to a hearing under section 13 of the ordinance.

Petition dismissed.

(196 Mass. 360)

BRADLEY v. CENTRAL VERMONT RY. CO.(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 15, 1907.)**1. MASTER AND SERVANT—INJURIES TO SERVANT—DANGEROUS PREMISES—ASSUMED RISK.**

Plaintiff was struck by a pole carrying electric wires standing in defendant's freight yard as he was passing it on the roof of a caboose. Plaintiff had been in defendant's service for 3½ years before the accident, during all of which time the pole had stood in its place near the track, and plaintiff had been accustomed to pass it regularly on the train. *Held* that, in the absence of a change of the position of the pole during such period, its dangerous proximity to the track, if any, was one of the risks which plaintiff assumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 574-592.]

2. SAME—CHANGE OF CONDITION—NEGLIGENCE—FINDINGS—EVIDENCE.

Where a brakeman was struck by a pole carrying electric wires, which had been located near the track in defendant's yard for several years, evidence *held* to sustain a finding of defendant's negligence in permitting a guy wire to be taken from the pole which permitted the top to lean over the track and become an object of danger.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

Defendant had permitted an electric pole to remain near the track for several years. It had been held in place by a guy wire, which, about two or three months before the accident, had been taken down, and permitted the pole to lean dangerously near the track. Plaintiff, a rear brakeman on a train, while passing around the monitor on the top of the caboose in the performance of his duties, was struck by the top of the pole and injured. *Held*, that plaintiff, having no reason to believe that the guy wire had been removed or that the pole was in dangerous proximity to the track, was not negligent as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

4. SAME—ASSUMED RISK.

Plaintiff did not assume the risk of the danger negligently produced by the removal of the guy wire.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 554-556.]

Report from Superior Court, Hampden County; Jabez Fox, Judge.

Action by James Bradley against the Central Vermont Railway Company. A verdict having been rendered in favor of plaintiff, the case was reported to the Supreme Judicial Court. Judgment on verdict.

Green & Bennett, for plaintiff. Brooks & Hamilton and C. W. Witters, for defendant.

KNOWLTON, C. J. The plaintiff was a brakeman on one of the defendant's freight trains and, while riding on a car, in the performance of his duty, he was struck by a pole carrying electric wires, owned by an electric light and power company, and standing in the defendant's freight yard in St. Albans, Vt. The case comes before us on a report, which presents only the question whether there was evidence which war-

ranted a submission of the case to the jury.

The plaintiff had been in the service of the defendant more than 3½ years before the accident, during all of which time the pole had stood in its place near the side of the track, and he had been accustomed to pass it regularly on the train. If there had been no change in its position, its existence would have continued to be one of the risks of the business which he assumed when he made his contract for service, and which, under the law of Massachusetts, would have given him no right to recover for an injury received from it. *McLeod v. New York, New Haven & Hartford Railroad Company*, 191 Mass. 389, 77 N. E. 715; *Lovejoy v. Boston & Lowell Corporation*, 125 Mass. 79, 23 Am. Rep. 206; *Coombs v. Fitchburg Railroad Company*, 156 Mass. 200, 30 N. E. 1140; *Thane v. Old Colony Railroad Company*, 161 Mass. 353, 37 N. E. 309; *Roonney v. Sewall, etc., Cordage Company*, 161 Mass. 153, 36 N. E. 789. Whether it would have given him such a right under the law of Vermont, which was put in evidence, it is unnecessary to determine.

But there was evidence tending to show that, two or three months before the accident, a guy wire had been taken down, which previously had held the pole upright, and that the wires on the pole ran in such directions as to tend to make the top lean towards the track, and that at the time of the accident, for want of the guy wire, the top of the pole leaned a foot or two towards the track, so that the plaintiff, while passing from front to rear on the roof of the caboose around the monitor, walking near the edge of the roof at the side of the monitor, was struck and injured. The jury well might find that it was negligence on the part of the defendant to allow this pole to be left without the guy wire, with a load of wires upon it which would tend to draw it over towards the track. They might find that this negligence caused the accident. Under the law of Massachusetts, and under the law of Vermont as shown by the cases put in evidence, the defendant might be held liable for this negligence.

There was evidence from which the jury might find that the plaintiff was in the exercise of due care. He was the rear-end brakeman on the train, whose duty it was, among other things, to watch for signals and to give signals while passing through the yard. There was testimony tending to show that it was proper for him to pass by the monitor which was on the top of the caboose, and to be near the edge of the roof, holding to the railing, in going by it. For years he had passed along this track on the train. He had no reason to think that a guy wire had been removed from the top of the pole, or that the pole had leaned over so as to be in dangerous proximity to the track. In performing his duties as brakeman he would not be expected

speedily to discover a small change of that kind and to appreciate the danger from it. He did not assume the risk of a danger unnecessarily and negligently produced by the removal of the support of the pole. The case was rightly submitted to the jury.

Judgment on the verdict.

(196 Mass. 384)

BREWER v. CASEY.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 18, 1907.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—IMPRISONMENT—JURISDICTION.

The power conferred on police, district, and municipal courts by Rev. Laws, c. 168, §§ 80, 81, to commit a debtor for contempt if he fails to comply with a valid order for the payment of a debt, is analogous to that exercised by a court of equity by imprisonment for contempt, under Rev. Laws, c. 168, § 13, and does not confer jurisdiction on such inferior courts to commit the debtor to the house of correction at hard labor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 1202.]

2. FALSE IMPRISONMENT—COMMITMENT—JURISDICTION.

Where a commitment for contempt in supplementary proceedings recited that, on the debtor's failure to comply with the order for the payment of the debt, he was adjudged guilty of contempt and "committed to prison for the term of 14 days," the term "prison" was sufficiently broad to include all institutions for the detention of persons sentenced to imprisonment, so that the commitment was not in excess of the jurisdiction of the police court, as authorizing imprisonment in the house of correction at hard labor, and therefore would not sustain an action for false imprisonment.

3. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—SETTLEMENT—QUESTION FOR JURY.

In an action for false imprisonment, evidence *adduced* to present a question for the jury as to the authority of plaintiff's attorney to make a settlement with one of the alleged joint tort-feasors.

4. RELEASE—INJURIES TO PERSON—FALSE IMPRISONMENT—JOINT TORT-FEASOR.

Where plaintiff was imprisoned under a void order, he had but a single cause of action, for which he was entitled to but one satisfaction in damages, and, having released one of the joint tort-feasors, could not recover against the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 64.]

Exceptions from Superior Court, Berkshire County; John O. Crosby, Judge.

Action by Nelson J. Brewer against P. H. Casey. The jury found for defendant, and plaintiff brings exceptions. Overruled.

The action was in tort for assault and false imprisonment. The evidence showed that defendant was adjudged guilty of contempt in the police court of Lea in a proceeding had under Rev. Laws, c. 168, §§ 80, 81, for a failure to comply with an order and was committed to prison for 14 days. It was also shown that plaintiff's attorneys, after action was brought, threatened to amend so as to make John T. Wilson, clerk of such police court, a codefendant, and that Wilson, in consideration that plaintiff's attorney would not make him a codefendant

and release him of all liability on account of such false arrest and imprisonment, settled with plaintiff's attorney and paid him \$75 in full settlement, and defendant claimed that such settlement with Wilson released defendant from all liability. This plaintiff denied, and offered proof that his attorneys had no authority to settle any claim with Wilson so as to release defendant from liability; that plaintiff never authorized the settlement with Wilson, nor ratified the same.

P. J. Moore, for plaintiff. Bart Bossidy and Noxon & Eisner, for defendant.

BRALEY, J. Under Rev. Laws, c. 168, §§ 80, 81, the power conferred upon police, district, and municipal courts to commit a debtor for contempt if he fails to comply with a valid order for the payment of the debt is analogous to that exercised by a court of equity, which may enforce its decrees by imprisonment of the contemner in the common jail. Rev. Laws, c. 168, § 13; Hurley v. Com., 188 Mass. 443, 448, 74 N. E. 677. The only recital relating to the plaintiff's cause of action, is that upon his failure to comply with an order of the court made under the statute he was adjudged guilty of contempt, and "committed to prison for the term of 14 days." But the word "prison" being sufficiently broad to include all institutions for the detention of persons sentenced to imprisonment, or detained to await their trial, no excess of jurisdiction appears, and obviously the plaintiff has not been wronged. *Sturtevant v. Com.*, 158 Mass. 598, 600, 33 N. E. 648. Upon resort, however, to the instructions under which the case was submitted to the jury, but to which no exceptions were taken, it is manifest that evidence was introduced from which it could have been found, that as justice of a court of limited jurisdiction the defendant exceeded his authority in issuing an order directing the commitment of the plaintiff to the house of correction at hard labor, instead of to the common jail, and having been committed and detained in execution of the sentence he would be entitled to recover damages for a false imprisonment. *Piper v. Pearson*, 2 Gray, 120, 61 Am. Dec. 438; *Clarke v. May*, 1 Gray, 410, 61 Am. Dec. 470. But while fully recognizing and stating this feature of the case, the presiding judge further charged, that previous to the entry of an order committing the debtor for contempt certain preliminary proceedings were necessary under section 81, which not having been taken the order entered was irregular, and the place and conditions of imprisonment therefore became immaterial. An instruction then followed predicated upon evidence presumably before the trial court, although not appearing in the exceptions, that because of the defendant's failure to proceed in conformity with the statute, the police court was without jurisdiction to enforce the decree required by section 80, and the de-

defendant could be held responsible in damages.

To avoid liability upon either ground the defendant relied upon a settlement made with one Wilson, who as clerk of the court issued the warrant of commitment. The validity of this compromise, and if upheld whether it is a bar to the present suit, presents the questions to be decided. It is first contended by the plaintiff that the attorneys whom he originally retained, and who acted for him during the negotiations, were not authorized to make the settlement. In this case where it is again raised by the defendant, as in the cases of *New York, N. H. & H. R. Co. v. Martin*, 158 Mass. 313, 83 N. E. 578, and *Anglo-American Land, Mortgage & Agency Co. v. Dyer*, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437, we do not find it necessary to determine the question there left open, whether under a general retainer an attorney is authorized without his client's permission to compromise his client's claim either before or after suit has been brought. See, also, *Dalton v. West End St. Ry. Co.*, 159 Mass. 221, 34 N. E. 261, 38 Am. St. Rep. 410. It was undisputed not only that the money had been received, and retained by the plaintiff's attorney who then was in active management of the litigation, but Wilson was led to understand, and understood, that as finally left the adjustment at least released him from any further liability. If the ample statements concerning the knowledge of the plaintiff, and of previous authority from him to settle, found in the letters of his counsel, were inconsistent with their oral evidence given at the trial the true character of the transaction in all its essential details, as well as the credibility of the witnesses remained and issue of fact solely for the jury to determine. *O'Driscoll v. Lynn & B. R. Co.*, 180 Mass. 187, 189, 62 N. E. 3; *Paquette v. Prudential Ins. Co. of America*, 193 Mass. 215, 79 N. E. 250. They were not unwarranted in finding, as they must have done on this conflicting testimony, that after the plaintiff had been informed it would be advisable by an amendment to join Wilson as a defendant in the present suit if a settlement was not effected, the payment was made and received with his knowledge and acquiescence. In either view, the order having been illegal, and hence void, whether, if he had been joined, Wilson could have been held ultimately for misfeasance in the performance of a ministerial duty is immaterial, and need not be decided. See *Agry v. Young*, 11 Mass. 220; *Stetson v. Kempton*, 13 Mass. 271, 282, 7 Am. Dec. 145; *Libby v. Burnham*, 15 Mass. 144; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550, 557. The plaintiff only had a single cause of action, for which he was entitled to but one satisfaction in damages, although the wrong suffered might have been a joint tort. *New York Bank Note Co. v. Kidder Press Mfg. Co.*, 192 Mass. 391, 407, 408, 78 N. E. 463, and cases cited. In the application of this principle, if in good faith a claim

is made against one of the alleged wrongdoers, who is thereafter discharged by a compromise, all are thereby released, even if the party with whom the settlement is made might not have been legally liable. While the plaintiff may not have intended to pursue them jointly, but to institute separate suits, by claiming as the jury must have found under the clear instructions upon this point, that both participated in the wrongful act of which he complained, his settlement with Wilson also operated as a release of the defendant. *Brown v. Cambridge*, 3 Allen, 474, 476; *Leddy v. Barney*, 139 Mass. 394, 2 N. E. 107; *Stimpson v. Poole*, 141 Mass. 502, 6 N. E. 705; *Pickwick v. McCauliff*, 193 Mass. 70, 78 N. E. 730.

Exceptions overruled.

(196 Mass. 290)

HOUGH v. CITY OF NORTH ADAMS.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 16, 1907.)

1. TAXATION—REVIEW—STATUTORY PROVISIONS—"A PERSON AGGRIEVED."

Under Rev. Laws Mass. c. 12, § 73, providing that a person aggrieved by the taxes assessed upon him may apply for an abatement, etc., "a person aggrieved" means one whose pecuniary interests are or may be adversely affected.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 817.]

2. BANKRUPTCY—RIGHTS VESTING IN TRUSTEE—TITLE TO PROPERTY.

Where there is an adjudication in bankruptcy of a landowner, the situation as to the title to the land is the same as it would have been under a deed from the bankrupt to his trustee.

3. SAME—EFFECT OF APPOINTMENT AND QUALIFICATION OF TRUSTEE—TITLE TO PROPERTY.

Under Bankr. Act U. S. July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], providing that the trustee of a bankrupt, on his appointment and qualification, shall be vested by operation of law with the title of the bankrupt, as of the date of the adjudication, to all property, etc., no other act than the filing of the petition and the appointment and qualification of the trustee is required to vest title in the trustee.

4. SAME—EFFECT OF ADJUDICATION—NOTICE AS TO TITLE TO PROPERTY.

An adjudication in bankruptcy and appointment of a trustee are constructive notice to everybody, at least within the federal jurisdiction, of the transfer of title to the bankrupt's property, and such persons must take notice that the ownership of the bankrupt has ceased and become vested in the trustee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 143.]

5. SAME—EFFECT OF RECORDING ADJUDICATION, ETC.—CONSTRUCTIVE NOTICE.

The record of the adjudication of bankruptcy and the appointment of a trustee in the registry of deeds for the district in which land of the bankrupt is situated is constructive notice to the assessors that the title has passed out of the bankrupt.

6. TAXATION—ASSESSMENT—DATE OF ASSESSMENT.

The fact that assessors did not make an assessment of taxes until July is of no consequence, since under the statute the assessment, when made, takes effect as of May 1st of the same year.

7. SAME—DUTY OF ASSESSORS.

The assessment of taxes is a purely statutory proceeding, and must ordinarily be pursued with technical strictness, in order that the acts of the assessors may have any validity.

8. SAME—VALIDITY OF LEVY.

No tax can be sustained as valid, unless it is levied in accordance with the letter of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 486.]

9. SAME — LEGALITY OF TAX — ILLEGALITY SHOWN BY RECORD.

Where the owner of certain land was adjudged a bankrupt, and a trustee was appointed and qualified, and a certificate thereof was filed in the registry of deeds for the district where the land was situated, and thereafter the land was assessed to the bankrupt, the record disclosed the illegality of the tax.

10. TAXATION — REVIEW OF ASSESSMENT — RIGHT OF REVIEW—PERSONS ENTITLED.

Under Rev. Laws Mass. c. 12, § 73, providing that a person aggrieved by the tax assessed upon him may apply for an abatement, etc., where the record discloses the illegality of a tax assessed against property belonging to one petitioning for abatement, making it apparent that no proceeding in rem under the assumed tax could affect the title thereto, because it was assessed to one who was neither the record owner nor in occupation on May 1st, the petitioner is not "a person aggrieved," within the contemplation of the statute, and cannot maintain his petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 817.]

Report from Superior Court, Berkshire County; Wm. F. Dana, Judge.

Petition by Charles M. Hough for the abatement of certain taxes. From a judgment of the superior court, affirming a decision of the board of assessors of the city of North Adams, petitioner appeals. Affirmed.

W. F. Barrington, for petitioner. John H. Mack and P. J. Ashe, for respondent.

RUGG, J. This is a petition for the abatement of taxes for the year 1905. The property taxed consisted of land, buildings and machinery of a mill known as the Johnson-Dunbar Company. The Johnson-Dunbar Company was a foreign corporation, and this property had been assessed to it as owner prior to 1905, and it was so assessed for that year. On October 10, 1904, the Johnson-Dunbar Company was adjudicated a bankrupt, and on November 30, 1904, one Squires was appointed trustee of said bankrupt, both the adjudication and appointment having been recorded on January 6, 1905, in the registry of deeds for Northern Berkshire within the district in which the property was situated. On April 13, 1905, the Commercial Trust Company of New Jersey, a foreign corporation, mortgagee named in a mortgage given to it by the Johnson-Dunbar Company upon said property in 1901, entered for the purpose of foreclosing the mortgage, a certificate thereof being recorded in said registry of deeds, and duly foreclosed the mortgage, and on June 23, 1905, conveyed by deed all the property in question to the petitioner, which deed was duly recorded July 17, 1905. The

tax bill for 1905 was sent to the petitioner, who was not a resident of this commonwealth, and who on October 2, 1905, paid the tax under protest in writing, and on September 30, 1905, made application to the assessors for an abatement, which was refused. The question raised is whether under these circumstances the petitioner is "a person aggrieved by the taxes assessed upon him," within the meaning of these words as used in section 73, chapter 12, of the Revised Laws, so as to enable him to maintain a petition for the abatement of taxes. As used in this statute, the words "a person aggrieved" mean one whose pecuniary interests are or may be adversely affected. A similar meaning is given to nearly the same words in certain statutes relating to appeals. *Pierce v. Gould*, 143 Mass. 234, 9 N. E. 568. The inquiry then is whether the assessment of the tax in question could work any harm to the property rights of the petitioner.

It is stated in the petition that the trustee in bankruptcy conveyed the interest acquired by him by operation of the bankruptcy act to one Gluck on March 17, 1905, subject to said mortgage. The answer to the petition is, in substance, a general denial, and, although it is stated in the report that the pleadings may be referred to, yet there is no finding in the report as to this conveyance, and it cannot therefore be regarded for the purposes of this decision. If this be the fact, the assessment to Johnson-Dunbar Company on May 1, 1905, was void, and no valid action could be founded upon it. *Desmond v. Babbitt*, 117 Mass. 233; *Tobin v. Gillespie*, 152 Mass. 219, 25 N. E. 88. We must, however, assume that the only change in the record title between May 1, 1904, and May 1, 1905, was the adjudication in bankruptcy of the Johnson-Dunbar Company. Under these circumstances the situation of the title was the same as it would have been under a deed of conveyance from the bankrupt to his trustee. It does not appear whether the certificate of entry of the Commercial Trust Company of New Jersey, under its mortgage, was recorded before or after the 1st of May, 1905. In any event, its only effect was to authorize the assessors to make the assessment to the mortgagee in possession, and as no attempt was made to do this, this circumstance may be disregarded. Under the federal bankruptcy act (Act Cong. July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), "the trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudicated a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." No other act than the filing of the petition and the appointment and qualification of the trustee is required to vest by law the title of

the bankrupt's estate in his trustee. As was said in *Connor v. Long*, 104 U. S. 228, 26 L. Ed. 723: "The filing of the petition [in bankruptcy] was in effect a caveat to all the world. It was in effect an attachment and an injunction. Thereafter all property rights of the debtor were ipso facto in abeyance until the final adjudication. If that were in his favor, they revived and were in full force. If it were against him, they were extinguished as to him and vested in the assignee for the purposes of the trust with which he was charged. The bankrupt became as it were for many purposes civiliter mortuus." A part of the language is quoted, and the case cited with approval, in *Mueller v. Nugent*, 184 U. S. 1, 14, 22 Sup. Ct. 260, 46 L. Ed. 406.

There is nothing in *York Manufacturing Co. v. Cassell*, 201 U. S. 344-353, 26 Sup. Ct. 481, 50 L. Ed. 782, to impair the force of this language respecting such a case as that now before us. The adjudication and the appointment were constructive notice to everybody, at least within the federal jurisdiction, of the transfer of the title of the bankrupt's property, and no one could thereafter deal with it on any other basis than that the ownership of the bankrupt had ceased and the title had become vested in the trustee. *Stevens v. Mechanics' Savings Bank*, 101 Mass. 109, 3 Am. Rep. 325; *Fuller v. N. Y. Fire Insurance Co.*, 184 Mass. 12, 67 N. E. 879. The record of the adjudication of bankruptcy and the appointment of the trustee in the registry of deeds for the district in which the land was situated, before the 1st of May, 1905, was an additional constructive notice to the assessors that the title had passed out of the bankrupt. That the assessors did not in fact make their assessment until after July 20, 1905, is of no consequence, for the reason that under the statutes of this commonwealth the assessment, when made, takes effect as of the 1st of May of the year in which it is made. Nor is it of any significance that the assessors knew of the bankruptcy and of the conveyance to the petitioner. The assessment of taxes is a purely statutory proceeding, and must ordinarily be pursued with technical strictness, in order that the acts of the assessors may have any validity. No tax can be sustained as valid unless it is levied in accordance with the letter of the statute. The invalidity of the tax in question did not depend upon any evidence. An inspection of the record disclosed its illegality, and made it apparent that no proceeding in rem under the assumed tax lien could affect the title in any way. In this as well as other respects the case is distinguishable from *Milford Water Company v. Hopkinton*, 192 Mass. 491, 78 N. E. 451. It follows, therefore, that the petitioner, being the owner of the property by conveyance from the mortgagee, could not by any legal possibility be harmed by the assessment of the taxes upon the property in question to one who was neither the record

owner nor in occupation on May 1, 1905; hence he was not aggrieved, and did not belong to the class of persons upon whom the statute confers the right to bring a petition for abatement. Whether the petitioner may have a remedy by some other form of procedure is not before us. Under the terms of the report, let the entry be

Judgment for the respondent affirmed.

(196 Mass. 393)

INHABITANTS OF WHATELY v. INHABITANTS OF HATFIELD.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 15, 1907.)

1. PAUPERS—SETTLEMENT AND REMOVAL—SUPPORT.

Under Pub. St. c. 83, § 1, cl. 5, providing that any person 21 years old who resides in any place within the state for five years and pays all taxes for any three years within that time shall gain a settlement therein, one who resided in a town for over five years, except for four months while he was confined in the house of correction in another town and paid his taxes for three years thereof, gained a settlement, his compulsory detention in prison not working any change of domicile, and the town was liable for his family's support, under Rev. Laws, c. 80, § 1, cls. 1, 2, providing that a married woman and legitimate children shall have the settlement of the husband and father, and Rev. Laws, c. 81, § 1, making a town liable for the support of paupers having a settlement therein.

2. SAME—NATURE OF RESIDENCE REQUIRED.

Residence, for the purpose of a settlement of a pauper, includes more than mere presence. There must be a settled intention on the pauper's part of choosing the place as a home.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Paupers, §§ 65-68.]

3. DOMICILE—PRESUMPTION OF CONTINUANCE.

No person shall be regarded as without a domicile, and, when an acquired status is once established, the presumption of its continuance follows until a contrary purpose is shown by a change of residence with the intention of remaining permanently at the place of removal; and, since a change of domicile involves the exercise of the power of choice, adults mentally incapable are unable to acquire a settlement for themselves.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Domicile, § 36.]

4. PAUPERS—SUPPORT—CONVICTS.

Upon the conviction and sentence of a person to imprisonment for larceny, under Pub. St. c. 203, § 20, his town is not liable for his support as a pauper, since he is a criminal whose support during confinement is first to be borne by the county under the express provisions of Pub. St. c. 220, §§ 53, 54, relating to the expense of supporting prisoners, the liability of a town for the support of prisoners having a settlement therein being limited to those sentenced for stealing property less than \$5 in value under Pub. St. c. 203, § 23, or for being rogues, vagabonds, etc., under chapter 207, § 29, and Pub. St. c. 220, § 61, allowing a recovery from the town in those cases; and the right expressly conferred upon the county commissioners by Pub. St. c. 220, §§ 60, 61, reenacted in Rev. Laws, c. 224, §§ 34, 35, to recover from the convict any excess due for maintenance, is a liability enforceable only against him or any kindred liable to maintain him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Paupers, § 203.]

5. SAME—STATUTES—REPEAL.

Rev. Laws, c. 224, §§ 34-37, relating to jails and houses of correction, is expressly repealed by Laws 1904, p. 180, c. 211.

Appeal from Superior Court, Franklin County; Loranus E. Hitchcock, Judge.

Action by the inhabitants of Whately against the inhabitants of Hatfield. Judgment for defendant, and plaintiff appeals. Affirmed.

Samuel D. Conant, for plaintiff. John B. O'Donnell, for defendant.

BRALEY, J. The amount disbursed by the plaintiff for the relief as paupers of the wife and children of John Wagner cannot be recovered from the defendant if he previously had gained a settlement in Whately. Rev. Laws, c. 81, § 1; *Id.* c. 80, § 1, cl. 1, 2. In the agreed facts his domicile of origin is not stated, but he is shown to have removed with his family from Hatfield to the plaintiff town in March, 1896, where he continued to reside until October, 1902, unless his absence therefrom for four months in 1897 under a sentence to the house of correction is to be treated as an interruption. But for this term of imprisonment, having been assessed, and paid a poll tax for three years, although the assessments were not consecutive, under Pub. St. c. 83, § 1, cl. 5, then in force, he gained a settlement. *Taunton v. Wareham*, 153 Mass. 192, 26 N. E. 451. It often has been decided in the construction of our statutes relating to the settlement of paupers, and of taxation, that residence for either purpose includes something more than mere physical presence. There must be on the part of the pauper, and of the taxpayer, the settled intention of choosing his place of residence with the object of making it his home. *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424; *Lyman v. Fiske*, 17 Pick. 231, 234, 28 Am. Dec. 298; *Stoughton v. Cambridge*, 165 Mass. 251, 43 N. E. 106; *Phillips v. Boston*, 183 Mass. 314, 316, 67 N. E. 250. It is settled for these purposes that no man shall be regarded as without a domicile either of birth or of choice, and when an acquired status is once established the presumption of its continuance follows until a contrary purpose is manifested by an actual change of residence with the intention of remaining permanently at the place of removal. *Jennison v. Hapgood*, 10 Pick. 77; *Chicopee v. Whately*, 6 Allen, 508; *Shaw v. Shaw*, 98 Mass. 158, 160; *Hallet v. Bassett*, 100 Mass. 167, 170. A change of this nature being voluntary involves the exercise of the power of choice, and for this reason adults mentally incapable have been held unable to acquire a settlement for themselves. *Phillips v. Boston*, *ubi supra*, and cases cited. There is no statement that during the time of his absence it was the intention of Wagner to change his place of abode nor are any facts recited from

which as matter of law such an inference can be drawn. See *Brooks v. West Springfield*, 103 Mass. 190, 79 N. E. 337. The house of correction was not his residence but his place of punishment and his temporary detention in prison in another town of the county being compulsory did not of itself work any change of domicile. *Colleston v. Hailey*, 6 Gray, 517; *Langdon v. Dowd*, 6 Allen, 423, 83 Am. Dec. 641; *Hallet v. Bassett*, 100 Mass. 167; *Moor v. Harvey*, 128 Mass. 219; *Cobb v. Rice*, 130 Mass. 231, 235; *Freeport v. Stephenson County*, 41 Ill. 495; *Grant v. Dalliber*, 11 Conn. 234, 238; *Topsham v. Lewiston*, 74 Me. 237, 43 Am. Rep. 584; *Young v. Pollak*, 85 Ala. 439, 5 South. 279; *Barton v. Barton*, 74 Ga. 761.

We are not unmindful that in the cases of *Reading v. Westport*, 19 Conn. 561, and *Washington v. Kent*, 38 Conn. 249, a different conclusion was reached, but the earlier case of *Grant v. Dalliber*, *ubi supra*, seems to us not only more in harmony with our own decisions on the question of domicile, but on the exact point presented is in accord with the cases previously cited from other jurisdictions. If, however, his legal settlement remained, the plaintiff further contends that its acquisition was interrupted because while a prisoner Wagner having been unable to pay for his support must be considered as a pauper. *East Sudbury v. Sudbury*, 12 Pick. 1; *East Sudbury v. Waltham*, 13 Mass. 460; *Worcester v. Auburn*, 4 Allen, 574; *Taunton v. Wareham*, 153 Mass. 192, 26 N. E. 451. See St. 1874, p. 188, c. 274, § 4; St. 1878, p. 130, c. 190, § 1, cl. 6; St. 1879, p. 570, c. 242, § 1; Pub. St. c. 83, § 2; Rev. Laws, c. 80, § 2. But upon his conviction and sentence to imprisonment for larceny, under Pub. St. c. 208, § 20, he must be classified as a criminal whose support during confinement was first to be borne by the county, as provided in Pub. St. c. 220, §§ 53, 54. The right conferred upon the county commissioners by Pub. St. c. 220, §§ 60, 61, re-enacted in Rev. Laws, c. 224, §§ 34, 35, to recover from him any excess that remained due for maintenance "after deducting the net profit of his labor," was a personal liability enforceable against him or "any parent, master or kindred liable by law to maintain him," but in no sense could the plaintiff have been held responsible as he was not convicted and sentenced for either of the offenses punishable under Pub. St. c. 203, § 23, and chapter 207, § 29. *Boston v. Dedham*, 8 Metc. 513. Before closing the discussion, it should be observed that Rev. Laws, c. 224, §§ 34, 35, 36, and 37, have been repealed by St. 1904, p. 180, c. 211.

The decision of the questions discussed renders any consideration of the sufficiency of the notice given to the defendant immaterial, and no error of law appearing the judgment of the superior court in its favor is affirmed.

So ordered.

(196 Mass. 410)

NICHOLS v. MINTON et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 30, 1907.)**ELECTIONS — VOTING MACHINES — CONSTITUTIONALITY OF STATUTE.**

Rev. Laws, c. 11, § 270, and St. 1905, p. 234, c. 313, § 2, providing for the use of voting machines at elections, whereby the voter trusts to the accuracy of the machine, whose workings he cannot see, is unconstitutional, under Const. pt. 2, art. 3, c. 1, § 3, providing that representatives shall be chosen by written votes.

Case Reserved from Supreme Judicial Court, Suffolk County.

Petition by Malcolm E. Nichols for mandamus to John M. Minton and others, election commissioners. Peremptory writ to be issued.

Vahey, Innes & Vahey, for petitioner. Thos. M. Babson, for respondents.

KNOWLTON, C. J. This is a petition for a writ of mandamus to compel the board of election commissioners of the city of Boston to provide the so-called Australian ballot for use at the next election in precinct 6 of Ward 10 of said city instead of the Dean ballot machine which they have voted to use. It appears that this machine has been approved by the Secretary of the Commonwealth, the Treasurer and Receiver General, and the Auditor of Accounts, under the provisions of Rev. Laws, c. 11, § 270, and regulations for the use of it have been made and instructions for voters have been prepared by the Secretary of the Commonwealth in accordance with St. 1905, p. 234, c. 313, § 2.

This machine is a mechanical device for registering votes. In shape it is like a box. It is about 3 feet in height and 2½ feet square upon its upper surface. It is used as follows: Immediately before the opening of the polls it is inspected by the election officers. There are certain dials on the machine, some registering the number of votes received by a candidate for office, and one which records the total number of voters casting ballots. All these dials are set at zero. The election officers see that a steel top is placed directly over the machine, upon which top is pasted the official list of candidates to be voted for and questions to be answered. This top is then locked by the election officers, and when it is so locked it is impossible for any voter to see the dials which register the number of votes cast for the respective candidates, and all that the voter can see is the names of the various candidates and the language of the questions, and such other information in reference to the candidates as is required by law to be upon the ballot. As each voter gives his name when about to vote, he steps under a curtain connected with the machine, which curtain conceals the face of the machine and all of the mechanical device used for registering votes from the sight of the election officers. The voter sees upon the face of the machine only the names and information

above mentioned, and a number against the name of each candidate. There is a blank space to the right of the number, and a key to the right of the blank space, about one-fourth of an inch square. The voter pushes down the key to the right of the name of each candidate for whom he desires to vote. The pushing down of the key causes a cross to be exposed in the blank space between the number and the key, but none of the dials registering votes is moved in consequence of the pressing down of the key. After he has marked a cross in this way against the name of each candidate for whom he desires to vote, he throws a lever, called the "operating lever," from right to left, prior to which act he may change his cross from one candidate to another. This lever is attached to the machine, and the moving of it from right to left, and this alone, causes a dial connected with the name of each candidate so crossed to move, thereby registering a vote for each candidate whose name is crossed. The movement of this dial cannot be seen by the voter or by any one else. After the polls are closed, the election officers unlock the top on which the official list of candidates and questions is pasted, and read the dials, and make official returns of the votes cast for each of the respective candidates and questions in accordance with the figures thrown upon the dial.

The petitioner contends that the use of this machine as proposed would be illegal, and in violation of the provision of the Constitution of the commonwealth (part 2, c. 1, § 3, art. 3), which provides that representatives to the General Court shall be "chosen by written votes," and of other provisions of the Constitution, which by implication require that other state officers shall be chosen in the same way. See Const. Mass. c. 2, § 1, art. 3; chapter 1, § 2, art. 2; chapter 2, § 1, art. 10; Const. Amend. arts. 16, 17. In chapter 2, § 1, art. 3, cited above, it is made the duty of the town clerk, in the presence of the selectmen of towns who conduct the election, to "sort and count the votes, form a list of the persons voted for, with the number of votes for each person against his name," and to "make a fair record of the same," and a "public declaration thereof"; and there are other similar provisions.

The constitutional question thus raised was considered in the different answers, given to questions submitted by the House of Representatives, which appear in the Opinions of the Justices, 178 Mass. 605, 609, 611, 60 N. E. 129, 54 L. R. A. 430.

This question may be answered affirmatively or negatively, according to the degree of strictness with which we interpret the language of the Constitution. If a choice by written votes is to be limited as to details to the particular method or methods which the framers of the Constitution had in mind more than 100 years ago, it is plain that the use

of this machine is not permissible. If we look at the object of the constitutional requirement, there is ground for an argument that it may be accomplished by the use of this machine, and that, in a broad and liberal application of the provisions of the Constitution to the present conditions and possible methods of voting, the use of this machine at an election should be deemed a choice "by written votes." It may be argued that the making of a material record of his act by each voter, and thereby securing for it greater certainty and performance than would result from a show of hands, or a declaration *viva voce*, is accomplished by the use of the machine as well as by a paper vote written by the hand of the voter and deposited in a box. The secrecy of the ballot is even more effectively secured by the machine than by the method practiced 100 years ago. It might be contended that, when the voter has pressed down the key before the name of each of his candidates, he has before him his vote upon which his choice is designated by the crosses opposite the names, and that his movement of the lever which makes the record upon the dials below does not differ in effect from a movement of his hand in throwing a piece of paper into a box, and that the numerical adjustments and uncertainty that intervene between his act and the entry of the result by the election officers are no greater in the one case than in the other. Some of the Justices, including the writer of this opinion, would prefer to decide that this method of voting is within the meaning of the constitutional provision.

But the method in detail is entirely unlike the writing of a name of chosen candidates upon a piece of paper, and the deposit of the paper in a box, to be afterwards taken out and counted. In the use of the machine the voter must trust everything to the perfection of the mechanism. He cannot see whether it is working properly or not. This chance of error, whether greater or less than the chance that a ballot deposited in a box will not be properly counted, is very different from it. It was not within the knowledge or contemplation of the framers of the Constitution.

In one of the opinions already referred to, signed by three of the justices (178 Mass. 616, 60 N. E. 133, 54 L. R. A. 430) this language was used:

"Interpreting the Constitution in the light of the circumstances existing at the time of its adoption, as well as of the laws and customs which had theretofore prevailed, we think that the language prescribing the way in which the will of the voters shall be expressed and ascertained in the case of the election of Governor and of the other state officers, where similar language is used, necessarily implies at least that the choice of the voter shall be indicated by some kind of writing upon a paper or other material thing, that this material thing bearing this written ex-

pression of the choice of the voter shall by this act of voting pass from his possession and control into that of the officers charged with the duty of conducting the election, and that the voter shall have reasonable opportunity to see that it has so passed, that it shall be distinct from that handed in by any other voter, and that these written votes so handed in shall continue to be the same material things, capable of being handled, sorted and counted, and that the whole work of ascertaining and declaring the result shall be the personal act of these election officers, with the written votes before them, the sorting and counting as well as the declaration of the result being done by sworn officers. One reason for the requirement of a written vote is that the voter may have a reasonable opportunity of making his choice without immediate influence upon the part of others; and that the reason for the requirements applicable to the sorting and counting is that the votes may not fall of their proper force by reason of mistake or fraud in the count. The safeguard erected by the Constitution is that there shall remain after the closing of the voting, in a material form, capable of being read and understood by men, a written vote cast by each voter; and that all these individual votes, each given by the voter to the election officers, shall be read, sorted and counted in accordance with the several tenor of each, by men acting under the sanction and obligation of their respective official oaths."

There is no doubt that, in reference to the only conditions and methods which they then knew or thought possible, this is a fair statement of what was in the contemplation of the framers of the Constitution. To a majority of the court, the adoption and use of a machine which employs none of these methods, and whose working and whose record of the result is invisible to the voter, seem so great a departure from the method referred to in the language of the Constitution as not to be included within its broadest meaning. Even if the principal objects to be accomplished by the constitutional requirement would be accomplished as well by the use of the machine, it seems too great a stretch of language to say that the use of it is the expression of a choice by a written vote. In the opinion from which we have already quoted there is also this language:

"The turn of a wheel or a dial, the punching of a hole in an unseen roll of paper on which are the names of candidates, by a voter who pulls a lever or turns a key, is not the use of a written vote within the meaning of the Constitution; nor is the inspection of a dial, even if preceded or followed by an inspection of all the cogs and mechanism which have moved the hands of the dial, or the counting of holes in such a paper and the inspection of the machinery which made the holes, the sorting and counting of votes by election officers. If it be said that these are the best and most efficient means to secure

a free and honest election, the answer is that they are not the means prescribed for those ends by the Constitution. The Constitution does not authorize the General Court to put the expression of the voter's will to the chance of being nullified or perverted by slipping cogs, defective levers or other mechanical devices which have no living intelligence, no conscience and no liability to punishment to insure their going right. It requires that every step in the task of seeing that votes, whether given by Indian corn and beans or other ballots, by show of hands, by the living voice or by paper writing, are counted rightly, shall be intrusted to and performed, not by an inanimate machine, but by sworn officers, and in open meeting, where each step of the work can be verified and mistakes corrected."

Decisions in other states that bear upon this question are under constitutional provisions differing somewhat from our own, and we do not deem them conclusive. In re Voting Machine, 19 R. L. 729, 36 Atl. 716, 36 L. R. A. 547; *Edwell v. Comstock*, 99 Minn. 261, 109 N. W. 608, 7 L. R. A. (N. S.) 621; *Lynch v. Malley*, 215 Ill. 574, 74 N. E. 723; *City of Detroit v. Board of Inspectors of Elections*, 139 Mich. 548, 102 N. W. 1029, 6 L. R. A. 184, 111 Am. St. Rep. 430.

In the opinion of a majority of the court the statute under which the respondents are acting is unconstitutional.

Peremptory writ of mandamus to be issued.

(170 Ind. 323)

CLEVELAND, C. C. & ST. L. RY. CO. v. MOORE. (No. 20,995.)¹

(Supreme Court of Indiana. Oct. 18, 1907.)

1. CONTRACTS—SUBJECT-MATTER—CHANGE OF PLANS.

A provision for changes in plan and location in a contract does not authorize radical departure from the work as mapped out in specifications attached to the contract, but only authorizes such incidental changes as are necessary to complete the work according to the general intentment.

2. SAME—PLANS AND SPECIFICATIONS.

The nature of an undertaking is not unsettled because of the provision in the contract that the work is to be done "in accordance with plans and specifications to be furnished and stakes to be set," where the plans and specifications were attached to the contract at its execution, since the provision is to be construed in the light of that fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 749.]

3. WORK AND LABOR—EXISTENCE OF EXPRESS CONTRACT—EFFECT OF BREACH.

The fact that a contract has been violated does not authorize a party to recover under a quantum meruit for work comprehended within and done under the contract in excess of the contract price, since the breach does not ipso facto terminate the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, §§ 23-33.]

¹ Rehearing denied, 84 N. E. 540.

4. PRINCIPAL AND AGENT—NOTICE TO AGENT—IMPUTATION TO PRINCIPAL.

Where a general agent is in charge of work for his principal, the presumption that the principal knew all facts of which the agent had knowledge is so violent that it may not be controverted in determining the parties' rights in respect to a claim of compensation for additional work done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 670-679.]

5. SAME—GENERAL AGENTS.

A person authorized to transact all the business of another at a particular place, and impliedly invested with discretion to determine the proper construction of the contract under which work was being done, is a general agent.

6. PRINCIPAL AND SURETY—LIABILITY OF SURETY—WAIVER OF DEFENSE.

Where a surety has a defense to an action owing to prior changes in the contract made without his consent, a renunciation of his right of defense rests on the doctrine of waiver, and the elements of knowledge and intent, in the absence of estoppel, are essential to a waiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 866-872.]

7. NOTICE—FACTS PUTTING ON INQUIRY—FULL KNOWLEDGE.

Though notice to put a person on inquiry is not always the equivalent of full knowledge, yet the doctrine of notice is not to be invoked wherever a person sought to be charged with knowledge has not been careful, but only where the result of his omission to inquire is such that it would be unconscionable to permit him to assert that he had no knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Notice, §§ 3-12.]

8. ASSUMPSIT, ACTION OF—EQUITABLE NATURE OF REMEDY.

Equitable principles govern in an action of assumpsit.

9. NOTICE—CIRCUMSTANTIAL PROOF.

Notice of facts putting a person on inquiry may be proved circumstantially, and the deduction therefrom as to its effect, in the absence of any showing that information was unsuccessfully pursued, is a result of the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Notice, § 40.]

10. NEW TRIAL—GROUNDS—RECEPTION OF EVIDENCE—PRESUMPTIONS.

Where the fact of notice is built on rebuttable presumptions which have judicial sanction, if the presumptions are not adopted, in the absence of explanation, it may be ground for a new trial.

11. CONTRACTS—ACTIONS—EVIDENCE—FINDINGS.

In an action to recover for extra work done in connection with a railroad contract, evidence held not to sustain a finding that plaintiff had no knowledge of changes made in the specifications.

12. SAME—DEVIATION BY CONSENT OF PARTIES—COMPENSATION.

Where there is a deviation from the contract by consent of the parties, the general rule is to trace the contract into the extra work in so far as it furnishes a conventional admeasurement of the value which the parties have placed upon the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1071-1097.]

13. ESTOPPEL—FAILURE TO PLEAD—WAIVER.

Where, in an action for extra work done under a contract, plaintiff alleges that it did the work in its endeavor to carry out the contract, and that it had no knowledge that the work was not included in the contract, defendant cannot plead as estoppel that plaintiff did have such knowledge, since it would be neither

a denial nor the allegation of new matter, as required by Burns' Ann. St. 1901, § 350; and defendant is therefore within the rule that an estoppel in pais, though not specially pleaded, is not waived where there is no opportunity to plead it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 300.]

14. PLEADING — ANTICIPATING DEFENSES — PLEADING EXCEPTIONS.

It is not anticipating a defense to plead facts which bring plaintiff's case within an exception.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 139.]

15. EVIDENCE—NEGATIVE ALLEGATIONS—BURDEN OF PROOF.

Where a negative allegation is pleaded to bring a case within an exception, it must be substantially proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 114.]

16. ESTOPPEL — EQUITABLE ESTOPPEL — NATURE AND SCOPE.

The doctrine of equitable estoppel is based upon promoting the equity of an individual case, and may not be carried further than the end for which the estoppel is created.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 291.]

17. CONTRACTS—CONSTRUCTION—EXTRA WORK—DECISION OF ENGINEER.

A provision in a contract that claims for extras are to be passed on by the engineer has no reference to work outside of and occasioned by an unauthorized change in the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1071-1097, 1800, 1315.]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by J. Hampton Moore, receiver of the City Trust, Safe Deposit & Surety Company and others against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed, with directions.

Leonard J. Hackney and Frank L. Letteleton, for appellant. Ferd Winter, for appellees.

GILLETT, J. This action was commenced by the City Trust, Safe Deposit & Surety Company, against appellant, to recover for extra work done in connection with a railway construction contract. Appellant filed a cross-complaint to recover on a bond, in the sum of \$10,000, executed by appellee McNerney, as principal, and appellees surety company and Johnson, as sureties, conditioned on the performance of said contract. No further statement of the issues appears necessary. There was a special finding filed, together with conclusions of law thereon, and, pursuant to said conclusions, the court rendered judgment for the surety company upon its complaint, and in favor of all of the appellees that appellant take nothing by its cross-complaint.

The findings are very long, and we shall only attempt an outline of the more important facts therein set forth. It appears from said findings that in June, 1899, the railway company invited bids for the construction of

what it termed the "South Anderson cut-off," according to plans and specifications. The notice contained the approximate estimate of the chief engineer of said railway company of the number of yards of earth to be placed in embankment, and the number of yards to be excavated within the normal cross-section, as well as of the quantity which was to be taken from widened cuts and borrow pits. The estimated length of the greatest average haul was also stated in said notice. The contract was let to McNerney for 15 cents a yard, measured in embankment, and he was to be allowed 12 cents a foot for track laying. These prices were but one-half of the reasonable value of the work, as the railway company well knew. The work involved the building of about 13,500 feet of main track and 16,000 feet of yard track, and the contract provided that the work was to be done in accordance with plans and specifications to be furnished, and stakes to be set, by the railway company, but the plans and specifications were, in fact, attached to the contract when it was executed. It was provided in said contract that the location and plan of the work might be changed by the chief engineer of the railway company, and that if the grade and quality of the work was not thereby affected, and the change only involved an increase in quantity, the contractor should have no extra claim; but it was provided that, if the grade and quality of the work was affected, then the engineer was to determine the amount of increase or deduction. By further limitation it was sought to cut off all claims for extras unless ordered by the chief engineer, and it was required that prompt notice be given of all such claims. It was further provided that the chief engineer's decision on the question of claims for extras was to be considered as in the nature of an award and conclusive upon the parties. Another clause of the contract provided that the quantities set forth in the notice to bidders were to be considered as estimates only, and that the company might increase or decrease them as it might elect. The sixth clause of the contract reduced the width of the embankment for main track, as fixed in the specifications, from 20 feet to 15 feet. The slopes of fills and cuts along this track were fixed at a ratio of $1\frac{1}{2}$ horizontal to 1 vertical. The excavations and embankments for yard tracks were to be of such widths and slopes as the engineer might direct, and he was also authorized to fix the widths of cuts and the points where earth was to be borrowed. He was also empowered to require all further embankments and excavations which in his opinion were necessary for the construction of the railroad. The specifications provided that no allowance was to be made for haul. The plans showed that the yards were to consist of five tracks, in addition to a passing track, and that a highway, known as the "Anderson and Fall Creek Pike," was

to be carried across the railroad by an overhead bridge. The substance of the bond has been already stated. After the execution of the contract, McNerney commenced work thereunder, and continued until the early part of November, 1899, when he refused to proceed further and abandoned the contract. The railroad company then called on the surety company, as surety, to perform such contract, and it thereupon took upon itself, as such surety, the prosecution of the work, and continued therein, with all due diligence, until June 23, 1900. November 23, 1899, said company took an assignment of the contract from McNerney, but the assignment was not reported to the railroad company, nor assented to by it. The findings then show extensive changes made from time to time by the engineers of the railroad company in said work. The first change was made in accordance with what is termed the "May, 1899, profile," by which the grade was gradually raised from station 60 to station 151, at which point there was a departure of $4\frac{1}{10}$ feet from the original grade, and from thence the new grade gradually approached the former until station 185 was reached. The length and width of the yard tracks were next increased and a Y track added, by which the tracks, other than main track, were increased from 15,060 feet to 40,435 feet, and subsequently the overhead crossing was changed to a subway, thereby changing what had been designed as an embankment, containing 17,416 yards, to excavation to the extent of 29,073 yards, the most of which was hardpan. After reciting the facts of the various changes, the court finds: "According to such changed plan, the entire amount of work of excavation and embankment required, including that which had been done by the defendant McNerney and the plaintiff, was 148,767 cubic yards measured in embankment, including 8,000 yards measured in excavation. The increases were all in the sections or stations where defendant McNerney and the plaintiff had worked. By the plans attached to the contract the work in these sections consisted, exclusive of the approaches to the Anderson and Fall Creek Pike, of 59,230 yards of embankment, or 69,682 yards measured in excavation, and, including the approaches to the Anderson and Fall Creek Pike, of 76,646 yards of embankment, or 90,171 cubic yards measured in excavation, and 66,701 yards of cuts, making it necessary to borrow 23,570 cubic yards. The changes increased the work between these stations to 123,291 yards of embankment, or 145,048 cubic yards measured in excavation, and 119,945 yards of cuts, a difference of 46,645 yards of embankment and 53,244 of cuts, and making it necessary to borrow 25,103 cubic yards." The average haul of each yard of earth handled was increased from 1,406 feet to 1,588 feet. The change in the yard required 85,800 yards of excavation. There are also findings that the

surety company conformed to the orders and directions of the railroad company and its engineers in doing the work in the belief that the same was being done according to the contract, and that said surety company performed said work without any knowledge or belief that any change had been made in the grade and quality of it as shown in the specifications and plans, or that any substantial change had been made in the quantity of work as disclosed by the plans, and also that said company did not at any time consent to any of said changes. In the latter part of May, 1900, the surety company, believing that mistakes had been made by the defendant railway company in the estimates, employed an engineer to estimate such work. It was further found that the chief engineer did not make a change in the plan and profile, and that, when the surety company made a claim to him for extras in June, 1900, he refused to allow it, on the ground that the grade had not been changed, except as to the highway, and that that change was beneficial to the surety company. The amount of work done by the surety company prior to its abandonment of the undertaking is found to be 62,306 yards, measured in embankment. Of this 85,663 yards were included in the work as originally planned, and the remaining quantity, 26,643 yards, was made necessary by the change. The value of the work of building embankment was found to be 30 cents a yard, and that it was worth 60 cents a yard for excavating and placing hardpan in embankment. The value of the extra haul was fixed at .0182 cent a yard. It is found that appellant let the work to a third person to complete it, and the amount of said company's damages, on account of a failure to carry out the contract as modified, is stated, conditional, of course, upon the question whether the facts found disclose a right of recovery. Of the statement of account, on which the court based its conclusion of law in favor of the surety company upon its complaint, it is only necessary to say that the disputed items are the allowance of 30 cents a yard for 26,643 yards of embankment, the crediting of the value of the extra haul on the embankment included within the work as originally planned, and an allowance for 500 yards of hardpan, included within said first item, at 30 cents extra per yard.

The evidence on behalf of the surety company shows that James M. Shaw, who had been acting as resident assistant secretary and resident vice principal, at Indianapolis, signed the bond; that he was placed in charge of the work by the surety company in November, 1899; and that he continued in that capacity until said company abandoned the undertaking. When he took charge of the work, he received from McNerney the contract, together with the plan and profile. Shaw testified on his direct examination that he had no knowledge of any change in the

grade as fixed by the profile attached to the contract. On cross-examination he testified that he knew that stakes were set widening the yard, after he took charge of the work; that the engineers then said that they wanted to put in an additional track or tracks; that he consulted the plan, and knew that the contract allowed them to make certain changes which involved only quantities; that he understood that to be within the scope of the contract; that he knew at the time that that was a change in the plan; that he understood that widening the yards was not modifying the contract, and that widening a cut was a change in the blueprint and plan attached to the contract; that he was notified about May 1, 1900, that the plan had been changed so as to require a subway for the highway crossing. It also appears from his testimony that considerable work was done after notice was received of these changes. On redirect examination he testified that in what he had said concerning a change in the plans he had reference to a change in the stakes.

The evidence shows that the railway yard was fully doubled in size, and that, aside from 6,821 yards of embankment put in to fill a low place lying partly within the original yard and partly within the extension thereof, the rest of the work on the yard consisted of excavation, to the extent indicated in the findings of the court. The earth thus excavated went into fills on the grade. It appears quite clearly from the evidence given by the surety company that the extending of the railroad yard followed, as a direct or secondary consequence, the first change of plan, whereby the grade was raised, and that the great increase in excavation work at that point was to the prejudice of said company. The June profile was drawn after the manner of profiles. Both the grade line and the contour of the natural surface of the earth were traced thereon. There were vertical lines showing stations at each 100 feet, and these lines were intersected by horizontal lines, in such manner as to form squares, the margin of the profile indicating, however, that from one horizontal line to the next was 5 feet. Within these squares there were drawn on a part of the profile other horizontal lines, apparently designed to aid in calculating the grade in feet, between the multiples of 5, at the various points above and below the natural contour of the earth. From station 185, where McNerney commenced, to station 158, the work was almost wholly in cuts, and from the latter station to station 151, the point of greatest departure between the plan as carried out and the June profile, embankment was to be constructed. At the latter point the profile indicates that the embankment was to be approximately six feet high. Concerning Shaw's knowledge of said profile, he testified, in identification of McNerney's copy, that that was the one he carried, and that the men who

were working under him referred to it; that in the latter part of March, 1900, he asked the chief engineer at Cincinnati for the profile under which they were working, as the men in charge of gangs at either end of the work needed a profile, and he wanted one at the camp, where he kept his copy in a frame; that he said to the chief engineer that he wanted a copy so that he could make his computations, as he was doing the work; that, upon being furnished with the other profile (it being the same as his), he took it back to camp and put it in a frame, which was so arranged that he could take it out when he desired, and that, when he did not want to carry it, he put it up in the frame. It is inferable from the testimony of appellant's assistant engineer that, notwithstanding the great changes of the work, Shaw was treating the June profile as the one he was working by until after his visit to the chief engineer, as the witness claims that, upon examining the profile so furnished, he told Shaw that it did not show the grade lines that he (the witness) was working by. Appellants offered evidence to show that Shaw received partial estimates from month to month, based on the contract, down to and including May, 1900. According to the testimony offered by the surety company, the chief engineer had no knowledge that there had been a change in the grade, at least he expressed ignorance thereof afterwards, when the parties were seeking to adjust their differences.

In considering the rights of the parties, the threshold question appears to be whether, under the findings, the provision of the contract authorizing the chief engineer to change the location and plan of the work afforded a legal warrant for the changes. There were three great departures from the plans in respect to the earth required to be handled: (1) In the height of the grade; (2) in the length and width of the yard; and (3) in the change in the highway crossing.

We may doubtless assume, what the evidence, in fact, shows, that the cost of hauling earth is a most important element in railway construction work, and that a contractor, bidding on work, for which he is to be paid by embankment only, can make no intelligent estimate whatever unless he knows that the grade is to be substantially maintained, because he must consider, from the distribution of cuts and fills along the work and the points where earth is to be borrowed or wasted, what it will cost him to complete the undertaking. The changes which were made in this case increased the average haul 182 feet. The great increase in the ratio of cuts to fills will also be noticed. Accepting the figures of counsel for the surety company, the cuts were increased 80 per cent., while the fills which alone counted for the contractor were increased 61 per cent. If changes as radical as those mentioned can be admitted as within the authority of the railway company to make changes, the price fixed would

have afforded the contractor little or no assurance that he would receive a compensation satisfactory to himself, and this must be considered in connection with the fact that the contract attempts to conclude the contractor by the judgment of appellant's own representative as to the extent of allowances for extras. It also seems doubtful whether the changes made, important as they were, could be said, for the most part, to be changes in grade or quality, so as to come within the provision of the contract for the allowance of extras. Assuming, in accordance with the contention of appellant's counsel, that the undertaking of a compensated surety or guarantor is not to be as narrowly construed as in the case of one who binds himself as a matter of accommodation, yet this does not appear to us as a case involving a close question of construction. Except as controlled by other considerations, a court should, in construing a contract, give to it a construction that will not work injustice. *Noonan v. Bradley*, 9 Wall. (U. S.) 407, 19 L. Ed. 757. A contract is supposed to have a subject-matter, and a provision for changes in plan and location does not authorize radical departures from the work as mapped out in the plans and specifications attached to the contract, but only authorizes such incidental changes as might have been fairly regarded as necessary to complete the work according to the general intentment. *United States v. Freely*, 92 Fed. 299, s. c. on appeal, 99 Fed. 237, 39 C. C. A. 491; *Id.*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177; *Wood v. City of Ft. Wayne*, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. Ed. 416; *City of Elgin v. Joslyn*, 136 Ill. 525, 25 N. E. 1090; *Erfurth v. Stevenson*, 71 Ark. 199, 72 S. W. 49; *Swasey v. Doyle*, 88 Mo. App. 536. The fact that the contract provided that the work was to be done "in accordance with plans and specifications to be furnished and stakes to be set" by the railway company did not leave the whole matter as to the nature of the undertaking unsettled, since said provision is to be construed in the light of the fact that the plans and specifications were attached at the time of the execution of the contract. See *Penn Mutual Life Ins. Co. v. Norcross*, 163 Ind. 379, 387, 72 N. E. 132. Although the findings are somewhat evidentiary in character, we think that it may fairly be deduced therefrom that unwarranted changes from the plans were made by appellant's engineers, who were charged with the duty of staking out the work, and that by reason thereof the surety company, without any knowledge or belief that such changes had been made, was led to perform a large amount of additional work, to its prejudice. The findings, therefore, seem to make out a defense to appellant's cross-complaint; but this question need not be definitely determined now, since, for reasons hereafter stated, a new trial must be awarded, and therefore the ultimate settlement of the question suggested

must await the main case. Although appellees McNerney and Johnson filed answers to the cross-complaint, we are unable to say that they did not consent to the changes. The situation of said parties is that appellant's counsel make no distinct point as to them as apart from the surety company, and they, on the other hand, although challenged by the assignments of error, have not filed a brief. In these circumstances we have concluded, since complications may arise from any other course, to reverse this case as to them, without prejudice, however, as upon error confessed.

Referring again to the case as between appellant and the surety company, as presented upon the findings, we have to say, in answer to the claim of appellant's counsel that the practical construction of the parties shows that the changes were warranted, that, so far as the findings go, they place an absolute negative upon the idea that the surety company consented to any of the changes. With this we dismiss the contention of counsel for appellant that a conclusion of law ought to be stated in its favor upon the issues formed under the cross-complaint.

Taking up the case of appellee surety company, whereunder it seeks an affirmative recovery, we observe that the court adopted the principle of allowing said company for embankment included within the June plan at the contract rate of 15 cents per yard, and for all additional embankment at the rate of 30 cents per yard, and that it also allowed as extras for additional haul of earth moved under the contract, and for the excavation of hardpan. It is first sought to justify these additional allowances on the theory that the very making of the changes per se worked an abrogation of the entire contract, even for the purposes of damages, and from this proposition it is argued that the allowances in excess of the contract were warranted on the theory that the surety company was entitled to recover the reasonable value of the entire work. In this contention we are of opinion that counsel for said company are in error. It is one thing to affirm that said company was discharged from its collateral instrument of guaranty, and it is quite another thing to assert that thereby it became authorized to recover, without regard to the principal contract, for work done pursuant thereto. It was stated by Park, B., in *Robinson v. Harmon*, 1 Exch. 850, that "the rule of the common law is that, where a party stands to lose by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." So it was declared in *Adler v. Keighley*, 15 M. & W. 17, to be a clear rule "that the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken." So far at least as this court is concerned, it stands committed to the doctrine de-

clared in the leading case or *Doolittle v. McCullough*, 12 Ohio St. 380, that the fact that the contract has been violated by the defendant does not authorize the plaintiff to recover under a quantum meruit for work comprehended within, and done under, the special contract, in excess of the price which the contract fixes as the compensation for the doing of such work. *Louisville, etc., R. Co. v. Hollerbach*, 105 Ind. 137, 5 N. E. 28; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797. It was said in the latter case: "When the person employed is doing the work according to contract, and is prevented from completing the same by the other party, in violation of the terms of said contract, the person so prevented from performing his part of the contract can recover the reasonable value of his work, not exceeding, however, the contract price on the quantum meruit, or he may sue upon the contract for the breach thereof, and the measure of his damages is the amount that will compensate him, which will include the reasonable value of his work, as well as loss, if any, on account of his not being allowed to complete the same." We are not unmindful of the fact that the change in the grade antedated the doing of the work by the surety company, but this should not be construed as the equivalent of an unqualified refusal on the part of the railroad company to go on with the contract, so as to justify the assumption that the parties were proceeding as under an implied contract. It was laid down in *Franklin v. Miller*, 4 Adol. & E. 599, that it is a clearly recognized principle that if there is only a partial failure of performance, for which there may be a compensation in damages, the contract is not put an end to. It is stated in the note to *Cutter v. Powell*, as reported in *Smith's Leading Cases* (11th Eng. Ed.) 33, that the refusal which will authorize the rescission of a contract must be an unqualified one, and must be acted on as a breach by the person who has a right to insist upon its performance. See, also, *Robinson v. Lake Shore, etc., R. Co.*, 103 Mich. 607, 61 N. W. 1014. It is difficult to understand how it can be that, by an equivocal act on the part of a defendant, a contract is abrogated for the purpose of assessing damages for work done under it, since it cannot be determined whether the plaintiff, had he been apprised of the breach, would have elected not to be bound, or by accepting the changed conditions, or suing on the contract for the breach, have confirmed the contract. It was said by Coleridge, J., in *Franklin v. Miller*, supra, that "the rule is that in rescinding, as in making a contract, both parties must concur." It is held that, where a contract contains an express provision, for the benefit of one of the parties, that it shall be void upon a certain condition, the stipulation only means that it shall be voidable at the election of such party, and so here, where the law imports such condition as exists, we are unable to perceive how we can say that, upon a breach, ipso facto there is no contract. It

therefore appears to us that the theory is unsound that all of the work is to be treated as if there were no express contract.

Proceeding to the evidence, we have to say that we have reached the conclusion that appellant ought to be awarded a new trial because of the finding of the court as to the surety company's lack of knowledge of the changes. Shaw was in charge of the work for said company, and the presumption that the company knew all facts of which he had knowledge is so violent that the law will not permit it to be controverted, at least, for the purpose of working out the rights of the parties in respect to the claim of compensation for additional work done. *Field v. Campbell*, 164 Ind. 389, 72 N. E. 260, 108 Am. St. Rep. 301. More than that, the position of Shaw, so far as we can understand it, was that of a general agent of said company, since he was authorized to transact all of its business at the particular place, and was impliedly vested with discretion to determine questions as to the proper construction of the contract, as an incident to the carrying out of the undertaking committed to him. *Cruzan v. Smith*, 41 Ind. 288; *Fatman v. Leet*, 41 Ind. 133. As to the change of grade, made in McNerney's time, there would perhaps be no objection to the view, so far as the contract may be said upon its face to show its own meaning, that by such change the surety company was discharged. This would seem to leave open, in respect to such liability, only the question as to whether the meaning of the contract can be said to stand as modified by the practical construction of the parties, and this may depend upon acts done with actual, as distinguished from constructive, knowledge of the change. Where a surety has a defense to an action, owing to prior changes in the contract made without his consent, a renunciation of his right of defense would seem to rest on the doctrine of waiver (29 Am. & Eng. Ency. of Law [2d Ed.] 1092), and the elements of knowledge and intent in the absence of estoppel are essential to constitute a waiver. *Id.*, 1095, 1096, 1108. Relative to constructive knowledge, which we shall hereafter more fully consider, it may be said now, with reference to the cross-complaint of the railway company, that notice sufficient to put a party on inquiry is not always the equivalent of full knowledge. 2 Pomeroy's Eq. Jur. (3d Ed.) §§ 592, 593, 603. We are of opinion that the doctrine is not to be invoked in every case where the party sought to be charged with knowledge has not been careful (aside, perhaps, from cases in which from certain facts an established presumption of knowledge exists), but rather to cases where his omission to inquire has had such a result that it would be unconscionable, in view of his conduct, to permit him to assert that he had no knowledge. *Id.*; *Kettlewell v. Watson*, L. R. 21 C. D. 685; *Cleveland Woolen Mills v. Sibert, Ward Co.*, 81 Ala. 140, 1 South. 773; *Acer v. Westcott*, 46

N. Y. 394, 7 Am. Rep. 355. Many of the cases, as well as some text-writers, treat the subject of notice as involving constructive fraud. When the surety company, claiming as the assignee of McNerney, becomes an actor and seeks to recover for the extra embankment, at double the contract price, the question arises whether, in view of the facts, it ought not, in the attainment of the practical ends of justice, to be charged with such a constructive knowledge of the raising of the grade that it should not be permitted to recover for all of the extra work wholly apart from any consideration as to the contract price. The action by the surety company practically approximates an action in assumpsit. Equitable principles govern the latter form of action. 3 Cyc. p. 320. For this reason, if for no other, we think that it should be held, as the evidence stands, that on the principle of constructive knowledge, based on notice of facts calculated to put an ordinarily prudent man on inquiry, the surety company should *prima facie* be regarded as having had such constructive knowledge of the changes, and this, coupled with acquiescence on its part, and reliance on such conduct by the railway company, to its prejudice, is sufficient to bring the claim for extras within the influence of the contract, at least to some extent, in fixing the quantum of recovery.

It may be admitted that the facts were not sufficient to charge Shaw with constructive knowledge of the change in grade at the time he entered upon the work, but we are unwilling to sanction the view that the surety company did not at any time during the execution of the work stand charged with a constructive knowledge that the grade was changed. Mr. Wharton says: "But that a person who is *capax negotii* should set up ignorance of facts as ground of exculpation or of defense would be against the policy of the law; and hence, where there is no fraud or coercion, the law treats him as if he were cognizant of what he did. He is not supposed to have known facts of which it appears he was ignorant; but, if his ignorance is negligent or culpable, then the law declares that it cannot protect him. Apart from this liability, we have a right to infer, as a presumption of fact based upon our experience of business, that an intelligent person who does a thing in his particular line of business knows what he is about." 2 Wharton on Evidence, § 1243. In 19 Am. & Eng. Ency. of Law (1st Ed.) 63, it is said: "One who enters into a contract may be presumed to know all of the material facts bearing on that contract." So it is laid down in 16 Cyc. 1072, that it is a presumption "that a party knew what he had the opportunity of knowing and should have known."

Let us, therefore, look to some of the facts which surrounded Shaw; facts so easily discovered that it seems scarcely conceivable

that a man of ordinary prudence, giving his whole energy to the particular business, could have failed to have had his attention directed to some or all of them. (1) He found, according to his statement, an embankment of 1,000 feet long, between stations 147 and 157, which appeared to be up to the crown stakes and to have been washed down on the slides by rain, and yet he was required by the engineer to add from a foot to a foot and one-half (perhaps we should say 1 foot) to all of this embankment, as well as to widen it six feet. The actual difference in the grade on this 1,000 feet, as between the two profiles, was 4 feet 1 inch at station 147, 4 feet 2 inches at station 151, and thence gradually descending to the west to station 157, where the grade was increased 3 feet 3 inches. Within these stations, which we refer to because the work there was all embankment, the difference between the area of a cross-section of an embankment built according to the June profile and of one built according to the May profile is surprising when put in figures, but the difference in appearance between two such embankments would be such that the increase could scarcely have been overlooked by one familiar with the profile under which he was supposed to be working. The difference between an embankment 6 feet high and one 10 feet 2 inches high would be most obvious. (2) The June profile shows the natural surface of the ground to be at grade at stations 98 plus and 131, and approximately at grade at station 119 plus, and yet the surety company built a 22½-inch embankment at the first of these stations, and a 3-foot embankment at the second, while it worked within 50 feet of the third point where the increase was about 2 feet. A still more evident deviation is found at stations 161 and 163, where the surety company built over a foot of embankment, although the profile showed at said points about 1 foot of cut. (3) The grade at which the work was established was so far raised above the grade of the June profile that, roughly judging, the cuts between stations 95 and 110 and between stations 120 and 130 were apparently decreased to the extent of one-third in the first instance and two-thirds in the second. (4) It should be assumed that the engineer's estimate was within Shaw's knowledge, since, as respects the execution of the work, it was only secondary in importance to the contract, specifications, plan, and profile. In getting at the extent of the departure from this estimate, we shall, for the sake of convenience, consider all of the changes as if made at once, for that brings out in bold relief the question as to the correctness of the court's finding that the surety company had no knowledge of changes in the grade or quality of the work. The estimate showed 113,000 cubic yards of embankment, to be obtained from 65,000 yards of normal cross-section, 27,000 yards widening of cuts, and

21,000 yards from borrow pits. The reduction in the width of embankment from 20 feet to 15 feet, according to the finding of the court, amounted to a reduction of 10,000 feet in embankment. The elimination of the overhead crossing reduced the embankment 17,416 yards, and by deducting these two items we have 85,584 yards of embankment, or, making due allowance for shrinkage, nearly enough, within the normal cross-section and widened cuts (without resorting to borrow pits), to build the embankment, and yet Shaw was cognizant of the widening of the yard, which doubtless afforded about 50,000 extra yards of earth, and was advised of the subway change, which involved excavation to the amount of 29,000 yards. Seemingly the enlarging of the yard was in itself a fact strongly calling for inquiry, in view of the fact that the excavation within the normal cross-section, as well as earth borrowed at the west end, was also being used in the fills, and, if he gave the slightest attention to the general plan of obtaining embankment as indicated by the estimate, it would seem that he would have perceived that putting all of this excavation on embankment meant that there had been a change in the grade. The testimony of Shaw clearly implies that he had in mind the question of the right of the railway company to require him to place this additional earth upon the grade; for, in response to the question as to whether he examined his plan when the direction was given to him to widen the yard, he answered: "I consulted the plan, and I knew the contract allowed them to make certain changes, which involved only quantities. That I understood to be within the scope of the contract." (5) The net amount of embankment called for was 85,584 yards, and yet, although the general undertaking was far from completed when the surety company abandoned the work, we find that said company was credited at that time, on account of the contract, with 82,456 yards of embankment, the most of which was represented by current estimates. In these circumstances the average man in Shaw's situation would have been likely, before many months after he had entered upon his work, to have been seeking the reason for the fact that there was a great discrepancy between the amount of work remaining as shown on paper from what appeared on the ground.

Notice of facts putting a person on inquiry may be proved circumstantially, and, if proved, the deduction therefrom, as to its effect, in the absence of any showing that information was unsuccessfully pursued, is a result of the law. *Pomeroy's Equity Jurisprudence* (3d Ed.) §§ 595, 596. Of course, we realize that the fact of notice concerning the matters which we have pointed out as together amounting to notice is built on rebuttable presumptions, yet, as the pre-

sumptions referred to have judicial sanction, they ought to be adopted in the absence of explanation, and, if not adopted, where they seem as cogent as in this case, it is ground for a new trial. See *Phillips on Ev.* (3d Ed.) 439. In *Kennedy v. Green*, 3 Mylne & K. 699, 722, it is said: "Whatever is notice enough to excite attention and put the party on his guard, and call for inquiry is notice of everything to which such inquiry might have led. When a party has sufficient knowledge of a fact, he shall be deemed conversant with it." In 21 *Am. & Eng. Ency. of Law* (2d Ed.) 590, it is stated: "But, when from the uncontroverted facts in evidence it appears that circumstances existed of which the party sought to be charged had knowledge or information sufficient to affect his conscience, and thereby put him upon inquiry which, if followed with reasonable diligence, would necessarily have led him to actual knowledge of the particular fact, and his failure to make the inquiry is not satisfactorily explained, he will be held chargeable with the knowledge which he might thus have acquired, and will not be allowed to say that he did not actually know that the fact existed. His knowledge of the circumstances being sufficient to make it his duty to inquire and to render any inaction on his part unconscientious, his failure to pursue the path of duty is no defense or excuse. Under such circumstances, it is said that the presumption of notice is conclusive." See, also, *Webb v. John Hancock, etc., Ins. Co.*, 162 Ind. 616, 635, 69 N. E. 1006, 66 L. R. A. 632.

It can but be inferred from the evidence that Shaw made no inconsiderable use of his profile, and his familiarity with the contract may be inferred both from the evidence and the fact that he had it in his possession as the representative of the surety company. Making all due allowance for the misleading effect of the change in grade stakes, yet he knew that they were being changed to some extent, and that the contract purported to give to the railway company an undefined latitude concerning changes, and therefore, in view of the fact that the general change of grade produced consequences so obvious that no man could fail to observe some or all of them if he was giving heed to the business, we are of opinion, in view of the presumption of knowledge of surrounding facts to which we have heretofore adverted, that explanations were called for on Shaw's part, and that his general statement that he never questioned whether the grade stakes were set in accordance with the June profile ought not to be accepted as sufficient. There is too much to suggest a turning away from knowledge upon the part of a man of ordinary prudence—the standard by which the surety company must be judged—to allow this bald statement to pass muster. If Shaw never questioned the manner in which the grade stakes were set, it may yet remain that he

ought to have questioned them, and this, under the law, since the most casual comparison of the grade, as he had constructed it with his profile, would have instantly revealed the truth, is equivalent to knowledge. It therefore appears to us that the case is not one involving the weighing of conflicting evidence, but is one in which the court below misapprehended the scope and legal effect of the evidence. *Field v. Campbell*, 164 Ind. 359, 72 N. E. 260, 108 Am. St. Rep. 301. If the railway company is to be charged with the consequences of a deviation from the plan, to work a discharge from the guaranty, then the change must be accepted as the railway company's act for all purposes, and we have therefore *prima facie* a deviation from the plan on its part together with constructive knowledge thereof, and want of objection on the part of the surety company. Our view is that the court's finding on the question of knowledge is not borne out by the evidence, and that from this cardinal misconception of the force of the testimony the court has doubtless failed to find the further facts which would make out an equitable estoppel, at least to the extent of precluding the surety company from questioning the application of the contract as affording a basis for the adjustment of the rights of the parties.

In *Board v. Byrne*, 67 Ind. 21, Worden, C. J., speaking for this court, said: "Prima facie the contract price for the like kind of work ought to govern for the extra work." There being a deviation from the contract by consent of parties—and, as we have indicated, we are of opinion that as to a part of the additional work at least the surety company should, as the evidence stands, be charged with the consequences of acquiescence in the change—the general rule is to trace the contract into the extra work, in so far as it can be said to furnish a conventional admeasurement of the value which the parties themselves have placed upon the work. *Jones v. Woodbury*, 11 B. Mon. (Ky.) 167; 2 Sedgwick, *Measure of Damages* (8th Ed.) § 655; 2 Parsons on Contracts, 58; *Koon v. Greenman*, 7 Wend. (N. Y.) 123; 2 Sutherland on Damages (2d Ed.) 707; *McCormick v. Connolly*, 2 Bay (S. C.) 401; *Lloyd, Law of Building*, 85. In *Merrill v. Ithaca R. Co.*, 16 Wend. (N. Y.) 586, 30 Am. Dec. 130, which was an action for work done in the construction of a railroad, it appeared that the plaintiffs, under the direction of the engineer, had worked upon sections of the road not embraced in the written contract, but the whole work was done, estimates made, and payments received as if it were all embraced within the contract. The court, speaking by Cowen, J., said: "After such an exact tacit adherence, on the side of the plaintiffs, as appears from the evidence in this case, to the written terms of the contracts, without one word that they intended to alter their rates of charge, it would be a fraud upon the company were

they allowed to change their ground. It is not denied that they may resort to the general counts. Both parties having assented that the work should go forward after the day, that may be so. It is clearly so as to line C and section 4, if they are not touched by the general provisions of the contract in respect to section 8, yet the rule is well settled that, though there be a deviation, yet the special contract shall be pursued as far as it can be traced and made to apply. Here all the powers of the engineer in chief, with the measures and estimates, may be retained and applied to the whole work, with very little exception. For a plain excess beyond what the parties may have treated as within the articles, there could, of course, be no objection to allow on the basis of a quantum meruit." It is true that there is no plea of estoppel in this case, and we are aware of the general rule of Code pleading that an estoppel in pais must be specially pleaded. It is, however, a well-recognized exception to the rule that a party does not waive the estoppel where he has no opportunity of pleading it. *Foye v. Patch*, 132 Mass. 105; *Clink v. Thurston*, 47 Cal. 21; note to *Tyler v. Hall*, as reported in 27 Am. St. Rep. 337, 344; *Schurtz v. Colvin*, 55 Ohio St. 274, 45 N. E. 527; *Bigelow on Estoppel* (4th Ed.) 668; 16 Cyc. 806. The determination of the question whether the railway company had the opportunity to plead the estoppel requires a consideration of the surety company's complaint. Instead of relying on a common count, as is ordinarily done in such cases, the pleader saw fit to plead the contract specially, and the fact was revealed in the complaint that the plaintiff did the work in its endeavor to carry out the contract. This then at once gave rise to the question whether the deviation was by consent of parties or otherwise, for in the former case the measure of damages would have *prima facie* been based on the contract price, whereas the plaintiff was seeking to recover the reasonable value of what it had done. To avoid this objection, it alleged that it had "no knowledge or reason to believe that the work was required to be, and which was done was, materially different in grade, quality, or quantity from that which was required to be done by said contract and specifications and blueprints attached thereto." The consideration suggested rendered the allegation a proper one, for it is not anticipating a defense to state facts which bring the plaintiff's case within an exception to the general rule. *Latta v. Miller*, 109 Ind. 302, 10 N. E. 100; *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948; *Wade v. Rusher*, 4 Bosw. (N. Y.) 537; 4 Ency. of Pl. & Pr. 614. Having done this, it became necessary for the plaintiff substantially to prove its negative allegation, since it was of the gravamen of its case. *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144; *Nash v. Hall*, 4 Ind. 444. While the course pursued by the pleader was

authorized, yet the question arises as to what position it put the defendant in, whose answer, under the Code, was required to consist of a denial, or "a statement of any new matter constituting a defense." Section 350, Burns' Ann. St. 1901. In the circumstances the railway company could not plead an estoppel, for the major allegation of such an answer must have been that the plaintiff did know of the changes, and this would have been neither a denial nor the allegation of new matter, but an affirmative allegation of the existence of a fact which the plaintiff, owing to the form of complaint adopted, found it necessary expressly to deny. *Schurtz v. Colvin*, supra. The plaintiff having, by the pleading, made out a case on the theory that the extra work was, as it were, foisted on it, it was not at liberty to change front, and insist that it was immaterial whether an allegation of a want of knowledge was proved if the defendant did not plead an estoppel affirmatively. The latter had a right to join issue on a material allegation of the complaint, and to try the truth of that allegation. See note to *Tyler v. Hall*, supra, at page 346. It therefore appears to us that the question of estoppel was in the case, and that, if the court's finding was erroneous on the major question as to whether the surety company in legal effect had knowledge of the change, a new trial ought to be awarded.

In considering the question whether the surety company is estopped, it must be remembered that by its complaint it charges the railway company with no more serious offense, in legal effect, than a misinterpretation of its own contract. The doctrine of equitable estoppel, which is no longer peculiar to courts of chancery, is based on the ground of promoting the equity and justice of the individual case, and it is not to be carried further than the end for which the estoppel is created. 2 *Herman, Estoppel and Res Judicata*, § 782. In the work to which we have just referred, it is said: "This equitable estoppel involves a question of legal ethics, the doctrine lies at the foundation of morals, and applies whenever a party has made a representation, by words or conduct, which he cannot in equity and good conscience prove to be false, and this kind of estoppel, being a broad doctrine of equity, cannot be limited in application by the terms of any narrow legal definition." Section 749. It is also laid down in the above work that: "A person who intentionally or by culpable negligence induces another to act upon his representations will be estopped from denying the truth. Under the circumstances creating the estoppel, representations made by words, acts, or silence when duty requires the party to speak are conclusively presumed to be true as against him and in favor of the person whom he misled. The estoppel is called into life for the purpose of preventing wrong and redressing injury." Section 788. This court has said: "The vital principle of an

equitable estoppel is that of fraud. He who, by his language or conduct, leads another to do what he would not otherwise have done, will not be permitted to subject such person to loss or injury by disappointing the expectations upon which he acted. * * * Nor is it necessary that there should exist a design to deceive or defraud on the part of the person sought to be estopped. It is enough if, when he asserts his claims, it would be inequitable and unjust to allow him to prevail against a purchaser. The falsehood and moral wrong which the law denominates fraud appear when the claim is asserted. And this is true whether a party knowingly remains silent or so negligently conducts himself with reference to his rights as to mislead another." *Klefer v. Klinsick*, 144 Ind. 46, 54, 42 N. E. 447, 450. And see, on the subject of estoppel by negligence, 3 *Canadian Law Times*, 223. It was said in *Re Hall*, 10 L. J. C. P. 210, 212: "'Lata culpa et crassa negligentia,' both by the civil law and our own, approximate to, and in many instances cannot be distinguished from, 'dolus malus,' or misconduct." It is evident that, for the purpose of determining whether a plaintiff shall be given the right to insist upon a certain construction of a contract, much may depend upon the consideration as to whether it is just, in view of the manner in which he has conducted himself and the effect upon his adversary, to accord him that right. It was said in *Kirk v. Hamilton*, 102 U. S. 76, 26 L. Ed. 79: "What I induce my neighbor to regard as true is the truth if he has been misled by my asseveration." In the note to *Duchess of Kingston's Case*, as reported in *Smith's Leading Cases* (11th Eng. Ed.) 724, 865, it is laid down that the courts, perceiving how essential it is to the quick and easy transaction of business that one man should be able to put faith in the conduct and representations of his fellow, are inclined to hold such conduct and such representations binding where a mischief or injustice would be caused by treating their effect as revocable.

The case of *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811, is an illuminative case upon the proposition that, where there is owing on the part of a person the duty of disclosing the invalidity of a writing, his negligent omission so to do may estop him to raise the question after the other party has acted to his prejudice. It was there held that a bank depositor owes some duty to the bank to examine his returned checks, and that, if by his negligence in that respect the bank is led to treat as valid a series of raised checks, bearing the depositor's signature, he will be estopped to deny their validity. In that case *Mr. Justice Harlan*, after considering the cases on the subject of estoppel by negligence, said: "These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote

the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth—which he has the means, by ordinary diligence, of ascertaining—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent; for, as observed by the Supreme Court of Ohio in *Ellis & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628, 667, 64 Am. Dec. 610, while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it, and the very existence of society depends upon compelling every one to pay a proper regard to the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every department of active life rights are in this manner daily lost and acquired, and we know of no reason for making the commercial classes an exception.' In the leading case of *Jones v. Woodbury*, 11 B. Mon. (Ky.) 167, Marshall, C. J., said: "Prima facie, the employer has a right to suppose, unless apprised to the contrary, that every proposition as to different portions of the work is made under the contract for the whole, and is intended merely to present to him a choice of modes within that contract. And, to get rid of this inference, the undertaker must show either that he apprised the employer that his proposition was a departure from the original design and contract, and would be attended with increased cost, or that it was of such a character as necessarily to carry this information to him. * * * The general principle applicable to a special contract for erecting a house, when in the progress of the work there have been alterations or additions not originally contemplated nor expressly provided for, seems to be that, as far as the work can be traced under the original contract, it shall be paid for under that contract, and that the residue which cannot be brought within the contract shall be paid for as if there were no contract. But the safety of employers, and the good faith proper to be observed in all cases, requires that this rule should be so applied as not to violate the principles above stated; and they seem to indicate, further, that extra work either in quantity or quality, unless done under an express agreement, or at least a statement of the price, should not be charged for at a greater rate in reference to the measure and value price of such work than the contract

price bears to the measure and value price of the work contracted to be done; so that, if the contract price was a fourth or a fifth less than the price estimated by measure and value, the extra work should not be estimated at more than three-fourths of four-fifths of its price according to measure and value." See, also, 1 Hudson, Building Contracts (2d Ed.) 358.

In *Merrill v. Ithaca R. Co.*, 16 Wend. (N. Y.) 586, 30 Am. Dec. 130, evidence was offered tending to show that the plaintiffs, who were railway contractors, had been damaged by the neglect of the company in not employing a sufficient number of engineers to lay out the work, make estimates, etc. In referring to one portion of the work, Cowen, J., speaking upon the assumption that the delay and embarrassment was but the result of oversight or miscalculation, said: "As to section 8, there is no doubt that all the substantial provisions of the written contract should be applied. The prices and estimates of the engineer in chief would still be conclusive, though we should allow the action of *indebitatus assumpsit*. It is a mere change of remedy. It would be gross injustice to allow any substantial departure from stipulations in reference to which the parties all along acted. No matter for the delay, and no matter which party was so unfortunate as to be the innocent cause of it, it was the business of either to speak out if a change of terms was in contemplation. Silence was equivalent to saying, 'I go upon the old terms.' It is like a tenant holding over in silence. He shall pay his last year's rent. If one party by his conduct and silence leads another to believe that he is at work for him on certain wages, he is estopped and shall not add to his demand." The above case was followed in *McGrann v. North Lebanon R. Co.*, 29 Pa. 82. In that case extensive changes had been made in the line of a railroad in the execution of a construction contract; the agreement providing that the line of the road might be changed. The contractors did not give notice that they would not perform the contract at the time the change was made, and they continued, without objection to receive estimates based on the contract price until the work was finished, when they sued to recover its value. It was held that the fact that both parties had acted upon the contract estopped them from questioning it; the court adding: "When the change was made in the line of the road, if the contractors wished to abandon the contract, it was their duty to give notice to the company to this effect." In the latter case the court refers to *Shaw v. Turnpike*, 3 Pen. & W. 445, wherein the plaintiff sought to recover on the quantum meruit for work done under a special contract, on the theory that the acts of the defendant entitled him to treat the contract as rescinded. The court there said: "The very work for which he

demands compensation was done on the foot of that contract. Would he have been permitted to go on had he informed the company that he was working under no contract but what the law might imply? Most probably he would not; and it is now too late to apprise it for the first time that the terms had been changed." It was held in *Davis v. Bush*, 28 Mich. 432, that, where contractors for the erection of a building knew that their employer understood that they were undertaking the work at a fixed price, they would be estopped from asserting, after they had completed the work without undeceiving their employer, that there was no price fixed between them, and that they were entitled to the market value of the work. In that case the court said: "Was it admissible for the defendants in error after such declarations and admission, and after such payments and receipts upon the basis of it, to shift their ground, and take an inconsistent position? Were they at liberty to say that, having got all they could by putting one face upon the transaction, they would then repudiate as one no longer of service to them the status they had thus admitted and put forward another and inconsistent position and relation in order to get more? Unless we depart from settled principles, these questions must be answered in the negative, even though we should feel that defendants in error would have been warranted in steadily standing out from the beginning for a different measure of compensation. If they were eventually to contend that their true relation with plaintiff in error was one giving them the right to require him to pay according to the standard of market value because no price was settled upon them, they should have acted, in dealing with him about the rate and in receiving pay, consistently with their construction of the transaction, or at least they should have avoided the contradictory and misleading course which was taken." In *Hawkins v. United States*, 12 Ct. Cl. 181, 189, it was said: "There was a clear departure from the terms of the contract, and the claimant might then have declined to follow the directions of the assistant superintendent, and, if they were persisted in, he might have maintained an action against the defendants for breach of contract in preventing him from going on with his work, or he might have notified the defendants that if he furnished such stone as the assistant superintendent required—a stone materially different and more expensive than that called for by his agreement—he would not deliver it under the contract at contract price, but should claim such compensation as the material was worth. Had he thus promptly notified the defendants, they would have had an opportunity to determine whether they would overrule the directions of the assistant superintendent, or would go on according to his wishes, and construct a more expensive

wall than had been contemplated. But this opportunity was lost to them by the claimant's ready submission to the wishes of the assistant superintendent, and by his long silence as to any claim for greater compensation. It was his duty, when he was requested to deliver stone of a higher grade and more expensive kind than that contracted for, before he had delivered any such stone and before the defendants had acted upon the change, to have given notice and asserted his intention to demand a higher price therefor. He could not lie by and allow the defendants to go on upon the supposition on their part that they were incurring no extra expense until it was too late for them to recede, and then successfully spring upon them a claim for other and different and greater compensation than had been agreed upon."

It is certainly true that, if constructive knowledge of the change of grade came to the surety company at a comparatively early time in the execution of the work, the railway company was entitled to notice, that it might determine whether it would not after all construct the improvement, in view of the increased cost, under the June profile, and, even if the knowledge came later, there is much force in the view that notice should have been given, for, if there was no contract whatever governing the extra work, fairness to the railway company would have seemed to require the giving of notice, that the latter might govern itself accordingly. Mr. Lloyd, in speaking of provisions in building contracts for the adjustment of the compensation for alterations and additions by arbitration after the work is completed, says: "Experience, however, keeps a dear but a good school, and those who have a broader knowledge of such transactions agree that, by some mysterious process of calculation, things valued afterwards in that way always cost a great deal more than if contracted for beforehand." Lloyd, *Law of Building*, § 47. The surety company continued to receive estimates under the contract, so that there was an actual dwelling under that agreement. This consideration strongly re-enforces the general rule that extras are, in substantially the same circumstances, to be valued according to the contract. We are of opinion that the surety company did not make out a case for the allowance for all of the extra embankment at the market price, and that the contract price ought to have been extended, at least to some of it, with a possible addition for extra haul, and for the excavation of hardpan—the former on the theory that the existence of that fact could not have been discovered until the work was measured, and the latter on the theory that, upon the whole, the railway company should perhaps have taken notice that work of such a character was not provided for in the contract. See *Du Bois v. Delaware, etc., Canal Co.*, 4 Wend.

(N. Y.) 285, s. c. 12 Wend. (N. Y.) 334, 15 Wend. 87; *Merrill v. Ithaca R. Co.*, 16 Wend. 586, 30 Am. Dec. 130. There may possibly have been other extra items of cost in the work as performed, but, in the absence of argument, we shall not go into them. As to the provision in the contract that claims for extras are to be passed on by the engineer, we take it that such provision has no reference to work which was outside of and occasioned by an unauthorized and unsanctioned change in the contract. *Wood v. City of Ft. Wayne*, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. Ed. 416; 1 *Hudson on Building Contracts* (3d Ed.) 348.

Objection has been urged by counsel for appellant to the sufficiency of the surety company's complaint, but, as it appears to us that an amended complaint will be filed, it seems unnecessary, especially in view of what has been said, to pass on the objection urged.

The judgment is reversed, with a direction to the trial court to sustain the motion for a new trial. The court is also directed to permit the parties to reframe the issues.

(189 Ind. 240)

THURMAN v. STATE. (No. 21,017.)

(Supreme Court of Indiana. Oct. 31, 1907.)

1. STATUTES—REPEAL—TIME OF EXPIRATION. *Burns' Ann. St. Supp.* 1905, § 1880 (Acts 1905, p. 637, c. 167), relating to the admissibility of confessions, being in force when the offense was committed, must govern at the trial.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 44, Statutes, §§ 365-375; vol. 20, Evidence, § 581.]

2. CRIMINAL LAW—CONFESSIONS—VOLUNTARY CHARACTER.

The confession by a person accused of crime is presumed to be voluntarily made, until the contrary is shown.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 14, Criminal Law, § 1212.]

3. SAME—SUFFICIENCY OF PRELIMINARY EVIDENCE—REVIEW.

Whether confessions of a murder were made by defendant "under the influence of fear produced by threats or by intimidation or undue influences," within Acts 1905, p. 637, c. 167, was an issue of fact before the court below, and, as there was evidence introduced which fully supports its decision that the confessions were not so made and were therefore competent evidence, the Supreme Court is not authorized to weigh the evidence or interfere with the decision.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 15, Criminal Law, §§ 3074-3080.]

Appeal from Circuit Court, Henry County; J. M. Morris, Judge.

Frank Thurman was convicted of murder, and he appeals. Affirmed.

Fred C. Gause and Wm. A. Brown, for appellant. Geo. M. Barnard, Jas. Bingham, A. G. Cavins, H. M. Dowling, and E. M. White, for the State.

MONKES, J. Appellee was charged by indictment with the crime of murder in the

first degree. A trial of said cause resulted in a verdict of guilty of the offense charged, and, over a motion for a new trial, final judgment was rendered thereon.

The errors assigned and not waived call in question the action of the court in overruling the motion for a new trial. The only causes for a new trial relied upon for a reversal were the admission in evidence of a written confession of appellant, and the testimony of five witnesses of oral confessions of appellant. The written confession was signed and the oral confessions were made by appellant while confined in the county jail on the charge of murder of which he was convicted. The objection urged to said confessions, oral and written, was that the same were "produced by threats and fear of mob violence and were not voluntary." Section 1880, *Burns' Ann. St. Supp.* 1905, being section 239, Acts 1905, p. 637, c. 169, in force when this offense was committed, and which therefore governed at the trial of the cause (*Miller v. State*, 163 Ind. 568, 570, 571, 76 N. E. 245), provides: "The confessions of a defendant made under inducement, with all the circumstances, may be given in evidence against him, except when made under the influence of fear, produced by threats or by intimidation or undue influence; but a confession made under inducement is not sufficient to warrant a conviction without corroborating evidence." The court excused the jury, and, after hearing the evidence of the appellant and the state, held that said confessions, oral and written, were admissible in evidence under said section 1880 (239) supra. It has been held by this court that "a confession by a person accused of crime is presumed to be voluntarily made until the contrary is shown." *Hauk v. State*, 148 Ind. 238, 252, 46 N. E. 127, 131, 47 N. E. 465, 466; *Ginn v. State*, 161 Ind. 292, 293, 68 N. E. 294. As the evidence given to the court on the hearing of this question takes up some 75 pages of record it would unnecessarily extend the opinion to set it out; but we have read the same, and are of the opinion that the court did not err in admitting the evidence of said confessions. Moreover, as the question whether said confessions or any of them were made by appellant "under the influence of fear produced by threats or by intimidation or undue influences" was an issue of fact before the court below for its determination, and as there was evidence introduced which fully supports its decision that said confessions were competent evidence, we are not authorized to weigh the evidence given to the court or interfere with said decision. *Hauk v. State*, 148 Ind. 238, 252, 253, 46 N. E. 127, 47 N. E. 465, and cases cited; *Keyes v. State*, 122 Ind. 527, 532, 23 N. E. 1097; *Smith v. State*, 142 Ind. 288, 298, 41 N. E. 595. It follows that the court did not err in overruling the motion for a new trial. Judgment affirmed.

(169 Ind. 80)

BOARD OF COM'RS OF JACKSON COUNTY v. BRANAMAN. (No. 21,132.)

(Supreme Court of Indiana. Oct. 10, 1907.)

1. MANDAMUS—ADEQUACY OF OTHER REMEDY.

A contractor, who has performed his contract for paving a road pursuant to Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, authorizing the paving of highways under the control of the board of county commissioners, etc., has an adequate remedy to obtain payment of the contract price, and he cannot by mandamus coerce the commissioners to receive the road and to direct the auditor to draw a warrant for payment therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 83, Mandamus, §§ 8, 25, 30, 31.]

2. HIGHWAYS — IMPROVEMENTS — STATUTES — CONSTRUCTION.

Under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, providing for the improvement of highways, on petition of freeholders of townships, etc., and directing that the board of county commissioners shall proceed with the construction of such roads, etc., the board is the agency of the law to carry into effect its provisions, but it is not the agent of the particular township constituting the taxing district.

3. SAME—INDEBTEDNESS.

The indebtedness created by the construction of roads, as authorized by Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, providing for the paving of roads, is not a liability against the county nor against the township which may constitute the taxing district, but is the indebtedness of the persons whose property, under the law, is liable to be assessed to defray the cost.

4. SAME—ACCEPTANCE OF WORK.

Under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, authorizing the paving of highways, and providing that the whole amount of the contract for paving shall not be paid until the road shall have been received as completed by the board of county commissioners, the board may determine when work has been completed, and until it is completed the contractor cannot demand that the road be received by the board, or that he be paid the full price.

5. STATUTES—CONSTRUCTION.

The court in construing a statute may resort not only to contemporaneous and prior acts, but also to subsequent acts in pari materia for the purpose of discovering the intention of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 303, 304.]

6. HIGHWAYS — IMPROVEMENTS — PAYMENT — ENFORCEMENT—STATUTES.

Under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, authorizing the improvement of highways on the voters of a township demanding it, and providing that no payment shall be made by the county commissioners for more than 80 per cent. of the estimate of the work done by the contractor, nor shall the whole amount be paid until the road shall have been received as completed by the board, etc., contemplates that the proceedings to construct a road shall remain on the docket of the board until the work is completed, and that the board shall fix a time for determining the question of its completion, at which time any interested taxpayer may appear, and a party aggrieved by the decision of the board may appeal to the circuit court.

Appeal from Circuit Court, Lawrence County; J. B. Wilson, Judge.

Action by Abraham C. Branaman against
82 N.E.—5

the board of commissioners of the county of Jackson. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See 79 N. E. 923.

D. A. Kochenour, for appellant. Brooks & Brooks, A. N. Munden, Branaman & Branaman, and A. C. Branaman, for appellee.

JORDAN, J. This action was instituted by appellee, as plaintiff, in the Jackson circuit court, against appellant, the board of commissioners of the county of Jackson, to recover upon a contract entered into by and between him and said board, whereby he contracted to construct five gravel roads in Owen township, in said county. A demurrer to the complaint for insufficiency of facts was overruled, and the venue was changed to the Lawrence circuit court, wherein, upon the issues joined between the parties, there was a trial by the court and a finding in favor of the appellee, and, over appellant's motion for a new trial, judgment was rendered against it for \$3,937.35, to be paid out of the funds arising from the sale of the bonds issued under the statute. It was further adjudged that appellee recover of appellant his costs laid out and expended. The assignment of errors calls in question the decision of the court in overruling the demurrer to the complaint, as well as other rulings in the case.

The facts alleged in the complaint may be said to be substantially as follows: Upon a petition of 50 freeholders of Owen township, in said Jackson county, the board of commissioners ordered, and there was held, an election by the voters of the township to determine whether or not the highways in question should be improved by graveling and grading as prayed for in the petition. A majority of the voters voted in favor of the improvement, and the board of commissioners thereupon duly ordered that said highways be improved. Plans, profiles, and specifications were adopted, and the contract, upon competitive bidding, was duly and legally let to appellee. Thereupon he entered into a written contract with the board of commissioners to construct the roads in accordance with the plans and specifications as adopted, at and for the sum of \$15,690. Said proceedings were had under and in pursuance of an act of the Legislature approved March 3, 1893, and the amendatory act thereto, approved March 7, 1895. By the terms of the contract, payments were to be made to appellee as the work progressed, on estimates made and certified by the superintendent. Twenty per cent. of such estimate was to be withheld until final completion of the work. It is further alleged that appellee duly filed his bond as such contractor, which was approved. Appellant board caused bonds to be issued and sold for an amount ample and sufficient to pay the amounts due to appellee and received the money therefor, and now has, and at all times has had, money arising from the sale of

such bonds amply sufficient to pay for such roads in full. Thereafter appellant levied a tax upon the property of said township for the payment of said bonds and the interest thereon. Appellee fully performed all the work required by his said contract in accordance with the estimates, plans, and profiles therefor, which were modified by said board of commissioners so as to require him to perform extra work, etc. Appellant duly received, accepted, and approved the construction of the following roads embraced in said contract, to wit: (Here the complaint specifies three of the five roads embraced in the contract.) It is further averred that appellee had completed the other two roads according to the plans and profiles as modified by appellant and by the superintendent in charge of such construction, and in accordance with his contract, and that appellee had fully performed every condition and provision of his contract. Appellant from time to time made payments to appellee as the work progressed, upon estimates duly made and filed, and the amounts paid and the amounts remaining unpaid are fully specified and set out. Upon one of the roads appellee did additional work under the order and direction of appellant, amounting to \$501, and upon another he did additional work in obedience to the order of appellant, under the plans and profiles aforesaid, as modified, to the value of \$503.54. It is charged that upon the completion of said work, and long before the commencement of this action, appellee filed his verified claim for said sums, and each of them, with the auditor of said county, more than 10 days before the regular term of the board, which claim was accompanied by the certificate and report of the superintendent of each of said roads, duly verified by him, showing that said roads, and each of them, had been theretofore completed according to the plans, plats, profiles, and contract; but appellant, after a long and unreasonable delay, refused to pay him any part of said sum, although the same was long past due and wholly unpaid. The contract and itemized statement of the extra work are filed with and made exhibits of the complaint, and judgment is demanded for \$7,500, payable out of the fund derived from the sale of the bonds, and for all other and proper relief.

The proceedings to improve the highways in question appear to have been instituted, as alleged in the complaint, under and in pursuance of the provisions of a statute approved March 3, 1893 (Acts 1893, p. 196, c. 112), as amended by an act approved March 7, 1895 (Acts 1895, p. 143, c. 63). The latter act amended sections 1, 2, 5, 6, 7, 8, and 9 of the original act. Section 1 as amended authorizes the board of commissioners of any county in this state, upon being petitioned by 50 freeholders of any township, or townships, for the improvement of any highway, or highways, of such township, or townships, by

grading, graveling, paving with stone or macadamized material, to submit the proposition, or question, to the voters of such township, or townships, as the case may be, at an election as therein provided, etc. This section, among other things, further provides that if a majority of the voters at the election held shall cast their votes in favor of building such road, or roads, then and in that event the board of commissioners shall at once proceed with the construction of such road, or roads. The board is empowered to appoint a surveyor, or engineer, and two freeholders of the county as viewers to view and locate the proposed improved highway, and to assess damages, etc. Section 5 of the original act, as amended, empowers the board of commissioners to issue the bonds of the county in order to raise money to pay for the construction of the improvement. The county treasurer is authorized to sell such bonds and to keep the proceeds arising from such sale as a separate and specific fund in the county treasury, to pay for the construction of the road, or roads, for which the bonds were issued; the money to be paid by the treasurer to the contractor upon warrants issued by the county auditor as directed or ordered by the board of commissioners. It is further provided that the board shall order the money to be paid in such amounts and at such times as they may agree; but no more shall be paid than 80 per cent. of the engineer's estimate of the work done by the contractor, and the entire amount of the contract price shall not be paid until the improvement has been received as completed by the board of commissioners. Section 3 of the statute makes it the duty of the board, in the event the election is in favor of the improvement, to advertise for bids for the construction of the road, or roads, and receive such bids either at a regular or call session of the board, and to let the construction of the improvement by contract to the lowest responsible bidder, or bidders. The successful bidder is required to give bond for the faithful performance of the work. The contract shall specify all of the particulars of the construction as set forth in the report of the viewers, and shall specify the time when such work shall be completed. By section 6 as amended, the board of commissioners, in order to provide money to pay the bonds and their interest accruing thereon, is required to levy annually a special tax upon the property of the township, or townships, including all towns and cities therein under 30,000 inhabitants. Section 10 invests the board of commissioners with the authority to permit amendments to be made to the petition or the report of the viewers, and to continue the hearing from time to time. The board is also authorized to appoint a competent superintendent, who is to be governed by such rules and regulations as the board may prescribe, and he is required to render to the board, at its regular sessions, an account of

the time which he has actually served in the discharge of his duties.

It is manifest, from the facts in this case, and the law applicable thereto, that the complaint in controversy does not, in any sense, state a cause of action against appellant, the board of commissioners. Appellee, by his counsel, however, insists that by his complaint he is not seeking to recover a judgment against the board in its corporate entity, but is merely endeavoring to compel it, as the agent of Owen township, to order the money in the custody of the county treasurer arising from the sale of the bonds to be paid to him. He certainly is mistaken in respect to the remedy, or method, to be employed to secure the payment to him in full of the contract price upon the completion of the work. It is not tenable to argue that he, under the facts, can invoke the remedy of mandamus to coerce the board of commissioners to receive the road in question as completed, and to require it to direct the auditor to draw a warrant for payment in full upon the separate and specific fund in the hands of the county treasurer. It is evident, from an examination of the statute upon which the proceedings to construct the road, or roads, are based, that he has a complete and adequate remedy to obtain payment in full of the contract price for the services which he has performed under and in accordance with his contract. In the enactment of the law in regard to the construction of free gravel roads, the Legislature has deemed it proper to designate the board of commissioners of the county as the tribunal before which the proceedings to build or construct such highways shall be instituted and carried to a final completion. The commissioners therefore merely act as a board for that purpose. The statute does not contemplate that the board shall be the agent of the particular township, or townships, which constitute the taxing district. It is merely the designated agency or instrumentality of the law to carry into effect its provisions, and for this purpose it has been invested by the statute with certain limited functions and powers, some of which are in their nature and character administrative, while others may be said to be judicial. In carrying the law into effect, the board cannot exceed the powers with which it has been invested. It is settled that the indebtedness which is created by the construction of these free improved public highways is not, in any sense, a liability against the county, nor against the township, or townships, which may constitute the taxing district, but is the indebtedness of the persons whose property, under the law, is liable to be assessed to defray the expenses of such improvements. *Board of Commissioners v. Harrell*, 147 Ind. 500, 46 N. E. 124; *Kline v. Board of Commissioners*, 152 Ind. 321, 325, 51 N. E. 476; *Board of Commissioners v. Hill*, 115 Ind. 316, 16 N. E. 156;

King v. Board of Commissioners, 34 Ind. App. 231, 72 N. E. 616, and cases there cited.

It will be noted that under the provisions of section 3 of the amendatory act of 1895, supra, the completion of the improvement by a contractor, according to the terms of his contract and the plans and specifications, which form a part thereof, is made a condition precedent to his right to receive and be paid the whole amount of the contract price. One of the controverted questions in this case appears to be in regard to the completion by appellee of the work which he undertook to perform according to the contract. Until the road is completed according to the contract, he is not in a position to legally demand that the road be received by the board of commissioners, and that he be paid the full amount of the contract price. While it is true that there is no express provision contained in the statute in question providing that the board of commissioners shall determine when the work has been completed, nevertheless, it is manifest that the statute, impliedly at least, intends or contemplates that the board shall be invested with this power. It must be remembered that by an express provision of the law the board is invested with the general power, or authority, to carry into effect the improvements of public highways, subject to the requirements and conditions therein provided. In addition to this general provision, section 3 of the act of 1895, supra, specifically declares: "Nor shall the whole amount of the contract be paid until the road shall have been received as completed by the board of commissioners." In determining the method to be employed by a contractor under the law in question to obtain payment in full when he has completed his work according to his contract, we are aided to a great extent by the rule asserted and enforced in the cases of *Conn v. Board of Commissioners*, 151 Ind. 517, 51 N. E. 1062, and *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933. These cases involved the construction of certain statutes relative to the drainage of lands, and the question as therein presented is analogous to the one involved in the case at bar. In the case of *Conn v. Board*, etc., supra, we said: "It is a well-affirmed principle that, where a power is conferred by a statute, everything necessary to carry out the purpose of the power conferred and make it effectual and complete will be implied [citing authorities]. The implication or inference which may arise in the construction of statutes is of something not expressly declared, but arises out of that which is directly or expressly declared in the statute. If the intention of the makers of the statute in question, in regard to the remedy or method to be employed to enable a contractor to secure payment from the county treasurer upon the completion of his job, can be ascertained, it will control, for it is a fundamental rule that a matter or thing within the

intention of the makers of the law is the same in effect as if it were within its express letter. In our search to discover this intention, we may be guided by a well-settled canon of construction, which permits us to look to kindred statutes or laws upon the same subject, for aid in the exposition of such intention. It is not, generally speaking, as a rule, expected that a statute which has a place in a general system of laws will be so perfect as to need no support from the rules and provisions of the system of which it forms a part, and hence, when it is a part of a general system of laws upon the same subject, its construction or interpretation may receive support from the rules and provisions of that system." In *Studabaker v. Studabaker*, supra, the question arose as to whether the board of commissioners was invested with the power to determine if the public ditch therein in controversy had been completed according to the contract. In considering this question, we said: "While there is no express provision in the statute requiring the board to determine when the ditch has been completed as ordered and designated in the contract of the contractors, still the law fairly implies and intends that the board shall perform this duty. It is an elementary rule that the grant of a principal power carries with it all necessary, subsidiary, or implied powers. Hence the board of commissioners, under the express authority conferred upon it by the statute to order the construction of such public improvement, is invested with such incidental or implied powers as are necessary to fully carry out the completion of the work. The discharge of such duties is as incumbent upon the board as are those expressly imposed. In practice, it may be asserted that the law contemplates that the matter of the petition for the proposed ditch, or other improvement, shall remain upon the docket of the board of commissioners until the final completion of the work. The law, undoubtedly, further contemplates that, when the work is completed according to contract, the engineer, who acts as a superintendent, is to make a final report to the board for its approval, and one of the essential matters to be determined by the board in approving such report is whether or not the work has been completed according to contract. Any landowner whose land is affected by the improvement would certainly be entitled to appear before the board and controvert the question of the completion of the ditch."

Guided by the rule affirmed in placing an interpretation upon the statute involved in *Conn v. Board*, etc., supra, we looked to and considered the provisions of section 21 of the drainage law enacted in 1881 (Laws 1881, p. 417, c. 44), which act formed a part of the general system of laws providing for the establishment of public ditches by boards of commissioners. Therefore, under the same rule or authority, in our endeavor to explore the intention of the law under consideration

in this case, we are at liberty to resort to and proceed in the light of kindred statutes or laws relative to the improvement of public highways by boards of commissioners, enacted either prior or subsequent to the statute in question in this case. By an act approved and in force March 11, 1901 (Acts 1901, p. 449, c. 205), the Legislature appears to have covered the entire subject as the same is embraced in the statute of 1893, supra, and the act amendatory thereof. By the act of 1901, the statute of 1893, together with all of its amendatory and supplemental acts, is expressly repealed, as are also the other acts therein mentioned. The act of 1901 provides that it shall only apply to proceedings begun before it became operative, and that the repeal of the acts as therein mentioned shall in no wise affect proceedings begun thereunder prior to their repeal. By section 13 of this latter act, the Legislature expressly designated the procedure to be pursued when the road, or roads, improved thereunder, have been completed. It is provided that if the superintendent and engineer believe that the road has been completed, either as a whole, or any part thereof less than the whole, as required and according to the plans, plats, profiles, and contract under which the improvement is let, then these officials shall each file a sworn statement therein that the road, or roads, as a whole, or parts thereof, as the case may be, have been completed according to the plans, plats, profiles, and contract, and that the quality and quantity of material in making such improvement were used as required under the contract. The law contemplates that the auditor shall place this statement or report before the board of commissioners at its next regular term, but it is provided that the board shall not act upon this statement or report until it has been filed with the auditor at least 10 days before the first day of such regular term. During this period of 10 days, under the provisions of said section 13, any taxpayer interested in such improvement is given the right, as therein provided, to controvert, by his sworn statement, the completion of the road in question. In the event such statement is filed, the board of commissioners is required to fix a day for a hearing of the issue raised in the case in respect to the completion of the improvement. It is provided that witnesses may be subpoenaed and evidence heard by the board upon such issue in like manner as issues in other cases are heard by the board. If, upon a hearing, the board finds that the road, or roads, or the parts thereof, in issue, as the case may be, have been completed according to the plans, plats, profiles, and contract, then it is required to accept and receive the work of improvement; but, if it finds to the contrary, it becomes its duty to refuse to accept the work and to require the contractor to proceed to complete the improvement according to the plans, etc. This section further awards the

right of appeal in the matter to the circuit court from the decision of the board of commissioners.

It is a well-recognized rule that, in the construction of a statute, the court may resort, not only to contemporaneous and prior acts of the Legislature, but also to a subsequent act, or acts, of that body in *pari materia* for the purpose of ascertaining or discovering the intention or meaning of a former statute. *Prather v. Jeffersonville, etc., R. Co.*, 52 Ind. 16; *United States v. Freeman*, 3 How. (U. S.) 556, 11 L. Ed. 724; *Cannon, Adm'r. v. Vaughan*, 12 Tex. 399; *In re Yick Wo*, 68 Cal. 294, 9 Pac. 139, 58 Am. Rep. 12; *Lawrence v. People*, 188 Ill. 407, 58 N. E. 991; 26 Am. & Eng. Ency. of Law (2d Ed.) p. 624; *Endlich on Interpretation of Statutes*, §§ 43, 44, 47. Considering the provisions of section 13 of the act of 1901, it certainly can be said that it aids us in determining the procedure which the Legislature intended should be pursued under the statute herein involved when a contractor has fully completed the work which he had contracted to perform. As originally shown, section 5 of the amendatory act of 1895 provides that "no payment shall be made by the commissioners for more than eighty per cent. of the engineer's estimate of the work done by the contractor, nor shall the whole amount of the contract be paid until the road shall have been received as completed by the board of commissioners." Construing this provision along with the others of the act of which it forms a part, and in the light of the provisions of section 13 of the subsequent act of 1901, and we are warranted in holding that the Legislature intended and meant, when the work of construction was completed, that a procedure somewhat similar to that provided in the act of 1901, *supra*, should, as far as practicable, be followed or had before the board of commissioners; or, in other words, the statute in question contemplates that the proceedings to construct the road, or roads, shall remain upon the docket of the board of commissioners until the work is finally completed, and that the superintendent appointed by the board to supervise the construction of the road, or roads, shall then report to the board of commissioners, stating or showing in such report the fact that the work of improvement has been fully completed by the contractor in accordance with his contract. That thereupon the board shall fix a day for hearing and determining the matter in regard to the completion of the work, at which time any interested taxpayer, or taxpayers, shall be accorded the right to appear before the board and controvert the question of the completion of the road, or roads. In the event a taxpayer becomes a party for such purpose, then the contractor should be made an adverse party and be afforded an opportunity to sustain the issue raised by the superintendent's report in regard to the completion of the improvement. If, upon the completion

of the improvement, the superintendent should fail to report that fact to the board for its determination, then the contractor may interpose and file an application before the board, showing therein that he had fully completed the work according to his contract, and demand that the road, or roads, be accepted or received by the board as completed, and that it order a warrant upon the county treasurer to be issued in his favor, upon the proper fund, in payment in full of the contract price. Of course, in the event he avails himself of this right, any interested taxpayer, in like manner as hereinbefore stated, should be accorded the right to appear as an adverse party to him and controvert the question in regard to the completion of the work. In respect to the right of a person who may be aggrieved by the decision of the board upon the issue or question relative to the completion of the work to appeal therefrom to the circuit court, see *Board, etc., v. Wolff*, 166 Ind. 325, 330, 76 N. E. 247; section 7859, *Burns' Ann. St.* 1901. If, upon such hearing, the board shall find that the road, or roads, have been completed according to the contract, then it should receive and accept the work and order a warrant to be drawn upon the treasurer in favor of the contractor for payment in full of the contract price out of the money arising from the sale of the bonds.

We believe that this interpretation or construction of the statute in question is in accord with its spirit and meaning, and will accomplish what was intended by the Legislature, and will afford a contractor an adequate remedy for securing the payment of the contract price. In this holding we are fully sustained by the decisions in *Conn v. Board, etc., supra*, and *Studabaker v. Studabaker, supra*. The views which we herein express lead to a reversal of the judgment of the lower court upon the ground that the complaint does not state a cause of action. Hence the court erred in overruling the demurrer thereto.

For this error the judgment is reversed, and the cause remanded to the lower court, with instructions to sustain the demurrer to the complaint.

MONTGOMERY, J., did not participate in the decision of this cause.

(169 Ind. 61)

STATE ex rel. CLAWSON v. BELL. (No. 21,021.)

(Supreme Court of Indiana. Oct. 8, 1907.)

1. ELECTIONS—PERSONS ELECTED—INELIGIBLE CANDIDATE.

Though the candidate for an office who receives the most votes is ineligible, the eligible candidate receiving the next highest number of votes is not elected, unless the votes for the ineligible candidate were cast for him without full knowledge or notice of his ineligibility.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 207.]

2. QUO WARRANTO—RIGHT TO MAINTAIN—ALLEGATIONS OF INFORMATION.

Within Burns' Ann. St. 1901, §§ 1145, 1146, providing that an information may be filed against a person unlawfully holding a public office by any person, on his own relation, when he claims an interest in the office, one has not such an interest in the office held by the one who received the most votes therefor merely because he received the next highest number of votes, and the person who received the most was ineligible, unless the votes for such person were cast with full knowledge or notice of his ineligibility, so that, to show his right to maintain quo warranto, the information or complaint must allege such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, §§ 27, 51; vol. 37, Officers, § 116.]

Appeal from Circuit Court, Henry County; J. M. Morris, Judge.

Information in the nature of quo warranto, on the relation of John M. Clawson, against Jesse Bell. Judgment for defendant. Relator appeals. Affirmed.

Horace G. Yergin and T. J. Study, for appellant. Barnard & Jeffrey and Forkner & Forkner, for appellee.

JORDAN, J. On the 5th day of January, 1907, John M. Clawson, as relator, filed an information, or complaint, in the lower court, in the nature of quo warranto, for the purpose of contesting the election of appellee to the office of county assessor of Henry county, and to obtain a judgment ousting him from said office and awarding the possession thereof to the relator, together with damages in his favor against appellee for the detention of the office in question. Appellee unsuccessfully demurred to the complaint upon the ground of insufficiency of facts. Thereupon he filed an answer in two paragraphs; the first being a general denial. The second alleged affirmative matter. Upon the issues joined under the pleadings, there was a trial by the court and a finding in favor of appellee, and, over the relator's motion for a new trial, assigning the statutory grounds, the court rendered judgment that he take nothing, and that the defendant recover of him his costs laid out and expended. The only error assigned and relied upon for a reversal is the overruling of the motion for a new trial.

The complaint alleges facts to show the eligibility and qualification of the relator, John M. Clawson, to be elected to and hold the office of county assessor. It further avers that at the general election held on the 8th day of November, 1906, at the county of Henry, for the election of county assessor and other officials, the defendant, Jesse Bell, and the relator and one William A. Smith were the only candidates voted for by the electors of said county for the office of county assessor. It is then averred that the relator "received the highest number of votes at said election for said office of any of the eligible candidates therefor," and therefore he was duly elected thereto for a term of four years

from the 1st day of January, 1907. It is charged that the defendant, Bell, is ineligible to hold said office of county assessor, for the reason that he was not a resident freeholder of Henry county for four years prior to the date of said election. It is further alleged that the relator on December 19, 1906, filed with the county auditor his official bond, as required by law, with good and sufficient sureties, and that on the same day he took the required oath of office and became duly qualified to act and discharge the duties of county assessor. On the 5th day of January, 1907, he demanded of the defendant possession of the office, together with all books, papers, and keys thereto belonging, with which demand the defendant refused to comply. It is further alleged that said defendant on January 4, 1907, usurped said office, and has held the same and received the fees and emoluments thereof in the sum of \$25, and that he has during said time wrongfully and unlawfully kept the relator out of possession of the office and deprived him of the fees and emoluments, to his damage in the sum of \$25.

The complaint discloses that the relator demanded possession of the office on the 5th day of January, before the commencement of this action on that date. The following, among other, facts, is shown by the evidence in the record: Appellee, Jesse Bell, was nominated by the Republican Party of Henry county, Ind., as a candidate for county assessor at the primary election held by that party in 1906. Relator was nominated as a candidate for the same office by petition as a candidate of the "Citizens' Party." One William A. Smith was also nominated for the office by the Prohibition Party. The board of election commissioners of Henry county, in pursuance of law, appears to have caused the names of each of the above nominees to be printed on the official ballots as candidates for said office at the election in question. It is shown by the official canvass and return of the votes cast at the election that appellee, Bell, received of the votes cast by the voters of said county for county assessor 3,257, that the relator, John M. Clawson, received 1,783 votes for the same office, and William A. Smith 265 votes. Appellee was duly returned by the proper board of canvassers as elected to the office in controversy, and the proper certificate of his election was issued and delivered to him. On November 24, 1906, he appears to have qualified by executing an official bond to the approval of the county auditor, and by taking the required oath of office. After having so qualified, he entered into possession of the office on January 4, 1907, and began to discharge the duties thereof. The relator on the 19th day of November, 1906, appears to have taken the oath of office and executed an official bond, which he tendered to the county auditor for acceptance and approval. The auditor refused to receive or approve this bond, on the

ground that the relator had not been elected to said office. The evidence shows that the relator had been a resident freeholder of the county of Henry for over four years prior to the date of election, and was in other respects qualified for said office. There is also evidence tending to show that appellee, at and prior to the election, was a resident freeholder, and had been a voter of the county for many years. Relator predicates his right to institute and maintain this action upon the provisions of sections 1145 and 1146 of the statute relating to the filing of informations, etc. Burns' Ann. St. 1901. It is provided in section 1145, supra, that "an information may be filed against any person or corporation in the following cases: First, when any person shall usurp, intrude into, or unlawfully hold or exercise any public office. * * *" Section 1146 provides that "the information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office. * * *" Section 1 of the statute "Concerning Taxation," as amended by an act of the Legislature approved February 25, 1903 (Acts 1903, p. 81, c. 29), provides: "There shall be elected on the first Tuesday after the first Monday in November, 1906, and every four years thereafter, in each county in this state, one county assessor, who shall possess the powers and perform the duties hereinafter specified. Such county assessor shall be a resident freeholder of the county not less than four years before the date of such election."

The gravamen of the complaint is the ineligibility or disqualification of appellee to be elected to and hold the office in controversy because he was not a freeholder at the date of the election, as required by the above statute; that, by reason of the fact that the relator received at such election the next highest number of votes for said office, he was elected, and is entitled thereto. In fact, the only contention urged by counsel for reversal of the judgment is that the evidence in the case establishes that the appellee was not a freeholder at the date of the election in 1906, or at any time within four years prior thereto. Consequently they argue that, therefore, he was not eligible or qualified to be elected to or to hold the office of county assessor. They further insist that, as the relator received the next highest vote and is shown to have been a freeholder as required by the statute, and otherwise eligible and qualified to be elected to and to hold the office, and having qualified as shown, he is entitled to the possession of the office and to receive and have the emoluments thereof; or, in other words, they seek to sustain his right to oust appellee from the office and to be installed therein himself, solely on the

ground that he, an eligible candidate at the election in controversy, received the next highest number of votes to appellee, who was, as asserted, ineligible or disqualified. Opposing counsel endeavor to uphold the title or right of appellee to the office, first, because, as they contend, the evidence establishes that he was a freeholder as required by law at the date of the election; second, that the statute requiring a county assessor to be a freeholder, etc., is repugnant to the state's Constitution, and contrary to the fundamental principles of our government, and therefore invalid. We pass the question in respect to the invalidity of the statute without consideration, for the reason that we have reached a conclusion unfavorable to relator upon a vital point in the case.

Conceding, without deciding, that appellee, under the facts, is shown to have been ineligible or disqualified at the date of the election on the ground as claimed by the relator, nevertheless the latter, under the facts and the law applicable thereto, as hereafter shown, is not in a position to successfully maintain an action to contest the election of appellee and to oust him from the office in question. It will be noted that, by section 1146, Burns' Ann. St. 1901, the prosecuting attorney is authorized, upon his own relation, to file the information provided by section 1145, or the same may be filed by "*any other person on his own relation whenever he claims an interest in the office.*" (Our italics.) The claim to the office which the relator asserts under the facts as alleged in his complaint, and as shown by the evidence, cannot be held to be such an interest therein or thereto within the meaning or contemplation of the statute as will authorize him to become the relator in this case. The interest claimed must be shown to be such as will, in the eye of the law, give him a standing in court to maintain the action. State ex rel. v. Ireland, 130 Ind. 77, 29 N. E. 396; Reynolds v. State ex rel., 61 Ind. 392; 15 Cyc. 406. At the election in question he neither received a majority nor plurality of the votes cast by the electors of Henry county for county assessor, while, in fact, appellee appears to have received a large majority of the votes cast for that office. Under the facts, in our opinion, the relator falls far short of establishing any legal right to or interest in the office. It does not necessarily follow because he, an eligible candidate, received the next highest number of votes to appellee, who was ineligible, as we have arguendo conceded, must be held to have been elected to the office. While the rule affirmed by the authorities is that a majority or plurality of votes cast at a popular election for a person ineligible to the office for which such votes are cast does not, as a general rule, confer any right or title to the office upon such an ineligible candidate, nevertheless the votes so cast will be effectual to prevent the election of an eligi-

ble person who received the next highest number of votes, in the absence of proof of the fact that the votes cast for the ineligible candidate were given by the electors with the full knowledge or notice, either actual or constructive, of his ineligibility or disqualification. 10 Am. & Eng. Ency. of Law (2d Ed.) 758; 15 Cyc. p. 404; Commonwealth ex rel., etc., vs. Cluley, 56 Pa. 270, 94 Am. Dec. 75; People ex rel. Furman vs. Clute, 50 N. Y. 451, 10 Am. Rep. 508.

This rule is in harmony with the holding in *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49, which is the first decision in this state to assert and follow what is recognized and known as the English rule. The same rule was affirmed and followed in *Carson v. McPhetridge*, 15 Ind. 327. All other cases in this state involving the same question rest upon *Gulick v. New*, supra, and they must be limited to the rule as therein recognized and affirmed, and cannot be considered as extending beyond the holding in that case. The court, in the *Gulick* Case, in considering the question as there involved, said: "Whilst it is true that the votes of the majority should rule, the tenable ground appears to be that, if the majority should vote for one *wholly incapable of taking the office*, having notice of such incapacity, or should perversely refuse or negligently fail to express their choice, those, although a minority, who should legitimately choose one eligible to the position, should be heeded." (Our italics.) Judge Perkins, in an opinion in the same case, in expressing the views of the court, said: "Where, at an election, there are opposing candidates for an office, and the candidate receiving the highest number of votes is ineligible, but from a fact or cause which the voters did not and were not bound to know, the result is a failure, and gives no candidate the right to the office, and should be followed by another election. Probable examples, under this proposition, of cases where the voters might not have knowledge, viz., infancy of candidate, nonresidency, want of naturalization, not of male sex, not of required degree of white blood, not in existence. * * * Where the voters at the election do know, or are legally bound to know, so that, in law, they are held to know, of the ineligibility of a candidate, the election does not result in a failure, but, in such case, the eligible candidate receiving the highest number of votes is legally elected, and entitled to the office." Recently, in the case of *Hoy, Mayor, v. State ex rel.* (Ind. Sup.) 81 N. E. 509, we considered the basis upon which the English rule is founded. In that appeal we said: "The cases of *Gulick v. New*, supra, and *Vogel v. State*, 107 Ind. 374, 8 N. E. 164, accept and enforce the English rule. Under the latter rule or doctrine, great stress is placed upon the fact that the electors having had notice of the ineligibility or incompetency of the person for whom they cast their votes, therefore, under the cir-

cumstances, it is 'willful obstinacy and misconduct' on their part to cast their votes for a person laboring under a known incompetency." The vital infirmity in the case at bar is that neither the facts as alleged in the complaint nor as disclosed by the evidence in any manner show or reveal that the electors of Henry county, when they cast their votes for appellee, had any notice or knowledge, either actual or constructive, of his ineligibility or disqualification. It cannot, under the circumstances, in the absence of such a showing or proof, be presumed that they "willfully or obstinately" cast their votes for appellee with notice that he was ineligible to be elected to and hold the office in controversy. *Hoy, Mayor, v. State ex rel.*, supra; *Barnum v. Gilman*, 27 Minn. 466, 8 N. W. 375, 38 Am. Rep. 304; *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538. In this latter case the court held that, where a disqualified candidate has received the greatest number of votes, the election is void, and does not result in the election of the eligible candidate for the same office who received the next highest number of votes, where it is not implied or shown that the electors, with knowledge of the disqualification, willfully voted for the ineligible candidate.

In *People ex rel. Furman v. Clute*, 50 N. Y. 451, 10 Am. Rep. 508, the facts appear to be as follows: The relator, Furman, and the defendant, Clute, were at the general election held in November, 1871, opposing candidates for the office of superintendent of the poor for the county of Schenectady, state of New York. A statute of that state prohibited the election of a supervisor of a town or city to the office of the superintendent of the poor. Clute, at the time of the election, appears to have held the office of supervisor of the Fifth Ward of the city of Schenectady. He received at said election a majority of all the votes cast for the office in question, and the relator, an eligible candidate, received the next highest. Clute was declared elected, and, having qualified as required by law, entered upon the discharge of the duties of the office. The relator, Furman, also took the oath of office and tendered and deposited with the proper officer his official bond, and then claimed the office and commenced an action in the name of the people, on his own relation, to oust Clute therefrom and to obtain possession thereof for himself, on the ground that under the statute Clute was ineligible to be elected to the office. There was no proof on the trial of actual notice to any of the electors of the county of Clute's ineligibility, nor were there any facts shown from which such notice or knowledge could be implied or imputed, other than the fact that at the time of the election Clute held the office of supervisor in said county. The court in that case held that by reason of the statute Clute was not eligible to the office, but also held that the relator, who received the next highest

number of votes, was not entitled to the office in the absence of proof that the persons who voted for Clute did so with notice or knowledge of his ineligibility or disqualification. It was further held that there was no presumption of notice on the part of the electors by reason of the fact that Clute's disqualification was created by statute. In passing upon the question and denying the right of the relator to be awarded the office, the court, by Folger, J., said: "We think that the rule is this: The existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied. * * * Our theory of government by the people is upon the assumption that the people, as a whole, are intelligent of their rights and interests, and are honestly and earnestly concerned in the due and wise administration of affairs, and zealously alive to the need of good and fitting men in the various places of public trust, and hold in high esteem the privilege of suffrage and are unready to pretermitt its exercise or to exercise it meaninglessly. It is much to presume, with this as our starting point, that any considerable body of electors will purposely so exercise their right of electing to office as that it shall be but an empty form, and that going through with outward signs of an election they will of intent so cast their ballots as that they will be votes wasted."

The number of votes which the relator in the case at bar received is far below those received by appellee. To nullify the votes cast for the latter in the absence of proof of the required notice or knowledge of his ineligibility or disqualification on the part of the persons who voted for him, and award to the relator the right to the office in question, would, under the circumstances, be antagonistic to the principles of popular government, and would, as is shown by the number of votes cast for appellee, be in opposition to the deliberate choice of a large majority of the voters of Henry county. There are some loose expressions in the cases of *State ex rel. v. Gallagher*, 81 Ind. 558, and *State ex rel. v. Johnson*, 100 Ind. 489, and in other cases decided by this court, upon the question herein involved which might afford room for asserting that these decisions do not consider the feature of notice or knowledge upon the part of the voters as an

essential and controlling element, and are therefore for this reason in opposition to the holding in *Gulick v. New*, supra. This is not the intent of these cases, and they must be limited and restricted to the doctrine as enunciated in the latter case. We find no warrant under the facts in this case for holding that the votes cast for appellee should be treated as nullities, and therefore, rejected, and the right to the office be awarded to the relator. Under the circumstances, in a legal sense, he has no more interest therein or thereto than he would have had he not been a candidate at said election. If appellee, as claimed, is disqualified for holding the office, the proper prosecuting attorney, as provided by the statute, can institute an action in the name of the state on his own relation to oust him from the office. We find no error.

Judgment affirmed.

(169 Ind. 140)

McCLARREN et al. v. JEFFERSON
SCHOOL TP. (No. 20,971.)

(Supreme Court of Indiana. Oct. 17, 1907.)

1. EMINENT DOMAIN — PROCEEDINGS — STATUTORY PROVISIONS.

Under the express provisions of Acts 1905, pp. 59-64, c. 48 (Burns' Ann. St. Supp. 1905, §§ 893-904), providing for condemnation, actions pending at the time the act took effect were not affected thereby. Held, that a condemnation proceeding pending when the act was passed was governed by Acts 1881, p. 502, c. 87 (Burns' Ann. St. 1901, §§ 6006-6008), regulating condemnation proceedings, even though that act were repealed by the later one.

2. SAME — COMPLAINT — AMENDMENT OF DESCRIPTION.

In condemnation proceedings, it was not error to allow an amendment of the description of the property contained in the complaint to agree with the description in the appraisal after the appraisal had been filed, since the court has power even after verdict to allow amendments to remedy defects in the description.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 523.]

3. SAME — COMPENSATION — IMPROVEMENTS MADE BY CONDEMNOR.

Where the owner of land stands by and without objection permits a public schoolhouse to be constructed thereon in good faith and to be used for public school purposes until public interests and convenience become involved, the rule that a structure erected by a tort-feasor becomes a part of the land does not apply, and in an action to condemn the land the owner cannot recover the value of the improvements as part of the damages.

Appeal from Circuit Court, Greene County; O. B. Harris, Judge.

Condemnation proceedings by the Jefferson school township against Laura McClarren and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Geo. O. Sample, for appellants. Minor F. Pate, for appellee.

MONKS, J. Appellee filed in the court below a complaint to condemn certain lands

of appellant Laura McClarren, under the act of 1881 (Acts 1881, p. 592, c. 87), being sections 6006, 6007, 6008, Burns' Ann. St. 1901. After the appraisers had filed their appraisal, appellee, on leave granted by the court, amended the description of the real estate contained in the complaint to correspond with the description set out in the appraisal filed by the appraisers, to which appellants excepted. Appellants thereupon filed exceptions to the appraisal, and such proceedings were had that the court found against appellants and rendered judgment in favor of appellee.

Appellants insist that the proceedings were under the act of 1905 (Acts 1905, pp. 59-64, c. 48), being sections 893-904, Burns' Ann. St. Supp. 1905, for the reason that said act repealed the act of 1881, *supra*. Even if appellant's contention as to the repeal of said act of 1881 by the act of 1905 is correct—a question we do not need to decide—this proceeding is governed by said act of 1881, because the act of 1905, while it repeals all laws in conflict with it, provides that "this repeal shall not affect pending proceedings, but such proceedings may be completed as if this act had not been passed." The record shows that the complaint in this case was filed on March 20, 1905, and that summons was served on appellants on April 11, 1905. As the act of 1905 did not take effect until after April 11, 1905, it is evident that this cause was pending when the same took effect, and therefore is governed by the act of 1881, even if the same was repealed by said act of 1905.

It is insisted that the court erred in permitting appellee to amend the description of the real estate contained in the complaint, after the appraisal had been filed by the appraisers. The record shows that the description of the real estate in the complaint was amended to agree with the description contained in the appraisal. Error was not committed in permitting such amendment. The court had full power to allow the complaint to be amended after a finding or verdict on the exceptions to remedy any defect or incorrectness in the description of the real estate. 7 Ency. Pleading & Practice, 540, 542; 15 Cyc. 859, 860; *Midland Ry. Co. v. Smith*, 125 Ind. 509, 510, 25 N. E. 153; *Darrow v. Chicago, etc., Ry. Co.* (No. 20,979, this term) 81 N. E. 1081.

It appears from the record: That in September, 1904, appellee, believing that Charles E. McClarren, the husband of appellant, Laura McClarren, was the owner in fee simple of the real estate in controversy in this case, commenced a proceeding against him to condemn said real estate for the erection of a schoolhouse thereon under said act of 1881, and that such proceedings were had in said cause that final judgment was rendered, vesting the title in said real estate in appellee in conformity with said act of 1881. Appellant Laura McClarren was not a party

to said proceedings. That appellee, without any notice or knowledge that appellant Laura McClarren owned said real estate or claimed any interest therein, took possession thereof under said judgment with the belief that it was the owner thereof, and in good faith built thereon in 1904 lasting and valuable improvements, consisting of a public school building and fencing amounting to \$600, and the same has been ever since used for public school purposes by appellee. That appellant Laura McClarren had full notice and knowledge of the commencement of said former proceedings against her husband to condemn said real estate, and of each and all the acts and proceedings above stated. That with said notice and knowledge she, during all the time of "the construction and erection of said improvements on said real estate, lived in sight of the same, passed by and saw the same being erected and constructed, and had full notice and knowledge of the erection and construction thereof and of the purpose for which the same was being erected, and for which the same has been at all times used, and made no objection thereto, and at no time made known to appellee, or gave appellee to know or understand, that she was, or claimed to be, the owner of said real estate, until after said improvements had been completed, and after the same had been used for the use of the public schools. That thereafter, when appellee learned that she claimed to own said real estate, this proceeding was brought. Appellant claims that said improvements under the common-law rule became her property as the owner of said real estate, and that she was therefore entitled to recover the value thereof in this case as a part of her damages, and that the court erred in holding that she could not recover the same, citing *Graham v. Connersville, etc., Ry. Co.*, 36 Ind. 463, 10 Am. Rep. 53.

In *Graham v. Connersville, etc., Ry. Co.*, *supra*, cited by appellant, the court held among other things, that when a railroad company, without having acquired the right to do so, entered upon real estate and constructed a depot and other structures for the use of the company, under the common-law rule said buildings become a part of the real estate, and therefore the property of the owner of the land, and that in a proceeding subsequently brought by the company to condemn the said real estate the landowner was entitled to have the value of said improvements included as a part of his damages. The great weight of authority, however, is that when a person, corporation, or body, invested with the power of eminent domain, enters upon land with or without the consent of the owner, express or implied, and places improvements thereon, and subsequently institutes proceedings to condemn the same land, the common-law rule that a structure erected by a tort-feasor becomes a part of the land does not apply, and the owner is not entitled to the value of such improve-

ments. 15 Cyc. 763, 764; 19 Cyc. 1056; 3 Elliott on Railroads, § 998; Lewis, Eminent Domain, § 507, pp. 1142-1148; 4 Sutherland on Damages (3d Ed.) § 1076; 10 Am. & Eng. Ency. of Law, p. 1159; Louisville, etc., Ry. Co. v. Dickson, 63 Miss. 380, 56 Am. Rep. 809; Oregon, etc., Ry. Co. v. Mosler, 14 Or. 519, 13 Pac. 300, 58 Am. Rep. 321; Justice v. Railway Co., 87 Pa. 28, 31; Jones v. N. O. & S. R. Co., 70 Ala. 227, 232; International, etc., Co. v. McLane, 8 Tex. Civ. App. 665, 28 S. W. 454; Searl v. School Dist., 133 U. S. 553, 10 Sup. Ct. 374, 33 L. Ed. 740; Aldridge v. Board of Education, 15 Okl. 354, 82 Pac. 827; Burns v. School District, 61 Neb. 351, 85 N. W. 284; Chase v. Jemmett, 8 Utah, 231, 30 Pac. 757, 16 L. R. A. 805; Ellis v. Rock Island, etc., Ry. Co., 125 Ill. 82, 17 N. E. 62; Chicago, etc., Co. v. Goodwin, 111 Ill. 273, 53 Am. Rep. 622, and cases cited; St. Johnsbury, etc., Ry. Co. v. Willard, 61 Vt. 134, 17 Atl. 38, 21 L. R. A. 528, 15 Am. St. Rep. 886; Cohen v. St. Louis, etc., Ry. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; St. Louis, etc., Ry. Co. v. Nyce, 61 Kan. 394, 59 Pac. 1040, 48 L. R. A. 241, and cases cited; Jacksonville, etc., Ry. Co. v. Adams, 28 Fla. 631, 10 South. 465, 14 L. R. A. 533, and cases cited. True it was held in this state in *Graham v. Connersville Ry. Co.*, 36 Ind. 463, 10 Am. Rep. 56, cited above by appellant to sustain her contention in this case, and in *Indiana, etc., Ry. Co. v. Allen*, 113 Ind. 581, and cases cited on page 582 of 113 Ind. (15 N. E. 446, 447) and in *Midland Ry. Co. v. Smith*, 113 Ind. 233, 235, 15 N. E. 256, and cases cited, that when land is seized by a railroad company without right, the owner may maintain ejectment or injunction. But there are many exceptions to this rule. One important exception is that a failure to bring the action until public interests have intervened will prevent its successful prosecution. Acquiescence after the railroad company has entered upon its duties as a common carrier will ordinarily defeat the action. As was said by this court in *Indiana, etc., Ry. Co. v. Allen*, 113 Ind. 583, 15 N. E. 447, concerning such exceptions: "This element did not enter into the earlier cases decided by this court, and those decisions are not decisive of a case where it exists. * * * What we affirm is that acquiescence after public rights have intervened will prevent a landowner from destroying the line of road by wresting possession of a part of it from the company. This principle does not rest upon the right of the railroad corporation so much as upon considerations of public policy. * * * Compensation he may recover; possession he cannot. To the recovery of just compensation his rights are confined." *Graham v. Connersville Ry. Co.*, 36 Ind. 463, 10 Am. Rep. 56, cited by appellant in this case, *supra*, is one of the cases referred to by the court in said quotation as not being decisive of a case where such element exists. In *Midland Ry. Co. v. Smith*, 113 Ind. 233, 15 N. E. 256, a case to enjoin a railroad company

from constructing its road over appellee's land, this court said (pages 236, 237 of 113 Ind., and page 257 of 15 N. E.): "As has been seen, relief by injunction will only be granted when application therefor is seasonably made. A landowner who 'stands by' and acquiesces until a railroad corporation has expended its money and constructed its track across his land, so that the track at that point becomes part of its line, will not thereafter be entitled to invoke the aid of a court of equity in arresting an enterprise in which the public, as well as the railroad company, has an interest. Upon considerations of public policy, as well as upon recognized principles of justice, courts of equity will refuse to interfere after a railroad corporation has entered upon land with the consent or by the license of the owner, and has expended money in the construction of its road upon the strength of such license or consent, or where the landowner has acquiesced in the use of his land by the railroad company until the public interest or convenience becomes involved. *Campbell v. Indianapolis, etc., Ry. Co.*, 110 Ind. 490, 11 N. E. 482, and cases cited; *Chicago, etc., R. W. Co. v. Jones*, 103 Ind. 386, 6 N. E. 8; *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; 2 *Rorer, Railroads*, 741, 750, 751; 2 *Wood, Railway Law*, 794. Concerning the case of *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178, which is sometimes relied on as sustaining a contrary doctrine, this court said in the recent case of *City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109, that no question was made upon the delay in bringing suit or upon the acquiescence of the plaintiff." The following cases are to the same effect: *Cincinnati, etc., Ry. Co. v. Clifford*, 113 Ind. 460, 467, 15 N. E. 524; *Indiana, etc., R. R. Co. v. McBroom*, 114 Ind. 198, 200, 15 N. E. 831, and cases cited; *Louisville, etc., R. R. Co. v. Beck*, 119 Ind. 124, 21 N. E. 471; *Bravard v. Cincinnati, etc., R. R. Co.*, 115 Ind. 1, 5, 17 N. E. 183, and cases cited; *Strickler v. Midland R. R. Co.*, 125 Ind. 412, 415-417, 25 N. E. 455, and cases cited; *Porter v. Midland R. R. Co.*, 125 Ind. 476, 25 N. E. 556, and cases cited; *Midland R. R. Co. v. Smith*, 135 Ind. 348, 350-352, 35 N. E. 284, and cases cited; *Louisville, etc., R. R. Co. v. Berkey*, 136 Ind. 591, 593, 594, 36 N. E. 642, and cases cited; *Indiana, etc., R. R. Co. v. Morgan*, 162 Ind. 331, 336, 338, 70 N. E. 368, and cases cited. In *Indiana, etc., R. R. Co. v. Allen*, 100 Ind. 409, 415, 416, it was held that when a railroad company constructs its road with the knowledge of, and without objections from, the landowner, and afterwards institutes condemnation proceedings, the landowner is not entitled to recover as a part of his damages the value of the iron and cross-ties used in constructing said road on said strip of land.

It will be observed that in this case appellee in good faith expended money in the construction of the schoolhouse and fencing on

the real estate in controversy, owned by appellant, with her knowledge, and used said property for public school purposes, all with the knowledge of, and without objection from, her. By such conduct she acquiesced in said use of said land until public interests and convenience became involved. This brings this case within the rule declared in the case above cited, that the landowner cannot recover possession, but her rights are confined to the recovery of just compensation, which, as held in *Indiana*, etc., *R. R. Co. v. Allen*, 100 Ind. on pages 415, 416, and in the authorities above cited, does not include said improvements.

Judgment affirmed.

(169 Ind. 247)

ANTIOCH COAL CO. v. ROCKEY. (No. 20,869.)

(Supreme Court of Indiana. Nov. 1, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—MINERS—STATUTORY DUTY—FAILURE TO PERFORM—NEGLIGENCE PER SE.

Burns' Ann. St. 1901, § 7479, makes it the duty of a mine operator to employ a competent mining boss who shall see, as the miners advance in their excavations, that all loose coal, slate, and rock overhead are carefully secured against falling on the traveling and airways. Section 7472 makes it the duty of the boss to visit and examine every working place in the mine at least every alternate day, while the miners are, or should be, at work, and see that every place is properly secured by props and timber, and that the safety of the mine is assured. Section 7483 makes a violation of such provisions a criminal offense. *Held*, that the mine operator's failure to comply therewith constituted negligence per se, for which section 7473 authorized an injured person to maintain an action for damages, in the absence of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 177, 235-242.]

2. SAME—DELEGATION OF DUTY.

A mine operator being required by Burns' Ann. St. 1901, §§ 7472, 7479, to employ certain measurers to make and keep the working place in the mine reasonably safe, such operator could not relieve itself from liability for the results of the failure or negligence of the person to whom the performance of such duty was delegated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 175.]

3. SAME—FELLOW SERVANTS.

A mining boss, employed to inspect the safety of the mine, as required by Burns' Ann. St. 1901, § 7479, in the performance of his duty to see that the mine is safe, is the vice principal, and not the fellow servant, of a miner injured by the negligence of the boss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 422-488.]

4. SAME—COMPLAINT.

Burns' Ann. St. 1901, § 7472, makes it the duty of the mining boss, required to be employed by section 7479, to inspect, every alternate day, every working place and secure all loose coal, slate, and rock overhead, etc., and section 7483 makes a violation of the former section a criminal offense. *Held*, that a complaint for injuries to a miner by the fall of loose material from the roof of the room in which he was working, charging that the mining boss failed to visit and

examine the room, as required by statute, and that, by reason of such failure, the roof in such room was permitted to become weak and unsafe, and that the accident by which he was injured was the direct and proximate result of defendant's negligence as alleged, was not objectionable as showing that plaintiff was engaged in furnishing for himself a place to work which was constantly changing, and became dangerous by the furtherance of his operations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 816-836.]

5. SAME—SAFETY METHODS.

Burns' Ann. St. 1901, § 7472, requires operators of coal mines to cause the mining boss to examine the working places, and see that sufficient props are supplied and that the working places are made safe, and that, until such is done, no person shall be permitted to enter the unsafe place, except for the purpose of making it safe. Section 7479 declares that, as the miners advance in their excavations, the mining boss shall see that all loose coal, slate, and rocks overhead are carefully secured against falling, etc. *Held* that, where it is impracticable to secure loose coal, slate or rocks overhead in the working places by means of props, etc., it is the duty of the mining boss to see that such material is removed before the miners are permitted to resume work.

6. SAME—COMPLAINT—NEGATING DEFENSES.

As a general rule in pleading, a right of action for injuries to a miner, by the failure of the mining boss to support the mine roof, etc., as required by Burns' Ann. St. §§ 7472, 7483, etc., a substantial negation of a compliance with the statute is all that is essential to be alleged; plaintiff not being required to anticipate the question of assumed risk or contributory negligence by averring an absence of knowledge on his part of defendant's negligence.

7. SAME—EVIDENCE—SUFFICIENCY.

In an action for injuries to a miner by the alleged negligence of the mining boss in failing to inspect and prop or remove loose rock from the roof, as required by Burns' Ann. St. 1901, §§ 7472, 7479, evidence *held* sufficient to sustain the verdict for plaintiff.

8. SAME—CONTRIBUTORY NEGLIGENCE.

Where the unsafe condition of the roof of a mine in which plaintiff was employed was not shown to be open and obvious just prior to plaintiff's injury, he was not negligent in failing to make an inspection thereof by tapping in order to ascertain whether it was safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 710-722.]

9. SAME—PROGRESSIVE OPERATIONS—DANGEROUS PLACE—ASSUMED RISK.

While it was the duty of defendant's mining boss, as required by Burns' Ann. St. 1901, §§ 7472, 7479, to see that all loose coal, slate, and rock overhead was carefully removed or secured as the work progressed, before miners were permitted to resume work, a miner injured by the failure of the mining boss to perform such duty did not assume the risk incident to his working place, because the condition for safety was constantly changing as the mining progressed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 541, 557.]

10. SAME.

A coal miner engaged in making an unsafe place secure is, in general, required to look out for his own safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 541, 557.]

11. SAME—IMPUTED KNOWLEDGE.

Where blasting was a daily occurrence in a coal mine, the law would impute knowledge to the mining boss, and through him to the operator, that such blasting would tend to loosen

overhead material which would be dangerous to the miners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 243-251.]

12. APPEAL — HARMLESS ERROR — EXCLUSION OF EVIDENCE.

Defendant was not prejudiced by the exclusion of questions, where the testimony sought to be elicited was fully given in response to other interrogatories.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

13. SAME.

A miner not being required to tap the roof of his mining room to ascertain if it was dangerous, defendant, in an action for injuries to a miner, by the fall of material from the roof, was not prejudiced by the exclusion of a question as to whether tapping was the safest way to determine whether overhanging slate was loose and dangerous.

Appeal from Circuit Court, Sullivan County; A. B. Harris, Judge.

Action by William Rockey against the Antioch Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jno. S. Bays and Fred F. Bays, for appellant. Slinkard & Slinkard, for appellee.

JORDAN, J. Appellee commenced this action in the Green circuit court to recover of appellant company for personal injuries sustained by him while at work in its coal mine. The venue was changed to the Sullivan circuit court. A demurrer to the complaint for insufficiency of facts was overruled. Answer the general denial. Trial by jury. Verdict returned in favor of appellee, assessing his damages in the sum of \$600. Motion by appellant for a new trial, assigning the statutory grounds and that the court erred in not requiring the plaintiff, William Rockey, upon his cross-examination, to answer the following questions propounded by appellant: First. "Is not tapping the safest way to determine whether or not overhanging slate is loose and dangerous?" Second. "You are a practical coal miner, are you not?" The motion for new trial was denied, to which appellant excepted. Thereupon the court rendered judgment upon the verdict. The errors assigned for reversal are predicated, first, upon the overruling the demurrer to the complaint; second, in denying the motion for new trial. The complaint is in one paragraph, and among other facts charges that the defendant, the Antioch Coal Company, on August 20, 1908, and prior thereto, was a corporation, duly organized under the laws of the state of Indiana, for the purpose of mining coal. On said day, and for some time prior thereto, it was engaged in Green county, Ind., in mining coal by means of a shaft sunk from the surface of the earth to the bed of coal beneath, and by means of driving entries to the coal from which entries rooms were turned. It is averred that the defendant coal company had in its employ, engaged in mining coal in its said coal mine, 10 men and over. On said 20th day of August, plaintiff, as alleged, was in the employ of the de-

fendant as a coal miner, engaged in its said mine in mining coal, in a room and entry therein. The pleading, after averring what was the duty of the defendant, under the law, in regard to furnishing the plaintiff, its servant, with a safe place in which to perform his work, and alleging other facts in respect to the duty of its mining boss to visit and examine the working places of the miners, including the room in which plaintiff was performing his duty, etc., then alleges and shows that the defendant company had wholly failed and neglected to discharge its duty or duties in this respect. The complaint charges that said defendant negligently and carelessly failed, by and through its bank (mining) boss, to visit and examine said working place and room in which plaintiff worked at least once every alternate day while plaintiff was engaged at work therein, etc., but, on the contrary, it is alleged that its said mining boss did not visit said working place, while said plaintiff was at work, more than once during a period of one week, all of which was well known to defendant; that by reason of the defendant's failure, through its mining boss, to examine the working place where the plaintiff worked, the roof of said room and place was by the defendant negligently permitted to become weak and unsafe between the props therein and the face of the coal, and the defendant negligently suffered said roof to become dangerous; that on said 20th day of August, 1908, the roof of said room in which plaintiff was performing his work, which roof the defendant had negligently suffered and permitted to become dangerous, weak, and unsafe, as aforesaid alleged and charged, suddenly gave way, caved in, and fell upon plaintiff, thereby crushing, maiming, and injuring him, etc., by reason of which injuries he has been damaged in the sum of \$5,000, for which he demands judgment.

The only objection urged by appellant's counsel against the sufficiency of the complaint is that it discloses that the injury complained of did not occur at a working place in defendant's coal mine, where, under the law, it was compelled to use props to secure the roof thereof, or to see that its safety was assured, but they advance the argument that it appears by the complaint to have been a place wherein the conditions were constantly changing and where it was impossible to employ props, and that it must be considered and held to be a place which was furnished by the servant and not by the master. The pleading in controversy cannot be approved as a model, and possibly may be said to be open to a motion to make more specific. The pleader, however, appears to have followed the complaint which was held to be sufficient on demurrer in the case of Davis Coal Co. v. Pollard, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319. In the main, so far as the draftsman of the complaint in controversy appears to have deemed them applicable, the

same averments substantially are therein employed as were in the complaint in the latter case. Tested by the facts averred, and it appears that appellee bases his right of action upon section 13 of an act of the Legislature passed in 1891. Acts 1891, p. 59, c. 49; section 7473, Burns' Ann. St. 1901. This act provides a right of action against the owner, operator, agent, or lessee of a coal mine for any direct injury to persons or property occasioned or sustained by any violation of the provisions of said act, or for any willful failure to comply with its provisions. We note and consider other provisions of this same statute pertinent to this case. Section 19 (section 7479, Burns' Ann. St. 1901) makes it the duty of the owner, operator, agent, or lessee of all coal mines to which said act applies to employ a competent mining boss, who shall be an experienced coal miner. This section makes it the duty of such mining boss to "keep a careful watch over the ventilating apparatus and the airways" of the mine, and he is required to see, as the miners advance in their excavations, that all loose coal, slate, and rock overhead are carefully secured against falling on the traveling and airways. Section 12 (section 7472, Burns' Ann. St. 1901) enjoins upon the mining boss as his imperative duty to "visit and examine every working place in the mine at least every alternate day while the miners of such place are or should be at work, and he shall examine and see that each and every working place is properly secured by props and timber and that the safety of the mine is assured. He shall see that a sufficient supply of props and timbers are always on hand at the miners' working places. He shall also see that all loose coal, slate and rock overhead, wherein miners have to travel to and from their work, are carefully secured. Whenever such mining boss shall have an unsafe place reported to him, he shall order and direct that the same be placed in safe condition; and until such is done no person shall enter such unsafe place except for the purpose of making it safe. Whenever any miner working in said mine shall learn of said unsafe place he shall at once notify the mining boss thereof and it shall be the duty of said mining boss to give him, properly filled out, an acknowledgment of such notice in the following form," etc. A violation of the provisions of any section of the act in question is declared by section 24 (section 7483, Burns' Ann. St. 1901) to be a criminal offense. An examination of the provisions of the several statutes of this state pertaining to coal miners and their work in coal mines makes it evident that the principle purpose or object of the Legislature in the enactment of these laws was to provide more fully and effectually than does the common law for the safety and protection of this class of laborers by prescribing, as such statutes do, the particular means, methods, and measures to be used or employed, so far as practicable, by a

person, either natural or artificial, engaged in the operation of coal mines, in order that reasonably safe working places for the employes in such mines may be provided. *Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319. The Legislature having prescribed the particular means, measures and standards for securing the better protection or safety of such employes, it becomes the duty of their employer to comply with the provisions of the law, and the failure to so comply is by the law regarded as negligence per se, for which section 7473, Burns' Ann. St. 1901, supra, in the absence of contributory negligence on the part of the injured person, awards or provides a right of action for damages for a direct injury to person or property sustained thereby or resulting therefrom. *Green v. American, etc., Co.*, 163 Ind. 135, 71 N. E. 268; *Monteith v. Kokomo, etc., Co.*, 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; *Davis Coal Co. v. Pollard*, supra; *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060.

Appellant, as the authorities affirm, was required to employ the means or measures prescribed by the statute in order to make and keep the working place in its coal mine in a reasonably safe condition. Its duty was a continuing one, and the delegation thereof by appellant to another would not relieve it of liability from the results of the failure or negligence of the person so delegated to perform or discharge such duty. The mining boss which appellant employed, as required by the statute, was not, in the performance of his duties, under the law, the fellow servant of appellee, but was the representative of appellant. *Schmalstieg v. Leavenworth Coal Co.*, 65 Kan. 753, 70 Pac. 888, 59 L. R. A. 707; *Wellston Coal Co. v. Smith*, 65 Ohio St. 70, 61 N. E. 143, 55 L. R. A. 99, 87 Am. St. Rep. 547; *Linton Coal, etc., Co. v. Persons*, 11 Ind. App. 264, 39 N. E. 214; *Island Coal Co. v. Swaggerty*, 159 Ind. 664, 62 N. E. 1103, 65 N. E. 1026. A breach or negligence on his part in the discharge of these duties in the eye of the law must be imputed or attributed to appellant company, and it will be held responsible for the legitimate results from such breach or negligence. *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Schmalstieg v. Leavenworth Coal Co.*, supra; *Wellston Coal Co. v. Smith*, supra; *Linton Coal, etc., Co. v. Persons*, supra; *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060. In this latter case, in construing the provisions of the same statute herein involved, we said: "Among others, it was the duty of the mine boss, under the statute, to see that all loose stone and slate in any of the rooms were taken down or propped by means of timbers before the men were permitted to enter therein to work with the machines, and also to see 'that a sufficient supply of props and timber are always on hand at the miners' working places.'" As previously said, the complaint in question sub-

stantially follows the one in Davis Coal Co. v. Polland, supra. It charges the omission of appellant, through its mining boss, to perform or discharge a specific statutory duty, one which under the law it owed to appellee as its servant. The neglect or failure of its mining boss to visit and examine, as required by the statute, the working place in which appellee was engaged in mining coal for appellant, is expressly shown. By its averments, the complaint further discloses that, by reason of the negligence in question, the roof over the room or place in which appellee worked was permitted to become weak and unsafe, and that the accident by which he was injured was the direct or proximate cause of appellant's negligence. The complaint cannot be said to be open to the objections urged by counsel for appellant as hereinbefore stated. Their argument that appellee is shown to have been engaged in furnishing for himself a place in which to perform his work, and that in the furtherance of such work the place in question became dangerous, is not warranted, or in any manner supported by the facts alleged. Hence, under the circumstances, the cases cited and referred to as ruling such questions are not applicable.

It is further contended that, if the mining boss has by inspection discovered the weak and unsafe condition of the roof in controversy, he could not have avoided the accident, for the reason that the weakness or infirmity therein was between the props already in use and the face of the coal. Consequently it is argued that additional props and timber could not have been employed without preventing or interfering with the use of the machines. This is a mere assumption upon the part of counsel, as nothing of the kind can legitimately be inferred from the facts averred in the complaint. The mining boss, however, in his efforts under the statute to make reasonably safe the working places in the mine, is not confined to props or timbers as the only means to secure such safety. If, as insisted, it could be said under the facts alleged that it was impracticable to employ props in addition to those already in use to further support the roof, for the reason that they would prevent or interfere with the operation of the machines, then, under such circumstances, the mining boss should have caused the loose coal, slate, or rock, if any overhead, to be taken down, and until the place was made reasonably safe by such means, or others, he ought not to have permitted any of the employés to work in the place in question. In fact, section 7479, Burns' Ann. St. 1901, supra, provides that "as the miners advance in their excavations the mining boss shall see that all loose coal, slate and rocks overhead are carefully secured against falling," etc. Certainly, then, if for any reason it becomes impracticable to secure loose coal, slate, or rocks overhead in the working place in the

mine by means of timber or props, such loose coals, slate, or rock should be removed before the miners are permitted to resume their work. Appellant, by his demurrer to the complaint, conceded as true all the facts therein which were well pleaded, together with all the reasonable inferences which might be deduced from such facts. When tested by this rule, it is evident that appellee, by his complaint, has brought himself within the class entitled to the benefit of the statute, and has shown a positive violation thereof by appellant through its mining boss, and a resulting injury by reason of such violation. As a general rule, in pleading a right of action under the statute in question, a substantial negation of a compliance with its provisions upon which a plaintiff relies is all that is essential to be set forth in the complaint to show a violation of the statute. Generally speaking, it is not necessary for the plaintiff to anticipate the question of assumed risk or contributory negligence by averring an absence of knowledge on his part of the defendant's negligence. These, if available or competent, are held to be matters of defense. *Diamond Block Coal Co. v. Cuthbertson*, supra; *Davis Coal Co. v. Polland*, supra; *White, Personal Injuries in Mines*, § 355. Under the holding in *Davis Coal Co. v. Polland*, supra, the complaint in controversy is sufficient on demurrer.

Guided by the principles which we have hereinbefore announced, we pass to the consideration of the evidence which counsel for appellant assails as insufficient to sustain the judgment. We have carefully read the evidence as it appears in the record, and are satisfied with its sufficiency to uphold the judgment. Without going into details, but generally speaking, it may be said that there is evidence going to establish, among others, the following facts: Appellant is an incorporated company organized for the purpose of mining coal. At and for some time prior to the time of the accident by which appellee was injured, which occurred on the 20th of August, 1903, between 6 and 7 o'clock p. m., it had in its employ one John Eddy as its mining boss, and also had employed in working about its mine about 70 men or over, including appellee among the number. The mine which appellant was operating at and before the accident was situated about five miles west of Linton, in Green county, Ind., near the line dividing Green and Sullivan counties. There is evidence to show that appellee at the time he sustained the injury was 40 years old, and a practical or experienced miner. On the day of the accident, he and one Swaggerty were in the employ of appellant, engaged in operating a Morgan-Gardner cutting machine. For two weeks previous to said day they had been cutting with this machine, which weighed about 3,200 pounds. They had operated the machine in about 20 rooms on the west side

of the mine, including rooms 1 and 2. The room, or place, in the coal mine in which appellee was at work when injured, was known as "room No. 2." He would alternate in his work from room 1 to room 2. Witnesses testified that the latter room was off the second south entry of the mine west. There is evidence to show that for two weeks and more prior to said 20th day of August, 1903, appellant's mining boss, John Eddy, had wholly failed and neglected to visit and inspect or examine either of the rooms 1 and 2. On the 19th day of August it appears that the cutting machine operated by appellee and Swaggerty became out of repair. It was placed in the hands of a repairer and repaired, and made ready for use between 6 and 7 o'clock on the evening of the following day, when appellee and his said assistant resumed their work in room 2. The fact that the machine became out of repair was the reason that they did not resume their work until between 6 and 7 o'clock on August 20th. On the latter day they went into room No. 2 for the purpose of going to work therein, and, as means of affording them light, each had a lighted lamp in his cap. They looked around the room and at the roof, using the lights in their caps for that purpose. In fact, they appear to have fully exercised their senses of seeing and hearing in order to discover whether the room and its roof were in a safe condition for them to begin operating the machine. Upon such examination, they discovered nothing to indicate that the room or its roof was in an unsafe or dangerous condition. There is no evidence to show that the defects or unsafe condition of the roof overhead were in any manner open or obvious. Neither appellee nor his assistant tapped or sounded the roof in order to discover or ascertain in respect to its safety. After making the examination as shown, they began operating the machine, cutting the face of the coal. They had made some two or three cuts when a large piece of slate or rock, weighing about 1,000 pounds, fell from the roof on the north side of the room between the props and the face of the coal. This slate fell upon appellee, and thereby seriously injured him. He was pressed or held down upon the floor of the room by the slate for a considerable length of time before men could reach him to give assistance. There is evidence going to show that he and his helper were followed by men who did the blasting and shooting of the coal after he and his assistant had quit their work. In fact, it appears that the blasting is never done in the mine while the miners are at work therein, but is always performed after the work of the miners for the day is over. There is also evidence tending to show that if appellant's mining boss had, in obedience to the statute, made the visitation and inspection or examination as exacted, he would have discovered that the rock or slate which fell and injured appellee was loose

and liable to fall. It appears that, had the condition of the roof been tested by means of tapping or sounding, the unsafety thereof would have been discovered. The injury which appellee sustained consisted of a broken pelvis, a bruised spine, and lacerated flesh on his legs and other parts of his body. He is shown to have suffered much pain and was unconscious the greater portion of time during a period of nine days following the accident. He was taken to a hospital in Terre Haute, where an operation was performed, and he was placed in a plaster cast.

Counsel in the main renew and urge as against the sufficiency of the evidence the same argument which they advanced in respect to the sufficiency of the complaint. They insist that at the time appellee was injured he was guilty of contributory negligence, for the reason that he did not exercise the care required for his own protection. The claim is made that it was incumbent upon him to test the safety of the roof by tapping upon it. This method, they assert, is the only one by which it can be determined whether overhanging slate or rock is loose and liable to fall. It is contended that his failure to make this test must be held to be negligence on his part. This contention has no legal merit, and cannot be sustained. *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158; *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060. As previously said, there is no evidence in the case to prove that the unsafe condition of the roof was open and obvious to view, and, in the absence of this fact, it cannot be asserted that appellee was required to make an inspection of the roof by the means or method claimed in order to ascertain in regard to its safety. In *Diamond Block Coal Co. v. Cuthbertson*, supra, we said: "The law exacts of the servant the use of his faculties and senses in ascertaining whether danger actually exists, where the same is obvious or open to view; but, in the absence of apparent or known defects or perils in the place where he works, he is not bound to make an inspection thereof, or search therein in order to discover whether such place is safe or unsafe. *Baltimore, etc., R. Co. v. Roberts*, supra; *Rogers v. Leyden*, 127 Ind. 50, 28 N. E. 210; *Island Coal Co. v. Risher*, 13 Ind. App. 98, 40 N. E. 158."

It is further argued that appellee must be held to have assumed the risk or danger incident to his working place, because its character or condition for safety was constantly changing as the work of mining progressed. We believe we have fully met this argument in what was said in considering the sufficiency of the complaint. It is true that appellee and his assistant were engaged in advancing the excavations in the place or room where he was injured; but, to repeat what we have hereinbefore affirmed, as the work of these miners progressed, it became the duty of the mining boss, under the provisions of the

statute, to see that all "loose coal, slate or rock overhead," if any, in the room in question was carefully secured, and, if for any means such security could not be had, then it was his duty to see that such loose coal, slate, or rock was removed before the miners were permitted to resume their work in said room. The statute does not contemplate that an operator of a coal mine shall become an insurer of his employes working therein, but his omission to comply with the provisions of the statute is negligence per se. The safety of the miners working in a coal mine, to a great extent, depends upon the vigilance of the mining boss in the proper discharge of his duties. Of course, a coal miner who is engaged in making an unsafe or dangerous place secure is, under such circumstances, as a general rule, required to look out for his own safety. Appellee, however, was not so engaged. He was not, as counsel seemingly insist, engaged as a jerryman in cleaning up and making room No. 2 safe. Neither does it appear that the slate which fell and injured him from overhead was of a newly or recently excavated portion of the room in question. Therefore the authorities cited by counsel upon the last above enumerated points or propositions are, under the facts, not applicable or influential. It appears that the blasting done by the men who followed appellee and Swaggerty, as the work of the latter in excavating progressed, was a daily occurrence and possibly served, to an extent at least, to render loose and unsafe the slate or rock overhead in the room where these miners worked. Under the circumstances, therefore, it was very essential that appellant, through its mining boss, should exercise the care exacted by the statute. *White's Personal Injuries in Mines*, §§ 400, 412. It cannot be presumed that the mining boss, an experienced coal miner, as the law exacted, was ignorant of the daily occurrence of this blasting, and the tendency of these powder blasts to loosen slate or stone overhead in the rooms where the miners worked. Such knowledge the law would impute to him, and through him to appellant. The authorities affirm that masters are chargeable with notice, not only of what they actually know, but also of what they ought to have known; or, in other words, whatever fact which they could have known had they used or exercised ordinary care and diligence in the performance of their duties. *Shearm. and Redf. on Neg.* § 206.

Counsel next complain of the action of the court in not requiring appellee, on cross-examination, to answer the two questions hereinbefore set out. Passing the point made by appellee's counsel in regard to their form, we are satisfied that appellant was not harmed by this ruling of the court, for the reason at least that the testimony which appellant sought to elicit by the questions was fully given by appellee in response to other interrogatories propounded to him by appellant.

82 N.E.—6

Again, upon another view, appellant's case would not have been improved or strengthened had appellee answered the first of these questions in the affirmative, because, as we have herein held, it was not incumbent upon him to resort to the method of tapping or sounding the roof in order to discover whether it was safe.

Finding no available error, the judgment is affirmed.

(169 Ind. 242)

TERRE HAUTE BREWING CO. v. STATE.
(No. 21,027.)

(Supreme Court of Indiana. Oct. 31, 1907.)

1. INTOXICATING LIQUORS—SALES IN QUANTITIES OF FIVE GALLONS.

Sales of liquor in quantities of five gallons or over at a time may be lawfully made by a wholesale dealer to any person, whether a wholesaler, jobber, retailer, or consumer, without violation of the license laws.

2. SAME—UNLAWFUL SALES—INDICTMENT—SUFFICIENCY.

An allegation, in an indictment for maintaining a building in which unlawful sales of liquors were made, that the purchasers were not retailers of beer, was insufficient to show that the sales were unlawful, since they may have been made to jobbers or wholesale dealers, and not to consumers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 219, 220, 235.]

3. SAME.

The charge that such building was kept by defendant for selling liquors was not equivalent to an averment that unlawful sales of liquor were in fact made and an unlawful business carried on therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 255-257.]

4. SAME.

An indictment alleging that defendant maintained a building for the unlawful sale of beer, "which said building, and the transaction of the business aforesaid as there so done, occasions noisome smells, becomes injurious to the health," etc., "of the individuals living near such property, and to the public, and by hallooing, swearing, drinking on such premises permitted by the defendant, and by lewd," etc., "acts of immorality on the premises and in and about such building," etc., "whereby, by reason of such facts, property of the inhabitants is injured in value," etc., was insufficient for failing to affirmatively set out the facts charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 255-257.]

5. INDICTMENT AND INFORMATION—REQUISITES—RECITALS.

The facts constituting an offense must be affirmatively averred, and not introduced by way of recital only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 192.]

6. SAME—CERTAINTY.

Ambiguity and uncertainty in charging an offense, when made the ground of a motion to quash, must be taken most strongly against the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 174, 193, 194.]

Appeal from Circuit Court, Owen County;
H. H. Lee, Special Judge.

The Terre Haute Brewing Company was

indicted for maintaining a public nuisance, and appeals. Reversed.

James R. Miller, N. A. Whittaker, and Oscar Matthews, for appellant. James Bingham, Atty. Gen., for the State.

MONTGOMERY, J. Appellant was convicted of erecting and maintaining a public nuisance. It is charged that the trial court erred in overruling appellant's motions (1) to quash the indictment, (2) for a new trial, (3) in arrest of judgment, and (4) to modify the judgment.

The indictment is in two counts, differing only in the fact that the second describes the premises with particularity. The first count, omitting the formal parts, is as follows: "That one, the Terre Haute Brewing Company, a corporation, and George Teagarden, late of said county and state aforesaid, did then and there, and on divers other days before and since said time, up to the date of making this presentment, unlawfully erect, continue, use, and maintain a certain building at said county, to wit, on West Franklin street, commonly known as Railroad street, at * * * in the town of Spencer, said county and state, at, near, and among the dwelling houses and residences of many and divers inhabitants of said town, which said building is so erected, continued, used, and maintained by the defendants as a pretended wholesale house or barrel house for the unlawful sale of beer, and its delivery, distribution, and consumption by persons not retailers of such liquor, and which said building, and the transaction of the business aforesaid as there so done, occasions noisome and offensive smells, becomes injurious to the health, comfort, and property of the individuals being and living at, near, and about such property, and to the public, and by hallooing, swearing, drinking on such premises permitted by the defendants, and by lewd, lascivious acts of immorality on such premises and in and about such building, all the fault and by the permission of the defendants, and by the loading, unloading, and delivery of beer for and on behalf and at the request of these defendants, whereby, by reason of said facts so set out and each of them, the property of the inhabitants there living is injured in value, their comfortable enjoyment of life prevented, and their health and the health and comfort of the public there passing along and upon such highway and street, there situate, endangered, while the free use of the property of said inhabitants is thereby obstructed, and the comfortable enjoyment thereof prevented, to the great damage and common nuisance of all the inhabitants of said town and state there being and residing, and passing through and along and upon said street."

The gravamen of the offense attempted to be charged, as we interpret this pleading,

was the conduct of an unlawful liquor business. The essence of the charge in brief is that appellant erected, used, and maintained a certain building as a wholesale or "barrel house" for the unlawful sale of beer to persons not retailers of such liquors. The use of the word "unlawful" in this connection adds nothing to the force of the pleading. The theory of the pleader appears to have been that a sale of five gallons or more of liquor by a wholesale dealer to a consumer would be a violation of the license laws of this state. This assumption is clearly erroneous. Sales of liquor in quantities of five gallons or over at a time may be lawfully made by wholesale dealers to any person, whether such person be another wholesaler, or a jobber, retailer, or consumer, without subjecting the seller to the provisions of our license laws. *State v. Bock*, 167 Ind. 559, 79 N. E. 493.

This indictment purports to charge only that purchasers were not retailers of beer, and in the most favorable view and upon the theory of the draftsman would not be sufficiently comprehensive and specific to make such sales necessarily unlawful, since they may have been made to jobbers or wholesale dealers, and not to consumers. This charge is merely that the building was kept "for" a certain purpose. This is not equivalent to an averment that unlawful sales of liquor were in fact made and an unlawful business carried on therein. If the statute denounced the keeping of a room for the sale of liquor without a license as a crime, the offense might be committed without a showing that customers were found and sales in fact made. But crimes against the liquor license statutes in force at the time of preferring this charge consisted, not in mere purpose and intention, but in making unlawful sales of liquor. In order, therefore, to make it appear that appellant was engaged in an unlawful business, it should have been charged that at the time and place mentioned it made sales of liquor in less quantities than five gallons at a time, or made sales of liquor and suffered the same to be drunk on the premises where sold, without a license so to do.

The remaining parts of the indictment appear to be incidental to the principal charge, but are set out by way of recital, and their relation and government are not apparent and cannot be determined by grammatical rules. If appellant carried on its wholesale business so carelessly and negligently as to make unnecessary noises or occasion noisome and offensive odors, the facts should have been alleged and the charge specifically made. So, also, if it permitted men and women of immoral and lewd character to assemble and remain upon its premises, and to engage in drinking, swearing, and in acts of lasciviousness and immorality upon such premises, to the annoyance of the public, these facts should have been affirmatively charged. It is manifest that the indictment

comes far short of properly preferring any such charges. The facts constituting an offense must be affirmatively averred, and not introduced by way of recital only. They must be charged with such certainty as to fully inform the defendant of the nature of the offense preferred against him, and to enable the court and jury to understand distinctly what they are to try, and to make the record show for what crime the defendant was put in jeopardy. Ambiguity and uncertainty in charging an offense, when made the ground of a motion to quash, must be taken most strongly against the state. The affirmative allegations do not charge a criminal offense, and are not aided or strengthened by the subsequent recitals in this indictment.

Appellant's motion to quash should have been sustained. *McLaughlin v. State*, 45 Ind. 338; *Keller v. State*, 51 Ind. 111; *State v. Record*, 50 Ind. 107; *Strader v. State*, 92 Ind. 376; *State v. Cleveland, etc., Ry. Co.*, 137 Ind. 75, 36 N. E. 713; *State v. Feagans*, 148 Ind. 621, 48 N. E. 225; *Funk v. State*, 149 Ind. 338, 49 N. E. 266; *State v. Pasco*, 153 Ind. 214, 54 N. E. 802; *Johns v. State*, 159 Ind. 413, 65 N. E. 287, 59 L. R. A. 789; *Clark v. State*, 166 Ind. 288, 77 N. E. 52.

The judgment is reversed, with directions to sustain appellant's motion to quash the indictment.

JORDAN, J., did not participate in this decision.

FT. WAYNE COOPERAGE CO. v. PAGE. (No. 5,918.)¹

(Appellate Court of Indiana, Division No. 1.
Oct. 18, 1907.)

1. NUISANCE—NEGLIGENCE—USE OF BUILDINGS—PLACES NEAR HIGHWAY.

The fact that a manufacturing plant was maintained in close proximity to the public highway would not make the establishment a nuisance, or its erection and operation per se negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 143-149.]

2. NEGLIGENCE—CARE AS TO PERSONS ON ADJACENT HIGHWAY.

One may prosecute a lawful business upon his own premises so long as he does not thereby seriously affect those rightfully using an adjoining highway for travel, or does not essentially interfere with the comfortable enjoyment of life or property of adjoining owners.

3. NUISANCE—MATTERS CONSTITUTING NUISANCE.

It is not necessary that a party maintain an object actually in a highway in order to create a nuisance or to make him liable in damages to one injured by such object, but a thing may be a nuisance because it interferes with or endangers public travel, as an object at the side of the highway of such a character that it is naturally calculated to frighten horses of ordinary gentleness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 153.]

4. SAME—ACTIONS—GROUNDS OF ACTION.

Under *Burns' Ann. St. 1901*, § 290, providing that whatever is injurious to health or

indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action, a lawful business carried on in a proper place may be so erected and operated as to constitute a nuisance, and the party so offending be liable to one injured by its maintenance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 153, 158-160.]

5. PLEADING—COMPLAINT—SUFFICIENCY ON DEMURRER.

Under *Burns' Ann. St. 1901*, § 341, a complaint, to be good against a demurrer for want of facts, must exhibit enough facts in law to authorize affirmative relief, stated with sufficient clearness to enable a person of common understanding to know what is intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 105-118.]

6. NEGLIGENCE—PLEADING.

A complaint showing that in the operation by defendant of his mill great clouds of steam were emitted within eight feet of the public highway, and within six feet of the ground, which passed over the highway, producing at the same time and place loud and frightful noises, and which from its location was likely to frighten horses of ordinary gentleness, and that it did frighten plaintiff's horse and he was thereby injured, and describing the mill, its location, its proximity to the highway, etc., was not subject to a demurrer for want of facts, since the defendant was fully apprised of what the pleader thereby intended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 182-184.]

7. TRIAL—SPECIAL INTERROGATORIES AND FINDINGS—FINDINGS INCONSISTENT WITH GENERAL VERDICT.

Primary facts found by the jury in answer to interrogatories will not be allowed to overthrow the general verdict, unless they cannot be reconciled therewith on a vital point, after supporting the verdict with all reasonable inferences or inferences which may be drawn from the evidence legitimately admissible under the issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

8. SAME—INCONSISTENT FINDINGS.

Answers to special interrogatories which are contradictory neutralize each other, and cannot affect the general verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 856.]

9. HIGHWAYS—RIGHT TO USE.

Public highways are for the use of travelers, and they are entitled to use the same unobstructed in any unusual manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 417-419, 456.]

10. NEGLIGENCE—ACTIONS—QUESTIONS FOR JURY.

In an action for damages caused by the maintenance by defendant of a steam exhaust pipe near the public highway which frightened plaintiff's horse, held, that under the evidence the question whether the maintenance of the pipe at that place was an unusual obstruction of the highway was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 321.]

11. SAME—CONTRIBUTORY NEGLIGENCE.

A court cannot say as a matter of law that a person injured by reason of an obstruction in a public highway, while driving a horse well broken, roadworthy, and of ordinary gentleness along the highway with ordinary care and caution at a speed of seven miles an hour, was per se negligent, though negligence precluding a recovery for an injury under such circumstances

¹ Superseded by opinion in Supreme Court, 84 N. E. 145. Rehearing denied.

against a person maintaining the obstruction might arise where it is shown that the conditions were such that an ordinarily prudent person would anticipate danger, and that injury would reasonably and probably result from an attempt to pass the obstruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-286.]

12. TRIAL—SPECIAL INTERROGATORIES AND FINDINGS—FINDINGS INCONSISTENT WITH GENERAL VERDICT.

In an action for injuries to plaintiff caused by steam escaping from defendant's mill, which frightened his horse, the jury found specially that the plaintiff was driving a colt which had been driven around threshing engines, but not near steam and railroad cars or sawmills, and was not used to escaping steam, which plaintiff knew; that prior to the date of the injury plaintiff had passed the mill five or six times and knew its location and the location of the steam pipe; that he knew that, if steam crossed the road near the ground, it would likely frighten the colt; that he had full view of the mill for 40 rods before reaching it; that the jury did not know whether the plaintiff was paying any attention to the surroundings at the time or not; that he drove at the rate of seven miles an hour; that the colt was frightened by the steam and not by the noises from the mill; and that he shied some 30 or 35 feet from where he finally left the road, but was turned again by plaintiff into the center of the road. *Held*, that these findings are not in irreconcilable conflict with the finding of the general verdict that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

13. SAME.

In an action for injuries caused by defendant's negligent operation of his mill, in allowing the escape of quantities of steam which frightened plaintiff's horse, the special finding that on the day of the injury he was operating his mill in the usual manner, except the steam vats, and that no more than the usual amount of steam escaped, is insufficient to warrant the setting aside of a general verdict for plaintiff on the ground that it conclusively shows that defendant was not negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

14. SAME—QUESTIONS TO BE SUBMITTED.

Special interrogatories may be submitted to the jury, calling for material and pertinent primary facts, except when such facts, when found, admit of more than one reasonable inference of fact. Then an interrogatory calling for a conclusion from such inferences may be submitted and answered, but not interrogatories calling for a legal conclusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 828-835.]

15. SAME—DEFECTS.

In an action for injuries caused by plaintiff's horse being frightened by defendant's negligent operation of his mill, a special interrogatory calling for the state of mind of a companion of plaintiff, caused by the action of the horse while approaching the place of the accident, was properly refused, since an answer to it would have been immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 828-835.]

16. SAME.

Where a special interrogatory asked that if after the horse showed fright the injury could have been avoided by plaintiff alighting from the buggy and leading the animal, and the jury answered that he had no time to alight, it was not error to refuse to submit a special interrogatory asking would an ordinarily prudent man

have alighted from the buggy and led the horse when it first showed fright.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 828-835.]

17. SAME.

A special interrogatory in a personal injury action, calling for what an ordinarily prudent man would do under all the circumstances, was improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 828-835.]

18. SAME—QUESTIONS TO BE SUBMITTED.

It is not error to refuse to submit special interrogatories, where the facts elicited by them are practically brought out by answers to other interrogatories.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 828-835.]

19. SAME—RESPONSIVENESS OF FINDINGS.

Where special interrogatories are submitted to the jury, it is sufficient if the answers to all material questions are sufficiently responsive and definite to be fairly certain in meaning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 855.]

20. NEGLIGENCE—ACTS CONSTITUTING NEGLIGENCE—PROXIMATE CAUSE OF INJURY—INTERVENING EFFICIENT CAUSE.

Where plaintiff claimed damages, resulting from the steam from defendant's mill frightening his horse, defendant cannot escape liability on the ground that the steam was blown across the highway by the wind, an independent intervening agency which was the cause of the injury, where it does not appear that it was an unusual or extraordinary wind, the consequences of which could not have been reasonably anticipated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69-82.]

Appeal from Circuit Court, Miami County; Jos. N. Tillett, Judge.

Action by Charles Page against the Ft. Wayne Cooperage Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Vesey & Vesey and Loveland & Loveland, for appellant. J. S. Branyan, Milo Feightner, Lesh & Lesh, and Bailey & Cole, for appellee.

MYERS, J. Appellee brought this action against appellant to recover damages for personal injuries sustained, while driving his horse attached to a buggy upon a highway, by being thrown from the buggy in consequence of the horse becoming frightened at the noise and escaping steam from a pipe connected with appellant's stave and heading mill. The complaint was in two paragraphs. A demurrer to each paragraph for want of facts was overruled. Answer in denial, trial by jury, verdict with answers to interrogatories, and judgment for appellee in the sum of \$6,500. For a reversal of the judgment, appellant has assigned and argued three errors: (1) The insufficiency of each paragraph of the complaint to withstand the demurrer. (2) Overruling appellant's motion for judgment on the answers to interrogatories. (3) Overruling appellant's motion for a new trial.

1. Appellant argues that each paragraph of the complaint is insufficient for the reason that neither paragraph alleged that the steam

pipe maintained and operated by appellant was a nuisance; nor facts showing it to be a nuisance; that the location of the mill or pipe was improper; that the highway was largely used; that the highway was improved; that the noise was unusual or unnecessary, nor that any negligence of appellant caused unnecessary or unusual noise or steam, nor that the placing of the pipe by appellant was improper, nor that appellee received his injuries by the failure of appellant to use reasonable care and skill in preventing the escape of steam. By each paragraph of the complaint it is shown that appellant at the time of appellee's injury owned and operated a stove and heading factory, located about one mile east of the town of Roanoke, this state, and, as a part thereof, owned and maintained a steam house for the purpose of steaming its manufactured product; that this house was about 10 feet high, 10 feet wide, and 40 feet long, and situate about 8 feet south, and lengthwise parallel with the public highway running east and west to and from said town; that said house was supplied with exhaust steam from the engine which furnished the power for the operation of said mill by means of a steam pipe four inches in diameter, and from the house the steam was conducted through an iron pipe of like diameter, connected with the pipe from the engine, and along the north side of said steam house and parallel with said public highway to a point at the northeast corner of the house, and then at a right angle upward about 6 feet from the surface of the ground, and there, within 8 feet of said highway, allowed to escape in great clouds and over said highway, making a loud and frightful noise as it escaped from said pipe; "that said clouds of steam and said noise were calculated to and likely to frighten horses of ordinary gentleness driven by persons along and over said highway"; that said steam escaping in clouds as aforesaid, and passing out and over said public highway, and the peculiar and frightful noise with which said steam escaped, and all the aforesaid arrangements, were well known to appellant, as well as the fact that such arrangements and escaping steam and frightful noises were likely to frighten horses of ordinary gentleness driven by persons passing and re-passing along said highway; that appellee while driving over and along said public highway with a quiet and gentle horse hitched to a buggy, and driving in a careful and prudent manner, and without apprehending or believing any danger to exist, and when about 30 feet west of the point where appellant wrongfully and unlawfully and carelessly and negligently kept and maintained said steam house and said steam pipe, a large cloud of steam suddenly emitted from said pipe with a loud and frightful noise, and over said public highway and in front of his horse, frightening said horse and causing him to suddenly turn in said highway and run into a ditch and

over a picket fence with said vehicle and this appellee, and into an orchard, where said vehicle struck a tree, throwing appellee out of the buggy and seriously injuring him; that appellee did everything in his power to control said horse, and was unable to do so; that the injury was caused without any fault or negligence on the part of appellee, and without any notice or warning of danger from defendant, "but that the same was caused wholly by defendant unlawfully, wrongfully, carelessly, and negligently erecting and maintaining and operating said mill and steam house with said steam pipes in the manner above set out, and causing said horse to take fright at said noise and steam as above described." The facts are more directly and definitely stated in the second paragraph, and, in addition, it is alleged that at times the clouds of steam would be so dense as to completely obscure vision through it; that the steam so caused to escape therefrom along and over said public highway constituted a public nuisance; that his injuries were caused by the negligent, careless, and wrongful and unlawful maintenance of said public nuisance by appellant in the erection and operation of said steam house and pipe, and carelessly, negligently, wrongfully, and unlawfully causing the steam to escape therefrom by and over said public highway, etc. From this complaint it will be observed that appellant had erected and was operating a lawful business upon its own land. Its plant was maintained in close proximity to the public highway, but this fact alone would not make the establishment a nuisance, nor its erection and operation per se negligent. *Wabash, etc., Ry. Co. v. Farver*, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; *Wolf v. Des Moines Elevator Co.*, 126 Iowa, 659, 98 N. W. 301, 102 N. W. 517.

The rights and liabilities of parties to actions of this character cannot be fixed by any arbitrary rule, for the reason that they depend largely upon the conditions and circumstances of the particular case. However, one general rule most commonly referred to in this class of cases is to the effect that one may prosecute a lawful business upon his own premises so long as he does not thereby seriously affect those rightfully using an adjoining highway for travel or does not essentially interfere with the comfortable enjoyment of life or property of adjoining owners. *Wright v. Compton*, 53 Ind. 337; *Knight v. Goodyear, etc., Mfg. Co.*, 38 Conn. 438, 9 Am. Rep. 408; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Hannem v. Pence*, 40 Minn. 129, 41 N. W. 657, 12 Am. St. Rep. 717; *Shipley v. 50 Associates*, 101 Mass. 251, 3 Am. Rep. 346; *Dyert v. Schenck*, 23 Wend. 447, 35 Am. Dec. 575. It is not necessary that a party maintain an object actually in a highway in order to create a nuisance or to make him liable in damages to one injured by such object, but as said in *Lynn v. Hooper*, 93 Me. 46, 51, 44 Atl. 129, 47 L. R. A. 752: "A thing

may be a nuisance because it interferes with or endangers public travel, although it does not of itself constitute an obstruction of the highway. An object at the side of a highway of such a character that it is naturally calculated to frighten horses of ordinary gentleness may constitute a nuisance. *Elliot on Roads*, 482; *Cooley on Torts*, 617." See, also, *Island Coal Co. v. Clemmitt*, 19 Ind. App. 21, 49 N. E. 38; *Wright v. Compton*, supra. While a business may be lawful and the place where carried on a proper one, yet it may be so erected and operated as to constitute a nuisance (section 290, Burns' Ann. St. 1901), and the party so offending be liable in damages to one injured by its maintenance, or be liable on the theory of negligence, depending upon the facts and circumstances of the case. In the case at bar the first paragraph seems to be predicated upon the theory of a liability because of negligent acts upon the part of appellant in the operation of its mill; while the second paragraph proceeds upon the theory that appellant's negligent acts in the operation of the mill, located as it was with reference to the public highway, amounted to an obstruction to the free use of the highway, and was a nuisance. A complaint, to be good as against a demurrer for want of facts, must exhibit enough facts in law to authorize affirmative relief, and although such facts may be awkwardly stated, if they are sufficiently clear "to enable a person of common understanding to know what is intended," the demurrer should be overruled. Section 341, Burns' Ann. St. 1901. Appellee shows that in the operation of the mill by appellant great clouds of steam were emitted within eight feet of the public highway, and within six feet of the ground which passed over the highway, and at the same time and place the escaping steam produced a loud and frightful noise, and from its location was likely to frighten horses of ordinary gentleness; that it did frighten appellee's horse, and he was thereby injured. The mill, its location, its proximity to the highway was fully described and set forth in the pleading. All of these, with the other facts stated, in our judgment warrant the conclusion that appellant was thereby fully apprised of what the pleader thereby intended, and was therefore sufficient to withstand appellant's demurrer. *Knight v. Goodyear, etc.*, Mfg. Co., 38 Conn. 443, 9 Am. Rep. 406; *Island Coal Co. v. Clemmitt*, supra; *Weis v. City of Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Cincinnati, etc., R. R. Co. v. Worthington*, 30 Ind. App. 663, 670, 65 N. E. 557, 66 N. E. 478; *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485.

In *Baltimore, etc., R. Co. v. Slaughter*, 167 Ind. 330, 340, 79 N. E. 186, 7 L. R. A. (N. S.) 597, it is held that: "It is not necessary, in order to justify the submission of the question of negligence to a trial, that it should appear that the effect of the act or omission com-

plained of as negligent would in all cases, or even ordinarily, be to produce the consequence which followed. It is sufficient to present a trial question if it was to be reasonably apprehended that such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner. *Ohio, etc., R. Co. v. Trowbridge* (1890) 126 Ind. 391, 26 N. E. 64."

2. Referring to the second error to be considered, appellant insists that, after excluding the answers to interrogatories which are conclusions, it clearly appears that appellee was guilty of contributory negligence, and that appellant was not guilty of any negligence. The general verdict is a finding against appellant upon both propositions. More than 100 interrogatories were submitted and answered by the jury. It is a familiar rule that primary facts found by the jury in answer to interrogatories will not be allowed to overthrow the general verdict, unless such facts cannot be reconciled with the general verdict on a vital point, after supporting such verdict with all reasonable inferences or inferences which may be drawn from evidence legitimately admissible under the issues. *Wabash Ry. Co. v. Keister*, 163 Ind. 609, 67 N. E. 521; *Lake Shore, etc., R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425; *Rhodius v. Johnson*, 24 Ind. App. 401, 405, 56 N. E. 942; *Anderson v. Citizens' National Bank*, 38 Ind. App. 190, 76 N. E. 811. In substance, the material answers to the interrogatories locate the steam exhaust pipe 36 feet from the center of the highway and 208 feet from the Wabash Railway tracks, and from the west looking east visible for a distance of 110 feet, and mill and pipe on appellant's land; that on the day the injuries happened appellant was operating its mill in the usual manner, except the (steam) valve, and at that time with the cup off no more than the usual amount of steam escaped; that appellee was driving a colt born April 1, 1901, which had been driven to Columbia City and other places and around threshing engines on a farm, but not near steam and railroad cars or sawmills, and was not used to escaping steam, all of which appellee knew; that appellee had no reason to believe that his horse would frighten at a steam engine or at appellant's mill while in operation; that on August 30, 1904, appellee's horse, gentle and roadworthy as horses generally are, while driven by appellee along the public highway with ordinary care and caution, became frightened and uncontrollable at escaping steam from the steam exhaust pipe from the engine used by appellant in operating its mill, whereby appellee was injured; that appellee had not time to alight from the buggy after the colt became frightened and before the injury occurred; that prior to the day of the injury, appellee had passed the mill five or six times and knew of its location and the location of the steam pipe; that on the day appellee was injured no steam

passed over the highway from the time he crossed the railroad until his horse became frightened; that he saw none; that, by the use of his faculties, he could have seen steam, if any, passing over the highway from the time he approached the railroad crossing until he reached the point where his colt became frightened and finally left the road; that he knew that, while passing appellant's mill, as owned and operated, if steam crossed the road near the ground, it would likely frighten a colt three years and five months old, such as he was driving; that he had full view of the mill continuously for a distance of 40 rods before reaching it; that from the time he left the town of Roanoke he drove a gallop of seven miles an hour until he came near the mill, when his horse shied slightly to the side of the road, but was by appellee turned into the center of the road and driven forward in a trot until he came opposite the steam box, when he took fright and became unmanageable; that on the day appellee received his injuries steam at times was blown across and over said highway while appellee was approaching the mill. From the point where the horse first shied to the point where he finally left the road was about 30 to 35 feet. In answer to an interrogatory as to whether appellee was paying any attention to the surroundings or to the steam on and over the highway in front of him while driving from the railroad crossing to the point where the horse became frightened and left the road, the jury answered, "Don't know"; that only when atmospheric conditions were favorable—when wind blowing from the south—the steam would obscure vision along the highway. The answers of the jury in some particulars are contradictory; as, for instance, it is found that steam was, and that it was not, passing over the road while appellee was in a position, had he looked, to have seen it before his horse frightened. Such answers neutralize each other, and cannot affect the general verdict. Cincinnati Street R. R. Co. v. Klump, 37 Ind. App. 660, 77 N. E. 869. Appellant, in support of its motion, argues that appellee in driving his horse past appellant's mill in a trot, knowing the surroundings and likelihood that his horse would become frightened on its first approach to or acquaintance with steam in use, charged him with contributory negligence; that it was his duty to have driven slowly toward and past the mill, keeping his horse under control in order that he might better protect himself should occasion demand. Public highways are for the use of travelers, and they are entitled to use the same unobstructed in any unusual manner. Whether the maintenance by appellant of the steam exhaust pipe amounted to an unusual obstruction to the highway traveled by appellee was a question for the jury, guided by proper instructions from the court. We know of no rule of law fixing a standard of conduct for persons un-

der all circumstances. What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence.

This court cannot say as a matter of law that a person injured by reason of an obstruction in a public highway while driving a horse well broken, roadworthy, and of ordinary gentleness along such highway with ordinary care and caution at a speed of seven miles an hour was per se negligent. Negligence which would preclude a recovery for an injury, under such circumstances, against a party maintaining such obstruction, might arise where it is shown that the conditions were such that an ordinarily prudent person would anticipate danger, and that injury would reasonably and probably result from an attempt to pass the obstruction. But such is not the case before us. Here the answers show that appellant did not see the steam passing over the highway until about the time his horse became frightened. The complaint charges that great clouds of steam passed over the highway, and that it made loud and frightful noises as it escaped from the exhaust pipe. Interrogatory No. 58 and answer thereto is as follows: "Was said colt frightened and caused to run away by the noises of said mill, or by the steam therefrom? Answer. By the steam." We do not understand that any complaint was made because of the noises produced by the mill machinery, and therefore, when the jury answered that it was the steam which caused the colt to take fright, they did not say, nor does the interrogatory call for an answer, in respect to the noises made by the escaping steam. It is true that the jury found that steam was escaping at the side of and at times blew across the highway while appellee was approaching the mill. It is also found that he did not see any steam passing over the highway until about the time his horse became frightened. Whether appellee heard or knew of the noise made by the escaping steam there is no finding. True, the jury finds that only when atmospheric conditions were favorable—when wind blowing from the south—the steam would obscure the vision of persons passing along the highway, but from this finding it does not necessarily follow that the steam in such quantities as to obscure vision was necessary in order to frighten horses of ordinary gentleness. Without discussing each interrogatory, it is clear that they are not sufficient to be in irreconcilable conflict with the jury's general finding that appellee was not contributorily negligent. Appellant had the right to erect its mill upon its own land adjoining a public highway; but, when it exercised this privilege, the law imposed upon it the duty of so erecting, maintaining, and operating the mill as not to thereby materially endanger persons lawfully traveling over such highway under all the surroundings and ordinary weather conditions which an ordinarily pru-

dent person ought to know would likely arise in that locality. This principle of law is based upon the theory that "all persons are required to foresee and provide against the probable consequence of their acts." Louisville, etc., Ry. Co. v. Nitsche, 126 Ind. 229, 233, 26 N. E. 51, 52, 9 L. R. A. 750, 22 Am. St. Rep. 582. The jury found that on the day of the accident in question appellant was operating its mill in the usual manner, except the (steam) vats, and, with the cup off, no more than the usual amount of steam escaped. This finding is not sufficient to set aside the general verdict upon the ground that it conclusively shows that appellant was not negligent. It may have been operating the mill on that day as was its custom, and still have been negligent. It is the unusual—"frightful"—noises from escaping steam and the steam in great clouds near the ground passing over the highway which is charged to be the proximate cause of the injury. It is stated that the wind carried the steam across the highway, and no doubt such was the fact, but it is not shown that the wind on that day was so unusual and uncommon that its consequences could not have been reasonably anticipated. For cases more or less bearing upon the questions before us, see *Lauer v. Palms*, 129 Mich. 672, 89 N. W. 694, 58 L. R. A. 67; *Cork v. Blossom*, 162 Mass. 330, 38 N. E. 495, 26 L. R. A. 256, 44 Am. St. Rep. 362; *Cooper v. Randall*, 53 Ill. 24; *Hannem v. Pence*, 40 Minn. 127, 41 N. W. 657, 12 Am. St. Rep. 717; *Gagg v. Vetter*, 41 Ind. 228, 18 Am. Rep. 322; *Wright v. Compton*, 53 Ind. 341; *Wolf v. Des Moines Elevator Co.*, supra. The court in the case last cited, after discussing the present day demand and right to erect manufacturing establishments near public highways, and that the travelling public must submit to the usual noises attending the operation of such establishment, on page 663 of 126 Iowa, and page 302 of 98 N. W., say: "On the other hand, it is said to be that the traveling public is entitled to make free use of highways and streets, and an adjoining property owner has no right to so use his property as to interrupt or interfere with the exercise of such right by creating or maintaining conditions unnecessarily dangerous, either in the way of producing unusual noises calculated to frighten horses ordinarily tractable and subject to control or otherwise. *Parker v. Union Woolen Co.*, 42 Conn. 402; *Smethurst v. Ind. Cong. Church*, 148 Mass. 263, 19 N. E. 387, 2 L. R. A. 695, 12 Am. St. Rep. 550; *Island Coal Co. v. Clemmitt*, 19 Ind. App. 21, 49 N. E. 83."

3. Appellant, in support of its motion for a new trial, insists that the court erred (1) in refusing to submit certain interrogatories to the jury; (2) in refusing to require the jury to make more specific answers to certain interrogatories submitted; and (3) that the verdict of the jury is not sustained by sufficient evidence. The court refused to submit to the

jury seven interrogatories presented by appellant. Our practice authorizes the submission of interrogatories to the jury calling for material and pertinent primary facts only, except when such facts, when found, admit of more than one reasonable inference of fact. Then an interrogatory calling for a conclusion from such inferences may be submitted and answered. *Citizens' Street R. R. Co. v. Reed*, 151 Ind. 396, 51 N. E. 477. But an interrogatory calling for a legal conclusion should not be submitted. *Chicago, etc., R. R. Co. v. Olander*, 116 Ind. 259, 264, 15 N. E. 227, 19 N. E. 110; *Ohio, etc., Ry. Co. v. Stansberry*, 132 Ind. 533, 32 N. E. 218. The first interrogatory in question clearly calls for a conclusion upon certain assumed facts. The second calls for the state of mind of a companion of appellee caused by the action or conduct of the horse while upon or approaching the railroad crossing. An answer to this interrogatory would have been immaterial. No. 76: "Would an ordinarily prudent man have alighted from the buggy and lead the colt when it first showed fright?" The interrogatory preceding this one asked if, after the horse showed fright, the injury could have been avoided by appellee alighting from the buggy and leading the animal. The answer thereto was: "Had not time to alight." Taking these interrogatories together, there was no error in refusing to submit No. 76. It also called for what an ordinarily prudent man would do under all the circumstances, and was improper. *Ohio & Mississippi Ry. Co. v. Stansberry*, supra. The facts sought to be elicited by interrogatories Nos. 95, 96, 97, and 98 were practically brought out by answers to other interrogatories. The reasons stated why the other interrogatories were improper apply to the four last mentioned. The second reason argued in support of a new trial is the overruling of appellant's motion for more specific and definite answers to 23 interrogatories. We have carefully examined and considered all of these interrogatories and answers, and find no reason for disturbing the action of the trial court. It will answer no good purpose to take the space to discuss each of these answers. It is sufficient to say that the answers to all material questions are sufficiently responsive and definite to be fairly certain in meaning. This is all that is required.

Upon the question of evidence to support the verdict, appellant contends that there is no evidence in this case showing that, independently of the action of the elements, the escaping steam in question could ever become dangerous to persons traveling on the highway with horses. This contention is based upon the theory that the evidence shows that the wind was the active and independent intervening agent, without which the injury would not have happened. We have carefully read the evidence, for, to our minds, it is clear that persons conducting manufacturing establishments or other lawful enterprises

wholly upon their own land ought not to be held in damages, where it is clear that the cause of the accident emanated from abnormal or extraordinary conditions which an ordinarily prudent person could not reasonably be expected to anticipate. The evidence as disclosed by the record in the case at bar does not impress us in the belief that the elements on the day of the accident were other than ordinary in that locality. This being true, the argument of appellant is answered by the court in Louisville, etc., R. Co. v. Nitsche, 128 Ind. 235, 28 N. E. 53, 9 L. R. A. 750, 22 Am. St. Rep. 582: "It is difficult, if not impossible, to find a substantial reason for holding that an ordinary wind is an independent intervening agency, for what occurs in the usual course of nature, and is not abnormal or extraordinary, cannot be regarded as an independent agency. * * * Extraordinary winds may justly be regarded as independent intervening agencies; but not so winds which are usual, and prevail without disturbing the normal condition of nature."

Judgment affirmed.

(43 Ind. App. 321)

COURT OF HONOR v. HUTCHENS.¹
(No. 5,857.)

(Appellate Court of Indiana, Division No. 1.
Nov. 1, 1907.)

**INSURANCE—MUTUAL BENEFIT INSURANCE—
BY-LAWS—AMENDMENTS.**

A benefit certificate, under which a person was insured, made suicide while sane a complete defense against the contract of insurance. The constitution and by-laws were made a part of the contract; the former providing that after two years a certificate should be incontestable, except for fraud, violation of the constitution or laws, or failure to pay assessments. After insured had paid his assessments for five years, a by-law was adopted providing that, if a member committed suicide, only a part of the face of the certificate should be paid. *Held*, that the by-law, having been passed after the defense of suicide had become unavailable, was void as to that certificate, since it impaired the obligation of a contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1855.]

Appeal from Superior Court, Vanderburgh County; Alexander Gilchrist, Judge.

Action by Rosa D. Hutchens against the Court of Honor. From a judgment for plaintiff, defendant appeals. Affirmed.

See 79 N. E. 409.

C. L. Wedding and W. B. Risse, for appellant. Spencer & Brill and G. K. Denton, for appellee.

WATSON, P. J. The question involved in this appeal upon which the final disposition of the cause depends is reduced to a very narrow limit. It is not necessary to its consideration herein that the general rules governing associations doing a life insurance business, such as appellant is conducting, should be reviewed. Appellant issued to Thomas H.

Hutchens a contract of membership in accordance with his written application therefor, in which appellee was designated as the beneficiary and by the terms of which she was entitled, upon his death, to the amount of one assessment, not exceeding \$2,000. The constitution and by-laws of the order were made a part of the contract. One clause of the application was in terms as follows: "I further agree that this order shall not be responsible under this contract, if my health shall become impaired by the use of narcotics, or alcoholic, vinous, or malt liquors, or shall die in consequence of a duel, or by suicide, whether sane or insane." It is averred in an answer that said Hutchens committed suicide while sane. Under the terms of the contract stated there can be no doubt but that such fact constituted a complete defense to appellee's action. The certificate contains a provision as follows: "This order will not pay the benefits of members who commit suicide, whether sane or insane, except it be committed in delirium resulting from illness, or while the member is under treatment for insanity, or has been judicially declared to be insane; but in all cases not within said exceptions the amount of money contributed to the benefit fund by such members shall be returned and shall be paid to the beneficiaries out of said fund in lieu of the benefit." "I hereby accept the above benefit certificate and agree to all the conditions therein contained. Thomas H. Hutchens." This provision in no way changes the fact that suicide while sane was, when the policy was written, a complete defense as against the contract of insurance. The mere return of the premium paid was not, nor did it purport to be, a carrying out of the contract of insurance on its part, so that, had the assured at once taken his own life after the policy went into effect, the appellant would have had a complete defense to an action upon the contract.

The constitution of the appellant, however, at the time such certificate was issued, contained a provision as follows: "After two years certificates of membership shall be incontestable for any cause except fraud, violation of the constitution or laws of this order or a failure to pay the assessments for the benefit and general funds, as provided by the laws." The assured paid his assessments for more than five years. After the expiration of the two years specified in said article of the constitution said certificate became incontestable for any cause except those specified therein, and the defense of suicide was, after such period, no longer available. The appellant society, which had power under the contract to make all reasonable changes in its constitution and by-laws, enacted, after the expiration of the period as aforesaid, and after the defense of suicide had become unavailable, a by-law in terms as follows: "If a benefit member commits suicide, whether

¹ Rehearing denied. Transfer denied.

sane or insane, voluntary or involuntary, there shall be payable to the beneficiaries entitled thereto five (5) per cent. of the face of the certificate for each year he shall have been continuously a member of the society, and after twenty (20) years of continuous membership the certificate shall be payable in full." No question as to the authority of the society to make or change its by-laws, generally speaking, is involved in this case, but by the terms of the contract the appellant had become absolutely liable for the payment of \$2,000, and could not thereafter discharge such liability to the extent of \$1,500 by the enactment of a by-law any more than it could discharge its entire liability by such an act (it admitting liability to the amount of \$500). The authorities are to the effect that such a by-law, thus amended and applied to the facts above stated, impairs the obligation of a contract, and is therefore invalid. *Mareck v. Mutual Reserve Fund Life Ass'n*, 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613; *Royal Circle v. Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; *Supreme Council Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153; *Langan v. Supreme Council Am. L. of H.*, 174 N. Y. 266, 66 N. E. 932; *Newhall v. American Legion of Honor*, 181 Mass. 111, 63 N. E. 1; *Russ v. Legion of Honor*, 110 La. 588, 34 South. 697, 98 Am. St. Rep. 469; *Hale v. Equitable Union*, 168 Pa. 377, 31 Atl. 1066.

The judgment is accordingly affirmed.

(40 Ind. App. 471)

HAYS v. HAYS. (No. 6,060.)

(Appellate Court of Indiana, Division No. 2.
Nov. 1, 1907.)

1. DIVORCE—PLEADING—CONSTRUCTION.

The petition in a divorce case is to be liberally construed as to all matters of form, but ambiguous, doubtful, and defective statements of fact are to be construed strictly against the pleader.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 283-286; vol. 39, Pleading, § 66.]

2. PLEADING—DEMURRER.

A demurrer to a pleading admits only the issuable facts alleged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 525-534.]

3. DIVORCE—PETITION—SEPARATION.

Where the only averment in a petition for divorce with reference to separation at the time the complaint was filed was the allegation that plaintiff and defendant were married on June 11, 1875, and lived together as husband and wife until November 17, 1904, when defendant, by a continuous and systematic course of abuse, which had been kept up for more than five years, drove plaintiff from his home, such allegation was consistent with the fact that they were living together at the time the complaint was filed, and therefore rendered the petition fatally defective.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 300.]

Appeal from Circuit Court, Monroe County; James B. Wilson, Judge.

Action by Albert H. Hays against Annie J. Hays. From a judgment for plaintiff, defendant appeals. Reversed, with instructions.

John R. East and Rufus H. East, for appellant. Miers & Corr, for appellee.

RABB, J. Appellee sued appellant for divorce. Appellant's demurrer to the complaint was overruled, answer filed, trial, finding and decree in favor of appellee for a divorce. The record here properly presents the question as to the sufficiency of the complaint to withstand a demurrer. The complaint avers that the parties were married on June 11, 1875, and continued to live together as husband and wife until the 17th day of November, 1904, "when the defendant, by a continuous and systematic course of abuse, which had been kept up for more than five years, drove this plaintiff from home; that she was cruel and inhuman in her treatment of plaintiff, in this: that she on the ——— day of September, 1904, and on divers other occasions, struck, and slapped him in the face and on the head, and kicked him, and on said occasion, as well as on many other times, scolded, abused, and quarreled at him, and called him all kinds of hard names, and on the ——— day of September, 1904, unjustly and cruelly accused him of adultery with ———, and many other women, without cause, and on said occasion and divers others defendant threatened to kill this plaintiff, and threatened to poison him, and called him all kinds of vile names, and made life miserable."

The statute requires that a petition for divorce shall specify the causes therefor with certainty to a common intent. The Code requires that the "complaint in a civil action shall contain a statement of the facts constituting the cause of action, in plain and concise language, without repetition, in such manner as to enable a person of common understanding to know what is intended." These statutory rules, while not couched in the same language, have the same meaning. 6 Ency. of P. & Pr. 249, 250, and cases cited. And there is certainly no reason why a more lax rule of construction should be applied by the courts in construing petitions for divorce than those that apply in construing a complaint in an ordinary civil action. Courts are guided by the same rules of construction in both classes of cases. The petition in a divorce case, as the complaint in a civil case, is to be liberally construed as to all matters of form; but ambiguous, doubtful, and defective statements of fact are to be construed most strictly against the pleader. *State ex rel. MacKenzie v. Casteel*, 110 Ind. 174, 11 N. E. 219; *Pond, Adm'r, v. Sweetser*, 85 Ind. 144; *Chicago, etc., v. McDaniel*, 134 Ind. 171, 32 N. E. 728, 33 N. E. 769; *Cincinnati, etc., Co. v. Smock*, 133 Ind. 411, 33 N. E. 108; *City of Indpls. v. Crans*, 28 Ind.

App. 587, 63 N. E. 478; *Shenk v. Stahl*, 35 Ind. App. 498, 74 N. E. 538; *Heintz v. Mueller*, 19 Ind. App. 240, 49 N. E. 293. And specific statements control the general averments. *Ragsdale v. Mitchell*, 97 Ind. 458; *Spencer v. McGonagle*, 107 Ind. 410, 8 N. E. 266; *McCrory v. Little*, 136 Ind. 88, 35 N. E. 836; *Williams v. Hanly*, 16 Ind. App. 464, 45 N. E. 622. A demurrer to a pleading admits all issuable facts alleged in the pleading, but none other. *Winstandley v. Rariden*, 110 Ind. 140, 11 N. E. 15; *Western Union Tel. Co. v. Taggart*, 141 Ind. 281, 40 N. E. 1051, 60 L. R. A. 671; *Sullivan v. O'Hara*, 1 Ind. App. 261, 27 N. E. 590; *Germania, etc., Co. v. Warner*, 13 Ind. App. 468, 41 N. E. 969.

The only averment in the complaint with reference to the subject of the separation of the parties at the time the complaint was filed is the averment reading as follows: "That the plaintiff and defendant were married on June 11, 1875, and continued to live together as husband and wife until the 17th day of November, 1904, when the defendant, by continuous and systematic course of abuse, which had been kept up for more than five years, drove this plaintiff from home." It is held in the case of *Burns v. Burns*, 60 Ind. 259, that a complaint for divorce should allege the separation of the parties, and that the fact should be proven on the trial. A majority of the members of this court hold that the allegations contained in the complaint are not a sufficient showing of the separation; that, at most, the fact is but inferentially stated, and that the allegations contained in the complaint leave room for the inference that the parties were still living together as husband and wife at the time the complaint was filed; that the averment that "the plaintiff was driven from home on the 17th day of November, 1904, by the systematic course of abuse, which had been continued by the defendant for more than five years," is not tantamount to the averment that they were separated, and that the matrimonial relation between them had been permanently discontinued, and for this reason that the demurrer to the complaint should have been sustained. It is the view of the writer that the complaint affirmatively shows condonement; that the only matrimonial offenses charged against the defendant are charged to have been committed in September. It is true that the complaint does charge that these same offenses were committed at divers other times, but it will not be presumed that they were committed after the specific date named in the complaint. Whatever doubt the plaintiff has permitted to come into the complaint on account of its allegations as to the time when the matrimonial offenses were committed by the defendant, such doubts must be resolved against the plaintiff, and therefore it will be presumed that the date fixed by him as the — day of September, 1904, was the

date of the last act of cruelty charged, and the complaint without question affirmatively shows that the parties continued to live together until the 17th day of November as husband and wife.

In deciding the case of *Burns v. Burns*, supra, the court say: "As a general legal proposition, it may be asserted that condonation of the offense, or wrong, which might be a cause of divorce, will bar a suit by the condoning party for a divorce on account of such offense. Condonation may be inferred from the facts of living and cohabiting by the injured party with the offender after knowledge of the commission of the offense. Cohabitation will be inferred, nothing appearing to the contrary, from the fact of the living together of husband and wife. * * * But in cases of cruel treatment and failure to provide, of which the present is one, the knowledge of the commission of the offense or offenses by the injured party is necessarily coexistent with the commission of the injury, because it operates, or is inflicted, directly upon her or his own person. Hence a continuous living and cohabiting with the offender must, prima facie, at all events, be accompanied with or by a succession of condonations while such living and cohabiting continue. * * * We arrive at the conclusion, therefore, that a complaint for a divorce should allege the separation of the parties, and that the fact should be proved on the trial." And the complaint in this case, showing affirmatively that the parties lived together as husband and wife for two months subsequent to the date of the wrongful acts charged against appellant as grounds for divorce, shows condonement upon the face of the complaint. The logic of the *Burns Case*, supra, applies with full force to the facts set up in this complaint. It was held in that case that a complaint for divorce must allege a separation of the parties, for the reason that their living together as husband and wife would constitute a condonement, and it was because of the fact that condonement would be presumed from their living together that it is necessary that the complaint should aver a separation. And where the complaint, as it does in this case, shows that the parties continued to live together as husband and wife subsequent to the commission of the alleged matrimonial wrongs complained of, and showing no subsequent matrimonial offense, it is the writer's opinion that the complaint is bad, and that the demurrer should have been sustained for the reason that it affirmatively shows a condonement. It has been held by the Supreme Court of this state in the case of *Lewis v. Lewis*, 9 Ind. 105, and followed by this court in the case of *Breedlove v. Breedlove*, 27 Ind. App. 560, 61 N. E. 560, that condonement is a special defense that must be pled, and that it may not be proved under general denial.

Recognizing this rule, we think it does not

apply where the condonement appears upon the face of the complaint, and for that reason the writer holds the complaint is insufficient, and the demurrer thereto should have been sustained.

Cause reversed, with instructions to the court below to sustain the demurrer to the complaint.

(42 Ind. App. 537)

ALCON v. KOONS. (No. 5,955.)¹

(Appellate Court of Indiana, Division No. 2.
Nov. 1, 1907.)

1. GUARDIAN AND WARD — ACCOUNT OF GUARDIAN—TRIAL—FINDINGS.

On a trial of exceptions to a guardian's report, it is proper practice, on request, for the court to specially find the facts, and to state conclusions of law thereon.

2. SAME—DUTIES OF GUARDIAN.

Under the express provisions of Burns' Ann. St. 1901, § 2685, subd. 2, it is the duty of a guardian to manage the estate for the best interest of his ward; the discharge of such duty depending largely, if not wholly, on the condition of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, §§ 168-171.]

3. SAME—DUTY TO ACCOUNT—FAILURE TO ACCOUNT—PENALTY.

Under the express provisions of Burns' Ann. St. 1901, § 2685, subd. 3, if a guardian fails to render an account of his trust every two years, he is liable to a penalty of 10 per cent. of the entire estate, and to a forfeiture of allowance for services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 475.]

4. SAME—PURPOSE OF STATUTE.

The purpose of Burns' Ann. St. 1901, § 2685, subd. 3, requiring guardians to account every two years, was to obtain in permanent and reliable form from time to time statements of the condition of estates for the information of the court and the protection of the wards.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, §§ 461-475.]

5. SAME—PAYMENT OF DEBTS.

It is not only the statutory duty of a guardian to manage the estate for the ward's best interest, but the guardian is specifically required to pay all just debts due from the ward out of the estate in his hands by Burns' Ann. St. 1901, § 2685, subd. 5.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, §§ 284-274.]

6. SAME—SALE OF REAL ESTATE—PAYMENT OF DEBTS.

Whenever necessary to pay debts of a ward or to discharge liens, the court may, on the application of the guardian, order a sale of the ward's real estate, or a portion thereof, as authorized by Burns' Ann. St. 1901, § 2692.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, §§ 326, 327.]

7. SAME—PETITION—REQUISITES.

On an application by a guardian for a sale of the ward's real estate to pay debts, the guardian must set forth in detail the facts connected with the estate, as required by Burns' Ann. St. 1901, § 2693.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, §§ 340-344.]

8. SAME—REPORT—EXCEPTIONS.

When a guardian files a report to which exceptions are taken, the burden is on him to establish facts entitling him to a discharge.

9. SAME.

A guardian filing a final report and seeking to be discharged is regarded as the plaintiff in the accounting proceeding.

10. INSANE PERSONS—GUARDIANSHIP—NEGLECT OF GUARDIAN.

Where an insane person under guardianship held two pieces of real estate, subject to a mortgage, one of the lots being worth \$800 and the other \$200 more than enough to redeem, but the guardian, without applying to an order of sale or endeavoring to sell the ward's equity of redemption, or redeem the land, permitted the ward's equity of redemption to be barred by foreclosure proceedings, he did not exercise such care of the estate as an ordinarily prudent man would have exercised, and was therefore responsible to the ward for the loss sustained.

Comstock, C. J., and Rabb, J., dissenting.

Appeal from Circuit Court, Marion County; H. C. Allen, Judge.

Judicial accounting by Charles Alcon, as guardian of the estate of William H. Koons. Exceptions were filed to his report, and, from an order sustaining certain of them and rendering judgment against him for \$1,703.16 and costs, he appeals. Affirmed.

C. E. Weir and Edgar A. Brown, for appellant. John Coburn, S. A. Haas, Harding & Hovey, and A. U. Newman, for appellee.

ROBY, J. Appellant on August 29, 1902, filed his final report as guardian of the appellee, who was in September, 1897, adjudged to be a person of unsound mind, and on July 3, 1902, adjudged to be of sane mind. In such report he set out a detail of his receipts and expenditures, averred that the trust was fully administered, prayed for the allowance of certain sums for his services and for attorney's fees, and "that the report be approved and the trust declared closed upon the payment into court by the ward of such sum as necessary, in addition to the cash balance in the guardian's hands, to discharge the advances made to the guardian and his attorney." The appellee filed written objections to the approval of this report, a trial was had, special findings of fact made, conclusions of law stated, and judgment rendered against appellant for \$1,703.16 and costs. In the trial of exceptions to a guardian's report it is proper practice upon request to find the facts specially and to state conclusions of law thereon. *Swift v. Harley et al.*, 20 Ind. App. 615, 49 N. E. 1069; *Wysong v. Nealls et al.*, 13 Ind. App. 165, 41 N. E. 388; *Peterson v. Erwin*, 23 Ind. App. 330, 62 N. E. 719; *Wainright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591.

The exceptions were sustained as to three matters therein specified and overruled as to all others. It will only be necessary to consider those in which the specifications were sustained. The second finding is substantially as follows: That on September 22, 1897, appellee was the owner of an equity of redemption in lot 32, in Lockwood & McLean's addition to the city of Indianapolis, and that said real estate was sold on decree

¹ Rehearing denied, 84 N. E. 1104. Transfer to Supreme Court denied.

of foreclosure July 17, 1897, for \$655.37. That from the appointment of appellant as guardian until July 16, 1898, the lot was reasonably worth fully \$800 more than the amount necessary for its redemption, and that appellant, as guardian, carelessly and negligently failed to make any reasonable effort to sell or dispose of his ward's equity in said property at any time during the year allowed by law for the redemption thereof, and further negligently failed to convert other property belonging to his ward into money with which to redeem the said property. That the guardian did not exercise the care and prudence in the management of the estate that an ordinarily prudent man employs in his own affairs, and that by reason of his carelessness and negligence the guardian had damaged the trust in the sum of \$800. The third finding is a practical duplicate of the second, describing a different lot worth \$200 more than the amount necessary to redeem. The duty of the guardian is "to manage the estate for the best interest of his ward." Section 2685, subd. 2, Burns' Ann. St. 1901. The discharge of this duty depends "largely if not wholly upon the condition of the estate." *Ray v. McGinnis*, 81 Ind. 451, 454. In the case cited the guardian was recompensed for money borrowed by him to discharge incumbrances upon his ward's land. See, also, *Taylor v. Calvert*, 138 Ind. 67, 78, 37 N. E. 531, and *Jones v. Crowell*, 143 Ind. 218, 42 N. E. 612. If a guardian fails to render an account of his trust every two years, he is liable to a penalty of 10 per centum of the entire estate, and shall receive no allowance for services. Section 2685, subd. 3, Burns' Ann. St. 1901. "Its obvious purpose is to require guardians having charge of the estates of minors to furnish in permanent and reliable form from time to time statements of the condition of estates intrusted to their management for the information of the proper court and the protection of wards." *Elce-man v. State ex rel. Leonard*, 75 Ind. 46, 48. It is not only the statutory duty of a guardian to manage the estate for the best interest of his ward, but he is "specifically required" to pay all just debts due from the ward out of the estate in his hands. Section 2685, subd. 5, Burns' Ann. St. 1901. "Whenever necessary for the * * * payment of the just debts of any minor or for the discharge of any liens on the real estate of such minor the court may upon the application of such guardian order the sale of the ward's real estate or a portion thereof." Section 2692, Burns' Ann. St. 1901. In an application for such sale the guardian is required to set forth in detail the facts connected with the estate. Section 2693, Burns' Ann. St. 1901; *Slaughter v. Favorite*, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106; *State ex rel. Millice v. Petersen*, 36 Ind. App. 269, 75 N. E. 602. It follows from the specific duties imposed upon guardians by the statute, as well as from the general character of the trust, that it was the

duty of the appellant to know every fact upon which the exceptions taken to his report depend, and, knowing them, to communicate them to the court for its information and the protection of the ward. If he had filed a petition for an order to sell the real estate of the ward, it would have been necessary to set out therein the value of the various tracts and the amount of incumbrance thereon. Had this been done and an order of sale made, but no property sold for lack of buyers, the guardian would occupy a much different position. If he had made a full report, upon which, after investigation, the court had concluded it was useless to offer the lands for sale, the guardian would not, in the absence of fraud, be liable for anything. The ward was not under any duty to instruct the guardian or advise the court. The only reason for a guardianship lay in his inability. It follows that, when a guardian files a report and exceptions are taken to it, the burden is upon him to establish facts entitling him to an order of discharge. "The administrators were required to establish the correctness of their report in respect to such matters as were embraced in the exceptions filed by the appellants." *Hamlyn v. Nesbit*, 37 Ind. 284; *Taylor v. Burk*, 91 Ind. 252; *Wysong v. Nealls*, 13 Ind. App. 165, 169, 41 N. E. 388.

The guardian filing a final report and seeking to be discharged is regarded as the plaintiff. *Brownlee v. Hare*, 64 Ind. 311, 316; *Spray v. Bertram*, 165 Ind. 13, 74 N. E. 502; *Taylor v. Burk*, supra; *Johnson v. Central Trust Co.*, 159 Ind. 605, 65 N. E. 1028. The burden of proof is, however, for the purposes of this case immaterial. The facts stated in findings 2 and 3 are sufficient to establish appellant's liability in any view which can be taken. The standard of care required from a guardian is that of an ordinarily prudent man. *Slaughter v. Favorite*, supra; *Wainright v. Burroughs et al.*, 1 Ind. App. 393, 27 N. E. 591. An ordinarily prudent man owning a city lot incumbered to the amount of \$655.35, it being "reasonably worth fully" \$800 in excess of the mortgage, will make a reasonable effort to protect or realize upon his equity. The appellant did not make such effort. It was his duty to do so, and the finding that he did not makes a case against him. In *Wainright v. Burroughs*, supra, it was found that the guardian endeavored to secure a purchaser for the property, and failed to do so. Nothing of the kind appears in the finding under consideration. If there was any doubt that a man of ordinary prudence would make a reasonable effort to protect his property under the circumstances described, such doubt is removed by the application of the well-established rule by which when diverse inferences may be drawn the question becomes one of fact. *Republic Iron & Steel Co. v. Jones*, 32 Ind. App. 189, 69 N. E. 191. The damage might be nominal (*Buchanan, Adm'r, v. State ex rel.*, 106 Ind. 251, 6 N. E. 614), but the liability is to compensate the actual loss, and

that is *prima facie* the value of the thing lost, and it devolved upon the appellant to show that the land was, with the diligence he was bound to exercise, worth less (*Harlan v. Brown*, 4 Ind. App. 319, 324, 30 N. E. 928; *Latham v. Brown*, 16 Iowa, 118; *Downer v. Madison Co. Bank*, 6 Hill [N. Y.] 648).

The judgment does not in all respects follow the conclusions of law, but, in the absence of a motion to modify or correct it in the trial court, the correction cannot now be insisted upon.

Judgment affirmed.

MEYERS, WATSON, and HADLEY, JJ., concur.

COMSTOCK, C. J., and RABB, J., dissent.

COMSTOCK, C. J. (dissenting). Action arising upon the exceptions filed to the final report of Charles Alcon, guardian of William H. Koons, a person of unsound mind.

Appellant was appointed guardian of William H. Koons, the appellee, a person of unsound mind, by the circuit court of Marion county, on the 22d day of September, 1897, and served as such guardian until July 3, 1902, on which date said Koons was adjudged by the same court to be a person of sound mind. Appellant, as such guardian, filed his final report in said circuit court on August 29, 1902, in which he charged himself with a balance of \$672.17. Appellee on August 12, 1904, filed his amended exceptions to this final report, in which he made five separate objections thereto and alleged as follows: First. That at the time he was declared of unsound mind he was the owner of lot 32, in Lockwood & McLean's addition to the city of Indianapolis, which consisted of a lot with dwelling house thereon, and that it was of the value of \$2,500; that it was incumbered by a mortgage for \$500, which had been foreclosed prior to the appointment of appellant as guardian, and that under a proper decree it had been sold to the mortgagee on July 17, 1897, for the sum of \$655.37, the amount of the mortgage, with interest and costs; that there was in this real estate a right of redemption of the value of \$1,540, and that the guardian failed to inventory or appraise it or sell it, but permitted the year of redemption allowed by law to expire, and such equity thereby to be lost. Second. That he had been the owner of lot No. 160, in Jackson & Hogshire's East Washington street addition to the city of Indianapolis, which consisted of a lot and dwelling house thereon, and was of the value of \$1,600; that this had been likewise incumbered by a mortgage for \$500, which had been foreclosed, and under a proper decree the same had been sold to the mortgagee on July 17, 1897, for the sum of \$597.17, the amount of the judgment, with interest and costs; that the right of redemption in this real estate was worth \$1,000; that the guardian neglected to inventory or appraise it

or file any petition to sell it within the year allowed by law for the redemption, and that the guardianship trust had been damaged thereby in the sum of \$1,000. Third. That he had likewise been the owner of lot No. 75, in Pickin & Loftin's East Washington street addition to the city of Indianapolis, which consisted of a dwelling house thereon and other improvements, and was of the value of \$3,000; that this likewise had been incumbered by a mortgage for \$1,600, which had been foreclosed prior to the appointment of a guardian and judgment rendered on February 10, 1897, for \$2,377.52, and that on March 6, 1897, the same had been sold by the sheriff for \$2,000; that the guardian failed to take possession of certain harness and survey of the value of \$100, but allowed them to be sold by the wife of the ward, by which the trust had been damaged in the sum of \$100. Fourth. That the guardian had failed to collect the wages of the ward's minor children, to his damage in the sum of \$1,872. Fifth. That he had been likewise the owner, at the time the guardian was appointed, of certain real estate, about 250 acres of farm land in the state of Iowa, all fully described; that this land was worth \$60 per acre for farming purposes, and that, in addition, it was underlaid with beds of coal, which added \$25 per acre to its value, and that these lands were improved and under cultivation; that the guardian took no care of these lands, but he filed a petition in the probate court in the state of Iowa and obtained an order to sell the entire body of land, and afterward sold it to one J. C. Copeland, who had been one of the appraisers appointed by the court; that the lands were really worth \$75 per acre, and that they should have brought \$9,373 instead of \$1,800. The exceptions pray judgment against appellant for \$20,000. Hearing was had upon the guardian's final report, and the exceptions thereto above noted. Upon the request of appellee the court made a special finding of facts and stated six conclusions of law thereon.

The first was to the effect that said Alcon was liable to Koons for \$800, the value of the real estate described in finding No. 2, over and above the amount necessary to redeem the same; the second that Alcon was liable to Koons for \$200, the value of the real estate described in finding No. 3, over and above the amount necessary to redeem the same; the third, fourth, and fifth that the third, fourth, and fifth objections to the report were not sustained; the sixth that Koons was entitled to the immediate possession of the mortgage note then in possession of Alcon. The appellant excepted separately and severally to the first, second, and sixth conclusions, filed a motion for judgment in his favor and for a new trial, which motions were overruled. Appellee excepted severally and separately to the third, fourth, and fifth conclusions. Appellee filed a motion for a new trial, which motion the court overruled.

and rendered judgment against appellant for \$1,703.16.

For reversal appellant says that the trial court erred, first, in the conclusions of law stated on the special finding of facts; second, in overruling appellant's motion for judgment in his favor; third, in overruling his motion for a new trial.

A special finding of facts and statements of conclusions of law thereon, in the case at bar, was proper practice. *Peterson v. Erwin*, 28 Ind. App. 330, 62 N. E. 719; *Slauter v. Favorite*, 107 Ind. 292, 4 N. E. 880, 57 Am. Rep. 106; *Taylor v. Wright, Adm'r*, 93 Ind. 121; *Wainright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591; *Wysong v. Nealis*, 13 Ind. App. 166, 41 N. E. 388; *Swift, Adm'r, v. Harley*, 20 Ind. App. 615, 49 N. E. 1069. The office of a special finding is to find facts essential to support the judgment. The fact, and not evidence of a fact, is to be specially found. *Christian Church v. Shoemaker*, 20 Ind. App. 321, 50 N. E. 594. A special finding must show all of the facts necessary to warrant the conclusions of law. *Miller v. Stephenson*, 27 Ind. App. 271, 59 N. E. 398, 61 N. E. 22. If the findings are silent as to any material fact, it will be presumed to be against him on whom the burden rests.

The substance of said special findings numbered 2 and 3 is as follows: (2) That on the 22d day of September, 1897, appellee was the owner of an equity of redemption in lot No. 32 (describing it), which had been sold by the sheriff of Marion county, on a decree of foreclosure on the 17th day of July, 1897, to the mortgagee, for the sum of \$655.37, being the full amount of principal, interest, and costs adjudged against said Koons. That on the day of the appointment of said guardian and until the 16th day of July, 1898, this real estate was (reasonably) worth fully \$800 more than the amount necessary for the redemption thereof, and that appellant, as guardian, carelessly and negligently failed to make any reasonable effort to sell or dispose of his ward's equity in the property at any time during the year allowed by law for the redemption thereof, and carelessly and negligently failed to convert other property belonging to his said ward into money with which to redeem the same from sheriff's sale, and that the guardian did not exercise that degree of care and prudence in the management of said real estate, and in relation to providing means for the redemption thereof or in finding a purchaser for his ward's interest therein, as an ordinarily prudent man employs in his own affairs, and that by reason thereof the trust was damaged in the sum of \$800. (3) That on the 22d day of September, 1897, said Koons was the owner of an equity of redemption in lot No. 160 (describing it); that the same was sold by the sheriff of Marion county on a decree of foreclosure to the mortgagee on the 17th day of July, 1897, for the sum of \$597.17, being the full amount of principal, interest, and costs

adjudged against said Koons; that this real estate on the appointment of the guardian, and thereafter up to the 16th of July, 1898, was worth \$200 more than the amount necessary to redeem the same. The language following is identical with that employed in said second finding, excepting the finding that the trust was damaged in the sum of \$200. The words "carelessly and negligently," and that the "guardian did not exercise that degree of care and prudence in the management of said real estate and in relation to providing means for the redemption thereof or in finding a purchaser for his ward's interest therein, as an ordinary and prudent man employs in his own affairs," etc., are conclusions of law. They are void, and must be disregarded. *Old National Bank, etc., v. Heckman et al.*, 148 Ind. 490, 47 N. E. 953. Omitting these conclusions, and there remain only the findings that the appellee was the owner of a certain equity of redemption in the real estate described, and that the guardian failed to dispose of it during the year allowed by law for redemption. There is no finding that it was even possible for a guardian to sell said equities. The findings upon the possibility of selling the equities in the different pieces of real estate which had been sold are that they were worth fully a sum certain more than the amount received by the sheriff's sale. Such finding is not sufficient to make the guardian liable. Cash would have been necessary for the purpose of redemption, and it should appear that it was possible to realize cash out of the right of redemption. The findings do not state the market value of the real estate, or that it had any market value. The expressions "reasonably worth" or "reasonable value" are not so broad as market value. In *St. L. K., etc., R. Co. v. Chapman*, 38 Kan. 307, 16 Pac. 695, 5 Am. St. Rep. 744, and cases cited, the difference in the meaning of "reasonably worth" and "market value" are pointed out. An instruction given to the jury was approved which treated actual value and reasonable worth as synonymous, and said: "You should consider its [the lot's or real estate] reasonable worth in the mind of a prudent seller, at liberty to sell at a reasonable time for selling at usual and reasonable terms and conditions of sale." "Reasonable worth" imports the conditions of time and terms, and not a sale for cash. These findings do not fairly tend even to show that the equities could have been sold for cash within the time allowed for redemption. The alleged negligence of the guardian was not embraced in the report. Such negligence would not therefore be presumed. *Wainwright v. Smith*, 106 Ind. 239, 6 N. E. 333; *Wainright v. Burroughs*, 1 Ind. App. 393, 27 N. E. 591. As to all matters in the report of a guardian questioned by exceptions, the report is the complaint of the guardian and the burden is upon him to sustain it, but, as to negligence or nonfeasance of the guard-

lan consisting of matters outside the reported facts, the burden is upon the exceptor. The following cases are in point: Kirby v. Coles, 15 N. J. Law, 441; In re Johnson's Estate, 11 Phil. (Pa.) 83; In re Palmer, 3 Dem. Sur. (N. Y.) 129; In re Thomas, 4 Kulp (Pa.) 446; Sheppard v. Gill, 49 Ala. 162; In re Millenovich's Estate, 5 Nev. 161; Brownlee's Adm'r v. Hare et al., 64 Ind. 311. The burden was upon appellee to show the negligence of appellant in failing to redeem the equities in the real estate sold. There is no finding of any fact showing an opportunity to sell the equities, or that they might have been sold for their full value or for the amount of cash necessary to redeem them. The findings being silent on these material facts, they will be presumed to be against the appellee, and the conclusions of law based upon special findings 2 and 3 were therefore not warranted.

That the law imposes upon guardians important duties and requires that they be discharged with promptness and fidelity, that the proper court may authorize a guardian to borrow money to discharge liens upon the property of his ward, are propositions not disputed. In the case at bar the controlling question is, "Are the conclusions of law supported by the facts specially found?" This question should, we think, be answered in the negative. Conclusions of law should be based upon ultimate facts found, and not evidentiary facts. To warrant a judgment against appellant the special finding should show that the guardian failed in selling the equities of redemption when such sale could have been made, and the money realized thereby to redeem his ward's lands within the year for their redemption.

The judgment should be reversed, and a new trial had.

RABB, J., concurs in the foregoing dissenting opinion.

(40 Ind. App. 426)

TAYLOR'S ESTATE v. LARTER. (No. 6,119.)

(Appellate Court of Indiana, Division No. 2, Oct. 29, 1907.)

1. WITNESSES—TRANSACTIONS WITH DECEASED PERSONS.

Burns' Ann. St. 1901, § 506 (Rev. St. 1881, § 498), provides that in proceedings where an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, and in which a judgment or allowance may be made for or against the estate, any necessary party whose interest is adverse to the estate shall not be a competent witness as to such matters against the estate. *Held*, that minor children of a claimant for services against the decedent's estate were not disqualified to testify in the claimant's behalf.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 582-597.]

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

An affidavit on an application for a new trial for newly discovered evidence averred that

petitioner before the trial had made diligent search for evidence, that he had inquired of all persons that he had any reason to believe had any knowledge of facts which would sustain his defense, or were likely to have any knowledge of the facts, and personally interviewed them. *Held*, that the affidavit was fatally defective under the rule that, where diligence consists in making inquiries, the time, place, and circumstances of the inquiries made must be set out to show that they were made in the proper quarter and in due season.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 307, 308.]

Appeal from Circuit Court, Lawrence County; Jas. B. Wilson, Judge.

Proceeding by Leason Larter for the establishment of a claim for services against the estate of Hiram Taylor, deceased. From a judgment in favor of claimant, the estate appeals. Affirmed.

R. N. Palmer and Boruff & Boruff, for appellant. John R. East, James A. Zaring, and Rufus H. East, for appellee.

COMSTOCK, C. J. Appellee recovered judgment for \$506.25 on his claim filed in the court below for services alleged to have been rendered the deceased, Hiram Taylor, by said claimant and certain members of his family. The amount demanded was \$1,230, and the items, which were for boarding, washing, and nursing of decedent and labor performed by claimant's minor children extended over a series of years from 1898 to the death of said decedent March 17, 1905. Upon this appeal appellant discusses only the action of the court in permitting the minor children of appellee to testify in his behalf as to their services, and in refusing to grant appellant a new trial upon the ground of newly discovered evidence. The questions in this order.

In this state the general rule is that all persons are competent witnesses. Competency notwithstanding interest is the rule, and incompetency the exception. Section 506, Burns' Ann. St. 1901 (section 498, Rev. St. 1881), makes an exception to this general rule. It provides that "suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate," etc. To render such witness incompetent, he must be a necessary party to the issue, as well as to the record. Scherer v. Ingberman, 110 Ind. 428, 11 N. E. 8, 12 N. E. 304; Nicklaus et al. v. Dahn et al., 63 Ind. 87. Note, also, Sloan v. Sloan, 21 Ind. App. 815, 52 N. E. 413; Owings v. Jones et al., 151 Ind. 30, 51 N. E. 82, and cases cited. The witnesses whose competency was challenged were neither parties to the issue nor the record. The interest adverse to an

estate which under the statutes disqualifies a witness must be certain and vested, and not remote. *Connelly v. O'Connor*, 117 N. Y. 91, 22 N. E. 753; *Nearpass v. Gilman*, 104 N. Y. 506, 10 N. E. 894; *Whitman v. Foley*, 125 N. Y. 651, 26 N. E. 725. The interest of appellee's children was such as affected the weight of their testimony but not its competency.

The motion for a new trial for newly discovered evidence is based upon the affidavits of the administrator of the estate and of Charley D. and Frank Farmer, respectively. The affidavits state: That Charley D. and Frank Farmer are brothers. Charley is 47 and Frank 51 years. They show that they had known Hiram Taylor, deceased, for 15 years; that during the years 1890, 1900, 1901, 1902, and up to March, 1903, the said Taylor lived with, boarded with, nursed, and took care of the father of said affiants most of the time; that he took the time out to come to Bedford and act as janitor at a church and attend to his gardening and fruit, and such work which took a small portion of his time, and that at the rest of the time he was there staying in his house doing the aforesaid work. They further say that they did not disclose these facts because they did not know that there was a claim against the estate of decedent; that they were willing to testify to these facts. The administrator makes oath that, "before the trial of this cause, he made diligent inquiry and search for evidence to support and sustain the allegations of his various answers in said cause, and, to sustain and support the defense in said cause, that affiant inquired of all persons that he had any reason to believe had any knowledge any facts of evidence that would sustain the defense in said cause; that he made diligent search and inquiry of all persons likely to know or have any knowledge of the facts, and personally interviewed said persons as to their knowledge of the facts and evidence in said cause"; that after the trial, to wit, July 3, 1906, he learned for the first time that said Charley D. and Frank Farmer would testify to the facts set out in said affidavits. We need not determine whether the proposed new evidence is cumulative or whether it would change the result. The affidavit of the administrator does not show diligence on his part to discover the evidence in time to use it on the trial. Diligence is not shown by general allegations of fact. "The facts constituting the pretended diligence must be set forth with such particularity, definiteness, and clearness that the court may itself see on the face of the pleading that there was in fact proper diligence." *Bertram v. State ex rel.*, 32 Ind. App. 201, 69 N. E. 479; *Louisville & N. R. Co. v. Vinyard*, 39 Ind. App. —, 79 N. E. 384. "If it consists in making inquiries, the time, the place, and circumstances must be stated, to the end that the court may know that such inquiries were made in the proper quarter, and in due sea-

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son." *McDonald et al. v. Coryell et al.*, 134 Ind. 493, 34 N. E. 7, and cases cited.

Judgment affirmed.

(40 Ind. App. 460)

H. RUMELY CO. v. MYER. (No. 5,920.)

(Appellate Court of Indiana, Division No. 1, Nov. 1, 1907.)

1. MASTER AND SERVANT—RISKS ASSUMED BY SERVANT—OBVIOUS DANGERS.

An employé assumes the risk of all ordinary perils incident to the service, and is charged with knowledge of such perils as are open and obvious, or might have been discovered by him in the exercise of ordinary diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 550, 578.]

2. SAME—PLEADING—VARIANCE.

In an action for injuries because of the hazards of the place provided for the work, a general allegation of the servant's want of knowledge thereof, though sufficient when alone, may be overcome by specific statements showing that the servant must have known of the defects or dangers, or had the same means for such knowledge as the master had.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 846.]

3. APPEAL — REVIEW — PRESUMPTIONS—CARE REQUIRED IN GENERAL.

Nothing to the contrary appearing, it may be assumed on appeal in an action by an employé for personal injuries that plaintiff engaged in handling heavy machinery had sufficient help safely to perform the work assigned him; that he was a man of mature age and possessed all of his faculties, experienced, and of sufficient understanding to apprehend the dangers of the service.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3673.]

4. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK—KNOWLEDGE OF DEFECTS—DANGERS.

A corporation dealing in heavy machinery is not liable to an employé, whose duty it was to roll large traction engine wheels from one part of the factory to another over a certain way not protected from the elements, for injuries sustained while so transporting a wheel in its toppling over because of the unevenness of ice and snow on the way, which unevenness was not apparent on account of a fresh fall of snow, since the hazard was within the reasonable limits of the apprehension of a person of ordinary experience and understanding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 577, 578.]

Appeal from Circuit Court, Laporte County; John C. Richter, Judge.

Action for personal injuries by George Myer against the H. Rumely Company. From a judgment for plaintiff, defendant appeals. Judgment reversed, with instructions to sustain the demurrer to the complaint.

F. E. Osborn and W. A. McVey, for appellant. M. R. Sutherland and R. W. Smith, for appellee.

MYERS, J. Action by appellee against appellant to recover damages for personal injuries alleged to have been caused by the negligence of appellant. The issues formed by an amended complaint in one paragraph, answered by a general denial, were submitted to a jury, resulting in a verdict in favor of

appellee for \$1,800. Appellant's motion for a new trial was overruled, and judgment rendered on the verdict.

For a reversal of this judgment, appellant insists (1) that the trial court erred in overruling its demurrer to the amended complaint. By the complaint, it is made to appear that appellant, a corporation, on January 31, 1905, and the day of the accident, was engaged in manufacturing and repairing threshing machines, traction engines, and other articles, in the city of Laporte Ind.; that appellee was in its employ as a common laborer; that as such employé it was a part of his duty to assist in rolling or transporting from one part of appellant's factory to another large traction wheels composed of iron, and about 7 feet in diameter and 18 inches wide at the rim or tire, and weighing about 1,000 pounds; that on said day, and pursuant to his said employment, and in obedience to instructions from appellant, he, with three others of his co-employés, undertook to remove one of said wheels to a room known as the "wrecking room" of appellant's factory, and, in order to do so, it was necessary to roll said wheel on the ground across an open or uncovered space, and the only way provided by appellant for that purpose; that appellant negligently permitted said way to become unsafe, unfit, and in a dangerous condition for such use, in this: That appellant negligently failed to provide a roof or covering over such way, and negligently permitted said way to be and become exposed to the weather, and at that time to become covered with snow and ice, which made it rough and uneven, thereby making the same unsafe and dangerous for appellee in the work then and there engaged; that said way at the time appellee and his said co-employés were so engaged had the appearance of being safe, even and smooth by reason of a light snow having fallen on and covering the rough and uneven snow and ice, which appellant had negligently permitted to accumulate thereon; "that said roughness, unevenness, and unfit and dangerous condition of said way where plaintiff and his said co-employés were so directed to roll said wheel was well known to the defendant, and defendant well knew that said wheels were liable to become unbalanced and tip over when rolled over a rough surface, but, notwithstanding its said knowledge thereof, it, the defendant, negligently permitted said way to so remain rough, uneven, unsafe and unfit for use of this plaintiff and his said co-employés in and about the rolling of said wheel, all of which said roughness, unevenness, unsafe and unfit condition of said way was unknown to this plaintiff and his said co-employés, and of which plaintiff or his said co-employés had no knowledge whatever"; that appellee, at the direction of appellant and in the performance of his duty, and with his said co-employés, attempted to roll said wheel over and upon said way, while engaged in said work, and

while using all due care and caution said wheel came upon said rough and uneven snow and ice, and became immediately unbalanced, without any fault or negligence on the part of appellee or his co-employés so assisting, and by reason thereof fell upon and across the leg and ankle of appellee, seriously and permanently injuring him, etc. This complaint proceeds upon the theory that appellant was negligent in not furnishing appellee with a safe place to work. That an employer must use ordinary care in providing a safe place for his employés to work is no longer a question in this state. On the other hand, it is as firmly settled that the employé assumes the risk of all ordinary perils incident to the service in which he is engaged, and is charged with knowledge of such perils as are open and obvious, "or such as, by the exercise of ordinary diligence and by giving proper heed to the surroundings, he might have discovered." *Hattaway v. Atlanta Steel, etc., Co.*, 155 Ind. 507, 518, 58 N. E. 718, 722; *O'Neal v. Chicago, etc., Ry. Co.*, 132 Ind. 110, 31 N. E. 669; *Pelrice, Receiver, v. Oliver*, 18 Ind. App. 87, 47 N. E. 485. In an action by an employé against his master for damages for injuries received, attributed to the hazards of the place provided for him to work, the complaint must show his want of knowledge or notice of such defects or unsafety, and a general allegation to this effect is sufficient, but such allegation may be overcome by specific statements of fact "from which it is evident that the servant must have known of the defects or dangers, or had the same means or opportunity for such knowledge as the master had." *Baltimore, etc., R. Co. v. Hunsucker*, 33 Ind. App. 27, 70 N. E. 556; *Louisville, etc., R. R. Co. v. Kemper*, 147 Ind. 561, 565, 47 N. E. 214, and cases there cited; *Corning Steel Co. v. Pohlplatz*, 29 Ind. App. 250, 64 N. E. 476. In *Diamond Block Coal Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060, it is held that "the law exacts of the servant the use of his faculties and senses in ascertaining whether danger actually exists, where the same is obvious or open to view; but, in the absence of apparent or known defects or perils in the place where he works, he is not bound to make an inspection thereof, or search therein in order to discover whether such place is safe or unsafe"—citing authorities. "Obvious defects or perils such as are open to an ordinarily careful observation are regarded by the law as perils incident to the service, and latent defects—those not discoverable by the exercise of reasonable care—are not considered as risks incident to the employment, and therefore are never assumed by the servant."

In the case at bar the facts disclosed by the complaint show that appellee at the time he was injured was engaged in his regular employment; and, nothing to the contrary appearing, we may assume that he had sufficient help safely to perform the work assigned him, that he was a man of mature age

and possessed of all his faculties, experienced, and of sufficient understanding to apprehend the dangers of the service. *Myers v. W. C. De Pauw Co.*, 138 Ind. 590, 38 N. E. 37. He must have known the course the wheel must take to the wrecking room, for it is shown that appellant had provided but one way. If he had used his senses, he also knew that a portion of this way was uncovered and subject to the elements; the surroundings and position of the buildings; the season of the year; the climatic conditions, that snow was on the ground, and that it presented a smooth surface, and from a common knowledge and experience likely to obscure an uneven surface beneath; the size, material, and probable weight of the wheel; its tendency to tip over when rolled over a level or uneven surface; and the probable danger from its toppling over. It is the law that the servant may rest under the reasonable belief that "the master has discharged his duty under the law, and has exercised reasonable care in furnishing and maintaining a safe working place, and within reasonable limits he may act upon such assumption." *Diamond Block Coal Co. v. Cuthbertson*, supra. While appellee disclaims knowledge of the roughness, unevenness, unsafe and unfit condition of said way, yet in the face of the actual conditions surrounding him immediately before and at the time he was injured, and his opportunity to see and understand the danger that would probably or might arise in moving such a large and dangerously heavy wheel, he can hardly be heard to say that he was ignorant of that which the use of his senses, common experience, and judgment would otherwise teach him, or that he did not have the same means and opportunity of knowing the danger incident to the moving of the wheel because of the alleged defects, as that possessed by the master. *Louisville, etc., R. R. Co. v. Kemper*, supra; *Ames, Administrator, v. Lake Shore, etc., R. R. Co.*, 135 Ind. 363, 35 N. E. 117; *Peerless Stone Co. v. Wray*, 152 Ind. 27, 51 N. E. 326. In our judgment the facts as presented by the complaint warrant the conclusion that the hazard of the place where appellant was engaged in his work was within the reasonable limits of the apprehension of a person of ordinary experience and understanding. Under this view of the complaint the demurrer should have been sustained.

Judgment reversed, with instructions to sustain the demurrer to the complaint.

(40 Ind. App. 326)

GRACE v. GLOBE STOVE & RANGE CO.
(No. 5,906.)

(Appellate Court of Indiana, Division No. 1.
Oct. 8, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—GUARDING MACHINERY.

Where a line shaft was operated in defendant's factory eight feet above the floor in the usual and generally accepted manner of such

shafts, defendant was not required by statute to further guard the same to prevent injury to employés.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 228-231.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff, an experienced buffer operator in defendant's stove factory, was required to repair a belt connecting the line shaft with his machine. While endeavoring to place the belt over the shaft hanger, while the shaft was in motion, plaintiff got his arm caught and injured in the shaft. Defendant had provided a table or platform to be used in lacing belts and a friction clutch to stop the line shaft, which it was the duty of the engineer to do, when requested, and, if plaintiff had stopped the shaft while placing the belt over the hanger, he would not have been injured. He had never been instructed to perform such work in any other manner than by the safe means provided, though there was no evidence that the shaft had ever been stopped for that purpose. Held, that plaintiff voluntarily selected a dangerous method of doing the work, and that his own negligence was the proximate cause of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 745.]

3. SAME—DUTY OF EMPLOYERS.

Employers are not insurers of their employés' safety, nor are they required to use extraordinary care, but are only required to provide facilities in the manner generally accepted in other similar factories to guard against injuries to employés.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

4. SAME—PLEADING—ISSUES.

Where plaintiff was injured while preparing to repair a belt, and it was not alleged that it was the custom in the factory to adjust the belt on the shaft hanger and lace it in the manner plaintiff attempted to do, a verdict for plaintiff could not be sustained on that theory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1197.]

5. SAME—CONSTRUCTION.

Where plaintiff was injured while attempting to place a belt on the shaft hanger preparatory to relacing it, an allegation that plaintiff had often mended the belt while the shaft was in motion was not an allegation that it was the custom sanctioned by defendant to adjust the belt to the hanger, while the shaft was moving at a high rate of speed.

Appeal from Circuit Court, Howard County; J. F. Elliott, Judge.

Action by Michael Grace against the Globe Stove & Range Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Bell & Purdum, Jno. B. Joyce, and Cooper & Gerhart, for appellant. Blackledge, Shirley & Wolf, for appellee.

HADLEY, J. This is an action instituted against appellee for damages for personal injuries sustained by appellant while in the employ of appellee.

The complaint is in one paragraph, and avers that appellee is an Indiana corporation engaged in manufacturing stoves and ranges; that appellant was an employé in its factory at Kokomo; that his duty consisted in managing and operating a machine called the "buffer," which was used for the purpose of polishing metal; that said machine was driven by a belt, connecting it with a counter-

shaft directly over said machine, said countershaft being driven by a belt extending from the same to a line shaft, about 20 feet away; that said line shaft was driven at a high rate of speed by a gas engine; that the belt connecting the line shaft with the countershaft was old and frequently broke; that it was appellant's duty to mend said belt whenever it broke; that, in order to make said belt perform said work, appellant was compelled to and did use a large amount of belt dressing on said belt; that said dressing caused it to stick to said pulleys and anything else with which it came in contact; that it was the custom in said factory to throw said belt off the pulley on said line shaft every evening when work was stopped, and also at other times when said engine was stopped; that, when said belt was thrown off of said pulley, it was hung on a hanger by which said line shaft was supported and fastened to the floor above it; that said line shaft was about eight feet above the floor whereon appellant worked; that a run board had been placed about four feet above the floor under said line shaft for the workmen to stand on, so as to reach said shaft for the purpose of adjusting said belts and for any other purpose necessary; that on the 26th day of May, 1903, said belt broke; that appellant got ready to mend it; that said belt was then hanging loosely on said line shaft and countershaft; that said line shaft was in motion; that to have stopped it would have stopped much other machinery besides the machine which appellant was operating, and would have caused several men to have been idle; that appellant had often mended said belt under like circumstances; that a portion of the belt dressing that had been used on the belt as aforesaid had fallen off and adhered to said line shaft, causing its surface to become sticky and adhesive; that the motion of said line shaft kept said belt constantly moving, so that it was impossible to mend it; that appellant, for the purpose of getting said belt still, attempted to place it on the hanger before mentioned; that, in order to do so, he was compelled to get upon said run board, and thereby came in close and dangerous proximity to said line shaft; that while standing on said run board and carefully attempting to place said belt on said hanger, and while exercising due care and caution to avoid injury, said belt adhered to said line shaft and caught appellant's arm, which was thereby twisted and broken, causing injury, etc.; that on and prior to said date said line shaft was dangerous, in that it was wholly unprotected and unguarded in any way, a fact well known to appellee; that, notwithstanding such knowledge, appellee carelessly and negligently permitted said shaft to remain unprotected and unguarded; that, by reason of said negligent failure of appellee, appellant while in the performance of his duties as an employé of appellee, and

by appellee's direction and instruction, received the injury above specified.

To this complaint appellee filed general demurrer, which demurrer was overruled. Answer in general denial, trial by jury, finding for appellant by general verdict and answers to interrogatories. Upon motion, judgment rendered in favor of appellee on the answer to interrogatories. This ruling of the court is assigned as error. The answers of the jury to the interrogatories propounded show that appellant was 23 years old when he was injured; that he had been operating the buffer 23 months; that it was his duty to relace or mend said belt, and that he had been in the habit for a year or more of relacing the same; that appellee had provided for the use of appellant and its other employes a high table or platform, by means of which the employes were able to reach said belt in such a manner as to mend the same when required without coming in contact with either of said shafts or the machinery; that appellant knew prior to his injury that appellee had provided this table for said purpose; that said table was in appellee's factory at the time appellant was injured; that appellant made inquiry for said table on the date of said injury for the purpose of enabling him to reach the belt, in order to relace the same; that said table was so constructed as to be readily moved from one place to another when necessary to reach the belt connecting said line shaft with the countershaft operating said buffer; that there was a partition running parallel with and about 18 inches west of said line shaft extending from the floor to the height of about four feet, provided with a two by four scantling at the top; that this partition was not designed or intended as a walk or run board for the use of appellee's employes, but was used for that purpose; that no officer or agent of appellee had ever instructed appellant to use said partition for the purpose of reaching said line shaft or the pulley or belt connected therewith; that appellee, at the time he was injured, was attempting to adjust the belt to one of the hangers, so as to prevent the same from coming in contact with said line shaft while he was mending or relacing the same; that said line shaft was revolving at the rate of about 275 revolutions per minute at the time appellant attempted to adjust said belt to said hanger from his position on the top of said partition; that appellant's injury was caused by his arm being caught by said belt and wound around said shaft in attempting to adjust said belt to said hanger while said shaft was running at the rate of 275 revolutions per minute, and while appellant was standing on said partition; that said line shaft was provided with a friction clutch, whereby it could be thrown out of gear at any time when necessary to stop the same, in order to adjust the belt or make any necessary repairs of the appliance connected

with said line shaft; that it was the duty of the engineer in appellee's factory whenever it was necessary to adjust the belting to the pulleys connected with said line shaft, or for appellee's employes to come in contact with said line shaft or pulley in making needed repairs or adjustments, to stop said line shaft or reduce the speed thereof by means of said friction clutch so as to avoid injury to said employes so engaged in making said repairs or adjustments; that it was highly dangerous for appellant to attempt to adjust said belt to said hanger while standing on said partition wall, and while said shaft and pulley were revolving at the rate of 275 revolutions per minute; that appellant could have caused said line shaft and pulley to be stopped by means of said friction clutch by requesting the engineer to stop the same in order to enable him to adjust or attach said belt to said hanger immediately before he was injured; that no officer, superintendent, foreman, or agent of appellee had ever instructed or advised appellant to attempt to attach said belt to said hanger while said shaft and pulley were revolving or in motion; that, if appellant had caused said shaft to be stopped immediately before attempting to adjust said belt in the manner he was attempting to do when injured, he could have so adjusted the same without risk of having his arm drawn around said shaft; that it would have been much safer for appellant to have attempted to adjust said belt as he was attempting to do when injured, if he had caused said line shaft to stop long enough to enable him to make such adjustment; that appellant could have adjusted said belt to said hanger with reasonable safety, if said shaft had not been in motion at the time; that no officer, superintendent, or foreman of appellee at or prior to the time appellant was injured had any knowledge he was about to adjust said belt to said hanger while the said shaft was in motion; that it would have been necessary to stop said shaft 30 seconds in order to have enabled appellant to have attached said belt to said hanger while the same was not in motion; that, if said belt had been attached to said hanger while said line shaft was not in motion, appellant could then have mended said belt by means of said table with reasonable safety; that said line shaft was placed at such an elevation from the floor of appellee's factory as to avoid danger of coming in contact therewith by appellant while operating the machine or while appellee's employes were walking about on the floor of said factory; that, in order to come in contact with said line shaft, it was necessary for appellant to climb upon some elevation two feet or more above said floor; that said line shaft was maintained in appellee's factory at and prior to the time of appellant's injury in the usual and generally accepted manner, as such line shafts are maintained in order to best protect employes in factories from injury by

coming in contact therewith; that appellant had been familiar with the condition of the line shaft and pulley, at the point where he was injured, 23 months; that there was no condition of danger about said line shaft, pulley, or belt of which appellant was ignorant prior to his injury.

It is the theory of this action that the negligence of the appellee consisted in failing to perform the statutory duty of properly guarding the line shaft upon which appellant was injured. It is earnestly insisted by the appellee that this shaft, located as it was, eight feet from the floor, did not require any further protection; that the jury found in answer to interrogatory No. 42 that said line shaft was maintained in appellee's factory in the usual and generally accepted manner such shafts are maintained, in order to best protect employes from injury by coming in contact therewith. The statute does not require that every piece of machinery in a large building should be guarded. Factories are only required to guard against such dangers as would occur to a reasonably prudent man, as liable to happen. *Robertson v. Ford*, 164 Ind. 538, 74 N. E. 1; *Glens Falls, etc., Co. v. Travelers', etc., Co.*, 162 N. Y. 399, 56 N. E. 897; *Cobb v. Welcher*, 75 Hun, 283, 26 N. Y. Supp. 1068. It is also clear from the answers to the interrogatories that the proximate cause of appellant's injury was his own negligence. The jury found that appellee had provided a table or platform to be used in lacing belts; that it had provided a friction clutch to stop the line shaft; that it was the duty of the engineer, when requested, to stop said line shaft; that to have stopped the line shaft to have enabled appellant to have placed the belt over the hanger would not have taken over 30 seconds; that, if appellant had employed these means thus provided for the work he set about to do, he could have performed it with reasonable safety; and that to undertake it in the manner he did was highly dangerous. It is true the jury found that there was no evidence that the line shaft had ever been stopped for such purpose; but the jury also found that no officer, superintendent, or foreman of appellee had ever instructed appellant to perform this hazardous feat in any other manner than by the safe means provided, as aforesaid. It is also found that appellant knew of the safe means provided for him, and also knew the dangerous character of the manner he undertook to perform his task. This brings his act within the rule that where the employer provides a safe way for the employe to perform a given task, and the employe chooses to perform it in another and more dangerous way, and is injured thereby, the employer cannot be held liable. *Consolidated Stone Co. v. Redmon*, 23 Ind. App. 319, 55 N. E. 454; *Chamberlain v. Weymire*, 32 Ind. App. 442, 68 N. E. 306, 70 N. E. 81; *Wabash Paper Co. v. Webb*, 146 Ind. 303, 45 N. E. 474. The jury found that this shaft was maintained in the usual and

generally accepted manner, as such shafts are maintained in factories, in order to best protect its employes. Extraordinary care cannot be demanded. *Wabash Paper Co. v. Webb*, supra. Employers are not insurers of their employes' safety. *Robertson v. Ford*, supra.

Appellant had worked in this factory 23 months. He was 23 years old. All of the perils he encountered when injured were open and obvious and known to him. His employers had provided him reasonably safe means and appliances for the performance of his duties, all of which he knew. He chose to perform his task in his own and a more dangerous way, all of which facts are in irreconcilable conflict with the finding in the general verdict that he should recover from appellee. It is urged as a reconciliation of the answers to interrogatories with the general verdict that there might have been evidence that it was the custom in this factory to adjust the belt on the hanger, and lace the belt in the manner appellant attempted to do it; but the complaint does not proceed upon such theory. There are no averments in the pleadings to warrant such evidence.

It is averred that appellant had often mended the belt under like circumstances—i. e., while the line shaft was in motion—but appellant was not injured while mending the belt, but while attempting to place it on the hanger preparatory to relacing it. This averment falls far short of alleging that it was the custom sanctioned by appellee to adjust the belt to the hanger while the shaft was moving at a high rate of speed.

In our view of the case, it is unnecessary to consider other questions presented.

Judgment affirmed.

(40 Ind. App. 333)

INDIANAPOLIS ST. RY. CO. v. FEARNAUGHT. (No. 6,107.)

(Appellate Court of Indiana, Division No. 2. Oct. 9, 1907.)

1. LIMITATION OF ACTIONS—COMMENCEMENT OF PERIOD—PERSONAL INJURIES.

Limitations begin to run against an action for personal injury from the date of the injury when the right of action accrues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 302.]

2. SAME—PLEADING—AMENDMENT—NEW CAUSE OF ACTION.

Plaintiff was injured by the rear trucks of a street car missing a switch and throwing the rear of the car against a surrey in which she was riding. The complaint in one paragraph charged that the accident was caused by the defective condition of the switch and by the negligent and dangerous speed of the car, and the second paragraph charged negligence in the rate of speed only, which caused the switch to be thrown, causing the rear trucks of the car to turn on to another track. A trial amendment filed after limitations had run charged that the accident occurred because of defendant's negligence in allowing the switch to become defective and in failing to repair it, together with the negligence of defendant's employes in operating the car at a dangerous rate of speed. The

amendment also contained a second paragraph, which was the same as the second paragraph of the original complaint, with the additional charge that defendant's servants at the time of the accident were acting in the line of their duty. *Held*, that the original and amended complaints described the same cause of action, and that the cause of action alleged in the amendment was therefore not barred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 545.]

3. APPEAL—RESWEARING JURY—OBJECTIONS—SCOPE.

After the filing of a trial amendment, defendant objected to certain evidence, because the cause was then before the court on the amended complaint, and could not be properly submitted to the jury in the box for trial, and that such jury was not authorized on hearing such evidence to render any verdict on the amended complaint. *Held*, that such objection was insufficient to present the question on appeal that the jury should have been resworn after the filing of the amendment.

4. TRIAL—INSTRUCTIONS—MANDATORY INSTRUCTIONS—PROVINCE OF JURY—NEGLIGENCE—ASSUMED FACTS.

The court charged that if defendant's switch had become defective prior to the accident, and was thereby liable to be thrown so as to allow the rear trucks of defendant's street cars to turn on to another track and be likely to injure persons in vehicles on the street, and if defendant knew or could have ascertained the dangerous condition of the switch in time to place it in a reasonably safe condition prior to the accident, but failed to do so, and if at the time and place in question one of defendant's cars was run by defendant's employes at a negligent rate of speed over the switch, and the accident was the proximate result of defendant's negligence in the particulars stated, and plaintiff was injured as averred, then she was entitled to recover, if she was free from any negligence proximately contributing to her injury. *Held*, that such instruction was not mandatory nor objectionable as invading the province of the jury, and that it was also not defective as stating facts that constituted negligence, nor as assuming that the condition of the switch was negligent.

Appeal from Superior Court, Marion County; J. M. Leathers, Judge.

Action by Jennie Fearnought against the Indianapolis Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 79 N. E. 217.

F. Winter and W. H. Latta, for appellant. J. E. Bell, for appellee.

COMSTOCK, C. J. Appellee, who was plaintiff below, recovered judgment against appellant in the sum of \$5,000 for personal injuries. It is alleged that she sustained such injuries by reason of a "collision between a carriage in which she was riding and one of appellant's street cars. Appellee was on the back seat of a one horse surrey which was being driven north on the east side of South Illinois street. Appellant's car was coming south on the west track on said street. At the intersection of the car tracks on Maryland and Illinois streets, the front trucks of said car passed safely over the switches there located, but the hind trucks turned east on Maryland street, throwing the back end of the car against the horse and the

surrey in which the plaintiff was riding." The original complaint was in two paragraphs. The first charged that the accident occurred by reason of the defective, worn, and loosened condition of the switch and by reason of the rapid, careless, negligent, and dangerous rate of speed of said car. The second charges negligence in the rate of speed only, which caused the switch to be thrown, causing the hind trucks of the car to turn toward Maryland street. It does not charge that the switch was in a defective condition. Defendant answered by general denial. Upon the issues thus formed the jury was impaneled, and after the evidence was partially heard plaintiff was granted leave, over defendant's objection, to file an amended complaint in two paragraphs. The first paragraph of the amended complaint charges that the accident occurred by reason of the negligence of the defendant in allowing the switch to become defective, worn, and loosened and in negligently failing to repair the same, together with the negligence and carelessness of the defendant's employes acting in the line of their duty in operating the car at a rapid and dangerous rate of speed. The second paragraph is the same as the second paragraph in the original complaint, with the additional charge that the defendant's servants at the time of the accident were acting in the line of their duty. Defendant's demurrer for want of facts to each paragraph of said amended complaint was overruled. Defendant thereupon answered in four paragraphs. The first was a general denial. The other three pleaded the statute of limitations. Plaintiff replied to the second, third, and fourth paragraphs by general denial.

Appellant argues that the first and second paragraphs of the complaint was each insufficient upon various grounds, specifying them; that, the original complaint not being sufficient to withstand a demurrer for want of facts, an amended complaint based upon the same accident as the original complaint and stating the circumstances in the same way, if filed more than two years after the accident, would be barred by the statute of limitations. It is true that actions for injuries to the person shall be commenced two years after the cause of action has accrued. Section 294, Burns' Ann. St. 1901. The cause of action accrues from the date of the injury. *Hanna, Adm'r. v. Jeffersonville R. R. Co.*, 32 Ind. 113. The statute of limitations commences to run when the right of action accrues. The injury occurred April 13, 1902. Plaintiff's amended complaint was filed April 25, 1905. The two years allowed by statute for bringing the action had therefore expired before the filing of the amended complaint. It is earnestly argued that the right of action was not saved from the operation of the statute of limitations. The proposition of counsel is supported by decisions outside the state. A different rule obtains in this state.

The J., M. & I. R. R. Co. v. Hendricks, Adm'r, 41 Ind. 48, was an action brought by the administrator to recover damages for the death of his decedent caused by the alleged negligence of the defendant. In the first trial plaintiff had judgment, which was reversed upon the ground that the complaint was insufficient for want of facts. Following this ruling of the Supreme Court the court below sustained a demurrer to the complaint, and thereupon the plaintiff filed an amended complaint four years after the original cause of action had accrued. The defendant insisted that a new cause of action was stated; which was barred by the statute of limitations. In the course of the opinion the court said: "In our opinion the cause of action as set forth in the two paragraphs of the complaint as amended is the same as, and identical with, that set forth in the original complaint. It is neither new nor different. The cause of action as set forth in the original and amended complaints was the death of Mrs. Hendricks caused by the wrongful act or omission of the Jeffersonville Railroad Company, and without fault on her part, and not the particular manner or means of her death. The new facts stated relate to the time and fact of the death of the decedent as alleged in the original complaint. The position of counsel for appellant would be correct if the new facts stated related to a time and transaction different from the one set out in the original complaint. The cause of action arose, if at all, the moment the death was caused by the company's wrongful act, and it then only became a question of fact and hence of evidence what was the wrongful act." The case is cited and followed in the following Indiana cases: *Cleveland, etc., R. Co. v. Bergschicker*, 162 Ind. 108-111, 69 N. E. 1000; *Blake v. Minkner*, 136 Ind. 418, 36 N. E. 246; *Evans v. Nealis*, 69 Ind. 148; *Sidener v. Galbraith*, 63 Ind. 89; *Shirk v. Coyle*, 2 Ind. App. 354, 27 N. E. 638; *Ohio, etc., R. Co. v. Stein*, 140 Ind. 62, 39 N. E. 246; *Chicago, etc., R. Co. v. Bills*, 118 Ind. 221, 20 N. E. 775. See, also, *Texas, etc., Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Smith v. Missouri Pac. Ry. Co.*, 56 Fed. 458, 5 C. C. A. 557; *Van Doren v. Railroad Co.*, 93 Fed. 260, 35 C. C. A. 282; *Chicago City Ry. Co. v. Cooney*, 196 Ill. 466, 63 N. E. 1029; *Zieverink v. Kemper*, 50 Ohio St. 208, 34 N. E. 250. The facts set out in the original and in the amended complaint in the case at bar manifestly describe the same occurrence, and show that the negligence of appellant caused appellee's injury, and the court did not err in overruling the demurrers.

Upon the filing of the amended complaint, counsel for appellant filed a motion for judgment on the pleadings as they then stood. This motion was overruled. The argument urged in support of this motion is founded upon the proposition for which appellant contends that the amended complaint

states a new cause of action. That question has already been considered. It is contended that the court erred in not causing the jury to be resworn after the filing of the amended complaint and answers and replies thereto. It does not appear that the appellant asked that the jury be resworn. In *Knowels et al. v. Rexroth*, 67 Ind. 59, the Supreme Court has held that if counsel wish to reserve any alleged error in proceeding with the cause after an amendment is made, without re-swearing the jury, they should object and except at the time, and by a failure so to do the alleged error is waived. Counsel for appellant seek to show that the question was presented and saved in the manner following, to wit: After the issues were reformed and without the jury being resworn as appears from the bill of exceptions, *Wm. J. Groversner*, being recalled upon direct examination, was asked the question: "Where was the car when you first observed it? * * * (Defendant's attorney objected to the question as appears in the bill of exceptions in the stenographic transcript of the evidence.)" The objection as set out in the transcript record is: "The defendant objects to the question and evidence sought to be elicited, on the ground that the cause is now before the court on the amended complaint, and not properly submitted to the jury in the box for trial; and such jury is not authorized upon hearing this evidence to render any verdict thereon upon his amended complaint filed yesterday." In this language there appears no request that the jury be resworn, and, if counsel desired such action upon the part of the court, it does not appear anywhere in the record. Instruction No. 12 given to the jury reads: "If, therefore, you find from a fair preponderance of the evidence that at the time and place in question the said switch leading from defendant's west track in Illinois street east into Maryland street had become defective, worn, and loosened prior to the happening of the alleged injuries to plaintiff, and by reason thereof said switch was dangerous and liable to be thrown open so as to allow or cause the rear trucks of said cars to turn to the east into the track leading into Maryland street, and thereby likely to injure pedestrians or persons in vehicles lawfully upon said street, and if you further find that the defendant knew, or by the exercise of ordinary care and diligence could have known, of the said defective and dangerous condition of said switch in time to repair the same and place the same in a reasonably safe condition for use in said track prior to plaintiff's accident, but that defendant negligently and carelessly failed so to do; and if you further find that at the time and place in question one of the defendant's cars, approaching from the north in Illinois street, on the west track, was run by the employes of defendant, in the line of their employment, negligently and carelessly, at a high and dan-

gerous rate of speed, over said switch, and if you further find that, as the proximate result of the negligence of the defendant in the particulars or respects above stated, plaintiff was injured, as averred in the complaint—then I instruct you the plaintiff would be entitled to recover under said first paragraph of complaint, provided you also find that she herself was free from any negligence proximately contributing to her said injury, and in such event your verdict should be for the plaintiff." It is objected to as mandatory, as invading the province of the jury, as stating what facts constitute negligence, and assuming that the condition of the switch was negligent. We have set out in full the instruction complained of. From its wording it clearly appears that the objections are not well taken.

We find no reversible error.

Judgment affirmed.

(40 Ind. App. 340)

GROVER v. CAVANAUGH et al. (No. 6,046.)
(Appellate Court of Indiana, Division No. 1.
Oct. 10, 1907.)

1. FRAUDS, STATUTE OF—REPRESENTATIONS.

Representations by members of a corporation of existing facts as to its property for the purpose of showing the value of stock sought to be sold are not representations concerning the character, etc., of a third person within *Burns' Ann. St. 1901, § 6634*, providing that no action shall be maintained to charge a person by reason of any representation concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless the representation be made in writing and signed by the person to be charged thereby or his agent.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 23, Frauds, Statute of, §§ 61, 62.*]

2. SAME.

Under such statute, the representations as to the character, conduct, credit, etc., of a third person required to be in writing, must be made with the intent that he shall in the first instance obtain credit, money, or goods thereupon.

3. CORPORATIONS — RIGHTS OF PREFERRED STOCKHOLDER.

A holder of preferred stock is not a creditor of the corporation, but a shareholder, with the same rights as a common shareholder, except as they are limited by the statute and his contract, and the additional right to have his dividends paid and his stock redeemed in preference to the common shareholder.

4. SAME—CAPITAL STOCK—NATURE OF PROPERTY IN SHARES.

The purchase of capital stock is not a loan to the corporation of the amount of the stock, but is the purchase of an interest in the corporation.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 12, Corporations, § 649.*]

5. CONSPIRACY — LIABILITY — JOINT OR SEVERAL.

Where a fraudulent scheme was organized to obtain money from investors, all who knowingly entered into it became liable for all damages that might be caused thereby.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 10, Conspiracy, § 14.*]

Appeal from Superior Court, Marion County; *Vinson Carter, Judge.*

Action by *Martha A. Grover* against *Joseph*

R. Cavanaugh and others. From a judgment for defendants, plaintiff appeals. Reversed with directions.

Harvey, Pickens, Cox & Kahn, for appellant. Frederick E. Matson and Jos. F. Cowern, for appellees.

HADLEY, J. This was a suit instituted by appellant against the Mercantile & Bureau Company, an Indiana corporation, and Joseph R. Cavanaugh, Samuel A. Townsend, Joseph B. Gwin, Edward D. Moore, Charles M. McCabe, Frank L. Wayman, and James E. Pierce for damages. The complaint is in two paragraphs. Each of said appellees demurred separately to each paragraph of the complaint. Each of said demurrers, except that of the appellee corporation, was sustained. Appellee corporation answered, trial was had, and judgment rendered in favor of appellant against appellee corporation, and in favor of appellees against appellant on their demurrers. The question presented in this appeal is upon the ruling of the court in sustaining the demurrers of appellees to the complaint.

The first paragraph of the complaint avers that the Mercantile & Bureau Company is an Indiana corporation, with an authorized capital stock of \$150,000, of which \$100,000 was designated as common and \$50,000 as preferred stock; that appellees Cavanaugh, Townsend, Moore, McCabe and Wayman were the incorporators, and Pierce a director and Gwin a stockholder and manager; that none of the capital stock of said company was paid in except that Cavanaugh and Townsend assigned to said company certain copyright inventions and received therefor the whole of the authorized common stock; that at that time said copyright inventions were not of the value of \$100,000, but were of little or no value; that all of said officers and managers knew that said copyrights had no value and could have no value until they were perfected and placed on the market and a demand created therefor; that, for the purpose of raising a fund to so place said copyright article upon the market, said parties provided for the sale of \$50,000 of the preferred stock, at the time knowing that said company would have no capital or assets to carry on the sale except by the sale of said preferred stock, and that said preferred stock could have no value over and above the value of said copyrights; that said company was not successful in its business, and failed to perfect said copyrights or create a demand therefor; that thereafter said company and the other appellees, knowing that said copyrights were of no value and that said company was constantly losing money, determined to further experiment with said copyrights, and, knowing that said company had no cash capital for so doing, determined to purchase a printing plant for its use, and, to procure the necessary money, said company

and other appellees determined to represent and hold out to others, including this appellant, that its said stock was a good investment, and its business and assets such that said stock was worth par, and to thereby sell a portion of said preferred stock, and said company and its officers and managers and some of its stockholders, to wit, the said other appellees named herein, conspired and confederated and formed a joint and common purpose so to do; that, in furtherance of said plan, scheme, conspiracy, and confederation by and through its said officers and managers, particularly these appellees who each and all had knowledge of the said purpose and of the condition of the business, property, and finances of said company, as the agents of said company for said purpose, represented to appellant that the business of said company was prosperous and a good paying investment; that the output of said company was a valuable asset and was selling rapidly at \$10 per book, while the cost thereof was no more than \$.65 per book, and with a great demand existing therefor; that said company was earning profits, and was negotiating for a large printing establishment to be used in this business; that said company then owned a good size printing plant, but needed a larger one for this business; that said company then owned two Lamson monotypes which were of the value of \$2,000; that said company was solvent, and did not need more money, but that its stock was a good investment at par, and that the said stock would pay, under the then existing circumstances, at least 6 per cent. dividend annually; that it was not necessary that the said company sell any of its said stock, but that appellant would be granted the privilege of purchasing a portion thereof, if she desired to make a paying investment. It is then averred that each and all of said statements were untrue, and known by said company and said officers at the time to be untrue. Each of said averments is then specifically denied, and the facts set out in the denial averred to have been within the knowledge of appellees at the time. It is then averred that appellant theretofore had had no dealings with appellee corporation, and was unacquainted with its financial affairs, and knew nothing thereof, except as stated and represented to her by said appellees, that she had no opportunity for learning the actual facts, and that appellees pretended to have knowledge of the facts so stated and represented to be true and that appellant relied thereon and had no information to the contrary. It is then averred that, because of said representations so made and for said purpose, appellant bought 26 shares of said preferred stock and paid therefor \$2,600, and received therefor 26 shares of preferred stock and 13 shares of common stock; that said company received said amount and appropriated the same to its own use; that neither said common nor preferred stock at the time

she so purchased the same was of any value, and has not since been of any value, and by reason thereof she has been damaged in the sum of \$2,600.

The second paragraph of the complaint is substantially the same as the first, except that it is therein averred that appellees agreed together to form a corporation with a capital stock of \$100,000 common and \$50,000 preferred; that the \$100,000 common should be issued to Cavanaugh and Townsend for their copyrights, although knowing at the time that said copyrights were incorrect, defective, and mere experiments. It was also agreed before such organization that said corporation should be used as a cover for their purposes and schemes, and as a means of inducing others to invest therein and purchase the stock thereof, and pay for the same without knowledge as to the experimental condition of said copyrighted articles, and thus secure to said promoters and said company for their use and benefit the means whereby to carry into effect the schemes and purposes of said promoters for their individual use and benefit. It is then averred that, in pursuance of said agreement, said corporation was organized and under its cover the said stock was sold to appellant by appellees under the false and fraudulent representations as averred in the first paragraph. The same averments as to knowledge on the part of appellees and lack of knowledge on the part of appellant are made as are found in the first paragraph.

It is contended on behalf of appellees that the representations of said appellees averred in the complaint were representations concerning the character, conduct, credit, ability, trade, or dealings of the defendant corporation, a third person, and hence section 6634, Burns' Ann. St. 1901, applies, and that appellees cannot be held for damages by reason thereof, since such representations were not in writing, as required by said section. On the other hand, appellant claims, first, that said representations were not made concerning the character, conduct, credit, ability, trade, or dealings, but were representations of existing facts as to substantive property for the purpose of showing the value of property sought to be sold; second, that since the representations were made by the officers and managers of the corporation, the only persons who could speak for it, such representations were not made concerning a third person.

The question presented by the claim of appellant involves the construction of said section 6634, being section 6 of the statute of frauds enacted in 1852. Rev. St. 1852, c. 42. This section is as follows: "No action shall be maintained to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation be made in writing and signed by the party to be charged thereby,

or by some person thereunto by him legally authorized." The reason for the enactment of this statute is well stated in *Cook et al. v. Churchman et al.*, 104 Ind. 141, 3 N. E. 759, where the court say: "The statute we are now considering is in all respects the equivalent of what is commonly known as 'Lord Tenterden's Act.' This act was introduced to supply a defect found to exist in the statute of frauds, which was rendered conspicuous by the decision in *Pasley v. Freeman*, 3 T. R. 51. Notwithstanding the provision that no action should be maintained whereby to charge another upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement was in writing, signed, etc., the decision referred to pointed out a mode of evading the statute, by shaping the action so as to make it count upon a tort or wrong by some false or fraudulent representation to the defendant, in order to induce him to contract with another, instead of upon a special promise. The intent and purpose of the statute was to cut off all such actions, and to place representations of the character therein referred to upon the same basis as special promises to answer for the debt of another." To the same effect are the cases of *Walker v. Russell et al.*, 186 Mass. 69, 71 N. E. 86, and *Medbury v. Watson*, 6 Metc. (Mass.) 246, 39 Am. Dec. 726, where the same statute was under consideration. From these authorities it clearly appears that the protection of the statute can only be invoked by those who have made representations of the character, conduct, credit, ability, trade, or dealings of a third party to induce a person to extend credit in some form to such third party. "Representations as to the character, conduct, credit, ability, trade, or dealings of a third person, when the primary purpose for which such representations are made is not to induce the extension of credit, or the delivery of money or goods to the person concerning whom they are made, but to secure the execution of a contract to which the person making them is a party, are not within the terms of the statute, and need not be in writing in order to be actionable." *St. John v. Hendrickson*, 81 Ind. 350; *Hassinger v. Newman*, 83 Ind. 124, 43 Am. Rep. 64. When, however, such representations are made with the intent that a third person shall in the first instance obtain credit, money, or goods thereupon, in order to give a cause of action against the person who made them, they must be in writing, signed, etc. *Cook et al. v. Churchman*, supra; *Mann v. Blanchard*, 2 Allen (Mass.) 386; *Medbury v. Watson*, supra; *Norton v. Huxley*, 13 Gray (Mass.) 285; *Wells v. Prince*, 15 Gray (Mass.) 562; *McKinney v. Whiting*, 8 Allen (Mass.) 207; *Belcher v. Costello*, 122 Mass. 189. The representations averred in the complaint before us were not made to induce the extension of credit. They were representations of material exist-

ing facts that went to establish primarily the value of the property appellees were seeking to sell.

That the representations incidentally conveyed the impression that the corporation was worthy of credit, since they were to the effect that the corporation had assets, was solvent and was prosperous, etc., does not affect the question. They were not made for such purpose, and were not acted upon in such manner. The purpose and effect of the representations were to convince appellant that the preferred stock of said corporation was valuable and a good investment; and, acting upon the belief thus induced, she made the purchase to her damage. It is, however, contended by appellees that the purchase of preferred stock in an Indiana corporation is in effect a loan; but this position is untenable. The holder of preferred stock is a shareholder in the corporation. He is not a corporation creditor, and has no rights as such. His rights are those of the common shareholder, except as those rights are limited by the statute and the contract, and the additional right to have his dividends paid out of the earnings and his stock redeemed out of the assets in preference to the common shareholder. 1 Cook on Corporations, §§ 267-271; Burns' Ann. St. 1901, §§ 5066, 5067, 5068. The purchase of stock of a corporation is not a loan to the corporation of the amount of said stock. None of the elements of debtor and creditor exist. The purchase of stock is the purchase of so much of an interest in the assets and affairs of such corporation.

The second paragraph proceeded upon the theory that the organization of the corporation was a part of the fraudulent scheme, and was effected as a cover or misleading device or instrument for the successful fleecing of innocent investors, and that the whole plan was fraudulent from the beginning. This being true, all who knowingly entered into it became liable for all damages that might be caused through their fraudulent devices. The count is a plain action for deceit. The conception of the scheme, the organization of the company, the false representations all are charged as a part of one general plan of fraud and deception for the benefit of all the conspirators. That one link of the scheme of fraud involved representations as to the value of the assets and stock of a corporation ought not in all good conscience entitle the wrongdoers to the protection of a statute that was enacted solely to protect against fraud, and not as shield for fraud. *Miller v. Barber et al.*, 66 N. Y. 558. The case of *Cook v. Churchman*, supra, is not analogous to this case in any particular, and the general rules therein laid down are not antagonistic in any degree to our holding herein. The case of *Heinz v. Mueller*, 19 Ind. App. 240, 49 N. E. 293, however, does incidentally enunciate some principles of law that we are of the opinion are not supported by the clear weight of the authorities, and

it is therefore overruled in so far as it conflicts with the holding herein made.

For the foregoing reasons, judgment reversed, and court directed to overrule demurrers to complaint. All concur.

(40 Ind. App. 631)

SULLIVAN MACHINERY CO. v. BREEDEN et al. (No. 6,111.)¹

(Appellate Court of Indiana, Division No. 2
Oct. 9, 1907.)

1. APPEAL—REVIEW—HARMLESS ERROR.

The overruling of a demurrer to a bad paragraph of an answer is reversible error, unless the facts set forth in such paragraph that are competent to be given in evidence at all may be proved under some other sufficient paragraph, and unless it affirmatively appears that the verdict is based on a sufficient paragraph, and not on the defective one. Hence, where the verdict is a general one on all the issues, the overruling of a demurrer to a bad paragraph is reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4101.]

2. PLEADING—VERIFICATION—FAILURE TO VERIFY—EFFECT.

An unverified answer, denying that defendants made any other or different contract than that set up therein, raises no issue as to the execution of the written contract set up in the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 804.]

3. SALES—WARRANTIES—WRITTEN WARRANTY—MERGER OF IMPLIED WARRANTIES.

Where an article is sold under a written contract containing warranties of its quality, workmanship, or performance, all oral and implied warranties are merged in the writing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 760, 761.]

4. SAME—ACTIONS—ANSWER—SUFFICIENCY.

A paragraph of an answer, in an action for the price of a channeling machine sold under a written contract, which did not deny the execution of the contract by defendants and its fulfillment by plaintiff, but set up an entirely different contract, and in no way referred to the contract sued on, but averred that under the contract set up in the paragraph that plaintiff placed in defendants' quarry a worthless machine, which defendants refused to receive, but which did not aver that the worthless machine was the same machine for which plaintiff sued, and did not aver that the contract set up therein was the only contract for a channeling machine, was demurrable.

5. SAME.

A cross-complaint, in an action for the price of a channeling machine, alleging defects therein, and that the machine was warranted to cut 700 feet per day, but that it at no time cut that amount, and that defendants had been compelled to pay the same as if the machine cut 700 feet per day, which failed to show, except by inference, that the machine was delivered to defendants, and did not aver that defendants paid anything therefor or agreed to do so, and failed to show that in using the machine the work it did was not worth more than the expense of operating it, was demurrable as failing to show that defendants sustained any damages.

Appeal from Circuit Court, Owen County; Jos. W. Williams, Judge.

Action by the Sullivan Machinery Company against William T. Breeden and others.

¹ Rehearing denied.

Judgment for defendants, and plaintiff appeals. Reversed.

Joseph E. Henley, for appellant. Louden & Louden and Robert W. Miers, for appellees.

RABB, J. The appellant sued the appellees in the court below for the purchase price of a channeling machine alleged to have been sold by appellant to appellees. The suit was based on a written contract, which read as follows: "This agreement, entered into this 6th day of June, 1902, between the Sullivan Machinery Company, of Chicago, Illinois, and Claremont, New Hampshire, and the Monarch Stone Company, of Bloomington, Indiana, witnesseth: The Sullivan Machinery Company agrees to deliver to the Monarch Stone Company, f. o. b. cars, Claremont, New Hampshire, not later than June 13, 1902, one new Y Sullivan channeling machine, with latest improvements and with all equipments as per catalogue No. 80, excepting one set of drills is wanted cutting to the depth of nine (9) feet instead of two (2) set drills cutting to depth of six (6) feet. Price twenty-two hundred dollars (\$2,200). The said Sullivan Machinery Company guarantees this channeling machine to be equal in design, material and workmanship to the recent machines shipped into the Indiana district, and to replace any part or parts of the machine breaking due to defective material or poor workmanship, within one year from the date of this agreement. The Sullivan Machinery Company further agrees to assume the freight on the above material from Claremont, New Hampshire, to Clear Creek Station, Indiana. The said Monarch Stone Company agrees to pay the said Sullivan Machinery Company for the above machinery on the following terms: Twenty-two hundred dollars (\$2,200.) less 2 per cent., if paid within thirty (30) days after the arrival of machine at Clear Creek Station, Indiana, or by four equal notes of five hundred and fifty dollars (\$550) payable 30, 60, 90, 120 days, respectively, after arrival of machine at Clear Creek Station, Indiana, said notes to bear interest at 6 per cent. This contract is contingent upon strikes, fires, accident or other delays unavoidable or beyond control."

This contract is alleged to have been executed by the plaintiff and by the defendants under the name and style of the Monarch Stone Company. The defendants answered in 11 paragraphs, the fourth of which was as follows: "Said defendants, for further joint and separate answer herein, say that, during the year 1902, said defendants desired to purchase a stone channeling machine, and that said defendants were each called upon and solicited to purchase a Sullivan machine by said plaintiff's agent; that said plaintiff's agent represented to said defendants and to each of them that said Sullivan machine was the best channeling machine on the market; that said channeling machine would cut 700

lineal feet of stone each day when continuously operated, and said channeling machine was economical in operation, and he would warrant and guarantee these facts to be true; that said defendants, relying on said agreements, promises, and warranties so made by said plaintiff's agent, authorized said plaintiff's agent to deliver to them at their quarry in Monroe county, Ind., one Sullivan channeling machine; that said plaintiff has at no time complied with said promises, agreements, and representations so made by said plaintiff's agent; that said defendants at no time made any other or different contract or arrangement with said plaintiff. Wherefore said defendants demand judgment for costs." This paragraph of answer was not verified. The ninth paragraph was pleaded as a cross-complaint, and averred that appellant's agent called upon and solicited appellees to purchase a Sullivan machine, and represented to each of them that the Sullivan machine was the best machine on the market, "would cut 700 lineal feet of stone each day when continuously operated, and was economical in operation, and he would warrant and guarantee these facts to be true; that relying on these warranties they authorized plaintiff's agent to deliver to them at their quarry one Sullivan channeling machine, and that the machine, as purchased, was not the best machine on the market; that it was not properly built; that it was so constructed as to be extravagant in the use of steam, and of insufficient working ability; that the auxiliary valve leaked live steam into the exhaust; that the auxiliary valve fails to produce proper action of the main valve, or to give it full stroke; that it causes the working ability of the machine to be greatly impaired, and lessens its cutting ability; that it has at no time cut 700 lineal feet of stone per day; that in operating said machine the defendants have been compelled to pay the same as if said machine cut 700 feet per day." The tenth paragraph of answer avers the same facts regarding the representations and warranties of the plaintiff's agent, the authority given the plaintiff's agent to deliver defendants a Sullivan channeling machine at the quarry, and then avers that on the arrival of the machine at the quarry said agent assumed control of the unloading of the machine, and in so doing dropped the same, and it was injured; that said agent removed the parts injured to a machine shop and attempted to have them repaired; that defendants notified plaintiff's agent that they would not receive said machine so injured and damaged; that plaintiff, by its agent, at the time requested defendants to place said machine in its quarry and see if said machine was as agreed upon, and defendants, upon said request, placed said machine in said quarry; that said machine did not work as represented by plaintiff, and said defendants notified plaintiff; that plaintiff took possession of said machine, made numerous changes and

repairs on the same, and tried to operate said machine, but that neither plaintiff nor defendants have been able to operate said machine so that it would do the work as represented; and that the same is worthless. The appellant's demurrer to these paragraphs of answer were overruled. The cause was tried by jury, and a general verdict returned in favor of appellees, and judgment rendered on this verdict, against appellant, that it take nothing by its complaint. The ruling of the court on these demurrers are properly assigned here as errors, and present the question of their sufficiency to meet the case made by the appellant's complaint.

We are first met by the contention of appellees that no question is raised by the ruling of the court on the demurrer to the paragraphs of answer in question, for the reason that all the facts pleaded in these several paragraphs of answer could properly be given in evidence under the general denial and other paragraphs of answer that were unquestionably good, and we are cited in support of this contention to the well-recognized rule that where a demurrer is sustained to a good paragraph of answer, and there are other paragraphs of the pleading remaining in the issues under which the same facts could be proved that could have been proven under the paragraph demurred out, there is no available error. Appellees do not say so, but it is to be presumed that their process of reasoning is that what is sauce for the goose ought also to be sauce for the gander. This ancient homily does not apply in this case. Just the converse is true. Where a demurrer is overruled to a bad paragraph of a complaint or answer, unless the facts set forth in such paragraph of complaint or answer that are competent to go in evidence at all may be proved under some other sufficient paragraph, and it affirmatively appears that the verdict or finding is based on such paragraph, and not on the defective one, such ruling will constitute reversible error. *Boeber v. Goldsborough*, 44 Ind. 490; *Abdlil v. Abdlil*, 33 Ind. 460; *Peery v. Greensburgh*, 43 Ind. 321. Here the verdict is a general one on all the issues. It is in no wise controlled by a special finding or by answers to interrogatories, and it cannot be determined upon what paragraph of answer the verdict was founded, and therefore, if either of these paragraphs of answer was not sufficient to withstand a demurrer, the overruling of the demurrer thereto constituted reversible error.

While the fourth paragraph of answer avers "that the defendant at no time made any other or different contract or arrangement with said plaintiff than is set up in said paragraph of answer," yet the answer, not being verified, raises no issue as to the execution of the written contract set up in plaintiff's complaint, as is thoroughly settled by the well-considered case of *Cincinnati, etc., Co. v. Chenoweth*, 22 Ind. App. 685, 54

N. E. 403, and the cases therein cited. It therefore admits the execution of the contract, as averred in the complaint, but undertakes to avoid it by alleging an altogether different parol contract of warranty than that contained in the writing sued upon. The written guaranty contained in the contract of sale between the parties is that the channeling machine sold was equal in design, material, and workmanship to the recent machines shipped into the Indiana district; and the appellant agreed to replace any part or parts of the machine breaking, due to defective material or poor workmanship, within one year from the date of the agreement. No breach of this warranty is alleged in the answer; but it sets up a parol warranty averred to have been made, not by the plaintiff, but by the plaintiff's agent, that the machine was the best on the market, that it would cut 700 lineal feet of stone per day when continuously operated, and was economical in operation, none of which warranties is it pretended were included in the written contract. It is settled by all the authorities, elementary and judicial, that where an article is sold under a written contract, and the writing contains warranties of its quality, workmanship, or performance, all oral and implied warranties will be merged in the writing. In *Shirk v. Mitchell*, 137 Ind. 185, on page 190, 36 N. E. 850, 851, the Supreme Court say: "Where a written contract of warranty is made, oral warranties and implied warranties are all merged in the written contract, and by its terms the parties must be bound, as in other cases of written agreements"—citing *McClure v. Jeffrey*, 8 Ind. 79; *Hooper v. State*, 9 Ind. 572; *Smith v. Dallas*, 35 Ind. 255; *Robinson v. Chandler*, 56 Ind. 575; *Johnson Harvester Co. v. Bartley*, 81 Ind. 406; *Brown v. Russell & Co.*, 105 Ind. 46, 4 N. E. 428; *Conant v. Nat.*, etc., Bk. of Terre Haute, 121 Ind. 823, 22 N. E. 250; *Seitz v. Brewers Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837. To the same effect are the late cases of *Otto v. Braman* (Mich.) 105 N. W. 601; *Houghton Imp. Co. v. Doughty* (N. D.) 104 N. W. 516; *Buchanan v. Laber*, 39 Wash. 410, 81 Pac. 911; *Day Leather Co. v. Michigan Leather Co.* (Mich.) 104 N. W. 797. This paragraph of answer was clearly bad, and the demurrer thereto should have been sustained.

We think the tenth paragraph of answer is equally bad. It presents no issue on the contract set up in the complaint. It does not deny its execution by the appellee, and its complete fulfillment by the appellant. It sets up an entirely different contract from the one sued upon, and in no way refers to the contract sued on, but avers that under the contract set up in the answer the appellant placed in appellees' stone quarry a worthless Sullivan channeling machine, which appellees refused to receive. It does not

aver that the worthless channeling machine mentioned and described in the answer is the same machine for the price of which the appellant is suing. For aught that appears in this plea, the appellant may have sold or contracted to sell the appellees numerous channeling machines, and the worthless channeling machine alleged to have been placed in appellees' quarry by the appellant may have been, and presumably was, an entirely different machine from the one mentioned in the appellant's complaint. It is not even averred in this paragraph of answer, as it is in the fourth paragraph, that the contract between the appellant's agent and the appellees was the only contract ever entered into with reference to a channeling machine between the appellant and the appellees. We think the demurrer to this paragraph of answer should have been sustained.

The ninth paragraph of answer, which sets up a cross-complaint, is bad for the reason that it fails to show by the facts averred that the appellees sustained any damages. It does aver that the appellees authorized the appellant's agent to deliver to them, at their quarry, in Monroe county, one Sullivan channeling machine. It does not directly aver that the channeling machine was ever delivered. It only appears that the same was delivered by inference. It does not aver that the appellees ever paid a cent for the machine, or ever agreed to pay anything for it, or in any way become liable to pay for it. It is to be inferred from the allegations of this cross-complaint that the appellant delivered to the appellees a channeling machine, and the appellant's agent represented that the channeling machine was the best machine on the market, it would cut 700 lineal feet of stone per day when continuously operated; it was economical in operation, and he would warrant and guarantee these facts to be true; that as a matter of fact it was not the best channeling machine on the market; that it was so built and constructed that it was extravagant in the use of steam, and insufficient in working ability; that the auxiliary valve in said machine leaked live steam into the exhaust, and failed to give the proper stroke to the machine; that it at no time cut 700 lineal feet of stone per day, but had cut 300 lineal feet of stone per day; that appellees had obtained the use of this machine for nothing, defective though it was. It is true it is averred that the appellees had been damaged in the sum of \$3,000, but the facts upon which this conclusion was predicated nowhere appear in the answer. On the contrary, it is rather to be presumed that the appellees had been benefited by the transaction, because it fails to show that they had ever paid anything for the machine, or had ever obligated themselves to pay anything for it, and it fails to show that in using the machine the work it did was not worth more than the expense of operating it. We therefore think this paragraph of answer

was clearly bad, and the demurrer should have been sustained.

For these errors, the judgment of the court below is reversed.

(41 Ind. App. 580)

WHITE v. REDENBAUGH. (No. 5,866.)¹
(Appellate Court of Indiana, Division No. 1.
Oct. 8, 1907.)

1. MORTGAGES—DISTINGUISHED FROM CONDITIONAL SALE—EVIDENCE.

Where plaintiff deeded land to defendant, her husband's creditor, under a separate agreement for a reconveyance on the payment of the amount of the debt, interest, etc., that plaintiff was not bound to pay the amount for which the reconveyance was to be had, does not show conclusively that the transaction was a conditional sale.

2. SAME—DEED CONSTRUED AS MORTGAGE.

If an instrument does not show clearly whether a mortgage or conditional sale was intended, equity will construe it as a mortgage, rather than a conditional sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 5.]

3. SAME—INADEQUACY OF CONSIDERATION.

Inadequacy of consideration for a conveyance is a fact tending to show the transaction was a mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 104.]

4. APPEAL—REVIEW—CONCLUSIVENESS OF FINDINGS.

Where there is evidence in the record to support the finding, the Appellate Court will not disturb the judgment.

5. MORTGAGES—MORTGAGOR'S RIGHT TO RENT.

A mortgagor has a right to the rents and profits so long as he remains in possession of the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 513-525.]

6. SAME—TRANSACTION AS MORTGAGE.

There was a mortgage, and not a conditional sale, where, plaintiff's husband being indebted to defendant, and defendant holding a matured mortgage for \$425 on her land which was assessed for taxation at \$700, she deeded the land to him under a separate agreement for a reconveyance on the payment within a year of the debt, with interest, taxes, and liens.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 5.]

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action to cancel a mortgage and a deed by Carrie F. Redenbaugh against Israel H. White. From a judgment for plaintiff, defendant appeals. Affirmed.

M. W. Bruner and Chas. W. Burton, for appellant. Clyde H. Jones and John B. Murphy, for appellee.

WATSON, J. This was an action by appellee to set aside and cancel a mortgage, and also a deed of conveyance of her real estate, which she and her husband executed to appellant. She alleged that she executed said note and mortgage as surety for her husband, and that said deed was in fact a mortgage. Appellant demurred to the complaint. The demurrer was overruled and the cause put at issue by general denial. The errors relied up-

¹ Rehearing denied.

on by appellant are: First, that the court erred in overruling the demurrer to the complaint; second, the court erred in overruling the motion for a new trial.

The complaint alleges, in substance, that appellant loaned appellee's husband, George W. Redenbaugh, the sum of \$425, and accepted a note due two years after date, executed by the husband with appellee as surety, also the execution by said appellee of a mortgage on certain land which was appellee's separate property. Appellant knew the loan was for the husband, that neither the wife nor her separate estate received any benefit therefrom, and appellee was the owner in her own right of the premises. At the expiration of the two years, the debt being due and unpaid, appellant threatened to foreclose the mortgage unless paid at once. The appellant informed appellee that, if she would execute to him a deed for the land, the loan would be extended for a year, and if the loan was paid in the extended time he would reconvey the land to her. Being ignorant of her rights and unadvised in the matter, appellee and husband executed to appellant a general warranty deed to the land. At the same time they entered into an agreement in writing which recited the note and mortgage, also the execution of said deed. Appellant, by said instrument, agreed to reconvey said real estate to any one appellee might name within one year, providing she pay the \$425, with interest at 7 per cent. from August 16, 1904 (date when the note was due), and all taxes or liens. Appellant was to have a lien on the crops for the accrued interest. If the \$425, with interest, was not paid within the year, "this written agreement shall be null and void, and in said event said deed shall in nowise become ineffectual, but shall be valid and effectual for all intents and purposes, thereby giving, granting and conveying said real estate in fee simple as this day executed." The complaint further alleged that the deed was to extend the time of the indebtedness, and no other consideration whatever was received; that the property was reasonably worth \$1,200; a demand for a reconveyance of the property and the refusal of appellant; that appellee remained in possession of the land, using it as her own.

It is argued that the deed and contemporaneous written agreement constitute a conditional sale, and not a mortgage. It is true that by the written agreement appellee is not bound to pay the \$425 for which a reconveyance is to be had. But this fact of itself does not show conclusively that the transaction was a conditional sale. In *Conway v. Alexander*, 7 Cranch (U. S.) 218, 3 L. Ed. 321, Chief Justice Marshall said: "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance." 1 Jones on Mortgages, § 272; *Flagg v. Mann*, 14 Pick. (Mass.) 467, 478; *Da-*

vis v. Stonestreet, 4 Ind. 101, 106. Appellant also contends that, since the consideration for the execution of the deed was the surrender of the note and mortgage and the satisfaction of record of the mortgage, the debt was thereby extinguished, and hence the transaction constituted a conditional sale, and not a mortgage. Whether the debt was extinguished is a question of the intention of the parties. This must be gathered from an interpretation of the entire instrument. The fact is set out that there was an existing debt at the time the deed was executed. The amount of the debt is the exact sum set out in the deed as the consideration for the conveyance. On payment of said amount, White agreed to reconvey to any one whom appellee might name within one year. If appellee paid this sum, she would be entitled to a reconveyance of the land in question. It is further provided that the interest shall accrue at the rate of 7 per cent. from August 16, 1904, being the date of maturity of said note. The separate contract and deed were dated and executed August 20, 1904. The fact that interest is payable by the terms of the contract is a circumstance tending to show that the debt was not extinguished. Furthermore, appellee bound herself to pay the taxes on the land for the year agreed, and to pay all liens which White might pay or which might attach to the land. If the instrument does not show clearly whether a mortgage or conditional sale was intended, "equity * * * will construe a writing as a mortgage rather than a conditional sale." *Heath v. Williams*, 30 Ind. 495, 513; *Wolfe v. McMillan*, 117 Ind. 587, 592, 20 N. E. 509. According to the terms, the result would be this, if this agreement constitutes a conditional sale: Mrs. Redenbaugh would convey 74 acres of land, pay interest on \$425 for one year and four days, said interest amounting at the agreed rate approximately to \$30, pay the taxes for the stipulated year on the land which had an assessed value of \$700, and also pay any other liens for which the land might become liable. In return for this she would receive credit for the indebtedness of \$425. The inadequacy of the consideration is obvious, and it has been held repeatedly that inadequacy is a fact tending to raise the inference that the transaction was a mortgage. *Davis v. Stonestreet*, 4 Ind. 101, 106; *Turpie v. Lowe*, 114 Ind. 37, 45, 15 N. E. 834; 1 Jones on Mortgages, § 275. The trial court did not err in overruling the demurrer to the complaint.

Appellant further insists that there was error by the lower court in overruling the motion for a new trial. It has been said: "In order to authorize us on an appeal to disturb the judgment of the trial court on the evidence alone, it must appear that the evidence in the case is such as to raise or present for our decision, not merely a question of fact, but one purely of law on a material issue, and that such question of law under the

judgment of the trial court was decided erroneously." *Diamond, etc., Co. v. Cuthbertson*, 166 Ind. 290, 300, 76 N. E. 1060, 1063. See, also, *Carver v. Forry*, 158 Ind. 76, 81, 62 N. E. 697; *Republic, etc., Co. v. Berkes*, 162 Ind. 517, 526, 70 N. E. 815, and cases cited. Where there is evidence in the record to support the finding, this court will not disturb the judgment below. *Case v. Collins*, 37 Ind. App. 491, 506, 76 N. E. 781; *Nichols, etc., Co. v. Berning*, 37 Ind. App. 109, 116, 76 N. E. 776, and cases cited.

It is not disputed that the mortgage was executed for the husband's personal debt. Neither is the execution of the deed and the contemporaneous agreement denied. It resolves itself, then, into a determination whether there was evidence which would support the finding that this deed was given as a mortgage. The fair valuation of the land was shown to be \$1,200. It was testified that White said he wanted the deed to secure himself; that all he wanted was his money, not the land. The appellee was allowed to remain in possession and to enjoy the income from the mortgaged property. The appellant held the record title of this property merely as security for his loan. Therefore the construing of the deed and separate instrument, aided by the testimony, shows the relation between the parties to be the same as if the deed had been a mortgage. Appellant must be considered as the mortgagee out of possession of the mortgaged premises, and the same rules are applicable as if it had been a mortgage in the ordinary form. No rule of law is plainer or better understood than that the mortgagor of real estate has a right to the rents and profits so long as he remains in possession.

It is urged by appellant that the deed, absolute on its face, conveying the real estate in question, constituted a conditional sale. But considering together the deed, separate instrument, and all the facts surrounding the transaction, this position is not supported by the authorities. To have constituted a conditional sale, the debt to White from Carrie F. Redenbaugh must be extinguished by the sale and conveyance of the property. The proof shows that the debt was not extinguished, but, on the contrary, appellee was given one year and four days to pay same, and the rate of interest was fixed the same as in the note, and upon payment of the debt and interest appellant was to reconvey to her the land in question. The facts presented by the record in this case establish that the instrument executed by appellee and husband to appellant on the 20th day of August, 1904, must be and is regarded as a mortgage. *Harblson v. Lemon et al.*, 3 Blackf. 51, 23 Am. Dec. 376; *Watkins v. Gregory*, 6 Blackf. 113; *Loeb v. McAllister*, 15 Ind. App. 643, 41 N. E. 1061, 44 N. E. 378; *Matchett v. Knisely*, 27 Ind. App. 664, 62 N. E. 87; *Kitts v. Willson*,

130 Ind. 492, 29 N. E. 401; *Mott v. Flske*, 155 Ind. 597, 58 N. E. 1053; *Voss v. Eller*, 109 Ind. 260, 10 N. E. 74.

The evidence supports the finding of the trial court. Therefore no error was committed in overruling the motion for a new trial. Judgment affirmed.

(40 Ind. App. 420)

CLARKE et al. v. EVANSVILLE BOAT CLUB. (No. 6,671.)

(Appellate Court of Indiana. Oct. 17, 1907.)

1. APPEAL—SUPERSEDEAS—FUNCTION.

The function of a supersedeas is to stay further proceedings on the judgment appealed from.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2264-2274.]

2. SAME—POSSESSION OF PREMISES—RETURN.

Under Burns' Ann. St. 1901, § 654, providing that, on the filing of an appeal bond, execution and all other proceedings on the judgment in the trial court shall be stayed, and if execution has issued it shall be forthwith returned and the levy relinquished, where petitioners appealed from a judgment for possession of certain real estate and filed a bond pending which they were ousted on a writ issued on the judgment, they were entitled to a supersedeas pending appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2251-2253.]

Appeal from Circuit Court, Vanderburgh County; Alexander Gilchrist, Judge.

Action by the Evansville Boat Club against John N. Clarke and others. From a judgment for plaintiff, defendants appeal. On application for supersedeas. Granted.

Edgar Durre and Spencer & Brill, for appellants.

PER CURIAM. Appellants, against whom a judgment was rendered for the possession of real estate prayed an appeal to this court, gave bond and perfected such appeal as of term time, except that they failed to file the transcript in the office of the clerk of this court within the 60 days specified by statute. Section 650, Burns' Ann. St. 1901. Notice of appeal was subsequently served upon the plaintiff, and the defendants now present their application and bond for a supersedeas, together with a brief in support thereof. It is stated in the brief that, acting under a writ issued in said cause, the sheriff of said county has ousted the appellants from the premises in dispute, and we are asked to restore the property to them. The function of a supersedeas is to stay further proceedings upon the judgment appealed from. *Board of Comr's v. Gorman*, 86 U. S. 661, 22 L. Ed. 226; *Elliott's Appellate Procedure*, 389. Section 654, Burns' Ann. St. 1901, provides that any levy made shall be relinquished. To what extent the provisions of this statute may apply to the facts of this case is not at present a matter which we are in a position to decide.

Supersedeas ordered.

(40 Ind. App. 403)

INDIANAPOLIS TRACTION & TERMINAL
CO. v. MILLER. (No. 6,123.)(Appellate Court of Indiana, Division No. 2.
Oct. 17, 1907.)1. APPEAL—PRESENTATION OF OBJECTIONS BE-
LOW—SUFFICIENCY OF COMPLAINT—CAR-
RIERS—INJURY TO PASSENGERS.

A complaint, alleging that plaintiff after having paid her fare and become a passenger on defendant's cars in charge of a motorman and conductor, and after the car had stopped for passengers to alight at a place where plaintiff was to change cars, the motorman without signal and with a sudden violent jerk started the car, throwing plaintiff to the pavement, and causing the injuries alleged, stated a cause of action as against an attack first made on appeal, being sufficient to bar another action for the same cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1235.]

2. TRIAL—INSTRUCTIONS—ELIMINATION OF
FACTS.

The gist of an action for injuries to a passenger as she was about to alight from a street car was the negligent starting of the car without warning with a sudden jerk. The court charged that if the car had stopped to allow passengers to alight, and while plaintiff was attempting to do so defendant negligently started the car with a sudden jerk, throwing plaintiff to the pavement and injuring her, she was entitled to recover, unless she was negligent, which proximately contributed to the injury. *Held*, not objectionable as confining the jury to the evidence of the sudden jerk as the basis of plaintiff's right to recover, to the exclusion of other facts; such other facts being unimportant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

3. SAME—PEREMPTORY INSTRUCTIONS.

The conditional form of the instruction left the question of negligence in starting the car to the jury, so that the instruction was not objectionable as peremptory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439-466.]

4. SAME—INSTRUCTIONS—OTHER INSTRUCTIONS.

The court defined "contributory negligence," and charged that the burden was on defendant to show contributory negligence by a fair preponderance of the evidence, but if the evidence as a whole, by whomsoever produced, established contributory negligence, it would bar recovery. He further charged that it was a passenger's duty to use reasonable care in alighting; that she should not attempt to alight while the car was in motion, if dangerous to do so; and that if she did so she assumed any additional risk attendant on such attempt. The court also charged that if plaintiff attempted to alight while the car was in motion, and her injury was caused thereby, she could not recover. *Held*, that under such instructions the further charge that plaintiff was entitled to recover in a certain event, unless it had been "shown" that plaintiff was herself negligent, was not objectionable as implying that the proof of plaintiff's negligence must be such as to amount to a demonstration, instead of establishing the fact by a preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 703-717.]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Jennie Miller against the Indianapolis Traction & Terminal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

82 N.E.—8

F. Winter and W. H. Latta, for appellant.
C. S. & G. L. Denny, for appellee.

COMSTOCK, C. J. Action for personal injury. The complaint was in one paragraph. It alleges when the plaintiff was in the act of alighting from one of appellant's cars, and before she had stepped from the running board, the car was started forward throwing her to the ground and causing the injuries for which she sues. Appellant answered by general denial. The case was submitted to a jury, and verdict returned against defendant on which judgment was rendered for \$5,000.

That the complaint does not state facts sufficient to constitute a cause of action is the first error assigned. As the complaint is attacked for the first time in this court, it is only necessary to determine its sufficiency to bar another action for the same cause. It sets out the following facts by direct averment: That on the 22d of June, 1904, having paid her fare for transportation, she was a passenger on one of defendant's cars in charge of a motorman and conductor at a time and place definitely stated, and that, after the car had stopped for the passengers to alight at a place where she was to change cars, the motorman, without giving any warning, with a sudden and violent jerk, started said car, thereby throwing her to the pavement. Then follows a statement of her injuries. The facts directly alleged are sufficient as against this first attack. *City of South Bend v. Turner*, 156 Ind. 421, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200; *Zenia Real Estate Co. et al. v. Macy*, 147 Ind. 572, 47 N. E. 147.

The second and remaining error assigned is the overruling of appellant's motion for a new trial. The reasons set out in said motion which are discussed are that the verdict of the jury is not sustained by sufficient evidence, is contrary to law, and that the court erred in giving to the jury of its own motion instruction No. 8. Said instruction is in the following language: "(8) If you believe from the evidence that the plaintiff was a passenger upon one of defendant's street cars at the time and place in controversy; that the said car had stopped for the purpose of allowing passengers to alight therefrom; that the plaintiff attempted to so alight; that while she was in the act of so doing the defendant negligently started said car forward with a sudden jerk or movement, thereby throwing plaintiff to the pavement and injuring her—then the plaintiff would be entitled to recover, unless it has been shown by the evidence that plaintiff was herself guilty of negligence which approximately contributed to her injury, in which latter case plaintiff would not be entitled to recover." It is argued that the instruction was erroneous, because: First, it attempted to confine the consideration of the jury to certain facts, and to exclude other facts

which should have been considered; second, it invaded the province of the jury, "as it was a question of fact for the jury as to what facts constituted negligence"; third, because the facts in the instruction are not sufficient, standing alone, to warrant the court in instructing the jury peremptorily that they should find for the plaintiff. It is unquestionably error in an instruction to limit or confine the consideration of a jury to certain facts to the exclusion of others that are important. The negligence charged is the negligent starting of the car without warning, with a sudden jerk. This was the gist of the action, and if the plaintiff was free from negligence contributing to her injury the consideration of other facts was unnecessary. The question of the negligent starting of the car was left to the jury by the conditional form in which the instruction is put. The instruction is not peremptory, but is based upon the finding by the jury of the facts which would make the starting of the car negligent. The facts being found by the jury, it was for the court to pronounce the law. It is argued, too, that the instruction incorrectly states the degree of proof required on the question of contributory negligence. Attention is directed to the words, "unless it has also been shown by the evidence that the plaintiff was herself guilty of contributory negligence." The use of the word "shown" is criticised for the reason that it implies demonstration, and that "shown by the evidence" implies demonstration by all the evidence, when "contributory negligence need only be proved by a preponderance of the evidence, and need not be 'shown' by the evidence nor by all the evidence"; that "any evidence or the evidence of only one witness may amount to a preponderance in the minds of the jury."

The fourth instruction given defined "contributory negligence," and told the jury that it was a defense to an action for personal injuries, that "the burden is upon the defendant to show contributory negligence by a fair preponderance of the evidence; but if the evidence as a whole, by whomsoever produced, does establish such contributory negligence, then it will avail the defendant and prevent the plaintiff from recovery." In instruction 7, the court told the jury that it was the duty of the passenger in alighting from a car to use reasonable care to avoid injury; that a passenger should not attempt to alight while the car is in motion, if the motion is such as to make it dangerous to do so; that in attempting to alight while the car is in motion a passenger assumes the additional risk necessarily attendant upon such attempt if there be any. The ninth instruction given informed the jury that if it appeared from the evidence that the plaintiff attempted to alight from the car before it had come to a stop, and if her injury was caused by the attempt to alight while the car was in motion, she would not be entitled

to recover. In view of all the instructions given, and they are to be considered as a whole in determining the effect of any one, the proposition of appellant's counsel that any evidence, "or the evidence of only one witness, may amount to a preponderance in the minds of the jurors," is, we think, unwarranted.

It is insisted that appellee was proven guilty of contributory negligence by the undisputed physical facts; that her own negligence was the efficient cause of her injury. We cannot concede this claim. We cannot say that the verdict is without support.

Judgment affirmed.

(41 Ind. App. 175)

RELIANCE MFG. CO. v. LANGLEY. (No. 5,871.)¹

(Appellate Court of Indiana. Oct. 15, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—COMPLAINT.

A complaint for injuries to an employee by the fall of an elevator, alleging that defendant was negligent in using a defective rope to sustain and move the car, and in failing to provide a safety device for use in the event of the breaking of the rope, and that plaintiff had no knowledge of such defective or dangerous condition, stated a cause of action at common law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 816-836.]

2. SAME.

Where a paragraph of a complaint for injuries to a servant by a fall of an elevator charged negligence in the use of a defective rope, but did not allege that plaintiff had no knowledge of the defect, it was insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 846, 853.]

3. SAME—STATUTORY LIABILITY.

A complaint for injuries to a servant failing to clearly show a violation of a statutory duty on the part of the master is insufficient as an allegation of statutory liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 822.]

4. SAME—ELEVATORS—SAFETY DEVICES—STATUTES—APPLICATION.

Burns' Ann. St. 1901, § 7087a, requires elevator shafts in factories to be inclosed, and the installation of automatic trapdoors, if in the opinion of the factory inspector safety requires it, and declares that the chief inspector shall inspect the cable, gearing, or other apparatus of elevators in such establishments, and requires that the same be kept in safe condition with proper safety devices. *Held*, that such section, in so far as it provides for the installation of safety devices, is not mandatory, and a factory owner is not bound to install safety devices on elevators, unless required to do so by the factory inspector.

5. SAME—INSTRUCTIONS.

Since Burns' Ann. St. 1901, § 7087a, does not require a factory owner to install safety appliances on elevators unless required by the inspector, an instruction that the statute makes the master negligent in failing to provide safety appliances, and, unless the servant injured by the fall of an elevator caused by a defect in the rope was himself negligent, he could recover for injuries proximately caused by the master's failure to provide such appliances, etc., was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1148-1161.]

¹ Rehearing denied.

6. APPEAL—INSTRUCTIONS—PREJUDICE.

Where a servant was injured by the fall of an elevator because of a defective rope, and it was shown that he was aware of the absence of safety devices on the elevator, and it was a question whether he also had knowledge of the defective rope, defendant was prejudiced by an instruction that it was bound, under Burn's Ann. St. 1901, § 7087e, to provide safety appliances, and, if its failure to do so was the proximate cause of the servant's injury, he could recover in the absence of contributory negligence, and did not assume the risk merely because of knowledge of the master's violation of the statute.

Appeal from Superior Court, Porter County; Harry B. Tuthill, Judge.

Action by Isaac M. Langley against the Reliance Manufacturing Company. From a judgment for plaintiff, defendant appeals. Reversed, with instructions.

Elmer E. Stevenson, for appellant. Crum-packer & Moran, and E. J. Bower, for appellee.

HADLEY, J. The appellee brought this action to recover damages for personal injuries alleged to have been sustained by him by the breaking of a rope cable of a freight hoist or elevator, and the falling of the car in the factory of the appellant where appellee was employed. The amended complaint upon which the case was tried is in two paragraphs. The negligence charged against appellant in each of said paragraphs was in using a rope that was old, worn out, frayed, and rotten to sustain and move the car, and in failing to provide safety devices to prevent the falling of the car in the event of the breaking of the rope or cable. The first paragraph of the complaint also averred that appellee had no knowledge of this defective and dangerous condition. The second paragraph contained no such averments. A separate demurrer was filed to each paragraph of the complaint, which demurrers were overruled. Answer by general denial, trial, and verdict and judgment for appellee.

It is earnestly contended by appellant that the court erred in overruling its demurrer to each paragraph of the complaint. In the consideration of this question, we are met at the threshold with the technical objection of appellee that no question is presented on this ruling of the lower court by the record. In view of the fact that in our opinion this cause should be reversed on other grounds, we deem it unnecessary to pass on this technical objection, and, to avoid the question arising in a subsequent trial, we deem it to the best interests of all parties to express our opinion upon the paragraphs of the complaint. Without going into the averments of the first paragraph, it seems clear to us that it avers sufficient facts to show a common-law liability for negligence on the part of appellant and a cause of action in appellee, and the demurrer was properly overruled. The second paragraph is insufficient to show a common-law action, in that it does

not aver that appellee had no knowledge of the defective conditions as set out in the complaint, and which are averred as negligent acts on the part of appellant. It is not sufficient to show a statutory liability, for the reason that it does not show the violation of any statutory duty on the part of appellant. One who relies upon the statute must bring himself fully and clearly within all its provisions. *La Porte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277.

The question, however, upon which this case must be determined is upon the twenty-fifth instruction given to the jury by the court upon its own motion, over the objection of appellant. The instruction was as follows: "Under section 7087e of the Revised Statutes of 1901 of Indiana, it is made the duty of an employer of labor, who provides apparatus used for an elevator in his establishment, to keep the same in safe condition with proper safety devices whereby the cabs or cars will be securely held in the event of accident to the cable, rope, or hoisting machinery thereof, and the statute makes it the duty of the state factory inspector to inspect and require that this be done. This statute makes a master guilty of negligence in failing to comply by providing such safety appliances, and, in the absence of contributory negligence, the servant may recover for injuries which he suffers, where the failure of the master to provide said appliances is the proximate cause of the injury, and the servant does not assume the risk of injury merely by knowledge upon his part of such violation of the statute and failure to comply therewith upon the part of the master. However, he must be free from contributory negligence." It is insisted that this instruction is erroneous, since neither the section of the statute referred to therein nor any other statute of this state imposes upon the owner, lessee, or agent of a factory the duty of maintaining safety devices upon all elevators arbitrarily without regard to whether he has been so required or ordered by the factory inspector. The section referred to is as follows: "It shall be the duty of the owner or lessee of any manufacturing or mercantile establishment, laundry, renovating works, bakery or printing office, where there is an elevator, hoisting shaft or well hole, to cause the same to be properly and substantially inclosed or secured, if in the opinion of the chief inspector it is necessary, to protect the lives or limbs of those employed in such establishment. It shall also be the duty of the owner, agent or lessee of each of such establishments to provide, or cause to be provided, if in the opinion of the chief inspector, the safety of persons in or about the premises should require it, such proper trap or automatic doors so fastened in or at all elevator ways as to form a substantial surface when closed, and so constructed as to open and close by the action of the elevator in its passage, either ascend-

ing or descending, but the requirements of this section shall not apply to passenger elevators that are inclosed on all sides. The chief inspector shall inspect the cable, gearing or other apparatus of elevators in the establishments above enumerated and require that the same be kept in safe condition with proper safety devices whereby the cabs or cars will be securely held in event of accident to the cable or rope or hoisting machinery, or from any similar cause." This section may be separated into three divisions: (1) The duty is imposed upon the owner, lessee, or agent to have the elevator shaft or well hole properly and substantially inclosed and secured, if in the opinion of the factory inspector it is necessary for the proper protection of the employés. (2) The duty is imposed upon the owner, lessee, or agent to have proper trap or automatic doors so fastened in or at elevator ways so constructed as to open and close by the action of the elevator in its passage, and so fastened in or at elevator ways as to form a substantial surface when closed, if, in the opinion of the factory inspector, safety requires it. The requirements of this division do not apply to passenger elevators inclosed on all sides. (3) The duty is imposed upon the factory inspector to inspect the cables, gearing, and other apparatus of such elevators, and require that they be kept in a safe condition and with proper safety devices.

The first two subdivisions impose certain specific prescribed duties upon the owner, lessee, or agent of a factory. Under the conditions named, the last does not in terms impose any duty upon the owner, lessee, or agent, but does impose a duty upon the inspector. If the last subdivision can be said to impose a statutory duty upon the owner, lessee, or agent to maintain safety devices on all elevators of the class designated in the section without regard to the order or action of the inspector, then the instruction in question was properly given. If, on the other hand, this subdivision does not have such force, then the giving of said instruction was error. The plain words of the clause in question enjoins upon the inspector the duty of seeing that the owner performs a common-law duty, and also invests him with authority to compel such performance. To say that the clause means more than this necessitates the insertion of words not there, and the imposition of a duty not defined. The evident scope and purpose of this whole section is to protect the lives and limbs of persons in factories and workshops from accidents in and about elevators. But it is also evident the Legislature intended that this protection should be reasonable and practical, and not arbitrary or oppressive. Other duties with regard to elevators are clearly imposed upon the owners by this section, conditioned upon the discretion of the inspector. If the Legislature had intended to impose the duty of maintaining safety devices on all

elevators upon all owners, lessees, or agents arbitrarily, it would have said so. There is nothing to indicate the omission occurred by inadvertence or mistake. The act seems to have been carefully drawn to cover the subjects intended. The explanation is found in the fact that prior to this enactment it had been frequently determined in the courts of this state and other states that on some elevators and hoists, under certain conditions and circumstances, safety devices were neither practical nor necessary. *Sievers v. Peters, etc., Co.*, 151 Ind. 642, 50 N. E. 877, 52 N. E. 399; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150; *Kern v. De Castro, etc., Co.*, 125 N. Y. 50, 25 N. E. 1071; *Hoehmann v. Moss Engraving Co.*, 23 N. Y. Supp. 787, 4 Misc. Rep. 160. It is proper to presume that the Legislature understood the obligations of the parties as determined in these decisions when it passed the act in question, and recognized that the rights and interests of all parties might best be protected if left in the hands of the factory inspector. The Legislature did not deem it best to arbitrarily provide that the shafts should be inclosed or that automatic traps or doors should be maintained. We can see no reason why the Legislature should depart from this rule with reference to safety devices, and, in the absence of any words expressing such intention, it would be traveling in realms of imagination to hold that the Legislature intended to impose the duty of providing safety devices for all elevators, without regard to their character, practicability, or necessity. The act is highly penal. By section 25 violations thereof are punishable by fine. We do not think it would be seriously contended by any one that an owner could be successfully prosecuted under the facts in this case, for failure to maintain safety devices on an elevator of this character. And yet, if such act constituted a violation of any of the provisions of the statute, he could be so prosecuted. If he had not violated any of its provisions, there is no statutory liability for such failure. This seems to be an illustrative test of the section in question.

It is contended that the use of the word "shall" in the clause in question leaves the inspector no discretion, and amounts to a hard and fast mandate to the owner to provide safety devices in all cases. But this contention is not tenable. Section 70671, being section 9 of the same act, provides that all vats, pans, saws, etc., shall be properly guarded. But the Supreme Court has held that this language does not mean that all such machinery shall have guards, but that only such machinery should be so guarded as was practicable and necessary. *Robertson v. Ford*, 164 Ind. 538, 74 N. E. 1. In this case, quoting with approval from *Glens Falls, etc., Co. v. Travelers' Ins. Co.*, 162 N. Y. 300, 56 N. E. 897, and *Cobb v. Welcher*, 75 Hun (N. Y.) 233, 26 N. Y. Supp. 1068, the court say: "We think, however, that the Legisla-

ture could not have intended that every piece of machinery in a large building should be covered or guarded. This would be impracticable. What evidently was intended was that those parts of the machinery which were dangerous to the servants whose duty required them to work in its immediate vicinity should be properly guarded, so as to minimize, as far as practicable, the dangers attending their labors. Human foresight is limited, and masters are not called upon to guard against every possible danger. They are required only to guard against such dangers as would occur to a reasonably prudent man as liable to happen." In *Cobb v. Welch* (1894) 75 Hun (N. Y.) 283, 28 N. Y. Supp. 1068, the court said: "We do not understand the statute to make the factory man an insurer of the safety of his employes, or that it requires him to guard against the extraordinary accidents which careful and prudent men could not foresee or anticipate as liable to occur." There being no statutory duty upon appellant to maintain safety devices on the elevator in question at least until so ordered by the factory inspector, the giving of said instruction was error. And, it being shown by answers to the interrogatories that appellee was aware of the absence of the safety devices and there being a question as to whether he had knowledge of the defective rope, this error cannot be said to be harmless.

Cause reversed, with instruction to grant a new trial.

MYERS, COMSTOCK, RABB, and ROBY, JJ., concur. WATSON, J., not participating.

(40 Ind. App. 395)

MIEDREICH v. RANK et al. (No. 5,947.)
(Appellate Court of Indiana, Division No. 2,
Oct. 16, 1907.)

1. ATTORNEY AND CLIENT—FRAUD ON ATTORNEY—SETTLEMENT OF SUIT BY PARTIES.

An attorney under a written contract for a contingent fee instituted an action on a life insurance policy. Afterward defendant's attorney, with knowledge of the contract, by misrepresentation, prevailed upon the plaintiff to sign a written dismissal of the case, and had the case dismissed against her attorney's objection. Held to constitute fraud by the parties against plaintiff's attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 407.]

2. SAME—DUTY OF ATTORNEY—CONDUCT OF LITIGATION.

The conduct of a suit, except in a matter arising in the argument or hearing before the court, is exclusively under the control of the attorney of record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 161-189.]

3. SAME—AUTHORITY OF ATTORNEY—DISMISSAL OF SUIT.

An attorney cannot compel the dismissal of a cause against the objection of opposite counsel because of a settlement, but the settlement must be pleaded in bar of the further prosecution of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 412-416.]

4. SAME—LIEN OF ATTORNEY—STATUTORY REGULATIONS.

An attorney under Burns' Ann. St. 1901, § 7238, and also in equity, has a lien for his fees upon the judgment which he obtains for his client, but ordinarily he acquires no lien until the judgment is obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 385, 399-406.]

5. SAME—SETTLEMENTS BY PARTIES WITHOUT KNOWLEDGE OF ATTORNEY.

While a settlement made by the parties out of the presence and without the knowledge of plaintiff's attorney is allowable, it is viewed with suspicion, and will be closely scrutinized for fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 407-417.]

Appeal from Superior Court, Vanderburgh County; Jno. H. Foster, Judge.

Action by William P. Miedreich against Ada H. Rank and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Louis J. Herman, for appellant. Long & Price and Spencer & Brill, for appellees.

ROBY, J. Ada H. Rank, by William P. Miedreich, her attorney, sued the Illinois Life Insurance Company. Such proceedings were had as resulted in the filing of an amended complaint, to which the defendant on June 6, 1904, filed a demurrer for want of facts. No ruling was made thereon at the June term of the Vanderburgh superior court, wherein such action was pending, and on September 5th following, the same being the first judicial day of the September term, the attorneys for the defendant brought into court and filed a paper signed by the plaintiff, directing the dismissal of the action. Her attorney thereupon objected to the dismissal of said action by the court, and filed a motion supported by affidavit for leave to prosecute the suit to final judgment. His objections and motion were overruled. The defendant's motion to dismiss was sustained, and a judgment rendered for the defendant, from which the attorney for the plaintiff appeals, assigning error upon the action of the court as aforesaid. The averments of the plaintiff's amended complaint are to the effect that the defendant life insurance company was liable for the payment of a policy of insurance theretofore issued upon the life of John W. Rank, who was the husband of the plaintiff, who was named therein as a beneficiary; that he resided, with his family, in Evansville, Ind., and was in February, 1894, temporarily at St. Paul, Minn.; that he went from St. Paul to New York City, and in August, 1894, wrote to the plaintiff that he was suffering from nervous headaches, was on the verge of a nervous collapse, and was desirous of coming home; that she forwarded money to him with which to pay his way home, and has not had any tidings from him since, notwithstanding diligent inquiry and search upon her part; that she continued to pay the premiums on said policy until

February, 1896, at which time, such payments being onerous, she surrendered said policy in consideration of a paid-up policy issued by said company for the sum of \$598. It is averred that said paid-up policy was issued and accepted under a mutual mistake of fact; that both parties believed John W. Rank to be living when, in fact, he was then dead. It is averred that the original \$2,000 policy is in the defendant's possession, and for that reason a copy is not filed with the pleading. Performance of its conditions is averred, and judgment prayed for the cancellation of the paid-up policy, the reinstatement of the original policy, and for \$2,000.

In the affidavit filed by Mr. Miedreich, it is stated that he was employed as an attorney by Mrs. Rank to prosecute her claim against the defendant upon the paid-up policy, and a written contract is set out, by the terms of which she agreed to pay him for his services therein an amount equal to 25 per cent. of the amount recovered by judgment or compromise; that he investigated the legal propositions and facts involved, and gathered evidence by which to establish the death of John W. Rank, and came to the conclusion that the defendant was liable for the full amount of the original policy, whereupon a second agreement was entered into between him and Mrs. Rank, by which his fee was fixed at an amount equal to 33½ per cent. of the recovery as aforesaid; that he thereupon instituted this action. He further sets out that the signature of his client was secured to the written dismissal produced by defendant by means of misrepresentations made to her by it; that it represented to her, she at the time residing at Nashville, Tenn., that the case had been thrown out of court; that, unless she settled she would have to pay the accrued cost, amounting then to \$150 and which would amount to \$175 by September 5th, when in fact, all the costs in the case amounted to only \$12, and that the defendant had notice of the contracts between him and Mrs. Rank; that the value of his services is \$666, and that he has received no compensation whatever. The facts set up in the affidavit are not stated with the technical accuracy usual to a pleading charging fraud, but they are sufficient to make a prima facie case of fraud upon the attorney by the parties to the action. The paper purporting to evidence a settlement of the case bore the signature of the plaintiff, and was filed by the attorneys for the defendant. The attorney for the plaintiff was in court, objecting to the proposed dismissal. His authority is not only presumed (*Indiana, etc., v. Maddy*, 103 Ind. 200, 2 N. E. 574), but conclusively established by written contracts of employment. No other attorney appeared for the plaintiff, and no suggestion that Mr. Miedreich's employment had terminated was made.

"In the general management of a suit the attorney has a very extensive authority.

* * * The conduct of a suit except in a

matter arising in the argument or hearing before the court is exclusively under the control of the attorney of record in it." Weeks on Attorneys at Law (1st Ed.) § 220. The authority which an attorney exercises under a general retainer is not the subject of uncertainty. "He is more than the mere agent as to the business committed to his care. He is the sole manager." *Curtis v. Richards*, 4 Idaho, 434, 40 Pac. 57. "However, it may be said, in a general way, that a party to an action may appear in his own proper person, or by attorney, but he cannot do both. If he appears by attorney, he should be heard through him. It is necessary to the decorum of the court and the due and orderly conduct of the cause that the attorney should have the control and management of the action. Moreover, the client is thereby protected from the intrigues of his adversary. All the proceedings in the court to enforce the remedy, to bring the demand, cause of action, or subject-matter of the suit to trial, judgment and execution, are ordinarily within the exclusive control of the attorney; and, on the other hand, the attorney cannot compromise, settle, surrender, or impair the cause of action, or the subject matter of litigation without the consent of his client; it being within the exclusive control of the client." Note, 93 Am. St. Rep. 170; note, 3 A. & E. Ency. of Law, 357; *McConnell v. Brown*, 40 Ind. 384. The attorney for the defendant cannot be permitted to represent the opposite party. *Bartholomew v. Union Trust Co.*, 36 Ind. App. 328, 75 N. E. 31. The plaintiff was present in the court by her attorney. He may have had "special instructions from his client" (*McConnell v. Brown*, 40 Ind. 384), and the defendant could not compel a dismissal of the cause. If it had made a settlement, "it would have to plead in bar of the action or its further prosecution." *McConnell v. Brown*, supra. It follows that the court erred in dismissing the action. There is no appeal, however, by the plaintiff, and the disposition of the appeal depends upon whether upon the showing made the action of the court in refusing to permit the prosecution of the action by the attorney was correct. After several centuries of effort, the courts have come to the conclusion that an attorney may recover pay for services rendered. An interesting historical review of the subject made in 1853 is contained in *McDonald v. Napier*, 14 Ga. 89, 104, also *Fischer-Hansen v. Bklyn. Heights R. R. Co.*, 173 N. Y. 495, 66 N. E. 395. In Indiana he may by virtue of the statute acquire a lien upon the judgment which he obtains for his client. Section 7238, *Burns' Ann. St.* 1901. It has been decided that such lien is not his exclusive remedy, but that equity will, independent of the statute, create and enforce a lien in his favor. "The reason for this rule is that the services of the solicitor have in a certain sense created a fund, and he ought in good conscience to be protected." *Puett et al. v.*

Beard et al., 86 Ind. 172, 44 Am. Rep. 280; Justice v. Justice, 115 Ind. 201, 16 N. E. 615. A remarkably clear discussion of the subject is contained in the opinion of the court, written by Hackney, J., in Koons v. Beach, 147 Ind. 137, 45 N. E. 601, 46 N. E. 587. In New York and other states statutes have been enacted under which the attorney may acquire a lien upon his client's cause of action, but there is no such statute in this state, and it has been held that ordinarily an attorney acquires no lien for fees, until after judgment. *Hanna v. Island Coal Co.*, 5 Ind. App. 163, 31 N. E. 846, 51 Am. St. Rep. 262.

It is not necessary to determine whether the contract between Mrs. Rank and appellant amounted to an equitable assignment in the latter's favor. Generally speaking, the plaintiff has full power to compromise and settle his claim out of court and without the knowledge or consent of his attorney. *Hanna v. Island Coal Co.*, supra; *Young v. Dearborn*, 27 N. H. 324; *Jackson v. Stearns (Or.)* 84 Pac. 798, 5 L. R. A. (N. S.) 390. "The right of the parties to thus settle is absolute, and the settlement determines the cause of action and liquidates the claim. * * * Of course, we do not refer to dishonest settlements made to cheat attorneys, which the courts will brush aside with a strong hand." *Fischer-Hansen v. Bklyn. Heights R. R. Co.*, supra. The law favors compromises, and the settlement of litigation is encouraged, but such favor does not extend to transactions which are flavored with fraud. The effect of the authorities is accurately summarized by the editor of the *American State Reports* as follows. "While honest settlements between the parties to a litigation made without any intention of taking advantage of the attorneys are commendable and are to be encouraged, collusive and fraudulent settlements made for the purpose of defrauding the attorneys are, of course, reprehensible. If such are attempted, the court may interfere to protect the attorney. Its power to do so is inherent, and is founded on its right to protect its own officers against collusion and fraud practiced by the parties to the cause." *Monographic Note*, 93 Am. St. Rep. 173, and cases cited.

It is well known, although seldom stated, that the usefulness of the American judiciary depends upon the members of its bar. The judge can only decide questions presented to him for decision, and, in the absence of an independent bar, containing right-minded, fearless lawyers, the judge and the court would be of little use. The duty of courts to protect officers who are so essential to them and from whom the highest fidelity is exacted from fraud and imposition practiced or attempted by litigants is perfectly clear. It is an inherent obligation, and inherent power in the court to discharge it has always been recognized. *Jackson v. Stearns (Or.)* 84 Pac. 798, 5 L. R. A. (N. S.) 390; *Rasquin v. Knickerbocker Stage Co.*, 21 How. Prac. (N. Y.) 293; *Potter v. Ajax Mining Co.*, 19 Utah, 431, 57

Pac. 270; *Den ex dem. Mount v. Heister*, 17 N. J. Law, 438; *Fischer-Hansen v. Bklyn. Heights R. R. Co.*, supra; *National Exhibition Co. v. Crane*, 167 N. Y. 508, 60 N. E. 768; *Talcott v. Bronson & Bronson*, 4 Paige (N. Y.) 502; *William S. Reid v. Jordan*, 56 Ga. 282; *Jones v. Morgan*, 39 Ga. 310, 99 Am. Dec. 458; *Monographic Note*, 51 Am. St. Rep. 263, 276. "Where a settlement is privately effected between the parties with the design of preventing the attorney from obtaining his costs, the court will, notwithstanding the settlement, allow the attorney to go on and collect the costs in the action that he may secure himself." *Rasquin v. Knickerbocker Stage Co.*, supra. The procedure in such case is as follows: "Though a party may, without the consent of his attorney, make a bona fide adjustment with the adverse party, and dismiss an action or a suit before a judgment or a decree has been rendered therein, if it appears, however, that such settlement was collusive and consummated pursuant to the intent of both parties to defraud the attorney, the court in which the action or suit was pending may interfere to protect him, as one of its officers, by setting aside the order of dismissal, and permitting him to proceed in the cause, in the name of his client as plaintiff, to final determination to ascertain what sum of money or interest in the subject matter, if any, is due him for his services when fully performed." *Jackson v. Stearns (Or.)* 84 Pac. 798, 5 L. R. A. (N. S.) 392; *Potter v. Ajax Mining Co.*, supra; *Young v. Dearborn*, supra; *Randall v. Van Wagenen*, 115 N. Y. 531, 22 N. E. 361, 12 Am. St. Rep. 828; *Weeks & Conely v. Wayne Circuit Court*, 73 Mich. 256, 41 N. W. 269; *Howard v. Town of Osceola*, 22 Wis. 453; *Voell v. Kelly*, 64 Wis. 504, 25 N. W. 536; *Den ex dem. Mount v. Heister*, supra. The procedure has been designated as "clumsy." "It was a device of the courts, not of the Legislature, and sprang from the necessity of providing some remedy against fraudulent settlements." *Fischer-Hansen v. Bklyn. Heights R. R. Co.*, 173 N. Y. 501, 66 N. E. 397. The necessity is no less at this time in Indiana than it was in England years ago, when the procedure was first followed, and it furnishes a remedy by which the courts may compel the litigants to treat the lawyer with some measure of the honesty which he is bound to exercise in his dealing with them. *Hanna v. Island Coal Company* was an independent action brought by an attorney against the opposite party in the litigation, theretofore disposed of by settlement. The case might have been placed upon the ground that the remedy of the attorney was by motion. *Jackson v. Stearns (Or.)* 84 Pac. 798, 5 L. R. A. (N. S.) 393. The opinion shows that the principles heretofore stated were not considered, and were indeed not within the issue. The language used by the learned writer of that opinion is therefore limited to the case then before the court. The procedure adopted by the appellant in the case at bar

was correct, and, if the facts before the court were sufficient to make a prima facie case of fraud against him, the judgment appealed from will have to be reversed. The affidavit was presented to the court as one step in a pending cause the detail of which that court already knew.

The settlement was made by the parties out of the presence and without the knowledge of the plaintiff's attorney. While it was competent for the parties to settle their controversy in that manner, yet a settlement thus made is viewed with suspicion (*Falconio v. Larsen*, 31 Or. 137, 48 Pac. 703, 37 L. R. A. 254), and will be closely scrutinized and set aside when there is any appearance of fraud (*Voell v. Kelly*, supra). When it is remembered that Mrs. Rank was in another state and that the necessity for an immediate settlement to avoid the payment of \$150 costs which she was falsely told had already accrued, and which she was falsely told would amount to \$175 by September 5th, and when it is remembered, in addition, that the case she was settling was one which "had been thrown out of court," it would not be severe to say there was some appearance of fraud, primarily upon the plaintiff, but necessarily including the attorney of whose relation and contract both parties knew, and to whom his client pays nothing. The amount of the paid up policy which it is alleged was held by Mrs. Rank was \$592. In any view of the facts, she was entitled to that sum and costs, if she was entitled to anything. The rights of the parties would be practically determined by the fact of the husband's death. Whether he was dead or alive was a question which a court ought to be able to determine in accord with the evidence adduced upon the subject. Mrs. Rank was paid \$400. If the man was dead, the consideration was inadequate, and an inadequate consideration affords evidence of bad faith. *Young v. Dearborn*, supra. It is stated in the affidavit that the attorney gathered evidence to prove that the man was dead at the time the original policy was taken up, and the circumstances that the defendant made the settlement it did with a widow whose financial ability made it onerous for her to pay premiums upon a \$2,000 policy of life insurance, and that it made such settlement out of the presence of her attorneys in a distant state, assisted thereto by representations which, had they been true, would have rendered the payment made to her a mere gratuity, are inconsistent with that good faith and fair dealing necessary. Without an attorney to present and a court to enforce her claim Mrs. Rank was helpless. She agreed to compensate the attorney in proportion as she recovered on the policy. He evidently discharged his duty, and, when through his efforts his client was placed upon even terms with the insurance company and their respective rights were about to be adjudicated, the transaction in question took place. There are litigants who

do not hesitate under such circumstances to "beat the lawyer out of his fee." This is not strange in view of the fact that he furnishes the only check upon their rapacity, but no member of the bar who wishes to be regarded as reputable will connive or knowingly permit such practice by his clients—practice fraudulent in itself and against public policy, in that its result is to prevent the unfortunate and the poor from obtaining that redress which it is the high concern of the law to secure to them.

The judgment is reversed, and the cause remanded for further proceedings consistent herewith.

(40 Ind. App. 369)

HENRY et al. v. CENTRAL TRUST CO.
(No. 6,088.)

(Appellate Court of Indiana, Division No. 2.
Oct. 15, 1907.)

1. ADMINISTRATORS—SALES UNDER ORDER OF COURT—APPLICATION AND ORDER—CONCLUSIONS OF LAW SUSTAINED BY FINDINGS OF FACT.

Upon a petition by an administrator to sell real estate to pay the debts, the court found finding of facts that decedent died leaving a widow and children and grandchild, that he died seised of certain real estate, including that involved in this controversy, all of which was liable to be sold to pay debts, except certain lands, which were subject to the rights of the widow under an antenuptial contract; that the personal estate was insufficient to satisfy the debts; that the claims of two heirs at law to a certain lot of the land in controversy were false and unfounded, since they had purchased and improved it with money borrowed from decedent, and conveyed it to him in satisfaction of a part of this indebtedness, the remainder of which was unpaid; that they were insolvent and had no property subject to execution, except as heirs in the estate; and that the lot ought to be sold to pay debts. *Held*, that conclusions of law that the real estate described in the petition ought to be sold at private sale for not less than the appraised value thereof to pay liabilities, and that the petitioner ought to recover costs of the two heirs, were justified.

2. APPEAL—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—EXCEPTIONS TO CONCLUSIONS OF LAW.

An exception to a conclusion of law, based upon a special finding of facts, admits the correctness of the facts found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1637.]

3. SAME—EFFECT OF FAILURE TO TAKE PROPER EXCEPTIONS.

The failure to take exception to conclusions of law based on a special finding of facts is a waiver of the question of the sufficiency of the finding to sustain the conclusions of law.

Appeal from Circuit Court, Putnam County; C. C. Matson, Special Judge.

Petition by the Central Trust Company, administrator of the estate of Daniel L. Henry, deceased, for an order to sell real estate to pay the debts of the estate and for other relief. From a judgment for petitioner, Jasper J. Henry and others, heirs of the decedent, appeal. Affirmed.

C. E. Cox, Chas. Remster, and Moore & Moore, for appellants. S. A. Hays, for appellee.

COMSTOCK, C. J. The appellee filed its petition in the Putnam circuit court, making the appellants defendants thereto, averring that Daniel L. Henry died intestate in Putnam county, Ind., leaving surviving him his widow, Emma Henry, and certain children and a grandchild, his only heir at law, and the owner of two tracts of real estate in Putnam county, Ind., describing it, and also lot No. 3, block No. 2, Braden and others North Indianapolis addition to Indianapolis, and the said real estate in Putnam county was incumbered by certain mortgages, owned and held by certain defendants to the petition, and that Emma Henry has no interest therein except the right to occupy one of said tracts; that Jasper J. Henry and Fred D. Henry were claiming some interest in and to said lot No. 3 in block 2, other than as heirs of said decedent, and praying for an order of said court authorizing appellee to sell said real estate or so much as necessary to discharge and pay the debts and liabilities of said estate, and praying that Emma Henry be adjudged to have no interest in said real estate, except the right to occupy a certain portion thereof, and that the title of said real estate be quieted as against all of the defendants, except such interest as they may have as heirs at law of said decedent. Emma Henry was defaulted. Defendants Nellie M. O'Hair, Emma O'Hair, Lou Ann Scobee, Martha L. Hillis, May E. Whelan, Maggie J. Morris, and Eliza O. Clark filed their written consent to the sale of one of the tracts described in Putnam county, and lot No. 3 in block No. 2 in Braden et al. addition to North Indianapolis. The cause was put at issue as to the other defendants, except Amanda Randel and the Central Trust Company, neither of whom were served with process and neither of whom appeared to the action. At the request of the appellant, the court properly made special finding of facts, stated conclusions of law thereupon, and rendered judgment in favor of the petitioners. *Peterson v. Erwin*, 28 Ind. App. 330, 62 N. E. 719; *Slauter v. Favorite*, 107 Ind. 292, 4 N. E. 880, 57 Am. Rep. 106; *Taylor v. Wright*, Adm'r, 93 Ind. 121; *Wainright v. Burroughs*, 1 Ind. App. 393, 21 N. E. 591; *Wysong v. Nealis*, 13 Ind. App. 166, 41 N. E. 388; *Swift, Adm'r, v. Harley*, 20 Ind. App. 615, 49 N. E. 1069.

The errors assigned are that the court erred in its conclusions of law and in overruling the appellants' motion for a new trial. The causes set out in the motion for a new trial are: (1) The decision of the court is not sustained by sufficient evidence. (2) The decision of the court is contrary to law. (3) The special finding of the court is not sustained by sufficient evidence. (4) The special finding of the court is contrary to law.

The special finding of facts is substantially

as follows: That the decedent, Daniel L. Henry, died intestate at Putnam county, Ind., on the 4th day of April, 1905, leaving surviving him as his only heirs at law Emma Henry, his widow, and the following children, to wit: Jasper J. Henry, Fred D. Henry, Eliza O. Clark, Lou Ann Scobee, Ellena G. O'Hair, Maggie Morris, Martha Hillis, Nellie M. O'Hair, and Mary Whelan and one grandchild, Jessie Thomas, daughter of a deceased daughter of said decedent, all of whom are defendants in this action. That the said Daniel L. Henry was the owner in fee simple at the time of his death of the following real estate to wit: Lot No. 3, in block No. 2, of North Indianapolis, of the probable value exclusive of liens of \$1,200 and of the appraised value of \$1,250. We omit other tracts of real estate, for the reason that said lot is the subject of this controversy. That prior to his marriage, the decedent entered into an antenuptial contract with his said widow, of which the following is a copy (setting it out), and the same was in full force and effect at the death of said decedent, but which is not material to the matters involved in this appeal. That all of said real estate owned by said decedent at the time of his death is liable to be sold to make assets for the payment of the debts and liabilities of said estate; certain designated lands being subject, however, to the rights of the defendant Emma Henry therein, under the provisions of said antenuptial contract. That the personal estate of the decedent is as follows (giving a statement of the personal estate and statement of indebtedness). That the personal estate of said decedent is insufficient to satisfy the liabilities of said estate. That the claims of the defendants Jasper J. Henry and Fred D. Henry to lot 3 in block 2, in said addition, known as North Indianapolis, are false and unfounded in law and equity. That on the 22d day of July, 1904, the decedent loaned the defendants Jasper J. Henry and Fred D. Henry \$2,000, and that said lot No. 3 was purchased by said defendants, and the improvements thereon paid for out of said money. That on the 28th day of October, 1904, said Jasper J. Henry and Fred D. Henry, being indebted to said decedent, Daniel L. Henry, in the sum of \$2,019 on account of said money so borrowed, conveyed said lot 3 in block 2, above described, to Daniel L. Henry, in payment of \$1,500 of said indebtedness. That no part of said sum of \$2,000 so borrowed, of said decedent by said defendants on the 22d day of July, 1904, has ever been paid, except said sum of \$1,500 so paid by said conveyance above named. That said lot No. 3, in block No. 2, ought to be sold to pay the debts and liabilities of the said estate. That the said Jasper J. Henry and Fred D. Henry are both insolvent, and have no property subject to execution, except as heirs in the estate of said Daniel L. Henry, deceased.

And as conclusions of law upon the facts the court finds: That the law is with the

plaintiff is this cause. That the following real estate described in the petition ought to be sold by the administrator of the estate of Daniel L. Henry deceased to make assets to pay the liabilities of the deceased Daniel L. Henry, to wit: " * * * west half of the northwest quarter of section three (3) and the east half of the northeast quarter of section four (4) both in township fourteen (14) north, range four (4) west, in Putnam county, Indiana * * * and also lot number three (3) in block two (2) in Bradens and others addition to North Indianapolis, Marion county, Ind." That said real estate ought to be sold at private sale for not less than the appraised value thereof. That the plaintiff ought to recover of the defendants Jasper J. Henry and Fred D. Henry the costs made on the issues in this cause. It was adjudged that said lot No. 3 with other real estate be sold to make assets for the payment of debts of said decedent.

We have set out a summary of the special findings with perhaps more particularity than necessary, but to the end that it might be manifest that the conclusions of law were justified by the facts found.

An exception to a conclusion of law admits the correctness of the facts found, but appellant failed to take exception in the case at bar, thereby waiving any question of the sufficiency of finding to sustain the conclusion of law. *Peterson v. Erwin*, supra. However, the sufficiency of the evidence to sustain the findings is presented by the motion for a new trial.

Without reference to certain failures pointed out in behalf of the appellees upon the part of the appellants to comply with the rules of this court intended to govern the preparation of briefs and facilitate the business of this court, we have examined the record and find that from the evidence and the reasonable inferences which the court was warranted in drawing therefrom that no material fact found was wanting in evidence to support it. No question is raised upon the sufficiency of the petition nor upon the admission or rejection of evidence, and we do not believe that any good purpose would be served in view of the special findings by a recital or even a summary of the evidence. We find no reversible error.

Judgment affirmed.

(40 Ind. App. 620)

STAMETS et al. v. PLANO MFG. CO. (No. 6,094.) *

(Appellate Court of Indiana, Division No. 2.
Oct. 15, 1907.)

1. BONDS—EMPLOYEES—CONSTRUCTION—SCOPE.

An employee's bond specifying that the obligation should be continuous and cover the full period or periods of employment, including the present and any and all subsequent terms for which he might be employed by the obligee, whether under the present or under any future contract, covers the entire period of employ-

ment, which was continuous under various contracts.

2. SAME—PLEADING.

In a suit on an employee's bond under a written contract of employment set out in the complaint, requiring him to perform such duties as the employer might from time to time direct in such territory as the employer might assign, an answer pleading that, under the contract, the employee was to be a local agent at a specified place, was demurrable, since the answer, not purporting to set up a different contract between the parties, and being addressed to the complaint based on the written contract, conflicts with the contract, which must control.

Appeal from Circuit Court, Gibson County; L. C. Embree, Special Judge.

Action by the Plano Manufacturing Company against Elmer E. Stamets and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Thomas Duncan, for appellants. Jno. W. Brady, for appellee.

RABB, J. The appellee sued appellants in the court below on a bond executed by appellant Stamets as principal, and his co-appellants as his sureties, to the appellee. The bond was executed on the 7th day of December, 1897, in the penalty of \$2,000, and it recited that Stamets was engaged, or about to engage, in the service of appellee as collector of its securities, salesman of its goods, solicitor of agency contracts (creating local agencies for the sale of its goods), and also as adjuster and collector of its accounts from local agents, in which employment large sums of money and securities of appellee would come into the hands of said Stamets, and conditioned for the faithful performance of his duties under said employment by Stamets, and the prompt accounting to appellee by him for all moneys and securities of appellee coming into his hands. The bond expressly stipulated that it should be a continuing obligation, and covering the full period or periods of employment of said Stamets by appellee, whether under present contract of employment, or under future contracts of employment. It is averred in the complaint that, at the time the bond was so executed by the appellants, the appellant Stamets and appellee had entered into a written contract which is set out in the complaint, by the terms of which said Stamets was to enter the service of the appellee and perform such services for appellee as appellee should direct, and in such territory as appellee should assign him to work in, for which appellee agreed to pay said Stamets a certain sum per month for time actually employed in appellee's service, and it was expressly stipulated in this service contract that the appellee should have the right to change the residence of said Stamets, which in the contract was designated as Oakland City, Gibson county, Ind. This contract also stipulated that, before Stamets entered on the performance of his contract of service, he should give bond to appellee in the pen-

*For opinion on rehearing, see 82 N. E. 923.

alty, and with sureties to its satisfaction; that the bond in suit was given pursuant to the contract, and that the said Stamets thereupon entered into the employ of the appellee pursuant to the terms of said contract of employment and bond, and that he was continuously in the employ of appellee until the 12th day of March, 1901, new contracts of employment being executed by the parties for each subsequent year's employment in practically the same language as that of the first contract, except that the salary of Stamets was increased. The complaint charges that while serving appellee under said employment, and in his capacity as collector and adjuster of its accounts with its local agents, said Stamets from time to time received large sums of money, securities, and property of appellee, which, in violation of his duties as such employé, and of the conditions of said bond, he failed to account to appellee for, and converted to his own use. The complaint assigns 35 separate and distinct breaches of the bond sued on; five of the assigned breaches being for the unlawful conversion of different sums of money collected by Stamets as agent for appellee during his first year's employment, and aggregating \$563, and 30 of said assigned breaches being for the conversion of moneys and securities belonging to appellee and coming into the said Stamets' hands in the course of his employment as appellee's agent subsequent to the expiration of the first year's employment. A paper claimed by appellants to be a demurrer to the complaint and to each breach of the bond separately and severally was filed by each of the appellants Harris, Haurry, Van Zandt, and Klenck. This alleged demurrer reads as follows: "The defendant [naming him] demurs severally to the first, second, etc., breaches of plaintiff's complaint, on the grounds that neither of said breaches states facts sufficient to constitute a cause of action." This alleged demurrer was overruled by the court below, and to the ruling of the court the defendants jointly except. Appellant Stamets filed a separate answer in four paragraphs. The other appellants joined in an answer of six paragraphs, the first of which was the general denial. The third is addressed to so much of plaintiff's complaint as seeks recovery for defalcations of Stamets subsequent to the expiration of the first year's employment, and alleged that Stamets was employed by the appellee for a term ending on the 1st day of December, 1898, and was out of appellee's employment from that date until February 27, 1899, when he was re-employed at an increased salary; that he was first employed by appellee on November 1, 1897, to act as its local agent at the town of Oakland City for selling machinery and overseeing two or three agents of appellee in the immediate vicinity of said town; that the answering defendant then and continuously thereafter lived in said

town, and that the appellee on the 25th day of February moved the appellant, Stamets, from Oakland City to Evansville, 30 miles away, and assigned to him a different line of employment in a different field of labor, and enlarged his duties and fields of labor, and increased his compensation without the knowledge of the answering defendants. The court sustained appellee's demurrer to this paragraph of answer.

The cause was tried by jury, and the court, over the objection and exception of the appellants, instructed the jury as follows: "No. 2. If you find from a preponderance of the evidence that the defendant Stamets was constantly in the employ of the plaintiff from the 1st day of December, 1897, to the 16th day of March, 1901, the mere fact that the compensation to be paid by the plaintiff to said Stamets for his services during any given period of that time was not fixed and reduced to writing at the beginning of such period, but was afterward agreed upon and reduced to writing before the expiration of such period, would not be a defense to this action, and would not prejudice the plaintiff's right to recover on the bond in this action, if the evidence otherwise justifies such recovery, for any breach of the bond shown by the evidence to have been committed during the period of such employment." Instruction 4, given by the court on its own motion, reads as follows: "It is charged in the complaint that from the time of his entering upon the performance of his duties under the service contract dated November 1, 1897, until his alleged discharge from the plaintiff's service, the employment of the defendant Stamets was continuous, and was under the several service contracts before mentioned, and that during such service the plaintiff intrusted to Stamets a large amount of its business, consisting of securities to be collected, its goods to be sold, the creating of local agencies for the sale of its goods, the work of adjusting the accounts of divers of its local collectors and local sales agents, and the collection and transmission to the plaintiff of large sums of money due it in various localities where it had been or was then doing business. If you find from the evidence that these allegations are true, then, under the law, the defendants and each of them are liable in this action for each and every breach of the condition of the bond that has been charged in the complaint and proved to you by a preponderance of the evidence. The stipulation that the bond is a continuing obligation, and it is to cover the full period or periods of employment of said E. E. Stamets by said corporation, including the present term and any and all subsequent terms for which he may be employed by said corporation, whether under the present contract or any future contracts, extends the operation of the bond beyond the term of the first service contract so as to cover the whole period

of the continuous service of the defendant, Stamets, in the employ of the plaintiff, whether under the first service contract or any subsequent contract or contracts that have been given in evidence." The eleventh instruction, given by the court of its own motion, is as follows: "In still another paragraph of their separate answer, the defendants Harris, Van Zandt, Haury, and Klenck have alleged that, as to so much of the complaint as seeks to recover for breaches of the bond arising after the first day of December, 1898, the bond sued on, in so far as it secures breaches of duty by said Stamets, occurring after said day, was executed by them without consideration. If you find, however, that the plaintiff employed Stamets in manner and form as alleged in the complaint, and retained him in its service continuously until in the month of March, 1901, as therein alleged, there was sufficient consideration for the execution of the bond in respect to all breaches thereof that occurred between the 1st day of December, 1898, and the day of the alleged discharge, in the month of March, 1901." A verdict was returned in favor of appellee for the full penalty of the bond. Appellants' motion for a new trial was overruled, and judgment rendered upon the verdict of the jury.

The errors relied on by appellants for a reversal are the action of the court below in overruling appellants' alleged demurrer to the complaint, sustaining the appellee's demurrer to the third paragraph of the answer of the appellants Harris, Haury, Klenck, and Van Zandt, and overruling the several motions of appellants for a new trial. The demurrer to the complaint is very defective in form, and perhaps presents no question for review by this court; but, inasmuch as the questions that would arise on the demurrer, if in proper form, are, we think, properly presented on exceptions to the instructions given and refused, we deem it unnecessary to decide upon the sufficiency of the demurrer. It is the appellants' theory that the appellee's right to recover on the bond was limited to defalcations occurring during the first term of Stamets' employment by appellee. If this theory be correct, they were entitled to proper instructions from the court so limiting the recovery, even though no demurrer whatever had been filed to the complaint, or motion made to strike redundant matter from the complaint, and the action of the court in both giving the instructions complained of, and refusing to give the instructions asked, would be reversible error apparent upon the record in the absence of the evidence, because the case was presented to the jury upon an entirely different and antagonistic theory.

It is appellant's contention that the first contract of employment between Stamets and appellee and the bond sued on are each parts of one entire transaction, and are to be construed together as one contract, and the liability of the sureties on the bond limited to

the defalcation of their principal under that contract alone. Numerous authorities are cited to support this contention. The contract of employment and bond sued on are not parts of one entire contract. They are each separate and distinct contracts. It is true the bond itself secured the faithful discharge of Stamets' duties under his first contract of employment; but this is clearly not its limit. It was entirely competent for the parties to this bond to contract for the indemnity of the appellee, not only under the first contract of employment of Stamets, but under future contracts of employment as well. This they might do in one instrument as well as in several distinctive instruments, and this they did do in plain and unambiguous terms. The bond expressly declares that "It is stipulated and agreed that this obligation is a continuous obligation, and is to cover the full period or periods of employment of said E. E. Stamets by said corporation, including the present, and any and all subsequent terms for which he may be employed by said corporation, whether under the present contract, or under any future contract." Our language is not susceptible of making the meaning and intent of parties more clear than it is expressed in this obligation. While it is true that, in construing the terms of the bond, the contract, the performance of which it was intended to secure, must be looked to, it must first be determined what contract or contracts it was intended to secure, and that fact must be determined from the terms of the bond itself, and no uncertainty or room for diminution by construction is left by these terms in the bond under consideration, and the court's instructions to the jury that, if they found that the service of Stamets was continuous under the various contracts of employment by the appellee, the liability of the sureties on the bond would cover the entire period, correctly stated the law as applied to the case, and there was no error in refusing the instructions asked for by the appellant. *Ulster Co. Savings Inst. v. Young*, 161 N. Y. 23, 55 N. E. 483; *Fourth Nat. Bank v. Spinney*, 120 N. Y. 560, 24 N. E. 816; *Mut. Bldg. Ass'n v. Hammell*, 43 N. J. Law, 78; *People's B. & L. Ass'n v. Wroth*, 43 N. J. Law, 70; *Com. B. & L. Ass'n v. Steele*, 23 Pa. Super. Ct. 19; *Bateman Bros. v. Mapel*, 145 Cal. 243, 78 Pac. 734; *Union Dimes Sav. Inst. v. Neppert*, 51 Hun, 640, 3 N. Y. Supp. 797; *Union Dimes Sav. Inst. v. Feltz*, 51 Hun, 641, 4 N. Y. Supp. 607; *Durkin v. Va. Exchange Bank*, 2 Pat. & H. (Va.) 277.

The only other error relied upon for a reversal is the action of the court in sustaining appellee's demurrer to the third paragraph of the answer. This paragraph of the answer must be construed in connection with the written contract of employment and bond sued on. It is addressed to the complaint based on these writings, and it does not purport to set up any different contract between the parties, and therefore, where the allega-

tions of the answer are in conflict with the terms of the written contract, the writing must control. It is charged in the pleading that it was the purpose of the first contract of employment entered into between the appellee and Stamets to make Stamets the local agent of appellee at Oakland City for selling its machinery and to superintend several local agencies in that immediate vicinity, whereas, the contract of employment declares that Stamets is to serve said party of the first part, "performing such duties as said party of the first part may from time to time direct him to perform, in such territory as said party of the first part may from time to time assign him to work." Under this contract, which is to be read into the appellants' plea, the appellee clearly had the right to designate the work Stamets was to perform and the field of his operation, and it was not confined to the vicinity of the town of Oakland City. The gravamen of the plea is that the work of Stamets was removed from Oakland City, the residence of the other appellants, and his duties enlarged after the expiration of the first year's services. The contract of employment expressly gave appellee the right to change the residence of Stamets. Under the terms of the contract, they would undoubtedly have had the right to change Stamets' residence, and it cannot be consistently contended that such subsequent change of residence was beyond the purview of the contract between the parties. The bond declares that Stamets is about to engage in the service of said Plano Manufacturing Company, as the collector of its securities and salesman of its goods, and solicitor of agency contracts, creating local agencies for the sale of goods, also to work in the capacity of an adjuster of accounts of local collectors and local sales agents, in which capacity large sums of money and large amounts of securities belonging to said corporation will necessarily come into his hands and possession for transmission to said corporation, and the complaint alleges that it was for the embezzlement of the funds of the company coming into the hands of Stamets, as the company's servant in making collections from his local agents, that recovery is sought.

This pleading addressed to this complaint, founded on these written contracts, we think was clearly insufficient, and the demurrer thereto properly sustained. The authorities cited by appellants to sustain their contention are founded on an entirely different state of facts from those presented in this complaint and answer, and are none of them in point. The appellee's position is well sustained by the authorities cited (*Bateman Bros. v. Mapel*, 145 Cal. 243, 78 Pac. 734; *Com. B. & L. Ass'n v. Steele*, supra), as well as by the general principles of law.

The judgment of the court below is in all things affirmed.

(51 Ind. App. 61)

DUNCAN v. COX et al. (No. 6,026.)¹

(Appellate Court of Indiana, Division No. 2.
Oct. 29, 1907.)

1. STATUTES—CONSTRUCTION AS MANDATORY OR DIRECTORY.

The provision of Burns' Ann. St. 1901, § 5386, that at the first June session after the election is held the board of commissioners shall, if a majority of the votes cast at the election are favorable to the appropriation, levy a special tax, etc., is merely directory, and the board does not lose its jurisdiction by failing to act at that time.

2. TOWNS—AID TO RAILROADS—PETITION FOR TAX—NOTICE.

Where a taxpayer petitions the board of county commissioners to levy a tax upon the township to meet an appropriation voted in aid of the construction of a railroad, notice of the petition brings in all the taxpayers in the township, and they remain in and are bound to take notice of all the steps taken in the proceeding until it is finally disposed of by the board.

3. SAME—DECISION OF COUNTY BOARD—REVIEW.

Where a taxpayer petitions the board of county commissioners to levy a tax under Burns' Ann. St. 1901, § 5386, providing that, if a majority of the votes cast at an election to determine the question of an appropriation by a township in aid of the construction of a railway shall be in favor of such appropriation, the board of county commissioners at the ensuing regular session shall levy a special tax, etc., the board acts in a judicial capacity in determining all the questions of the sufficiency of the petition, and all the steps taken that would authorize them to grant the relief prayed, and the only remedy of taxpayers against the action of the board is by appeal.

4. SAME—REMEDIES AND RIGHTS OF TAXPAYERS—COLLATERAL ATTACK.

A remonstrance filed with the board of county commissioners against the levying of a tax under such statute is not a collateral attack upon the election, but seeks to defeat the granting of the appropriation by the board.

5. SAME.

A taxpayer may object to the validity of the proceedings had and the levying of the tax at any time before final action by the board.

6. SAME—APPROPRIATIONS—INTEREST OF PARTY BENEFITED.

Where an appropriation is voted under the statute, the railway to receive the appropriation has no interest in the subject until the money raised by the tax is in the treasury.

On petition for rehearing. Petition denied.

For former opinion, see *Duncan v. Cox*, 81 N. E. 735.

RABB, J. Appellant earnestly insists that this court erred in holding that the board of commissioners could go behind the returns of the election officers, and hold the railroad election void, and for that reason refuse the prayer of the petition, without notice, after the lapse of two years' time from the date of the election.

It is true the statute provides that, at the first June session after the election is held, the board of commissioners shall, if a majority of the votes cast at the election are favorable to the appropriation, grant the prayer of the petition; but this provision of the statute is merely directory. The board

¹ Transfer denied.

does not lose its jurisdiction by failing to act at that time. All taxpayers in the township are brought into the proceeding by the original notice of the petition, and they remain in, and are bound to take notice of all the steps taken in the proceeding as long as it remains in fieri, and it does remain in fieri until it is finally disposed of by the board either granting or refusing the petition. If they refuse to grant the petition, it matters not upon what ground, the only remedy of the taxpayers favorable to the appropriation is by appeal. If they grant the prayer of the petition, the only remedy of the taxpayer opposed to the appropriation is by appeal. The board acts in a judicial capacity in determining all the questions of the sufficiency of the petition, and all the steps taken that would authorize them to grant the prayer of the petition. Board, etc., v. Conner, 155 Ind. 484, 58 N. E. 828; Gilson v. Board, etc., 128 Ind. 65, 27 N. E. 235, 11 L. R. A. 835; Reynolds v. Faris, 80 Ind. 14; State ex rel. v. Board, etc., 131 Ind. 90, 30 N. E. 892; Board, etc., v. Hall, 70 Ind. 469.

Appellant treats the election as being the thing assailed, and claims that the remonstrance is a collateral attack upon the election. This is a mistaken view. The remonstrance is not a collateral attack upon anything. The election is an incident in the proceeding seeking the appropriation by the township of money to aid in the construction of the railroad. The remonstrance is against the granting of the prayer of the petition in the first instance. It does not seek to nullify the election, but to defeat the granting of the appropriation by the board of commissioners. All the cases in which the question has arisen cited by appellant, and in which it is held that the attack upon the validity of the proceedings was not seasonably made, have been proceedings to enjoin the collection of the tax after the order of the board of commissioners had been made granting the prayer of the petition. The cases hold that the question is not seasonably presented in those cases, not because of the lapse of time, but on account of the intervention of the judgment of the tribunal whose duty it was to determine the facts presented in the complaint as a ground for restraining the collection of the tax. It was not the lapse of time, but the adjudication that barred the complaining taxpayer. There is no positive law defining when the taxpayer may present his objection to the proceedings, and what we hold is that until they are determined by the tribunal where they are originally pending, they are seasonably presented. There is no question of estoppel arising that could operate against their making the remonstrance at any time before final action by the board. The only persons who are interested or who have any rights to be affected are the taxpayers of the township, and it could not be claimed that any tax-

payer had altered his position on account of the delay in presenting the remonstrance. As has been decided in numerous cases, the railroad in whose aid the appropriation is petitioned for has no interest in the subject until the money raised by the tax is in the treasury.

(40 Ind. App. 662)

PIERSE v. BRONNENBERG'S ESTATE.

(No. 5,831.)¹

(Appellate Court of Indiana, Division No. 1.
Nov. 1, 1907.)

1. DRAINS—PETITION—REPORT OF COMMISSIONERS—NOTICE.

Under the statute regulating the establishment of drains, the filing of the petition and the report of the commissioners is notice to all whose lands are named therein that their lands are to be assessed in the amounts named in the report to pay for the drain.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Drains, §§ 25, 79.]

2. SAME—LIEN—ATTACHMENT—TIME.

The lien of an assessment for the construction of a drainage ditch becomes fixed on the filing of the report of the commissioners, though the lien may be released by the court's action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Drains, § 88.]

3. COVENANTS—BREACH OF WARRANTY—UNASCERTAINED ASSESSMENT.

An unascertained assessment or tax may be such a lien as to constitute a breach of warranty in a deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 148.]

4. SAME—DRAINAGE ASSESSMENTS.

Where, by virtue of statute regulating drainage assessments, a ditch assessment was a lien on land conveyed at the time of the execution of the contract of sale and deed, such assessment constituted a breach of warranty against incumbrances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, §§ 118-121.]

On petition for rehearing. Petition denied.
For former opinion, see 81 N. E. 739.

HADLEY, J. Appellees insist that the court has erred in the foregoing opinion in holding that the assessment for the construction of the drain therein mentioned was a lien which amounted to a breach of the covenant of warranty in a deed made subsequent to the filing of the petition and report of the commissioners and prior to the approval of the court of the assessment. As we have said, this question is not properly before us; but we deemed it necessary to consider it in passing upon the other questions in the case. The statute is clear, and needs no construction. Under the statute the filing of the petition and report of the commissioners is notice to all whose lands are named therein that their lands are to be assessed in the amounts named in the report to pay for the same. The lien in reality becomes affixed at the time of filing the report of the commis-

¹ Transfer denied.

sioners, although it may be released by the action of the court. It is well settled that an unascertained assessment or tax may be such a lien as to constitute a breach of warranty. *Kirkpatrick v. Pearce*, 107 Ind. 520, 8 N. E. 573; *Lindsay v. Eastwood*, 72 Mich. 338, 40 N. W. 455; *Hill v. Bacon*, 110 Mass. 387; *Carr v. Dooley*, 119 Mass. 205; *Hutchins v. Moody*, 30 Vt. 656; *Lafferty v. Milligan*, 165 Pa. 534, 30 Atl. 1030. By virtue of the statute, the ditch assessment was a lien at the time of the execution of contract and deed. This is supported by abundant authority. *Kirkpatrick v. Pearce*, supra; *Hill v. Bacon*, supra; *Blackie v. Hudson*, 117 Mass. 181; *Carr v. Dooley*, supra; *Hutchins v. Moody*, supra; *Peters v. Myers*, 22 Wis. 602; *Lindsay v. Eastwood*, supra; *Hartshorn v. Cleveland*, 52 N. J. Law, 473, 19 Atl. 974. Many more could be cited.

As to the injustice that might occur under our construction, as pointed out by appellee, we have nothing to do, as that is a question for the Legislature; but in this case, if the written contract does not declare what was intended, the law should not be blamed.

The other questions presented in the brief for rehearing are fully covered in the opinion.

Petition for rehearing denied.

(189 N. Y. 287.)

ZARTMAN v. FIRST NAT. BANK OF WATERLOO.

(Court of Appeals of New York. Oct. 8, 1907.)

1. BANKRUPTCY—PRIORITY OF MORTGAGE.

A manufacturing corporation gave a mortgage on all its property to secure its bonds, giving the mortgagor a right to possession for his own use until default, with a clause purporting to cover after-acquired property. *Held*, not good as against a trustee in bankruptcy as to shifting stock and material, where possession was taken by the mortgagee one day after default and three days before bankruptcy proceedings against the mortgagor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 277.]

2. CHATTEL MORTGAGE—VALIDITY—PROPERTY NOT IN EXISTENCE.

An agreement of the parties to a chattel mortgage on property not yet in existence will be given effect by a court of equity so far as practicable, provided no interest is affected except that of the mortgagor and mortgagee who entered into the stipulation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, §§ 61, 62.]

3. SAME.

A chattel mortgage on property not in existence at its date is invalid as to creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 61.]

4. SAME—SALE FOR MORTGAGOR'S BENEFIT.

An agreement in a chattel mortgage, permitting the mortgagor to sell for his own benefit, renders the mortgage fraudulent as a matter of law as to creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Chattel Mortgages, § 412.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by George E. Zartman, trustee in bankruptcy of the Waterloo Organ Company, against the First National Bank of Waterloo. From a judgment of the Appellate Division (96 N. Y. Supp. 633, 109 App. Div. 406) affirming a judgment for plaintiff, defendant appeals. Affirmed.

The object of this action was to determine the rights of the parties to a fund realized from a sale in bankruptcy of the property of the Waterloo Organ Company, a manufacturing corporation formerly carrying on the business of making and selling organs, pianos, and other musical instruments in the village of Waterloo. All the property of the company, both real and personal, was sold in one parcel, free from liens, by order of the United States District Court, and the value of such chattels included therein as were acquired by the company after it had given a corporate mortgage to secure its bonds issued and negotiated in the usual way was the sum of \$15,480. The judgment directed in favor of the plaintiff consisted mainly of that sum, and there is no controversy over any other item. Upon appeal to the Appellate Division the judgment was affirmed, one of the justices dissenting, and the defendant appealed to this court.

Adelbert Moot, William L. Marcy, and Helen Z. M. Rodgers, for appellant. George H. Zartman and Frederick L. Manning, for respondent.

VANN, J. (after stating the facts as above). The question presented by this appeal is whether, in a mortgage given by a manufacturing corporation upon all its property, real and personal, to secure its negotiable bonds with the right of possession and enjoyment in the mortgagor for its own use and benefit until default, a clause, purporting in terms to cover after-acquired personal property, is good as to shifting stock and material on hand when possession was taken by the mortgagee pursuant to the provisions of the mortgage, one day after default in the payment of interest and three days before the commencement of bankruptcy proceedings against the mortgagor, as to the trustee in bankruptcy subsequently appointed therein.

The facts raising the question are stated so fully in the opinion below as to make it unnecessary to repeat them here. 109 App. Div. 406, 96 N. Y. Supp. 633. To the extent that the mortgage covered personal property it was a chattel mortgage, but as it was executed by a corporation to secure the payment of its bonds and was duly recorded as a mortgage of real property, according to the provisions of the lien law, there was no necessity for filing or refiling it as a chattel mortgage. Laws 1897, c. 418, p. 536, § 91. No question is raised as to the lien of the mortgage upon machinery, tools, and appliances belonging to the manufacturing plant, for the controversy is confined to musical instruments on hand, finished and unfinished, and

materials from which other instruments might be made. The learned counsel for the appellant, in an able argument, contends that while the mortgage did not create an absolute lien upon stock and materials acquired after its date, it operated as an executory contract to deliver possession upon default and to place the property as it then existed under the lien of the mortgage. He concedes that property of this nature is subject to seizure on execution by unsecured creditors during the period while it is subject to the disposal of the mortgagor, and until the trustee pursuant to the mortgage takes possession of it, but insists that the act of taking possession ripens the lien of the mortgage and makes it absolute as against general creditors or those with no prior lien. The mortgage provided that, "until default shall be made in the payment of the interest or principal of the said bonds or some of them, * * * It shall be lawful for the said party of the first part and its successors peaceably and quietly to have, hold, use, possess and enjoy the said premises and property, with the appurtenances, and to receive the income and profits thereof to its own use and benefit without hindrance or interruption" from the mortgagee or its successors. This clause gave the mortgagor power to sell for its own benefit all materials and products until the trustee took possession after default in the payment of interest. No limitation is placed by the mortgage upon the use to be made of the proceeds derived from the sale of the stock and materials. As was said by the learned justice who wrote for the Appellate Division: "The mortgagor was given unrestricted dominion over this mortgaged property or whatever was subsequently acquired. It might sell or dispose of all the personal property. It was permitted to use the income or profits of the business. It was not required to expend these avails in keeping the stock good, nor for the development of the business or in its management in any way," but could use them for its own benefit "precisely the same as if no lien existed." Conceding that the right of the mortgagor to receive the profits to its own use means a proper and legitimate corporate use, still the use permitted was independent of the mortgage or any lien supposed to be created thereby. As was said in a case upon which both parties rely: "The right of the mortgagor in the meantime [that is, until default] to the use of the earnings amounts, practically, to absolute ownership, and hence the mortgage cannot operate as a lien upon such earnings to the prejudice of the general creditors until actual entry and possession taken, and then only upon what is earned after that time. The lien of the mortgage upon future earnings is consummated as against other creditors only by the fact of the possession of the property, and cannot have any retroactive operation, since it would then deprive the unsecured creditor of the fund, up-

on the faith of which he may have given credit to the mortgagor during the time when the latter was permitted to deal with and use it as its own. The lien upon the earnings, in favor of the bondholders, attaches only upon what is earned after the time when the lien is perfected by entry and possession." *N. Y. Security & Trust Co. v. Saratoga Gas & El. L. Co.*, 159 N. Y. 137, 143, 53 N. E. 758, 45 L. R. A. 132.

If a lien was created by the mortgage upon property not in existence at its date, possession after it came into existence was of no importance. If no lien was created by the mortgage upon such property, the taking of possession pursuant to its terms did not create one as against general creditors, who are presumed to have dealt with the mortgagor in reliance upon its absolute ownership of the stock on hand. While the record of the mortgage was notice to all, it was notice of all its terms, which included the right of disposition for the use and benefit of the mortgagor, with no duty to apply the avails upon the mortgage indebtedness. If the question had arisen between the parties to the mortgage, equity might recognize a contract to give a lien and treat it as an actual lien; but it arises between the mortgagee and the general, unsecured creditors, who had little, if anything, to rely upon except the shifting stock, which, directly or indirectly, they themselves had furnished. The credit extended by them enabled the mortgagor to carry on business, and, if the product of that credit goes to the mortgagee, not only are they helpless, but, if the law is so declared, hereafter manufacturing corporations needing credit will be helpless also. If it is understood that a corporate mortgage given by a manufacturing corporation may take everything except accounts and debts, such corporations, with a mortgage outstanding, will have to do business on a cash basis or cease to do business altogether. Assuming that a court of equity may uphold and give effect to such a mortgage when the rights of the mortgagor and mortgagee only are involved, it will not aid the mortgagee at the expense of subsequent creditors when their rights are involved. It will not treat a contract to give a mortgage upon a subject to come into existence in the future as a mortgage actually then given, if the result would deprive the general creditors with superior equities so far as after-acquired property is concerned, of their only chance to collect debts. It is only when the rights of third parties will not be prejudiced that equity, treating as done that which was agreed to be done, will turn a contract to give a mortgage on property to be acquired into an equitable mortgage on such property as fast as it is acquired and enforce the same accordingly against the mortgagor, his representatives and assigns. In other words, the agreement and intention of the parties to a mortgage

upon property not yet in existence will be given effect by a court of equity so far as practicable, provided no interest is affected except that of the mortgagor and mortgagee, who entered into the stipulation, but equity closes its doors and refuses relief if the interests of creditors are involved. The result thus announced is founded on principle and sanctioned by authority. *Kribbs v. Alford*, 120 N. Y. 519, 524, 24 N. E. 811; *Wisner v. Ocumpangh*, 71 N. Y. 113; *McCaffrey v. Woodin*, 63 N. Y. 459, 22 Am. Rep. 644; *Jones on Chattel Mortgages* (4th Ed.) 170; *Beall v. White*, 94 U. S. 382, 386, 24 L. Ed. 173.

Was the alleged lien good at law? The authorities cited by both parties show that it was not for two reasons: First, because a man cannot grant what he does not own, actually or potentially. "*Qui non habet, ille non dat.*" *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632, 40 Am. St. Rep. 635; *Deely v. Dwight*, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298; *N. Y. Security & Trust Co. v. Saratoga Gas & El. L. Co.*, 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132; *Gardner v. McEwen*, 19 N. Y. 123; *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55; *Farmers' Loan & Trust Co. v. Long Beach Imp. Co.*, 27 Hun, 89; *Jones on Chattel Mortgages* (4th Ed.) § 138; *Thomas on Chattel Mortgages*, § 137; *Thompson on Corporations*, § 6141; 6 Cyc. 1041. Second, because an agreement permitting the mortgagor to sell for his own benefit renders the mortgage fraudulent as matter of law as to the creditors represented by the plaintiff. *Skilton v. Codrington*, 185 N. Y. 80, 90, 77 N. E. 790; *Mandeville v. Avery*, 124 N. Y. 376, 28 N. E. 951, 21 Am. St. Rep. 678; *Hangen v. Hachemelster*, 114 N. Y. 566, 21 N. E. 1046, 5 L. R. A. 137, 11 Am. St. Rep. 691; *Potts v. Hart*, 99 N. Y. 168, 1 N. E. 605; *Southard v. Benner*, 72 N. Y. 424. In reading the authorities it is important to observe how, where, and between whom the question arose, for the remarks of learned judges in discussing the rights of the mortgagor and mortgagee are not in point when the question relates to the rights of third persons as against either or both of the parties to the mortgage. Nor are they in point when, as in *Thompson v. Fairbanks*, 196 U. S. 516, 522, 25 Sup. Ct. 306, 49 L. Ed. 577, the federal courts feel bound to follow the decisions of the state courts as to local questions and the law of the state where the case arose differs from that of the state of New York. *Dooley v. Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457. As we have seen, equity takes hold of the subject with a strong hand in order to enable the mortgagee to get what the mortgagor intended to give, provided no other interest is involved, but when the creditors of the mortgagor enter the field equity goes no farther

than the law and will simply enforce a lien if it exists without attempting to perfect it if something is lacking to make it complete. The taking of possession by the mortgagee is relied upon by the appellant to "rip-en the lien," which, as is conceded, was inchoate before. If the contract between the mortgagor and mortgagee fell short of creating a lien, as was clearly the case, the act of taking possession did not enlarge, perfect, or complete it. A mortgagee cannot add to his title by his own act. *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11. The defendant did not have title to the after-acquired property when it took possession. All it had, as the courts hold, was the promise of the mortgagor to give title as the property came into existence. The mortgagor did not keep its promise by giving supplementary mortgages as plans were made or materials were purchased, or in any other way. If it had, creditors would have been warned and could have avoided the danger. Time passed, and insolvency overwhelmed the mortgagor, when it was too late to give additional mortgages owing to the bankruptcy act. The plaintiff, as trustee in bankruptcy of the mortgagor, has the same rights as a creditor armed with an attachment or execution. *Skilton v. Codrington*, supra; *In re Werner*, 5 Dill. (U. S.) 119, Fed. Cas. No. 17,416; *In re Garcewich*, 8 Am. Bankr. Rep. 149, 115 Fed. 87, 53 C. C. A. 510; *Bankruptcy Act U. S. 1898*, § 70 (Act July 1, 1898, 30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451]). When the general creditors intervened through the plaintiff, the mortgagee was simply in possession with title to the property that was in existence when the mortgage was given, but with no title to the shifting stock subsequently acquired. As to that property, it had only the promise of the mortgagor, which equity could help out by treating as done what was agreed to be done, but which it will not help out to the injury of unsecured creditors. The rights of the defendant, incomplete when it took possession, are incomplete still, for they can be perfected only by the aid of equity, and equity refuses to help under the circumstances of this case.

The judgment awarding the proceeds of the after-acquired property to the plaintiff was therefore properly rendered, and the action of the courts below should be sustained. The elaborate opinions written both at Special Term and in the Appellate Division make further discussion unnecessary.

The judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, and WERNER, JJ., concur. HISCOCK, J., not sitting.

Judgment affirmed.

(189 N. Y. 275.)

PEOPLE v. WENZEL.

(Court of Appeals of New York. Oct. 8, 1907.)

1. HOMICIDE—MURDER—EVIDENCE.

On a trial for murder, where defendant claimed self-defense, evidence held to justify verdict that defendant intentionally killed the decedent with premeditation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 480.]

2. CRIMINAL LAW—ADMISSION OF EVIDENCE—HARMLESS ERROR.

On trial for murder, where the widow of the deceased testified that defendant was always more or less troublesome when he came to her place, and on further examination, over objection, testified that he was also insulting persons in front of the bar in the presence of the witness, error in its admission was harmless, where defendant on the stand, giving the history of his own life, showed that his conduct was fully as bad as represented by the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3138, 3139.]

3. SAME.

Where an objection to proper evidence was made by the district attorney and sustained, but the answer had previously been given and was not stricken out, any error was harmless.

4. SAME.

Where accused, on trial for murder, voluntarily admitted in his statement that he had committed a burglary and had been convicted on a plea of guilty, any error in allowing a witness to testify that accused had stolen was harmless error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3139.]

5. WITNESSES—INTEREST—EVIDENCE.

Where, on trial for murder defendant's attorney questioned a police officer, witness for the state, as to his desire to see the accused convicted, it was not error for the district attorney to show that he had no other interest than that of a public officer anxious only to convict those who are guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 1207.]

Appeal from Kings County Court.

John Wenzel was convicted of murder, and appeals. Affirmed.

Herbert N. Warbasse and John D. Barber, for appellant. John F. Clarke, Dist. Atty. (Frank X. McCaffry, of counsel), for the People.

HAIGHT, J. John Wenzel, the defendant, at the time of the trial, according to his own testimony, was 33 years of age, 5 feet 11 inches tall, weighing 184 pounds, and had always been in good physical condition. He was born and brought up in Brooklyn, within a short distance of the place where the homicide took place. In 1892 he enlisted in the navy as a coal passer, served in that capacity for the term for which he was enlisted, and was honorably discharged. In April, 1898, he enlisted in the military service of the United States, and was dismissed after serving 2 years and 10 months. In December, 1902, he enlisted in the United States marine service, but was dismissed therefrom after a service of 23 months. The decedent, George Spatz, kept a saloon at the corner of Marcy avenue and Hopkiss

street, was married, and had two children. The defendant began visiting the saloon of Spatz in 1899, and thereafter became a frequent customer, making the saloon, as he expressed it, his "hanging-out place." In February, 1905, he was arrested, charged with the crime of burglary, and upon his plea of guilty was sentenced to the penitentiary, from which place he was discharged on the last day of April, 1906. He relates three occasions on which he had had some trifling disputes with Spatz before he was sent to the penitentiary, but states that he never harbored any ill-feeling towards him. On Monday evening, April 30, 1906, after his discharge from the penitentiary, between 10 and 11 o'clock, he visited Spatz's saloon, and found there Edwin Maher and Charles Blank, engaged in playing a game of cards. He asked for a drink, which was refused, Spatz saying to him, "You have got enough now," and that he wanted him to get out. At this point the testimony of Maher and Blank widely differ from that of the defendant as to what took place; that of Maher and Blank being to the effect that the defendant undertook to draw a pistol from his pocket, and they jumped up, interfered, struck him with their fists, knocked him down, and put him out on the street; that of the defendant, to the effect that Spatz provided them with clubs, and that the three attacked him with clubs, knocking him down, beating him, and that thereupon Mrs. Spatz interfered and saved him from being killed. After he had been put out of Spatz's place, he spent the remainder of the night in neighboring saloons, and early the next morning returned to Spatz's place, in company with one John Patterson, and, as he says, he asked Spatz why he had beaten him so the night before, to which Spatz replied, "You get out of here or you will get another." To this he replied, in substance, that he had no fear of getting another beating then, for the reason that Spatz's people of the night before were not there. He again asked Spatz to tell him why he got the beating, and Spatz told him he would not. He subsequently went home, arriving there about 8 o'clock. The evidence tends to show that he was badly bruised, and consequently remained home until Friday afternoon, and then went to the cemetery with his mother and sister. He returned home with them that night, and remained until Saturday afternoon. He then went down to near the ferry, intending to visit some of his friends on the Kearsarge on which he had previously served. On the way down he met O'Neill and had a talk with him, and then he purchased a revolver and some cartridges. He then went to Venus Hall on Flushing avenue, and entered the toilet room and tried to load his revolver with the cartridges, but, finding them too large, he returned and exchanged them for others that would fit, then put them in his revolver, and again started for the neigh-

borhood in which he had had his previous trouble, taking Andrew Nelson and Michael Donlan with him. They visited several places, and finally brought up at Spatz's saloon some time during Saturday evening. He says that he wanted to see Spatz in order to find out where Maher and his other associates were, who were looking for him to beat him again, that he understood that Maher was carrying a gun, and that he was going to take it from him. Then, as he tells us, Spatz went to the end of the bar, took out three clubs, handed one to each of two young men who were standing there, and told them to take the clubs, and they would clean "this bunch out." The defendant then told the young men not to take the clubs because this was none of their argument, and one of them replied, "All right." Thereupon Mrs. Spatz came into the room and asked what the trouble was, and he said to her that he wanted Spatz to keep the bunch away from him; that he heard they were going up to his house to kill him; that he had a mother there about 76 years old, and, if she ever saw anything of the kind, she would drop dead. He thanked Mrs. Spatz for saving his life on Monday night, but said her husband was a coward. They then left the place. Before leaving, however, he said that Spatz picked up the clubs and had one in his hand; that he started to make towards him with the club saying, "Well, you come in here again now, we will kill you." I says to him, "We will kill you." "Do you want to kill me?" I says to him. He says, "Yes, if I get you in here any time, I kill you." He then went out and stayed in Conner's saloon over night, and on the following Sunday morning he, in company with Michael Donlan, returned to Spatz's saloon, entering a rear room at the back door. He found a German sitting at the table, drinking beer, and Spatz was sitting in a chair tilted back against the wall by the side of the door that entered into the barroom. His story is that he asked Spatz to serve them with drinks and to let him explain himself to him; that he went to a table with the intention of sitting down, but Spatz replied, "You big son of a bitch, I will serve you with drinks," and attempted to draw from his hip pocket a revolver; that as he was pulling it out it caught in the strings of his apron, and thereupon the defendant drew his revolver and shot Spatz three times. He then ran from the saloon, took a Park avenue car, and disappeared.

The testimony of Frederick Harjes, the German, however, materially differs from that of the defendant with reference to the homicide. He had been to early morning church, and had then stepped into Spatz's place to have a visit and a glass of beer. He sat at a table, and Spatz had handed him a glass of beer and had taken a cigar in one hand and a match in the other, and had sat

down in a chair at the place already indicated. He said that they had been sitting there about two minutes talking when the defendant and another fellow came in and wanted beers; that Spatz said to the defendant, "I told you many times not to come in here, leave my house. You cannot have any beer in my house." Just as soon as Spatz replied, the defendant drew a pistol and it went "puff, puff, puff." He saw him fire the revolver three times, and after firing the shots they went out. It appears that the decedent was seated in a chair in the act of lighting his cigar at the time the defendant and his companion entered the room and called for beer; that during the firing he attempted to rise from his chair, called for help, and then fell to the floor. An ambulance was summoned, and he was removed to the hospital, where he died the following day. An autopsy disclosed that one bullet entered the back at the right side of the shoulder blade and was lost in the muscles of the back, one bullet passed through the right forearm three inches below the elbow, and the other bullet entered the right side of the abdomen, one inch below the border of the ribs and two inches to the right of the breast bone, passing through the liver, and was found in the spleen directly opposite. This wound was the cause of death. Harjes further testified that Spatz did not attempt to draw any revolver, that he had at no time made any effort to take anything out of his back pocket, and did not put his hand towards such pocket. It further appears that the officers searched the decedent before his removal to the hospital and that he had no revolver in his possession or about his person at the time of the homicide.

We have only briefly alluded to the most important portion of the testimony. The statement of the defendant that the decedent attempted to draw a revolver is shown to be false by a number of disinterested, and, so far as we know, credible witnesses sworn on behalf of the people, and, if false, then the defendant's claim, that he was acting in self-defense, utterly fails. The defendant, as we have seen, admits the killing. According to his own statement, he had been time and again ordered out of the decedent's saloon. Repeatedly he had been refused drinks when called for, yet he persisted in calling and demanding drinks when he knew that he was an unwelcome visitor. According to his own statement, he had been severely pounded and put out of the place the Monday evening before the homicide. In consequence of the injuries then received he remained at his house until the following Saturday afternoon. Then he started out, purchased a revolver, procured the cartridges that would fit it, loaded it, and then with two of his associates started out to find the persons who had inflicted the injuries upon him. Our conclusion is that the evidence required the submission to the jury of the questions of fact in the case, and

that it justified the verdict found, to the effect that the defendant with deliberation and premeditation intentionally killed the decedent.

There were several erroneous rulings made during the trial, and the question that we shall discuss with reference to them is as to whether, under the circumstances of this case, they were so prejudicial of the rights of the defendant as to require the ordering of a new trial.

During the trial Mary Spatz, the widow of the deceased, was sworn as a witness on behalf of the people, and testified that she had known the defendant off and on for about seven years; that he was always more or less troublesome when he came into their place. The question was then asked as to what she meant "by that." To this the defendant interposed an objection as improper. The objection was overruled, and the defendant took an exception. The witness answered: "He was always insulting people in front of the bar. Q. This was in your presence? A. In my presence most of the time." We do not understand that evidence of specific quarrels with other persons at some remote time, having no connection with the act resulting in the homicide and not tending to show any motive therefor, was competent at this stage of the trial. *People v. Larubia*, 140 N. Y. 87, 92, 35 N. E. 412. But subsequently the defendant took the stand in his own behalf, and gave us the history of his own life and conduct, showing that his character and conduct were fully as bad as that indicated by the answer of Mrs. Spatz, thus rendering her statement harmless, and counteracting the evil that otherwise might have resulted.

Upon the trial Michael Donlan was also sworn as a witness. It will be recalled that he was the companion of the defendant who had been with him the Saturday evening before the homicide, and the one who accompanied him into Spatz's place on the Sunday morning when the shooting took place. As we have seen, Donlan and the defendant entered Spatz's place through a rear door, passing into a room back of the barroom. Spatz was seated in a chair tilted back against the wall, next to the doorway entering into the barroom. He testified that, as the defendant called for two drinks, Spatz replied, "You get out of here as quick as you can." He then stated, in substance, that Spatz had his hand behind him and he raised up off the chair, and the defendant said, "No you don't, I got you first," and then fired the shots which caused the death. He was then asked if he wanted the jury to understand that Spatz put his hand into his pocket. He answered: "No. I could not say that. I do not say where he put his hand." Some further questions upon the subject were asked, and finally the witness answered: "I don't know whether he wanted to raise himself from the chair. I would not say for sure. All I said, he put

his hand behind him." Then followed the question: "Spatz, as Wenzel said this, put his hand back of him, evidently to raise himself out of the chair, and at the same time saying, 'Get out of here as quick as you can.' Is that right?" This question was objected to, the objection was overruled, and the defendant excepted. The witness answered: "Yes, sir." The question was somewhat leading, and called for a conclusion of the witness as to the intention of Spatz in putting his hand behind him. But we do not think the jurors were misled upon that subject, for he had answered quite fully in reference to what he saw and what he did not see. The same witness testified that on the evening before he was with the defendant in the saloon of the decedent when Spatz ordered them out, and that then he did not hear any remarks from the defendant, that he was a couple of feet behind him, and he could have heard any remarks that were made. At this point an objection was interposed by the district attorney, which was sustained and an exception taken. The answer, however, had previously been taken, and it was not stricken out, so that the evidence stands in the record and was before the jury. The testimony was called out upon the cross-examination, and was in answer to evidence tending to show that the defendant, as he went out, uttered a threat against Spatz.

Upon the cross-examination of the witness Harjes, who, as we have seen, was the German in the room drinking a glass of beer at the time of the homicide, he was asked by the defendant's counsel if he remembered making a remark, to the effect that he would like to see the defendant go to the electric chair. He answered: "I like that to see. It is good for him. I like to see that. It is too good for that man. He is a first bum." Upon redirect examination the district attorney asked him: "When you say you want to see him go to the electric chair, do you mean he ought to go there for killing Spatz?" This was objected to as an incompetent conclusion, the objection was overruled, and the defendant excepted. The witness answered: "Yes, sir; that is my idea." Again, upon recross-examination, he testified that he did not like this man before the shooting, that he never liked him, and that he hated him long years ago. Upon the redirect examination the district attorney asked him why. To this an objection was interposed, overruled, and an exception taken. He then stated that a couple of years ago the defendant had wanted to work for him, that he refused to have him, and, then in answer to another question as to what he meant, the witness answered: "He goes and steals. That's why I don't want him." Upon redirect examination, immediately following, he stated that he had never seen him steal, and that all he knew about it was what he had heard. The purpose of the defendant's counsel in cross-examining the witness undoubtedly was to show

that he was a prejudiced witness, disliking the defendant, and that, therefore, the jurors ought not to give implicit confidence to his testimony. But, he having opened this subject by the examination of the witness, the district attorney then had the right to show, if he could, that the witness had no prejudice whatever other than that which would naturally exist on the part of any person who saw the homicide. It must be conceded that the district attorney went beyond this, especially in calling out the statement that the defendant "steals." In most cases this might be regarded as so incompetent and prejudicial as to call for a reversal, still in this case we have the voluntary admission on the part of the defendant himself that he had stolen, that he had committed a burglary, and that he had been convicted upon his own plea of guilty, thus showing that it was a matter of public knowledge. And, inasmuch as the witness followed the statement with the further declaration that he had never seen him steal and that all he knew about it was what he had heard, we incline to the view that the verdict was not affected by the error complained of.

Owen Carney was the officer who succeeded in arresting the defendant. He testified to a number of declarations made by the defendant at that time, to the effect that he did not shoot Spatz, that he never had a pistol in his life, and that he was not in the saloon that morning. Upon cross-examination he was asked if it was to his credit that this man should be convicted, and his answer to this was excluded by the court. But he was permitted to testify that he was anxious to convict the defendant. The district attorney then asked why, and he was permitted to answer: "Because he deserves it." Then, on cross-examination, he was asked: "How do you know he deserves it?" To which he answered: "Because he shot the man in cold blood, I believe. Q. How do you know he shot him in cold blood? A. From the evidence given in the case. Q. You did not see him shoot him? A. No, sir." Upon redirect examination a question was asked which was objected to, and the question was withdrawn. And the further question was asked: "You have said in answer to the question asked you by counsel for the defendant that you reinforced your belief that this defendant ought to be convicted of this crime"—to which the witness answered: "Yes, sir." * * * Q. I want you to tell the jury why you believe that. A. From my investigation as a police officer. Q. You are convinced of the guilt of the defendant? A. Yes, sir." These latter questions and answers were not objected to. It was perfectly proper for the defendant's counsel to show that the witness was anxious for a conviction, and in answer thereto it was perfectly proper for the district attorney to show that the only interest that he had was that of a police officer in discharging his duty. The belief of the wit-

ness, or his judgment, as to what the evidence showed, was of no consequence, and was not a proper subject for the consideration of the jury. In this case the district attorney was allowed to go too far in his examination. He called out opinions of the witness which he had no right to have considered by the jury. But the most objectionable part of the testimony was not objected to by the defendant's counsel. He had opened the door for an inquiry as to the nature of the anxiety of the witness to have the defendant convicted. The district attorney had the right thereupon to show that he had no other interest than that of a public officer, anxious only to convict those who are guilty. Instead of stopping at this point or the striking out of irresponsible answers, both counsel continued the examination into the forbidden field. But it distinctly appeared before the jury that this witness knew nothing of the case further than the declarations of the defendant made at the time of the arrest. This fact taken in connection with the admissions made by the defendant in his testimony, to which we shall hereafter refer, incline us to adopt the view that these errors may also be disregarded.

It will be recalled that the defendant, after his recovery from his injuries received on Monday evening, started out Saturday afternoon to visit, as he stated, some of his friends who were on the Kearsarge. On his way he testified that he met one O'Neill driving a truck. An objection was taken to the question as to what he learned from O'Neill, which was sustained by the court. No offer was made calling the attention of the court to what was sought to be shown by this statement. It is now claimed that the defendant was advised that Maher and Blank were looking for him; that Maher had a revolver, and that he better be upon his guard; and that it was by reason of this information that he then purchased the revolver with which he did the shooting. It is quite possible, had the attention of the court been called to the purpose of the testimony, it would have been received. The defendant doubtless had the right to show the reason why he purchased the revolver, but we have the testimony of the defendant quite fully upon the subject. He tells us distinctly that he purchased the revolver and the cartridges for the purpose of looking up Maher and taking from him the gun that he had in his possession, and it appears that he soon thereafter, in company with two associates, started out to find the "bunch," as he termed the persons who had inflicted the injuries upon him the Monday evening before. It is thus apparent that he did not purchase the revolver solely for the purpose of protecting himself in case of an attack, but that he purchased it for the purpose of taking affirmative action against the other parties referred to. We are also of the opinion that the court improperly admitted the testimony of Officer Carney as to

the statement made by Michael Donlan, to the effect that he had stated to the defendant that the shooting was a cowardly trick. Donlan was sworn as a witness for the people. He therefore could not be contradicted upon collateral matters. While upon the witness stand, he did not recall making the statement to the defendant. No reply thereto was given by the defendant, and consequently it only amounts to his judgment as to the transaction. We think that there was no error in the charge of the court in submitting the case to the jury that calls for a reversal.

As we have seen, the defendant concedes that he did the shooting which caused the death of Spatz. He tells us of the circumstances under which he purchased the revolver and the cartridges, and of his starting out with his associates looking for Maher and others. Not finding Maher and Blank, they went to the saloon of the decedent during the evening, and were ordered out. After Mrs. Spatz appeared upon the scene, they took their departure. But, again the next morning, the defendant, in company with his remaining associate, Donlan, again called and demanded drinks. He then knew that on three occasions during the week he had been refused drinks and ordered from the premises. He knew that on the Monday evening before he had been driven from the premises after receiving a severe beating. He knew that he was not wanted there and had no business to enter the premises. Yet again we find him there and demanding drinks, and when refused, he fired the shots that deprived Spatz of life. All this appears from his own testimony. Of what importance, then, was the testimony contradicting Donlan as to how he characterized the act, or of what consequence was the testimony of Officer Carney as to his belief as to the guilt of the defendant, or of the other rulings, to which attention has been called? Prejudicial, we concede, had there been a doubt about the essential facts of the homicide. But the facts being admitted, they become unimportant, harmless errors, which, under other circumstances in other cases, might be deemed fatal.

There was really but one question of fact left open for consideration upon the trial, and that was as to whether Spatz had a revolver upon his person and attempted to draw it upon the defendant at the time the defendant did the shooting. As to this issue, we have already commented upon the facts, to the effect that the verdict was amply sustained by the evidence, which tended to show that the decedent was unarmed. But, even if Spatz did have a revolver and attempted to draw it, there was nothing to prevent the defendant from retiring and leaving the premises, in accordance with the demand of the proprietor. There was nothing that occurred that justified the defendant in shooting Spatz, nor was he justified in believing

that he was about to receive great bodily harm while retreating from the premises. We therefore conclude that the errors complained of, under the circumstances of this case, do not affect the substantial rights of the defendant. Code Crim. Proc. § 542.

The conviction and judgment should be affirmed.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK, and CHASE, JJ., concur.

Judgment of conviction affirmed.

(189 N. Y. 252.)

AMSINCK et al. v. ROGERS et al.

(Court of Appeals of New York. Oct. 1, 1907.)

1. **BILLS AND NOTES—LIABILITIES OF DRAWER.**

The liabilities of a drawer of a bill of exchange are fixed by the law of the place where he draws it, and he is discharged by the failure to protest the same in accordance with such law, though such failure is due to the different laws prevailing in the country where the bill is payable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1051-1054.]

2. **SAME—FOREIGN BILL OF EXCHANGE.**

The drawer of a bill of exchange guarantees its acceptance and payment in the foreign place on which it is drawn and agrees on default of such payment on due notice to reimburse the holder at the place where the contract was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 31.]

3. **SAME—FOREIGN BILL OF EXCHANGE—DEFINITION.**

A draft addressed by a firm doing business in New York to a firm doing business in Austria, requiring the drawee to pay on demand a specified sum to the order of the drawers and charge the same to a cargo shipped to the foreign firm by a specified steamship, is a "foreign bill of exchange" within the definition in Negotiable Instruments Law, Laws 1897, pp. 745, 746, c. 612, § 210, as amended by Laws 1898, p. 977, c. 336, § 25, and section 213.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 28.]

4. **SAME—FOREIGN BILL OF EXCHANGE—FAILURE TO PROTEST.**

A foreign bill of exchange was indorsed by the drawers to bankers in New York, who sent it to their agent in Vienna to collect. The agent failed to demand payment in accordance with the laws of New York, and failed to protest the same on the refusal of the drawees to pay, or to give notice of such protest to the drawers as required by the laws of New York. *Held*, that the drawers were discharged from any liability, though under the laws of Austria the instrument was a mere commercial order for money of which no protest need be made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1051-1054.]

Vann, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Gustav Amsinck and others against William C. Rogers and others. Judgment for defendants was affirmed by the Appellate Division (93 N. Y. Supp. 87, 103 App. Div. 428), and plaintiffs appeal. Affirmed.

Charles Oakes, for appellants. Martin Conboy, for respondents.

HISCOCK, J. Appellants brought this action as holders of a certain instrument for the payment of money drawn by the respondents to their own order upon parties in Austria, and then indorsed and delivered for value to the appellants. The bill of exchange, as we shall for the present denominate it, was not paid by the drawees, and thus far recovery against the drawers has been refused upon the ground that there was not proper protest and notice of protest. The material facts are not disputed, and the only questions presented for our consideration upon this appeal arise in connection with the rejection by the trial court of certain evidence of Austrian laws and usages offered for the purpose of excusing protest and notice thereof.

Respondents were iron merchants doing business in the city of New York, and appellants were bankers doing business in the same place. The former made a sale of iron to Messrs. A. Herm. Fraenckl Soehne, of Vienna, Austria, and against said sale drew the instrument in question, which reads as follows:

"New York, Jan. 8, 1901.

"Exchange for £2,058⁵/₈.

"On demand of this original cheque (duplicate unpaid) pay to the order of Rogers, Brown & Company, Twenty-two hundred and fifty-eight pounds ⁵/₈, payable at rate for bankers cheques on London value received and charge the same to account of pig-iron per S. S. Quarnero.

"Rogers, Brown & Co.

"To Mess. A. Herm. Fraenckl Soehne,

"Ruepasse, Vienna, Austria.

"No. 75."

This bill was drawn and indorsed and transferred to appellants in New York. There was delay in the shipment of the iron, so that when the consignees and drawees of the bill were notified thereof they refused to carry out their purchase thereof unless an allowance was made, and this condition was complied with by respondents. January 8, 1901, the bill was forwarded by the appellants to Vienna for collection, where it was received January 22d. It was presented to the drawees on the same day, but the collecting agent was requested by the latter not to present it at that time because there were certain differences then existing between them and the drawers concerning the iron in question which probably would be adjusted in a short time. The agent thereupon withdrew the bill, and it was not protested, and the respondents were not notified of the presentment and nonpayment. January 28, 1901, the bill was again presented by the agent to the drawees, and payment again demanded, when practically the same request was made that presentment be withdrawn, and the same process repeated; there being no protest, and

no notification of presentment and nonpayment being given to respondents. February 12, 1901, the bill was again presented, and payment formally demanded, which was refused, but no protest was made, and no notice given to the respondents, except that on February 18th appellants' London agent, who had been advised of the presentment on February 12th cabled information thereof and of the refusal to pay, and upon the same day appellants by letter advised respondents thereof. February 21, 1901, in response to instructions from New York, the bill was presented to the drawees, payment demanded and refused, and protest made, and with what we shall assume to have been proper diligence appellants thereafter, and on March 11, 1901, mailed to respondents the notice of protest that day received through their agents; the respondents promptly taking the position that they were discharged for lack of proper protest. As bearing upon the merits of respondents' position, it appears that the steamer carrying the iron arrived at Genoa February 20th, and that at that time the iron in question could have been sold at that place by the respondents at the same price at which it had been sold to the purchasers in Vienna if the bill had been promptly protested. Upon arrival in Austria, the purchasers refused to accept the iron, and it was sold for the sum of \$5,738.38 for the benefit of whoever might be concerned, leaving an unpaid balance upon the bill of \$4,364.45.

It is practically conceded by the learned counsel for the appellants that, if the latter's obligation to cause protest and notice of protest of this bill is to be measured by the laws of New York where it was drawn and transferred by respondents, there has been a failure of necessary steps which prevents a recovery. Recognizing this, he sought, as already suggested, to introduce evidence establishing a different and less rigorous obligation upon the part of the appellants. This evidence was to the general effect that in Austria, where the same was payable, the instrument involved was not a bill of exchange nor a check, but a "commercial order" for the payment of money which was negotiable, and which might be presented as often as occasion arose; each presentment being legally good as any other, and no protest or notice of dishonor to the drawer being required. In connection with the rejection of this testimony, which presents the only questions upon this appeal, appellants' counsel has seemed to argue the proposition, broader than the evidence offered, that the rights of the drawer of a bill of exchange to protest and notice are governed by the laws of the place where the bill is payable, upon the assumption that in this case such view would excuse the omissions complained of by respondents. We shall first discuss this general proposition so urged, and, as we believe, shall demon-

strate that the weight of authority is that the rights and obligations of the drawer of a bill of exchange are determined and fixed by the law of the place where he draws it, and, as in this case, transfers it, and that he is discharged by failure to protest the same in accordance with the laws of that place; such failure being due to different laws or customs prevailing in the country where the bill is payable.

It is familiar law that the contracts of the different parties to a bill of exchange are independent and carry different obligations. The drawer of such a bill does not contract to pay the money in the foreign place on which it is drawn, but only guarantees its acceptance and payment in that place by the drawee, and agrees, in default of such payment, upon due notice, to reimburse the holder in principal and damages at the place where he entered into the contract. His contract is regarded as made at the place where the bill is drawn, and as to its form and nature and the obligation and effect thereof is governed by the law of that place in regard to the payee and any subsequent holder. *Story on Bills of Exchange*, §§ 181, 154. While as to certain details, such as the days of grace, the manner of making the protest, and the person by whom protest shall be made, the law or custom of the place where it is payable will govern, the necessity of making a demand and protest and the circumstances under which the same may be required or dispensed with are incidents of the original contract which are governed by the law of the place where the bill is drawn, rather than of the place where it is payable. They constitute implied conditions upon which the liability of the drawer is to attach according to the *lex loci contractus*. *Id.* §§ 155, 175. These principles have been affirmed and enunciated by so many decisions that it would be out of place to attempt a general review of the latter, and citation may be made simply of the following cases outside of this state: *Powers v. Lynch*, 3 Mass. 76, 80; *Potter v. Brown*, 5 East, 124; *Price v. Page*, 24 Mo. 65; *Hunt v. Standart*, 15 Ind. 33, 38, 77 Am. Dec. 79; *Raymond v. Holmes*, 11 Tex. 54, 59; *Allen v. Kemble*, 6 Moore's Privy Council Cases, 6.

Since, however, it is contended by the learned counsel for the appellants that the views expressed by Story are in direct opposition to the decisions in this state, a somewhat more extended reference will be made to the latter, and with the result, we apprehend, of quite conclusively demonstrating that the current of their authority has been misjudged.

In *Aymar v. Sheldon*, 12 Wend. (N. Y.) 439, 27 Am. Dec. 137, a bill of exchange was drawn in the French West Indian Islands on a mercantile house in Bordeaux, and was indorsed and transferred in the state of New York; action being there brought upon the bill by the indorsees. The material ques-

tion arising in the case was whether the steps necessary on the part of the holders of the bill to hold the indorsers upon default of the drawees to accept should be determined by the French law or the law of New York, where the indorsement was made, and it was held that while the payee of the bill was bound to present it for acceptance and payment according to the law of France, as it was drawn and payable in French territories, the indorsee stood upon a new and independent contract, the indorsement being equivalent in effect to the drawing of a bill, and that, this indorsement having taken place in New York, the obligation of the indorser and the rights of the indorsee were to be measured by the laws of that state, rather than of the place where the bill was payable, and that, this being so, it was unnecessary to take certain steps in order to hold the indorser, which would have been necessary under the law of the place where the bill was payable. The court said: "That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made has been adjudged both here and in England. * * * The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this state; and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn are equally applicable to the indorser, for, in respect to the holder, he is a drawer. * * * Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation, and it is therefore to be presumed that the parties had reference to it. So, the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case. The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition."

Allen v. Merchants' Bank of New York, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289, was an action of assumpsit brought to recover the amount of a bill of exchange drawn in New York on a mercantile house in Philadelphia and deposited by the plaintiff with the de-

feudant for collection, and which was lost to the plaintiff in consequence of the omission to give notice of nonacceptance to the indorsers. It was held that the judgment in favor of the defendant should be reversed; that it did not excuse the bank from giving notice of the nonacceptance of the bill because by the law merchant of the place where the bill was presented notice of nonacceptance was deemed unnecessary, but that, on the contrary, as the *lex loci contractus* governed in such a case, it was the duty of the bank to have caused proper notice to be given in accordance with the law prevailing where the bill was drawn. In the majority opinion, the rule laid down by Story and above quoted as to the necessity of making a demand and protest is quoted with approval.

In *Carroll v. Upton*, 2 Sandf. (N. Y.) 171, affirmed 3 N. Y. 272, it was held that, in the case of a bill drawn at Washington on a house in New Orleans, the law of the place where the bill was drawn governed as to the notice of nonacceptance and of nonpayment necessary to be given in order to charge the drawer, and that evidence of a different usage prevailing at the place where the drawee resided and the bill was presented would not be admitted to control the drawer's liability.

The case of *Artisan's Bank v. Park Bank*, 41 Barb. (N. Y.) 599 was an action to recover from the defendants the amount of a promissory note deposited with them for collection, on the ground of a failure to protest and duly notify the indorsers of nonpayment. The indorsement was made in New York. The note was payable in Alabama. When the same became payable, it was presented for payment, which was refused, and the note was not protested, and the indorser was not notified of its nonpayment. It was claimed on the trial that the Alabama statute did not require the indorser of such a note to be notified of nonpayment; also, that the note was not a negotiable promissory note, and therefore the indorsers were guarantors, and not indorsers. The court ruled against these contentions, however, holding that the indorsement was a New York contract and governed by the laws of New York; that by the indorsement the indorsers in effect contracted to pay the note in New York if upon its being duly presented for payment in Alabama payment was refused, and they were duly notified of demand of payment and refusal; and that, these acts not having been performed, the indorsers were discharged.

In *Susquehanna Valley Bank v. Loomis*, 85 N. Y. 207, 39 Am. Rep. 652, Judge Danforth, speaking of the obligations of an indorser of a draft which, as before stated, are regarded as equivalent to those of a drawer, says: "What then was his engagement? As indorser it was, in general terms, to pay the draft to any holder for value whose title was derived through the payee, provided it was duly presented to the drawee, payment refus-

ed by it, and due notice of the nonpayment given to him."

Counsel for appellants especially relies upon two cases to sustain his proposition that the rules laid down by Story have not been adopted in this state. The first of these cases is that of *Everett v. Vendryes*, 19 N. Y. 436. This was an action by the indorsee against the drawer of a bill of exchange drawn in New Granada upon a corporation having its office in this state. It was payable to the order of one Jimines, indorsed by him at Cartagena, and was protested for nonacceptance. The answer denied the indorsement of Jimines in general terms. The plaintiffs claimed to be the indorsees according to the legal effect of the bill. The indorsement was not good and sufficient according to the laws of New Granada, but was so according to those of New York. The question therefore was whether for the purpose of bringing an action against the drawer of the bill upon nonacceptance by the drawee in New York state the indorsement was to be tested by the laws of New Granada, where it was made, or by the laws of New York, where the bill was payable. It was held that the laws of New York should govern, and Judge Denio, in writing for the court, said: "I have not been able to find any authority for such a case, but I am of opinion that upon the reason of the thing the laws of this state should be held to control. These laws are to be resorted to in determining the legal meaning and effect and the obligation of the contract. All the cases agree in this. In this case the point to be determined was whether the plaintiffs were indorsees and entitled to receive the amount of the bill of the drawees. This was to be determined, in the first instance, when the bill was presented for acceptance and payment in New York. The plaintiff's title was written on the bill. The question was whether it made them indorsees according to the effect of the words of negotiability contained in the bill itself. Those words and the actual indorsement were to be compared, and the legal rules to be employed in making that comparison were found in the law merchant of the state of New York, and by those rules the indorsement was precisely such a one as the bill contemplated. Besides, it is reasonable to suppose that, in addressing this bill to the drawees in New York, the defendant contemplated that they would understand the words of negotiability according to the law of their own country. * * * When, therefore, he directed the drawees to pay to the order of the payee, he must be intended to contemplate that whatever would be understood in New York to be the payee's order was the thing which he intended by that expression in the bill." In other words, it was held that the indorsement was made for the purpose of enabling the indorsee to present and collect the note in New York, and that an indorsement which was effective for that pur-

pose under the laws of the state where performance would be sought was sufficient. It does not seem to us that this decision in any way conflicts with those to which we have already referred. It is true that the learned judge commences his opinion with some general observations as to the principles conceived to be applicable in ascertaining the nature and interpretation of a bill of exchange. Such observations, however, constituted nothing more than a dictum, and were not sufficient in our opinion to outweigh the authorities to which we have already referred.

The case of *Hibernia National Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518, involved consideration of a draft drawn in New Orleans upon New York bankers. The case was disposed of upon the theory that the instrument was a check, which, of course, was the fact, and the obligations of the drawer of a check, as stated in the opinion, are entirely different from those of the drawer of a bill of exchange. The former undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will be paid to the holder when the check is presented, and if not so paid, and he is notified, he becomes absolutely bound to pay the amount at the place named. In other words, the drawer of a check contracts to pay at the place where the check is payable, instead of, as the drawer of a bill of exchange does, at the place where the instrument is drawn. It is not therefore in conflict with our views to hold that the rights of the parties in the case of such a check should be determined by the law of the place of payment; in other words, the place of performance by the drawer.

Our attention is also called to the case of *Union Nat. Bank of Chicago v. Chapman*, 169 N. Y. 538, 62 N. E. 672, 57 L. R. A. 513, 38 Am. St. Rep. 614, but we do not think that what is there said conflicts with the views we have expressed. In speaking of the general rules governing the construction of a contract, it is said: "All matters connected with its performance including presentation, notice, demand, etc., are regulated by the law of the place where the contract by its terms is to be performed."

In the first place, if we have correctly measured the weight of authority, it establishes the proposition that respondents' contract as drawers was to be performed in New York, where the bill was drawn, and therefore the rule quoted, if applicable, would lead to the conclusion that demand and protest so far as they were concerned would be governed by the laws of New York. In the second place, the question involved in the *Chapman Case* was not at all akin to that presented here, and we do not believe that the judge there writing intended to approve the rule that as against drawers in New York of a bill of exchange entire omission of protest might be justified by local customs and usages in a foreign country. We think that

he had in mind certain comparatively inconsequential details of the manner and method of making demand and protest, and which, as we have already seen, may be affected by local custom and usage, rather than the entire omission of these important acts. This estimate of what was intended is confirmed by the case of *Scudder v. Union Nat. Bank*, 91 U. S. 406, 412, 23 L. Ed. 245, which is especially cited as an authority for what was being said. In the latter case it is written: "The rule is often laid down that the law of the place of performance governs the contract. * * * For the purposes of payment and the incidents of payment this is a sound proposition. Thus, the bill in question is * * * in law a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different states. The law of Missouri, where this draft is payable, determines that question in the present instance. The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill (citations), are points connected with the payment of the bill, and are also instances to illustrate the meaning of the rule, that the place of performance governs the bill."

Thus far we have assumed that the instrument in suit was a bill of exchange, but we have also considered whether the drawer's rights to protest and notice were governed by the laws of Austria as though the adoption of the view that they were so governed would excuse omission of those steps. As a matter of fact, however, the appellants would not be benefited if we should hold, in this connection, that the laws of Austria did control, for no evidence was received or offered that the drawers of a bill of exchange would not be entitled to the same protest and notice under the laws of that country as under those of New York. Appellants' only excuse for the omission of these steps rests upon the final proposition that this is not a bill of exchange at all, nor even a check, but is what is known in Austria as a "commercial order" for the payment of money of which no protest need be made. Support for this proposition, it is said, would have been found in the rejected evidence which would have established as the Austrian law that a bill of exchange must be so designated in the body of the instrument itself, and that such designation by mere superscription as was found upon the instrument in suit is not sufficient. Therefore, on a close and final analysis of appellants' argument it is indispensable that they should convince us that their rejected evidence would have established that this was not to be regarded as a bill of exchange, but as a commercial order. We shall assume that under the Austrian law it was a commercial order. On the other hand, there is no doubt, and in fact it is not denied by the learned counsel for the appellants, that it

was a bill of exchange under the laws of the state of New York.

The Negotiable Instruments Law, Laws 1897, p. 745, c. 612, as amended, provides as follows:

"Sec. 210. Bill of exchange defined.—A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed determinable future time a sum certain in money to order or to bearer."

"Sec. 213. Inland and foreign bills of exchange.—An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill."

"Sec. 321. Check defined.—A check is a bill of exchange drawn on a bank payable on demand."

It sufficiently appears that this bill was drawn upon a business house and was not a check. It was therefore a foreign bill of exchange according to the laws of New York. And so, again, we are confronted with the inquiry whether the rights of these respondents as to the nature of this instrument shall be measured by the laws of New York or by those of Austria. It seems to us clear that it must be the former. The parties had their places of business in New York. The bill was there drawn and negotiated and transferred to the appellants. The contract of the respondents was executed and consummated there, and, as we have already seen, was to be performed there upon default of the drawees. The law of New York surrounded the parties and the execution of their contract, and in our judgment it would be, not only erroneous, but highly unreasonable, to hold that they contracted with reference to any law other than that of New York, or intended that their contract should be other than that which such law made it—a bill of exchange. The authorities which already have been cited with reference to the contract and rights of the drawer of a bill of exchange are amply sufficient to sustain this view.

Lastly, it is suggested that the decision which we are making will impose much trouble and responsibility upon those who are held for the proper demand and protest of paper in foreign countries where commercial laws and usages differ from our own. We do not see much balance of weight in favor of this argument, even if it is to be considered. In a case like this, there would be no great difficulty in forwarding with the bill instructions for its proper protest such as were finally given. Some such precautions would not be more onerous than would those otherwise imposed upon a party to a New York bill of ascertaining the law of the foreign country where it was payable in order that he might learn in what manner the rights secured to

him where his contract was made would be altered and perhaps materially impaired.

Therefore we conclude that no error was committed to the prejudice of appellants, and that the judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, and CHASE, JJ., concur. VANN, J., dissents.

Judgment affirmed.

(139 N. Y. 232.)

In re COSTELLO'S ESTATE.

(Court of Appeals of New York. Oct. 8, 1907.)

1. TAXATION—ASSESSMENT OF TRANSFER TAX—APPEAL.

On the decision of a surrogate acting as an assessor, under Transfer Tax Act, Laws 1896, pp. 874, 875, c. 908, §§ 231, 232, an appeal does not lie; the proper practice being to apply to the surrogate to review his decision, and appeal from the determination thereof.

2. SAME—LIABILITY TO TRANSFER TAX.

If the aggregate amount of the personal property of a decedent exceeds \$500, the amount passing to the nieces of the decedent is taxable, though their individual shares are less than \$200.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1689.]

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the appraisal under the transfer act of the estate of Mary Costello, deceased. From an order of the Appellate Division (103 N. Y. Supp. 6)¹ reversing an order exempting the estate from a transfer tax, the administrator appeals, and from an order of the Appellate Division dismissing an appeal taken by the Comptroller from an order of the surrogate acting as an assessor, the Comptroller appeals. Modified.

R. M. Cahoon and Frederick H. Chase, for appellant administrator. Mark Cohn, for appellant State Comptroller.

EDWARD T. BARTLETT, J. Mary Costello of Kings county died in September, 1895, intestate, leaving, her surviving, a sister and two nieces, and being possessed of personal property amounting to \$1,168.62. Letters of administration were issued to the public administrator of Kings county in March, 1896. On a judicial settlement of his accounts in December, 1896, the decree showed that the total estate coming to his hands after the deduction of debts and expenses of administration was a balance of \$654.90 to be distributed to the next of kin of decedent. The sister was entitled to one-half of this balance, or \$327.45, and the nieces each to one-fourth thereof, or \$163.72. The surrogate of Kings county, acting as an assessor, decided that the estate of the decedent was not subject to a transfer tax. The Comptroller of the state of New York appealed to the surrogate, acting judicially, which resulted in an af-

¹ 117 App. Div. 807.

firmance. Thereupon appeal was taken to the Appellate Division, where the order of the surrogate was reversed.

A preliminary question of practice is raised for our consideration which arises under the following circumstances: Transfer Tax Act, Laws 1896, pp. 874, 875, c. 908, §§ 231, 232, provides for the action of the surrogate in a dual capacity. By section 231 the surrogate is permitted to act as a taxing officer or appraiser, and may determine the cash value of an estate and the amount of tax to which the same is liable. Section 232 provides that the Comptroller of the state, or any person dissatisfied with the appraisal or assessment and determination of tax, may appeal therefrom within 60 days to the surrogate to review the same. In the case at bar, the learned counsel for the Comptroller insisted that this practice was anomalous and unnecessary; that an appeal could be taken from the surrogate, acting as appraiser or assessor, directly to the Appellate Division, and he accordingly, in order to test this question, served two notices of appeal from the order of the surrogate, acting as appraiser, wherein he determined that the estate was not subject to the transfer tax, one directly to the Appellate Division and the other to the surrogate, acting judicially, as the statute provides. The Appellate Division dismissed the Comptroller's appeal taken directly to that court from the order of the surrogate acting as an assessor. On the Comptroller's appeal taken from the order of the surrogate, acting judicially, the same was reversed. When we keep in mind the fact that the surrogate is a mere taxing officer or assessor, when acting under section 231, no incongruity is presented, although it is somewhat unusual that a judicial officer should sit in review of his own decision as an assessor. It is, however, to be said that on an appeal to the surrogate, acting judicially, a complete record is submitted, and both sides are heard. We are of opinion that the Appellate Division properly dismissed the Comptroller's appeal from the order of the surrogate made when acting as a taxing officer.

This brings us to the consideration of the merits. The question presented is whether the amount to which the nieces are each entitled is subject to the transfer tax. The amount involved is trivial, but the proper construction of the transfer tax act is important. We are induced by the earnest argument submitted on behalf of the Comptroller to point out that the question now discussed is settled by the decisions of this court. Prior to the amendment of the Inheritance tax law by chapter 399, p. 814, of the Laws of 1892, it was held that the law imposed a tax upon the right of succession to the property of the testator or intestate which vested in the successors severally. The act of 1892 worked a complete change in the manner of assessing the tax. In *Matter of Hoffman*, 143 N. Y. 327, 38 N. E. 311, Judge Finch said:

"In construing the inheritance tax law as it stood prior to the act of 1892, we had occasion to decide that it imposed a tax upon the right of succession to the property of the testator or intestate which vested in the successors severally and in their respective shares or proportions, and not upon the property or estate of the decedent. The shares received, in the hands of the recipients, were the measures of the right which was subjected to assessment, and the imposed tax could be enforced personally against the successor charged." The learned judge then proceeds with great clearness and elaboration to point out that the Legislature had declared that the word "property" shall mean what passes to those not exempted, and not what passes to individual transferees. In *Matter of Corbett*, 171 N. Y. 516, 64 N. E. 209, it was held that under the provisions of the statute relating to taxable transfers, as limited and defined therein, it is the aggregate amount of the personal property of the estate left by a decedent, and not the amount of the particular estate, or specific share or legacy, which passes from or is transferred by the decedent, which determines whether the tax shall be imposed or not, and when the aggregate amount of the personal property exceeds the sum of \$10,000 a tax must be imposed upon each and all of the estates which are exempted therefrom when the aggregate amount of the personal property does not exceed the sum of \$10,000, except upon legacies to a bishop or any religious corporation. This case was decided under the exceptions and limitations contained in section 2 of the original act, now to be found in section 221 of the tax law (Laws 1896, p. 869, c. 908).

The same principle and construction is to be applied to the case of the two nieces now before us. The exemptions here controlling are contained in section 1 of the original act and now known as section 220 of the tax law. It reads: "A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations not exempt by law from taxation on real or personal property, in the following cases: (1) When the transfer is by will or by the intestate laws of this state from any person dying seized or possessed of the property while a resident of the state. * * * When the original transfer tax law and the amendments thereof were re-enacted as a part of the tax law, section 22, which dealt with definitions, became section 242 of the tax law. That section reads, in part, as follows: "The words 'estate' and 'property,' as used in this article, shall be taken to mean the property or interest therein of the testator, intestate, grantor, bargainor or vendor, passing or transferred to those not herein specifically exempted from the provisions of this article,

and not as the property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees or vendees, and shall include all property or interest therein, whether situated within or without this state." We thus have this situation presented: The estate passing into the hands of the public administrator amounted to \$1,168.62; in other words, it exceeded \$500, and is the amount that determines whether the very small sum passing to each of these nieces is taxable. This is precisely the same question that was determined in *Matter of Corbett*, supra, except that the court was dealing with different exemptions and larger amounts. The share of the decedent's estate to which the sister is entitled has properly been held not subject to the transfer tax, but the shares of the nieces are clearly taxable.

The order of the Appellate Division appealed from, which reversed absolutely the order of the Surrogate's Court that held that the estate of decedent was not subject to the payment of the transfer tax, should be so modified as to hold the shares of the nieces taxable at the rate of 5 per cent., and, as modified, affirmed, without costs to either party.

CULLEN, C. J., and O'BRIEN, HAIGHT, WERNER, HISCOCK, and CHASE, JJ., concur.

Ordered accordingly.

(129 N. Y. 294.)

**THOMPSON v. SUPREME TENT OF
KNIGHTS OF MACCABEES OF
THE WORLD.**

(Court of Appeals of New York. Oct. 8, 1907.)

**BENEFICIAL ASSOCIATIONS — INITIATION OF
MEMBER—LIABILITY FOR INJURIES.**

The Supreme Tent of the Knights of the Maccabees of the World, having jurisdiction over subordinate tents, and having by its by-laws required the officers of such tents to carry out the directions of the ritual promulgated by it, is liable for personal injuries on the initiation of a member into a subordinate tent, the officers of which were by such ritual required to do the very acts which produced the injury.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Oscar D. Thompson against the Supreme Tent of the Knights of the Maccabees of the World. Judgment for plaintiff was reversed by the Appellate Division (100 N. Y. Supp. 1145, 114 App. Div. 906), and plaintiff appeals. Reversed, and judgment below for plaintiff affirmed.

E. W. Gardner, for appellant. George P. Keating, for respondent.

HAIGHT, J. This action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff during his initiation into one of the defendant's subordinate tents. The evidence tends

to show that in January, 1903, the plaintiff made an application, in writing, to be admitted to a beneficiary membership in Hopewell Tent, No. 305, of the Supreme Tent of the Knights of the Maccabees of the World, and that a benefit certificate issue for \$500, payable to his wife. This application was subsequently approved by the medical officers, and plaintiff was elected to membership in Hopewell Tent, and thereupon in February, 1903, he appeared at a meeting of that tent for initiation. At such meeting one McClure, a past commander of the order, at the invitation of the lieutenant commander, conducted the ceremonies for the initiation of the new members, and during such ceremonies the plaintiff, while standing in line with other applicants for initiation, was suddenly seized from behind by the shoulders, by one Rolland, a member of the order who had been selected for that purpose, and his body bent backward so that he fell against the man who seized him, producing an injury to the muscles, or spinal column of the back, which it is claimed has ever since incapacitated him from manual labor and has caused him much pain and suffering. While there was some conflict upon the trial with reference to the extent and durability of the plaintiff's injury, the witnesses all substantially agreed with reference to the details of the act complained of. The trial court submitted to the jury the question as to whether the officers and persons conducting the ceremony in question were the agents of the defendant, acting within the scope of their authority, to such an extent as to make the defendant liable for the injury produced. This question was raised by the defendant's counsel, in his motion for nonsuit and for the direction of a verdict in the defendant's favor, who claimed that the acts complained of were those of the Hopewell Tent, its officers and members, and were not those of the Supreme Tent. This therefore becomes the question in the case. If there was evidence given upon the trial sufficient to carry this question to the jury, then the verdict was proper. Otherwise there should have been no recovery.

The Supreme Tent of the Knights of the Maccabees of the World is, as we understand, a Michigan corporation duly organized under the laws of that state, and has been authorized to transact business in this state as a fraternal beneficiary order, for the relief, by insurance, upon the mutual or assessment plan, of persons or beneficiaries, in the case of disability or death, and its business is transacted upon the lodge plan through subordinate tents or lodges. The plaintiff at the time of his injury was given a copy of the laws of the order, adopted May 11, 1893, but the defendant introduced in evidence a copy of the revised laws of the Supreme Tent, which went into force August 20, 1901. Inasmuch as the plaintiff's injury was received in 1903, we shall consider only the laws of

the order then in force. They, in substance, provide that: "The Supreme Tent shall be composed of an unlimited number of great camps and subordinate tents organized as hereinafter provided." "It shall have power to make its own laws, rules and regulations for the government of the association, which shall not conflict with the articles of incorporation or the laws of the land." "It shall possess original and exclusive jurisdiction over all great camps and subordinate tents." "It shall be the supreme tribunal to which all final appeals shall be made on matters arising under these laws." "It shall be the judge of the election and qualifications of its own members, and decide contested elections." "It shall possess the power to regulate and control its benefit funds, fix the monthly rates on members, receive appeals and redress grievances, provide for its own support, and do all other legitimate acts necessary to promote its welfare." "It shall have power, when an appeal is made under the laws of the association from the action or findings of the Court of Appeals, to decide as to the validity of all death claims or any other claim which a member or the beneficiary of a member may have against it." It, or the board of trustees, when the Supreme Tent is not in session, "may require the surrender by a Great Camp of its charter, supplies, records, property and all its money." Its board of trustees is given the power to pass orders to cover any cases which are not provided for in the laws of the association or by the actions of the Supreme Tent, and to suspend beneficiary members from all the benefits of the association in cases specified. The supreme commander is given the general superintendence of the association, with power to grant dispensations for great camps, and charters to subordinate tents. He may appoint a deputy for each state, and remove from office any tent officer. All the officers provided for by the laws are required to perform such duties as are prescribed by the ritual, and as may be ordered from time to time by the Supreme Tent. The tent commander is required to enforce the laws, rules, and usages of the tent and of the association. The lieutenant commander shall aid the commander and perform such other duties as the rules and ritual may require and the by-laws of the tent enjoin. The duties of the other tent officers shall be such as are prescribed in the ritual of the association. All rituals shall be procured of the Supreme Tent. When a tent is suspended, all the books, property, etc., must be delivered to the supreme commander of the Supreme Tent. The ritual is a separate book furnished by the Supreme Tent, and, among other things, prescribes the ceremonies that shall be followed upon the initiation of members. The only part of which is necessary to be considered in this case has reference to the proceedings where the lieutenant commander approaches the sir knight commander, stating, "You have

forgotten the grip," to which the commander replies: "Oh, yes; the grip." He then addresses the candidate for initiation by stating: "You will follow me and note carefully the motion of my fingers." Then the instructions are partly in cipher, which are translated as follows: "The commander should extend his left hand to candidate as if about to shake hands. When the candidate extends his hand to take that of the commander, he should be seized and drawn back quickly by the master at arms, or some other member selected for that purpose, who should approach from the rear unobserved by the candidate. As the candidate is thus seized, the lieutenant commander should say: 'Sir Knight Commander, an imposter!'" It was during the execution of this part of the ceremony prescribed by the ritual that the plaintiff received the injury complained of.

The Supreme Tent, as we have seen, is a corporation organized under the laws of another state, doing business in this state. It makes the laws, rules, and regulations for the government of all the associations under it. It possesses original and exclusive jurisdiction over all great camps and subordinate tents. It establishes great camps and subordinate tents. These camps and tents are unincorporated associations subject to the control and management of the Supreme Tent, which may, when it sees fit, revoke the charters of the great camps or the subordinate tents, and require the return to it of all the books, records, and property they may possess. We thus have a corporation having jurisdiction and control over all subordinate tents, which has enacted by-laws requiring the officers of such tents to carry out the directions of the ritual established and promulgated by it, in which such officers are required to do the very act which produced the injury to the plaintiff. We think that these laws and ritual furnish evidence from which the jury might find that the officers and members conducting the ceremonies in initiating the plaintiff were not only following the directions of the ritual, but that they were also acting as the lawfully constituted agents of the Supreme Tent, within the scope of the authority vested in them, when the injuries complained of were inflicted upon the plaintiff.

The learned Appellate Division, in granting a new trial, referred to the case of *Jumper v. Sovereign Camp Woodmen of the World*, 127 Fed. 635, 62 C. C. A. 361. We think that case is distinguishable from this case. It did not appear but that the local lodge was an incorporation acting independently of the Sovereign Camp, and it did appear that the act of violence which resulted in the injuries to the complainant was adopted by the lodge itself, and was not authorized by the Sovereign Camp, or its practice known to have been indulged in. In the case of *Kaminski v. Knights of Modern Maccabees*, 146 Mich. 16, 109 N. W. 33, the Supreme Court of Michigan

held that no recovery could be had for injuries of a similar character. In that case the court apparently laid much stress upon the provisions of a by-law to the effect that a subordinate tent and its officers should be the agents of its members in all matters, and that the great camp will not in any case be liable for any fault or negligence on the part of a subordinate tent or any of its officers. In this case the provisions are somewhat different. They provide as follows: "A subordinate tent shall be the agent of its members in making applications for membership, in the admission of members, the collection and transmission to the Supreme Tent of all dues and monthly rates, and in the serving of all notices required under these laws to be served on the members of a subordinate tent." "The Supreme Tent shall not be liable for negligence in any of these matters, nor be bound by any irregularity or illegal action on the part of such subordinate tent." It will be observed that the matters for which the subordinate tent becomes the agent of its members are confined: (1) To the making of applications for membership and their admission; (2) to the collection and transmission to the Supreme Tent of all dues and monthly rates; (3) to the serving of all notices required, etc. Nothing in these provisions pertains to the initiation ritual. Then, again, referring to the provisions of the next section, we find that the Supreme Tent shall not be liable for negligence in any of these matters. The matters referred to pertain to the admission of members, the collection and transmission of their monthly rates to the Supreme Tent, and to the serving of notices. The Supreme Tent shall not "be bound by any irregularity or illegal action on the part of any subordinate tent." If any of the provisions referred to have reference to the negligence of the officers of the Supreme Tent in executing the requirements of the ritual, it must be found in the latter provision, "as an illegal action." But this we think cannot be the construction intended, for, as we have seen, the ritual expressly authorized the suddenly seizing of the applicant unawares, and the bending of him backward. To hold otherwise would charge the Supreme Tent with requiring its subordinates to do an illegal act, and then with adopting a by-law to the effect that it would not be liable therefor. It, doubtless, did not occur to the officers of the Supreme Tent, in adopting the ritual, that the act authorized by them might in some instances produce harm, or that some of its subordinate officers might execute the command of the ritual with more force than others; but it is apparent that they intended that the applicant should be taken unawares and frightened. He was to be approached from the rear unobserved, and was to be seized and drawn back quickly, with the announcement of the lieutenant commander: "An imposter!" We therefore are of the opinion

that these provisions ought not to be construed as constituting a contract on the part of the plaintiff to relieve the defendant from liability. But, even if they should be so construed, we should still hesitate about adopting the conclusion reached by the Michigan court in the case alluded to, for, in *Matter of Brown v. Order of Foresters*, 176 N. Y. 132, 68 N. E. 145, we have held that: "In so far as the defendant attempted by the enactment of by-laws to make the default or misconduct of its own agent and officer the default and misconduct of the members, who had paid their dues and assessments precisely as the regulations required, its action was nugatory." And in the case of *Johnston v. Fargo*, 184 N. Y. 379, 77 N. E. 388, 7 L. R. A. (N. S.) 537, we have held that a corporation or an association cannot relieve itself from liability for personal injuries by reason of the negligence of its own officers, by requiring its servants to enter into a contract to the effect that it shall not be liable therefor. See, also, *Mitchell v. Leech*, 69 S. C. 413, 48 S. E. 200, 66 L. R. A. 723, 104 Am. St. Rep. 811; *Knights of Pythias v. Withers*, 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762; and note, *Jumber v. Sovereign Camp*, 59 Cent. Law J. 48-52, 127 Fed. 635, 62 C. C. A. 361.

We are not disposed to criticize the defendant on account of its being a secret society. Its main object is the insurance of its members against disability and death, and as such we recognize the fact that it has accomplished much good. Coupled with the mutual benefit of its members through insurance is the social and fraternal feature, which, through the secret rituals of their lodges, have enabled them to keep their members in touch with each other and interested in the work of the tents. We think, however, that other acts might be prescribed by the ritual, from which the importance of the work of the tent might be impressed upon the mind of the applicant without resorting to violence.

The order appealed from should be reversed, and the judgment entered upon the verdict affirmed, with costs in this court and that of the Appellate Division.

CULLEN, C. J., and EDWARD T. BARTLETT and VANN, JJ., concur. WERNER and HISCOCK, JJ., not voting. GRAY, J., absent

*Ordered accordingly.

(189 N. Y. 302.)

HORACE WATERS & CO. v. GERARD.
(Court of Appeals of New York. Oct. 8, 1907.)

1. INNKEEPERS — LIENS — PROPERTY OF THIRD PERSON.

Laws 1897, p. 532, c. 418, § 71, giving an innkeeper a lien on goods owned by a third person in the rightful possession of a guest for the

value of his entertainment, is declaratory of the common law, and does not enlarge or extend an innkeeper's lien so far as it relates to the property of a third person in the lawful possession of the guest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, § 44.]

2. SAME—CONSTITUTIONAL LAW.

Laws 1897, p. 532, c. 418, § 71, in so far as it gives an innkeeper a lien on goods owned by a third person in the rightful possession of a guest, is not in violation of any constitutional right.

3. SAME.

As an innkeeper is by public policy held to an extraordinary responsibility, the Legislature has the constitutional right to give him a lien on the goods of a third person in the possession of a guest for the value of his entertainment, for the public welfare.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Innkeepers, § 44.]

4. SAME—EXTENT OF LIEN.

A hotel keeper has a lien on a piano in the possession of a guest under a conditional contract of sale providing that the title thereto shall remain in the vendor until the price has been paid, which is superior to the right of the vendor to retake possession of the piano on a breach by the guest of the conditions of the contract of sale.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Horace Waters & Co. against Caroline B. Gerard. From a judgment for defendant, affirmed by the Appellate Division (94 N. Y. Supp. 702, 106 App. Div. 431), plaintiff appeals. Affirmed.

Frederick H. Sanborn, Noel B. Sanborn, and George P. Sanborn, for appellant. Willard N. Baylis, for respondent.

CHASE, J. In 1898 and 1899 the defendant was the lessee and proprietor of a hotel for public entertainment known as "The Girard," in the city of New York. On August 23, 1898, one Carlisle came casually to said hotel as a guest, and so remained until March 15, 1899, inclusive. During said period she received food and lodging as a guest without any express agreement as to the period of entertainment or amount to be paid therefor. On March 15, 1899, she owed the defendant for accommodation, board, lodging, and extras furnished at her request from day to day between August 23, 1898, and March 15, 1899, inclusive, the sum of \$161.24, a part of which accrued on March 13 to 15, inclusive, 1899. On March 15, 1899, she took a lease of certain apartments in said hotel for one year from that day, which apartments she in part furnished, and thereupon occupied the same and continued in the occupation thereof until June 25, 1899, taking her meals from time to time without agreement as to price in the restaurant of the defendant in said hotel. On June 25, 1899, she left said hotel owing the defendant \$330.85, of which amount \$161.24 accrued on and prior to March 15, 1899, as stated, and the balance was due for rent under said lease and for food and incidentals furnished in the de-

fendant's restaurant between March 15 and June 25, 1899. The lease of said apartments contained a proviso that the defendant should have a lien on all of the effects and property brought into said hotel by said Carlisle for any indebtedness accrued or accruing to her. The plaintiff is a domestic corporation engaged in the manufacture and sale of pianos. On March 13, 1899, the plaintiff delivered to said Carlisle at the defendant's hotel a piano belonging to it under a conditional contract of sale, by the terms of which title thereto remained in the plaintiff until payment in full of the agreed price therefor, and in case of failure by said Carlisle to make any payment on said contract when due that said contract should at once terminate and the plaintiff become entitled to the immediate possession of the piano. Said Carlisle never paid the full purchase price of said piano, and became in default under said contract on June 13, 1899, and she then notified the plaintiff that she surrendered said instrument and requested the plaintiff to call and remove it. On July 26, 1899, the plaintiff attempted to remove the piano from said hotel, but the defendant refused to permit its removal, claiming a lien thereon as a hotel and boarding house keeper for the unpaid bills incurred by said Carlisle, and she retains the possession thereof. On and after July 13, 1899, the plaintiff had the right to the possession of said piano, subject only to any rights that the defendant had by reason of the facts herein stated. The defendant did not know that said Carlisle was not the real owner of said piano, or that the plaintiff had or claimed any rights or ownership therein until the demand was made therefor as herein stated. The plaintiff seeks to recover possession of said piano. The parties agreed upon a statement of facts to be submitted to the court for the determination of their controversy pursuant to section 1279 of the Code of Civil Procedure. The Appellate Division of the Supreme Court directed judgment in favor of the defendant, dismissing the plaintiff's complaint, and judgment has been entered thereon, from which judgment the appeal is taken to this court.

In this state prior to 1897 the lien of an innkeeper rested wholly upon the common law. It was first declared by statute in the Lien Law (Laws 1897, p. 532, c. 418, § 71), although the lien of an innkeeper was recognized in the act for the protection of boarding house keepers (Laws 1860, p. 771, c. 446), and the amendment thereto (Laws 1876, p. 308, c. 319), the act relating to the surreptitious removal of baggage by a guest (Laws 1867, p. 1727, c. 677), the acts relating to the enforcement and foreclosure of an innkeeper's lien (Laws 1869, p. 1785, c. 738; Laws 1879, p. 580, c. 530), the act extending the lien of an innkeeper (Laws 1894, p. 458, c. 253), and in the act granting a lien to lodging house keepers (Laws 1895, p. 713, c. 894). Section 71 of the lien law was amended by chapter

380, p. 834, of the Laws of 1899, and as it read at the time of the submission of the controversy herein it provided as follows: "A keeper of a hotel, inn, boarding house or lodging house, except an emigrant lodging house, has a lien upon, while in possession, and may detain the baggage and other property brought upon their premises by a guest, boarder or lodger, for the proper charges due from him, on account of his accommodation, board and lodging, and such extras as are furnished at his request. If the keeper of such hotel, inn, boarding or lodging house knew that the property so brought upon his premises was not, when brought, legally in possession of such guest, boarder or lodger, or had notice that such property was not then the property of such guest, boarder or lodger, a lien thereon does not exist." The provision in the lease by the defendant to Carlisle, by which Carlisle gave to the defendant a lien on all the effects and property brought by her into the hotel for any indebtedness accrued or accruing to the defendant, does not in any way affect the rights of the plaintiff herein, as it was in no way a party to it, and Carlisle could not, by contract with the defendant, transfer to her an interest in the property of a third person. Upon the facts submitted, the defendant, by the express terms of the statute in effect at the times mentioned, has a lien upon the piano for the entire amount of her claim. The plaintiff, however, claims that the statute is unconstitutional so far as it gives a lien on property of a person other than the guest. When the piano came into the possession of the defendant through her guest, a part of the unpaid account had accrued; a part accrued thereafter while Carlisle remained a transient guest in the defendant's hotel; and the remaining part of the unpaid account accrued while Carlisle was the occupant of the apartments in the defendant's hotel as a guest at an agreed price per year. If the defendant had a lien on the piano for any part of the account claimed by her, she was entitled to retain possession of it, and the plaintiff's demand and claim for the possession of the piano cannot be sustained.

It is only necessary to consider whether an innkeeper has a lien on goods rightfully in the possession of a transient guest when such goods are the property of a third person. Two questions arise for our consideration: (1) Did the common law of England, on and prior to the 19th day of April, 1775, give to an innkeeper a lien on goods owned by a third person in the rightful possession of a guest for the value of his guest's entertainment? (2) Apart from the question whether such lien was so given by the common law, is the act, so far as it gives a lien upon goods owned by a third person in the rightful possession of the guest, a violation of our Constitution?

Americans claim the common law of England as their natural heritage and shield.

Black's Constitutional Law, 9. The universal principle (and the practice has conformed to it) has been that the common law is our birthright and inheritance, and that our ancestors brought hither with them upon their emigration all of it which was applicable to their situation. The whole structure of our present jurisprudence stands upon the original foundation of the common law. 1 Story on the Constitution, § 157. The Continental Congress in its declaration of rights asserted that "The respective colonies are entitled to the common law of England." In the first Constitution of this state, adopted in 1777, it is provided as follows: "And this convention doth further, in the name and by the authority of the good people of this state, ordain, determine and declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this state, subject to such alterations and provisions as the Legislature of this state shall, from time to time, make concerning the same. * * * " Section 35. Substantially similar provisions were included in the second and third Constitutions of this state, and in the Constitution of 1894 (article 1, § 16) it is provided as follows: "Such parts of the common law and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five * * * which have not since expired, or been repealed or altered; * * * shall be and continue the law of this state, subject to such alterations as the Legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated." The principles and rules of organized society found in the English common law, so far as applicable to our conditions, became and continue in force, unless abrogated or modified by express constitutional or statutory enactments. Constitutions and statutes should be construed with reference to the doctrines of the common law. Black's Constitutional Law, 69; 6 American & English Encyclopedia of Law (2d Ed.) p. 270; 8 Cyc. 377, 383.

In construing the constitutional and statutory provisions which provide that a person shall not be deprived of life, liberty, or property without due process of law, it should not be held that there was an intention by convention or Legislature to forbid or in any way affect the right to any lien upon property which had been recognized and sustained by the common law, and thus by the law of the land. The writers in encyclopedias and text-books with singular unanimity have

asserted that an innkeeper has a lien at common law upon all goods in the rightful possession of his guest for the value of the guest's entertainment. From some of them we quote: The American and English Encyclopedia of Law (volume 16 [2d Ed.] p. 548) says: "Corresponding to the extraordinary liabilities which the law imposes on innkeepers is the extraordinary privilege of a lien on the effects of guests for the amount of the reasonable charges for the guest's entertainment. * * * It is essential to the existence of the lien that the goods on which it is claimed should have been brought to the inn by a person coming in the character of a guest, but it is not essential that the guest should in all cases be the owner of the goods." The Encyclopedia of the Laws of England (volume 6, p. 497) says: "He (an innkeeper) is entitled to a general lien upon all goods brought by the guest to the inn for the board and lodging of the guest and his servants and the keep of his horses." The Cyclopaedia of Law and Procedure (volume 22, p. 1090) says: "Where a guest brings to an inn goods ostensibly his the lien of the innkeeper attaches to the goods although they were in fact the goods of a third person." In Beale on Innkeepers and Hotels (section 261, p. 182) the language just quoted from the Cyclopaedia of Law and Procedure is repeated. In Wait's Law and Practice (volume 1 [5th Ed.] 655) it is said: "The law gives to any innkeeper a lien whether the goods are the property of the traveler or the property of third parties from whom it has been hired or even fraudulently taken or stolen, if the innkeeper has no notice of the wrong, and acts honestly." In Parsons on Contracts (volume 2 [7th Ed.] p. 156) it is said: "An innkeeper has a lien on the property of the guest (not on his person) for the price of his entertainment even if he be an infant. And he has this lien on goods brought to him by a guest although they belong to another person." In Overton on the Law of Liens (section 123, p. 150) it is said: "If property, goods, horses or the like are brought by a guest to an inn at which he obtains accommodations and leaves the property in custody of the innkeeper it seems the lien will attach thereto whether it belong to a guest or to a third person for whom the guest is bailee, or indeed even if it had been stolen by the guest, for the innkeeper is bound to receive and entertain the guest, and when unaccompanied by any suspicions would not be justified in inquiring into the title to the property delivered by the guest to his possession. Possession is prima facie evidence of ownership." In Edwards on the Law of Bailments ([3d Ed.] § 474, p. 363) it is said: "The relation of innkeeper and guest being established, the lien covers the goods, baggage and property of the guest and all such things as the guest brings with him; it extends to whatever the guest brings and the innkeeper receives; it is not limited

to property of the guest or to things of material or intrinsic value. * * * The innkeeper is bound to receive the guest and cannot stop to investigate his title to the property he brings with him, and it may be added he is also liable for the safe-keeping of the goods, though they may be the property of a third person." In Jones on Liens ([2d Ed.] § 499, p. 303, vol. 1) it is said: "Thus it has become the settled law with reference to this lien that there is no distinction between the goods of a guest and those of a third person brought by a guest and in good faith received by the innkeeper as the property of the guest. The innkeeper cannot investigate the title of property brought by his guests, and is bound unless there is something to excite suspicion to receive not only his guest, but his horse or other property brought by him as belonging to him, because it is in his possession." And in section 501, p. 304, it is said: "It is now settled, however, that the lien is not limited to such things as a guest ordinarily takes with him. An innkeeper who receives a piano in his character as innkeeper, believing it to be the property of his guest, is entitled to a lien upon it for his guest's board and lodging although in fact the piano is the property of another person who had consigned it to the guest to sell on commission." In Schouler on Bailments and Carriers ([3d Ed.] § 326, p. 327) it is said: "The law grants him (the innkeeper) as security for unpaid charges a lien upon all movable property which the guest may have brought with him to the house and placed in the legal custody of the innkeeper as bailee. Even where the thing belonged to a third person and the guest himself had only a bailee's right therein or was an agent for the owner, the innkeeper's lien will attach provided only he received the property on the faith of the innkeeping relation. And the innkeeper's knowledge that the guest did not own the goods does not affect the case unless he knew that the possession was wrongful. * * * An innkeeper's rightful lien ought fairly to be coextensive with his liability for all such property of other persons." In Story on Bailments ([9th Ed.] § 476, p. 446) it is said: "It has been said that the horse of a guest can be detained only for his own meals, and not for the meals and expenses of the guest. The reason is said to be that chattels are in the custody of the law for the debt which arises from the thing itself, and not for any other debt due from the same party, for the law is open to all such debts and doth not admit private persons to make reprisal. This may be correct as to all debts than the debt contracted by the party as a guest, but there seems reason to doubt whether the lien of an innkeeper does not extend to all the goods which a guest has at an inn for all his expenses there. The general rule seems in favor of such a lien whether any expense has been incurred on the particular goods

or not. The cases cited to support the opposite doctrine do not seem to justify it." In Moncrieff on Liability of Innkeepers (pages 55 to 56) it is said: "An innkeeper has a lien for the reckoning of his guest upon all those goods for which he as innkeeper becomes liable. His lien is coextensive with his liability, neither wider nor narrower. * * * This lien will endure even as against a third party being the real owner, provided that the innkeeper when he undertook the custody of the goods did not know that they did not belong to his guest." In Cowen's Treatise ([6th Ed.] vol. 1, p. 359) it is said: "His (an innkeeper's) lien for the keeping of the horse or other property of his guest is valid as against the true owner, although the guest did not own it, and even when he stole it if it was received and kept without knowledge of the facts." In Wharton's Law of Innkeepers (page 118) it is said: "The innkeeper has, therefore, a lien upon all goods brought by a guest. * * * He is not bound to inquire whether his guest is the owner of goods he brings with him to the inn, but only whether he comes as a guest; but he is bound to receive the goods, whatever their nature, provided he has sufficient accommodation, and has, therefore, a lien upon such goods which cannot be defeated even by the true owner." In a note to Calye's Case, 1 Smith, Leading Cases (9th Ed.) p. 259, it is said: "By the common law an innkeeper has a lien upon all the goods of the guest brought to the inn for board and lodging furnished by him to the guest at the request of the latter. And this is so although the goods may not be the property of the guest, but belong to some third person, provided the innkeeper is not aware that the goods are not the property of the guest."

The appellant admits that the courts of this state and of England and the text-book writers, without material exception, hold that an innkeeper has at common law the right to retain all of the goods brought by a guest to his possession as security for the payment of his charges for the accommodation of the guest, and that it is not necessary for the innkeeper to make inquiry as to the ownership of the goods so brought by a guest into his possession; but he asserts that this is the modern rule, and not the rule of the common law of England prior to 1775. He claims that the modern rule was first asserted in England in 1856 (Snead v. Watkins, 1 C. B. [N. S.] 267), and in this country in 1864 (Jones v. Morrill, 42 Barb. [N. Y.] 623). A brief general reference to the common law will aid in considering how we are to determine what a rule of such common law was at a given time. The common law of England is of great antiquity. It consists of rules established by custom. These rules, affected as they were in their inception by the views, habits, and necessities of the different peoples which mingled in the early history of the Britons, were principally re-

tained in memory and handed down from person to person and from generation to generation until by custom they became the unwritten law of the realm. Some of these rules are stated in the earliest Codes prepared by the Saxon lawgivers, and some are stated in subsequent reported decisions in contested cases. The printed reports of cases decided for many years subsequent to the discontinuance of the Year Books were prepared by unofficial reporters and consisted of such cases as were selected by them for that purpose, and the same case was sometimes reported by more than one person, and many of the cases so reported were contradictory and unsatisfactory. It is obvious that where a particular custom was not stated in the report of a decision in a contested case, or where the custom in such case was not stated by the writings of men learned in the law, it rested wholly in memory or a generally recognized tradition. The digests, and even the treatises on legal subjects, then, as now, followed principally along the lines of the reported decisions, and it is not even in recent years an uncommon thing to discover that a custom or principle of law of common knowledge has never been stated in a reported case. Where recognized printed reports of the English courts prior to 1775 show that the common law on any particular subject was by such case established and determined as therein stated, such reports are the best and highest evidence of such common law. Where the rules of the common law relating to a matter under consideration are not expressly stated in the reported cases of the English courts prior to 1775, the statement of the courts of this country and of England subsequent to that time, especially when they do not purport to modify the common law, are not only entitled to careful consideration, but to great weight in determining the common-law rule prior to 1775. An unreserved statement by a court as to the common-law rule will, in the absence of other authority, be assumed to be based upon custom and the unwritten law long antedating such time.

Our courts have frequently asserted that at common law an innkeeper has a lien upon the goods of his guest, although such goods are the property of a third person. Jones v. Morrill, supra; Betts v. Salisbury, 12 Alb. Law J. 337; Grinnell v. Cook, 3 Ill. (N. Y.) 485, 38 Am. Dec. 663; Ingalsbee v. Wood, 36 Barb. (N. Y.) 452; Briggs v. Todd, 28 Misc. Rep. 208, 59 N. Y. Supp. 23; Wilkins v. Earle, 3 Rob. (N. Y.) 368; Id., 44 N. Y. 172, 4 Am. Rep. 635; Smith v. Keyes, 2 Thomp. & C. (N. Y.) 650; Hulett v. Swift, 33 N. Y. 571, 88 Am. Dec. 405; Peet v. McGraw, 25 Wend. (N. Y.) 653.

The common-law rule in England and its ancient origin is stated by Lord Escher, Master of the Rolls, in Robbins v. Grey, 2 Queen's Bench, 501, as follows: "I have no doubt about this case. I protest against being

asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveler comes to an inn with goods which are his luggage—I do not say his personal luggage, but his luggage—the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveler, but not his luggage. If the traveler brought something exceptional which is not luggage—such as a tiger or a package of dynamite—the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveler and his goods. He has not to inquire whether the goods are the property of the person who brings them or some other person. If he does so inquire, the traveler may refuse to tell him, and may say: 'What business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in.' And then the innkeeper is bound by law to take them in, or he may say: 'They are not my property, but I bring them here as my luggage, and I insist upon your taking them in.' * * * Then the innkeeper's liability is not that of bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by servants of the inn, or by another guest, he is liable for not keeping them safely unless they are lost by the fault of the traveler himself. That is a tremendous liability. It is a liability fixed upon the innkeeper by the fact that he has taken the goods in, and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveler. By law that lien can be enforced not only as against the person who has brought the goods to the inn, but against the real and true owner of them. That has been the law for two or three hundred years; but to-day some expressions used by judges, and some questions (immaterial, as it seems to me) which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn he may refuse to take them in; or if he does take them in he has no lien upon them. * * * Now, is there any decided case in which it has been held that, although they have been brought to an inn as the luggage of the traveler and

received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveler? There is not one such case to be found in the books. * * * If we were to accede to the argument for the appellants, we should be making a new law, and our decision would produce in very many cases great confusion and hardship. I am of opinion that an innkeeper is bound to take in goods with which a person who comes to the inn is traveling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches; and that the question of whose property they are, or of the innkeeper's knowledge as to whose property they are, is immaterial."

It is assumed by counsel that there were but four cases (and we have found no more) reported from the English courts prior to 1775 involving the right of an innkeeper to retain, until his charges were paid, the property of a third person in the possession of his guest. These cases are *Skipwith v. —*, the Innkeeper (1612) 1 Bulst. 170; *Robinson v. Walter* (1617) 3 Bulstrode, 269, Popham, 127, 1 Rolle Rep. 449; *Stirt v. Drungold* (1617) 14 Jac. B. R. 650; and *Yorke v. Grenough* (1703) 1 Salkeld, 388, 2 Lord Raymond, 866. Each of the cases so reported is a claim of lien for the keep of a horse which had been brought to the innkeeper by one not the owner thereof. In the first case, it does not clearly appear that the person who brought the horse to the inn was personally a guest of the innkeeper. The Chief Justice being absent, the other members of the court were evenly divided upon the question as to whether the innkeeper could retain the horse until he be paid and satisfied for his meat. The lien was asserted for the reason, and two of the judges held: "That the innkeeper here is not bound to take knowledge of the true owner of this horse thus left to stand in his inn at hay by another." In the second case, the claim of lien is wholly for the keep of the horse against which the lien is claimed. The horse had been left with the innkeeper for half a year, and it was resolved by the court that: "The defendant's plea was good, for the innkeeper was compellable to keep the horse, and not bound at his peril to take notice of the owner of the horse. And by the custom of Lond. if a horse be brought to a common inn where he hath (as it is commonly said) eaten out his head it is lawful for the innkeeper to sell him, * * * and there is a difference where the law compels a man to do a thing and where not." In one of the reports it appears that one of the judges, in addition to holding that the innkeeper was entitled to a lien because he was compelled to receive the horse, also said that: "The owner would have had to find meat for his horse, and for that reason it is right he should satisfy it now to the innkeeper, for he will not be to a greater charge than he must have been if he himself had fed him." In the third case, a horse, saddle, bridle, and

saddle cloth were brought to the inn. The innkeeper claimed a lien on the horse for its keep, which claim was sustained. The report further says: "But some question was made whether he might retain the saddle, bridle, and cloth as well as the horse." And in the fourth case the lien was sustained upon the ground that the innkeeper was bound to receive and entertain guests, and therefore might detain the goods of guests till payment.

The question as to an innkeeper's general lien upon all the goods and property in the possession of his guest was not litigated and is not determined in either of said four cases. The decision in each of said cases is principally important at this time because of the reasons given for sustaining the lien. We have seen that, while in each of the four cases the lien could have been sustained as a special and particular lien, it was also and principally sustained because of the fact that an innkeeper is compelled to receive a guest and his goods and is not required to make inquiry as to the true owner of the goods so in the possession of his guest, and that because he is so bound to receive the guest and his goods he is allowed a lien for his reasonable charges in connection therewith. In the early decisions there is some confusion as to whether an innkeeper had a general lien for his charges on the goods brought by a guest to the inn, or whether the lien was solely upon the particular property benefited or preserved. The special or particular lien, as distinguished from a general lien, is based upon the benefit derived by the owner of the particular property in having it improved or preserved as in the case of a disabled or derelict ship at sea, in which case salvage is allowed. Where the lien is based upon the fact that the person or property has been benefited or preserved by the innkeeper in furnishing accommodation and food therefor, the ownership of the property is immaterial. The lien extends only to the property benefited or preserved, even if it is brought to the inn by the owner. Little, if any, claim on which to base a particular lien could be made against inanimate objects. Such a lien would not answer the demands of public policy in the case of an innkeeper and his guest. The liability of an innkeeper at common law as a bailee is not questioned. Public policy required that an innkeeper should receive as guests all travelers applying to him for accommodation, together with the luggage and property in their possession. The innkeeper became responsible for the personal safety of the guest and an insurer of the luggage and personal property in his possession against all loss and damage not occasioned by the act of God, the public enemy, or the negligence of the guest himself. From a time prior to 1775 the general lien of an innkeeper upon the goods owned by the guest has been conceded, and it is not now disputed by the appellant. The reason for the general lien is as applicable against the property of

third persons in the possession of the guest as against the property of the guest himself. Because the innkeeper was compelled to receive the traveler and accept the extraordinary liability which extends not only to the luggage and personal property owned by the traveler, but to the luggage and personal property in his possession, although owned by another, it was necessary to give to the innkeeper a compensatory lien for his charges to make the maintenance of inns desirable. The extraordinary liability and the lien are concurrent, and go hand in hand, and together make up the rule founded on public policy.

The four old cases especially called to our attention recognize the reason for the rule and to that extent justify the claim that such lien was given even against the property of third persons prior to 1775. In no one of the cases reported since 1775, either in this state or in England, where an alleged lien by an innkeeper against the goods of a third person has been sustained, has it been suggested that the court was thereby extending the common-law rule as it existed in England prior to 1775. In each case the lien is sustained upon the common law as it existed at the time the decision was made, which rule could not then have existed except by reason of a custom which had continued for such a period of time that the memory of man runneth not to the contrary. The statutory rule adopted by this state in 1897 does not, in our judgment, extend the rule so far as it relates to the property of a third person in the lawful possession of a guest beyond the rule of the common law as it existed prior to 1775. The reason for the rigorous rule of the common law is well stated in *Crapo v. Rockwell*, 48 Misc. Rep. 1, 94 N. Y. Supp. 1122. Although the conditions which existed when the rule was established at common law have materially changed, the same considerations of public policy justify the maintenance of the rule at the present time. So our courts have held from time to time. Thus in *Hulett v. Swift*, 33 N. Y. 571, 88 Am. Dec. 406, referring to the responsibility of an innkeeper for the safe-keeping of property committed to his custody by a guest, this court say: "This custom, like that in the kindred case of the common carrier, had its origin in considerations of public policy. * * * The safeguards of which the law gave assurance to the wayfarer were akin to those which invested each English home with the legal security of a castle. * * * The considerations of public policy in which the rule had its origin forbid any relaxation of its rigor. * * * The growth of commerce and increased facilities of communication have so multiplied the class for whose security it was designed that its abrogation would be the removal of a safeguard against fraud in which almost every citizen has an immediate interest. * * * The traveler is en-

titled to claim entire safety for his goods as against the landlord, who fixes his own measure of compensation and holds the property in pledge for the payment of his charges against the owner. * * * The rule is a salutary one and should be steadily and firmly upheld, subject to the statutory regulations for the protection of hotel proprietors from fraud and negligence on the part of their guests." See *Wilkins v. Earle*, 44 N. Y. 172, 4 Am. Rep. 655. In *Briggs v. Todd*, 28 Misc. Rep. 210, 59 N. Y. Supp. 25, it is said: "In the mammoth hotel of today, with its numberless rooms, its army of servants, its incessant stream of arriving and departing transients, the property of the guest is at the mercy of many people. His own room is necessarily accessible to a number of the employees of the hotel, where fraud or neglect may subject him to loss. He cannot prevent the injury, and after he has suffered it he is powerless to detect or prove guilt. The stranger disappears, and the servants protest ignorance and innocence. * * * Considerations of public policy which, in the interest of commercial prosperity and social welfare, require that intercourse in and between cities and towns be full, free, and secure, preserve and reaffirm the wisdom of the ancient rule." In *Adams v. New Jersey Steamboat Company*, 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616, this court sustained a recovery against the steamboat company for loss by a passenger of his personal effects, applying the rule of the common law as to liability between the plaintiff and the defendant in that case, and said: "No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations."

The right which an innkeeper has to require payment in advance for the accommodation of a guest, in view of the uncertain length of time that the guest may stay at the inn and the uncertainty in regard to what may be required by the guest in the way of accommodation from day to day, is insufficient as a practical means of protection to the innkeeper. Unless the innkeeper's lien extends to all the luggage and goods which the guest brings to the inn, and for which the innkeeper becomes responsible as an insurer, an opportunity is afforded by which great fraud might be perpetrated upon the innkeeper through a relative or other person claiming the ownership of the luggage and goods in the possession of the guest. So long as public policy requires that an innkeeper be held to the extraordinary and severe responsibility prescribed by the common law, the same considerations of public policy require that the rule of the common law be retained in its entirety, and that the innkeeper have a lien upon the luggage and goods in the possession of the guest for payment of his reasonable charges. All proper-

ty is held subject to such general regulations as are necessary to the common good and the public welfare. The courts have sustained a statute authorizing the seizure and sale of any goods or chattels in the possession of a tax debtor. *Hersee v. Porter*, 10C N. Y. 403, 3 N. E. 338. In that case this court said: "For the purpose of collecting the tax the actual ownership in contemplation of the statute follows the actual possession." Distress for rent, until abolished by statute (chapter 274, p. 369, Laws 1846), was permitted even against the property of a stranger found on the demised premises. The owner of real property who rents or permits it to be occupied by a tenant for the sale of intoxicating liquors may be subjected by statute to a personal liability to one injured in person or property by or in consequence of the intoxication of any person who obtained the liquor producing the intoxication (even lawfully) in whole or in part on such real property. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323. A law subjecting the logs of one owner in a log boom to a lien for fees due a surveyor general for surveying and scaling all the logs in the boom, including those of other owners, is valid. *Lindsay & Phelps Co. v. Mullen*, 176 U. S. 126, 20 Sup. Ct. 325, 44 L. Ed. 400.

This court is not now concerned in the provisions of the act in question, except as herein stated. We have seen that the act does not extend the rule beyond that established at common law or beyond the requirements of public policy, and the statute, in so far as we have stated, is therefore constitutional.

The judgment of the Appellate Division should be sustained, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.

Judgment affirmed.

(189 N. Y. 336.)

FISH v. WAVERLY ELECTRIC LIGHT & POWER CO.

(Court of Appeals of New York. Oct. 8, 1907.)

1. ELECTRICITY—ACTION FOR INJURY—EVIDENCE—ADMISSIBILITY.

In an action for injury to a clerk in a store, caused by the fall of a lamp maintained by defendant electric light company, and hung by a hook screwed through a thin board, it was improper to exclude a question, asked a carpenter testifying for plaintiff, as to where hooks are usually placed when attached to ceilings; the obvious intention of the question being to show that the hook should have been screwed into a joist.

2. SAME—DUTY.

An electric light company, furnishing and maintaining a lamp in a store and receiving monthly compensation for the service, must use reasonable care in placing it, and to that extent the company is a tenant in possession of the store as to all persons lawfully entering it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 7.]

3. SAME—QUESTION FOR JURY.

In an action for injury to a clerk in a store, caused by the fall of a lamp maintained by defendant electric light company, whether defendant was negligent *held*, under the evidence a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Electricity, § 11.]

Appeal from Supreme Court, Appellate Division, Third Department.

Personal injury action by George Fish, by George Burns, guardian ad litem, against the Waverly Electric Light & Power Company. From an order of the Appellate Division, Third Department (95 N. Y. Supp. 1129, 109 App. Div. 919), overruling plaintiff's exceptions and denying his motion for a new trial, and directing judgment upon an order of nonsuit granted at the trial dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

James O. Sebring and Charles C. Annabel, for appellant. Frederick M. Hawkes, for respondent.

EDWARD T. BARTLETT, J. The plaintiff seeks in this action to recover damages for personal injuries received under a novel state of facts. A nonsuit was granted at the close of plaintiff's case. It appears that a corporation known as the Gaitley Furniture Company, doing business at Waverly, N. Y., employed the plaintiff as a clerk in its store. A main aisle ran from the front to the rear of this store in the center thereof. There were three large arc electric lamps suspended over this aisle, one in front of the store, one about the center, and one near the rear, weighing 28 pounds each. The ceiling of the store consisted of narrow, thin boards nailed to joists. The joists ran crosswise of the store and were about 3 inches thick, 8 inches in the perpendicular, and placed 16 inches apart. The ceiling boards were from half an inch to five-eighths of an inch thick. One witness testified that the ceiling boards were pine, and another, a carpenter, said they were whitewood or basswood. These three lamps were placed in position by the defendant company in the latter part of October, 1903. They remained its property, and were under its exclusive care and control, thereafter. On the 22d day of January, 1904, about three months after the lamps were put up, the plaintiff was engaged in sweeping out the store at about 8 o'clock in the morning, when the hook holding the lamp in the rear of the store pulled out, thus permitting it to suddenly fall. The lamp in its descent struck plaintiff upon the head, glancing to the floor, and thence against a sideboard standing near. The result was that the plaintiff, who was alone in the store, was rendered unconscious, and when he revived had no recollection of the falling of the lamp and the blow upon his head. He was lying on the floor, bleeding profusely from a scalp wound, and feeling faint and confused. It was proved by several witnesses who afterwards came

upon the scene that there was a dent in the floor and an abrasion on the sideboard where the lamp struck. The lamp was suspended about 12 feet above the floor of the store.

Evidence was given as to the nature of the injuries and their possible permanent effect; the trial taking place in September, 1904, about eight months after the accident. It is unnecessary, however, to comment upon the nature and possible permanent effect of the injuries, by reason of the fact that the trial judge and the Appellate Division have determined that the defendant is not liable as matter of law on the conceded facts. The evidence as to the precise relations existing between the furniture company and the defendant electric light company may be summarized as follows: It appears that shortly prior to the placing of these lamps in position the furniture company had rented this store. The manager of the furniture company testified that in the latter part of October, 1903, the company took possession of the store, and that there was no electric lighting apparatus in it other than the wiring and some small incandescent lights left there by the former tenant; that shortly thereafter he applied to the company who did this wiring in order to have them put in the arc lamps, and was informed that he would have to see the defendant electric light company, who had the exclusive right to do the work; that he called upon the defendant, and it undertook to put arc lamps in the store. It was proved that the furniture company assumed no responsibility whatever for the installation of these lamps or the precise place in which they were to be located. The general statement was made that the furniture company wished three lamps—one in front of the store, one about the middle, and the other at the rear. There was no written contract between the furniture company and the defendant company, but the oral agreement was, in brief, that the defendant company were to remain the owners of the arc lamps, were to place them in position, and continue in the exclusive management and control of them; that their representative was to call weekly, keep them in repair, furnish carbons, and clean them; and they were to present to the furniture company monthly bills for the use of the lamps and these services.

The plaintiff, in making out his case, was compelled to swear one Harry Hewitt, who was in the employ of the defendant company and had been selected by it to place these lamps in position, and who continued in its employ at the time of the trial. He swore that his business was that of a trimmer of electric lights; that he was in the employ of the defendant company, and had been for nearly seven years. He further testified: "It is not a part of my duties, that of putting up arc lights. * * * I am not the regular man who puts up arc lamps. That was not part of my business in the store. I do not claim to be an expert in putting up arc lamps.

I am not an expert. There are a number of men there connected with the company whose business it is to put up the arc lamps." This witness was then closely questioned as to the extent of his experience, and as to how many lamps he had ever put up prior to the ones in question. He further testified: "I am trying to figure out how many I have. I will say four. These have been attached to ceilings. I had attached four lamps, prior to these three, to ceilings, and that constituted the whole total amount of my experience of hanging arc lamps to ceilings, except I have helped other men to do it. Those constitute the whole number I had done myself, had charge of it." This witness further testified in substance that he proceeded to the store of the furniture company and found some old hooks in the ceiling that were too small, and removed them, selecting hooks he deemed proper for the purpose. How he proceeded with his work may be best stated in his own language: "I did not have a hammer with me. I didn't make any test with a hammer upon the ceiling to ascertain where the joists were. I didn't look across the ceiling to see where the ends of the boards came and where they were nailed. I certainly knew this ceiling to be nailed to joists, and I made no effort on that occasion to ascertain the location of these joists. I screwed it right up there, regardless of where the joists were located. I didn't at that time ascertain whether the hooks that I took up were screwed in joists or not." It further appears that the furniture company did not interfere with the lamps in any way, but that they were under the exclusive care and control of the defendant company. The lights were turned on and off by a switch operated from the floor. It also appears that after the accident the lamp that fell was returned to the defendant company. It was also proved that the hook that pulled out, causing the fall of the lamp, was not over a foot distant from a joist, and the jury might have found that it was several inches nearer.

The plaintiff produced a carpenter as a witness who had worked at his trade for some 18 years. It appeared that he had examined the ceiling of the store, and he was asked this question: "Q. In attaching hooks to ceilings by screwing them in, where are they usually screwed?" This was ruled out under an objection that stated no grounds, and the plaintiff excepted. The obvious intention of this question was to show that, if the work had been properly performed, the hooks would have been so placed as to pass through the ceiling board into a joist. The question was clearly competent, and it was error to sustain the objection to it. This is in substance the evidence of the plaintiff. The latter had rested before the witness Hewitt was sworn, and owing to the discussion that followed on the motion for the nonsuit he was allowed to reopen his case and swear Hewitt,

who was evidently a hostile witness. At the close of the examination of this witness plaintiff again rested. The defendant's counsel then said: "I renew the motion for a nonsuit on the same grounds stated, and upon the further ground that the evidence now precludes the idea of any negligence in the erection—putting up—of this hook." The original motion was as follows: "(1) Defendant moves for a nonsuit upon the ground that there is no evidence in this case that would justify a finding of negligence on the part of the defendant; (2) upon the ground that the defendant is not shown to have owed to this boy any duty whatsoever; (3) the defendant would not be liable to a third person, even if the facts proved did show negligence in regard to this lamp, as there is no privity of contract between a third person and the defendant, and no such relation existed; (4) that under all the evidence in this case the plaintiff would not be entitled to recover, and no evidence has been given establishing the negligence on the part of the defendant alleged in the complaint."

Plaintiff's counsel then made the following motion: "The plaintiff asks to go to the jury upon all the questions of fact involved in this case, upon all the proofs presented. We ask to go to the jury upon the question as to the negligence of the defendant, also the question as to the injuries of the plaintiff, and also as to the question as to the defendant having the care, supervision, and control of the lamp, and being responsible for any injuries resulting from the failure to properly care for and look after the same, and upon all the other questions of fact involved in this case." The court denied the motion, and the plaintiff duly excepted. Thereupon the court directed an order to be entered that the exceptions taken by the plaintiff be heard in the first instance by the Appellate Division, and that judgment be suspended in the meantime. The plaintiff duly excepted to each and all of the rulings of the court. The Appellate Division (95 N. Y. Supp. 1129, 109 App. Div. 919), with a divided court (Parker, P. J., and Chase, J., dissenting), overruled the exceptions of the plaintiff, denied his motion for a new trial, and directed the entry of judgment upon the order of nonsuit dismissing the plaintiff's complaint. While no case is cited presenting a precisely similar state of facts, it is clear that the liability of the defendant may be sustained upon well-settled principles of law that have been applied to kindred cases. We start out with the uncontroverted fact that these arc lamps, after being placed in the store of the furniture company, remained the absolute property of the defendant and subject to its exclusive care, management, and control. Neither the officers of the furniture company, its employees, nor the customers that entered the store interfered in any way with the lamps in question, which were suspended about 12 feet above the floor, and

were visited only once a week by the representative of the defendant in the exercise of its care and control. This is not the case of master and servant resting upon contractual relations, but rather on a situation raising the question whether, under the peculiar circumstances here presented, the defendant does not owe the duty of reasonable care to every person lawfully entering the store of the furniture company either as officer, employé, or customer.

It must be conceded at the outset that, if the lamps had been placed in position by the defendant in the exercise of reasonable care, the plaintiff's case must fall. The plaintiff rests, however, on the allegation that the lamps were put up in an improper and insecure manner, notwithstanding the fact that a situation was presented which would have rendered the work absolutely secure if properly performed. It is to be borne in mind that these joists were only 16 inches apart and ran crosswise of the store; that the lamp fell in about three months after it was placed in position. In *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, the point was presented as to the liability of the landlord for the injury to a tenant resulting from the fall of an elevator, and one of the questions litigated was the measure of care that the landlord owed to his tenants and the general public properly frequenting the building and using the elevator. It was contended on the one hand that the landlord was required to use the utmost care and diligence, and is liable for the slightest neglect against which human prudence and foresight might have guarded, and upon the other that the maintenance and operation of the elevator required the exercise only of reasonable care. This court decided that the landlord could be held only to the exercise of reasonable care. Cullen, J., writing, after citing *Breen v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450, which held under the peculiar facts presented that the defendant company was liable only to the exercise of reasonable care, said: "I can see no reason why the rule thus declared is not applicable to all cases, or why the probative force of the evidence depends on the relation of the parties. Of course, the relation of the parties may determine the fact to be proved, whether it be the want of highest care, or only want of ordinary care, and, doubtless, circumstantial evidence, like direct evidence, may be insufficient as matter of law to establish the want of ordinary care, though sufficient to prove absence of the highest degree of diligence. But the question in every case is the same, whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact in issue."

It is true in the case at bar that the defendant company does not occupy precisely the same position as the defendant in the case above cited; but by virtue of its contractual

relations with the furniture company, and by parity of reasoning, it should be held liable to the exercise of reasonable care in placing its own property in the store of the furniture company, for which it was receiving monthly compensation. To this extent the defendant company placed itself in the position of tenant in possession of the store as to all persons lawfully entering it. In *Duhme v. Hamburg-American Packet Co.*, 184 N. Y. 404, 77 N. E. 386, 112 Am. St. Rep. 615, this court held that a steamship company owes no duty to persons upon its pier awaiting the disembarking of passengers from an incoming vessel, whether they are there as mere licensees or because of an implied invitation from the company, except to have the pier in a reasonably safe condition for access, and to exercise such ordinary care in the process of docking the vessel as to render it reasonably safe for persons to remain upon the pier. The principle that we are considering is here applied, not to a public place, but to the private property of a steamship company. It lays down that measure of responsibility under which the company rests as to mere licensees or others impliedly invited upon the premises. In *Griffhahn v. Krelzer*, 62 App. Div. 413, 70 N. Y. Supp. 973, affirmed without opinion, 171 N. Y. 661, 64 N. E. 1121, it was held that the lessee of a building, who sublets the same to various tenants, and furnishes and maintains a freight elevator therein for their common use, owes to an expressman who uses the elevator in the lawful business of one of the sublessees the duty of exercising reasonable care to see that the elevator is safe. In *San Filippo v. American Bill Posting Co.*, 188 N. Y. 514, 81 N. E. 463, this court held that a bill-posting company, which had the right to maintain a billboard or sign on the roof of a building under a formal lease from the tenant in possession thereof, in which the company agreed to keep the roof where the board was erected in good repair, and to indemnify the tenant in possession of the building from any and all damages and claims that he might be liable for in consequence of the maintenance of the board, is liable for the personal injuries resulting from the fall or blowing down of the board by reason of the careless or unsafe manner in which it had been erected.

It is not necessary, in determining this case, to go to the extent of holding that the same principles of law would apply as in the case of an insecure erection by a contractor in the public streets of arc lamps or any other form of construction, by reason of which persons lawfully on the highway suffered injury. Nor are we called upon to hold that the rule of law should apply as in the cases of race tracks, baseball grounds, or other places where seats are erected for the entertainment of the public generally. *Barrett v. Lake Ontario Beach Imp. Co.*, 174 N. Y. 310, 66 N. E. 968, 61 L. R. A. 829. It is true that it might be somewhat difficult to distinguish

between the cases of private grounds and other places where the public are generally entertained, but it is quite sufficient in this case to rest our decision upon the rule of law that has been applied to private premises. It certainly would be a reproach to the administration of justice if, under the circumstances disclosed by this record, the defendant company rests under no liability.

We have been referred to a large number of cases that are clearly distinguishable from the one at bar. It seems unnecessary to go over them in detail. Among them are *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513; *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311; *Kuelling v. Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691. The uncontradicted evidence introduced by the plaintiff establishes a clear case for the jury, and the complaint was erroneously dismissed.

The judgment and order appealed from should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, O. J., and O'BRIEN, HAIGHT, WERNER, and HISCOCK, JJ., concur. CHASE, J., not sitting.

Judgment and order reversed, etc.

(189 N. Y. 323.)

CITY OF ROCHESTER v. ROCHESTER & LAKE ONTARIO WATER CO. et al.

(Court of Appeals of New York. Oct. 8, 1907.)

1. WATERS—WATER COMPANIES—RIGHTS.

Where a water company was authorized to maintain its mains through a city to furnish water to other towns, and a railroad company, on whose right of way the mains were laid, was authorized by Laws 1890, p. 1086, c. 565, § 7, subd. 4, to acquire a necessary water supply, the water company could, without the consent of the city, furnish water to the railroad company for use as such within the city under private contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

2. SAME.

Where a water company, maintaining conduits from its source of supply through the city of Rochester, had not acquired a valid franchise to furnish water to consumers along the lines of its conduits prior to the passage of Laws 1903, p. 1226, c. 553, giving the city a monopoly of the right to furnish water to its residents, such act was applicable to the corporation and prevented it from furnishing water to consumers in Rochester without the city's consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

3. SAME—RIGHTS OF PRIVATE PROPERTY.

Where a water company was incorporated to pipe water from Lake Ontario to certain towns through the city of Rochester, the company had not such a private property right in the water as authorized it to furnish water to consumers along its right of way through the city of Rochester without the city's consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

4. SAME—STATUTES.

Transportation Corporations Law, § 82, subd. 2, authorizing water companies to lay

their pipes through the streets of an adjoining city, town, or village to a city, town, or village where the company has a permit to furnish water, does not authorize a water company to sell and distribute water in a town in which it has not obtained a permit, though it is authorized to use the streets of such city or town for a right of way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

5. SAME.

Transportation Corporations Law, § 81, provides that every water company shall supply the authorities or any of the inhabitants of any city, town, or village through which the conduits or mains of such corporation may pass or wherein such corporation may have been organized with pure water at reasonable rates. *Held*, that such section contemplates an intervening municipality, either having no water supply or an insufficient one, which might desire a supply from a company using its territory as a route for access to other municipalities, but did not authorize a water company to supply consumers in a city through which its mains were located against the protest of the city, which itself maintained an efficient water system and had been granted the statutory monopoly of the sale of water within its limits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Waters and Water Courses, § 287.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the city of Rochester against the Rochester & Lake Ontario Water Company and another. From a judgment in favor of plaintiff, affirmed by the Appellate Division (100 N. Y. Supp. 1110, 114 App. Div. 907), defendants appeal. Modified and affirmed.

Albert H. Harris, for appellants. W. W. Webb, Corp. Counsel, for respondent.

CULLEN, C. J. This action is brought by the city of Rochester to restrain the defendant water company from furnishing, distributing, or selling water within the limits of the city of Rochester, especially to the defendant railroad company. The water company was incorporated on the 30th day of December, 1902, under the transportation corporations law (Laws 1890, p. 1137, c. 566, amended by Laws 1892, p. 1170, c. 617) for the purpose of supplying water to the villages of Brighton and Fairport and the towns of Greece, Gates, and Brighton in the county of Monroe, and with its certificate of incorporation were filed the consents of the local authorities of said villages and towns, as required by section 80 of said law. The plan or scheme of operation adopted by said water company was to take its supply of water from Lake Ontario and lay its pipes or conduits thence southerly through the towns of Greece and Gates to the city of Rochester, through the city of Rochester to the town of Brighton, and thence to the village of Fairport. The railroad company is the owner and possessed of a right of way extending through the entire limits of the city of Rochester. About the time of its incorporation the water company, through assignment, obtained from the railroad company the right to lay its mains

through the city of Rochester upon the right of way of the latter company, on an agreement to furnish said railroad company water at certain stipulated prices. The railroad right of way is intersected by many of the city streets. When the water company sought to lay its mains through Rochester on the railroad right of way, the city authorities prevented it. Thereupon the water company brought an action to restrain the city and its officers from obstructing or interfering with the company in laying its mains. The city denied that the water company had acquired by its incorporation and the consents attached thereto any authority to enter within the limits of the city of Rochester, and also contended that by two acts of the Legislature passed in 1903 (Laws 1903, p. 1226, c. 553; Laws 1903, p. 197, c. 59) the company was expressly prohibited from laying its mains within the city limits. The water company was successful in its suit, which was brought on appeal to this court, and the judgment of the lower courts affirmed. *Rochester & Lake Ontario Water Company v. City of Rochester*, 176 N. Y. 36, 68 N. E. 117. This court held, through Haight, J., that the transportation corporations law, by subdivision 2, § 82 (Laws 1890, p. 1151, c. 566), authorized the company to lay its mains through the city of Rochester, so as to gain access to the town of Brighton and the village of Fairport, from the authorities of both of which it had the statutory consents, and that, as the company had obtained such consents and commenced the construction of its work, it had acquired thereby a franchise which subsequent legislation could not destroy. On the argument of the appeal and in the minority opinion of this court there was discussed to some extent the claim of the water company that it had the right to furnish water to consumers along the line of its mains in the city of Rochester. That claim this court expressly refused to pass upon, but, as already said, placed its decision upon the ground that the company had the right to lay mains through Rochester to reach the town and village beyond. The question thus left open is the one now presented to us, and presented to us in a double aspect; for the railroad company is the owner of a block of buildings in the city of Rochester not used for railroad purposes, but leased to private tenants, and the water company is now furnishing water to its codefendant, the railroad company, not only for railroad purposes, but for use in private buildings. In this action the Special Term held that the water company was not authorized to furnish water to the railroad company for any purpose. That judgment has been affirmed by the Appellate Division (114 App. Div. 907, 100 N. Y. Supp. 1110) by a divided court, and an appeal is now brought to this court.

So far as is involved the right of the railroad company to purchase and receive from the water company all the water that it may

require for railroad purposes, we are quite clear that the decisions of the courts below were erroneous. Whether the water company has a right to sell water to consumers in the city of Rochester generally or not, the railroad company is by the express terms of subdivision 4, § 7, of the railroad law (Laws 1890, p. 1080, c. 565), empowered to acquire a supply of water that may be necessary for its uses and purposes, and to build or lay aqueducts or pipes for the purpose of conveying such water, and to condemn any lands that may be necessary therefor. Therefore that company could have obtained a supply of water from Lake Ontario, or any other locality outside the city of Rochester, and carried the supply through a conduit on the very line which the water company has adopted. The water company, as determined by our previous decision, had the right to maintain its conduits for the purpose of carrying water to the towns beyond the city. So long as neither railroad company nor water company exceeded its franchise rights, the question of what structure should be employed for the exercise of those rights was a matter that solely concerned the two companies. It was not at all necessary that each company should build an independent conduit line. The parties could agree to construct a single conduit to be used in common by both, or either might agree to build it and the other pay for its use. This is exactly the effect of the agreement between the two companies. The way in which it is done or how the payments are made is immaterial. The railroad contributes its right of way, the water company builds the conduit line, and the balance of the expense or contribution between the two is adjusted by the railroad company agreeing to pay so much for the water it may use. The delivery of water to the railroad company under this contract is, therefore, authorized under the railroad company's charter, regardless of our determination as to what may be the water company's rights.

The block of private buildings owned by the railroad company, but in no sense used or held for public purposes, presents, however, an entirely different question. If justified, it must be justified solely under the water company's charter rights or its property rights. The question is one of great importance to the plaintiff, though but a small sum is involved in this case, for at great expense it has acquired a water supply and constructed a plant for the purpose of furnishing water to its inhabitants. If, as claimed by the appellant water company, it has the right to furnish water to all consumers in Rochester along the line of its mains, a competition will ensue by which the city may be deprived of a very substantial part of the revenue on which it relies for the maintenance of its water system and for the payment of the interest upon the debt incurred in the construction of that system.

If the water company should establish a lower rate than that fixed by the city, it is apparent that the city would either lose as customers all consumers along the line of the water company's mains or would be compelled to reduce its charges for water throughout the whole city; for, even if not illegal, it would be obviously impracticable to charge one set of customers one rate and another set of customers a higher rate. By chapter 553, p. 1226, of the Laws of 1903, already referred to, it was enacted that no person or corporation should furnish or distribute water within the city of Rochester, from pipes, mains, or conduits, except under a franchise granted by an ordinance of the common council, and that any such right, license, or permission to any person or corporation, other than the city of Rochester, should thereby be repealed and revoked. If, at the time of the enactment of this law, the water company had acquired a valid franchise to furnish water to consumers along the line of its mains, then, under our decision in the previous litigation between these parties, we may assume that the statute would be inoperative and ineffectual as against that appellant. We are, therefore, brought to a consideration of the construction and interpretation to be given to the various sections of the transportation corporations law under which the appellant water company was organized, and by which its franchise was conferred.

Before entering upon that discussion, however, it may be well to answer the argument of the appellant water company that it is exercising only a property right, as distinguished from a franchise right. It is urged that, as it is the owner of the water in the main and can furnish water to consumers adjacent to its conduit without entering upon the streets or public places of the city, it is exercising merely a right, which every owner of property possesses, to sell his property to whomever will buy. It is insisted that, if the owner of land should upon his property sink a well or find a spring, he may sell the water to an adjacent landowner, and deliver it by a pipe or conduit, so long as he does not seek to enter upon public property, and that no law can deprive him of that right. This proposition may be conceded, but it has no relevancy to the present case. Neither water company nor railroad company obtained the water from the right of way. It is found in the center of the block on private land, not because it is a product of that land, but because it has been brought there from a distant source, through a pipe line, which the water company was enabled to construct across the street solely by virtue of the franchise granted to it. There is no analogy between such a case and that of a private owner finding water on his land and furnishing it to his neighbor, without having to ask the privilege from any government, local or state.

We now return to a consideration of the transportation corporations law. Section 80 provides for the incorporation of waterworks corporations for the purpose of supplying water to any of the cities, towns, or villages in this state and to the inhabitants thereof. But, to authorize the filing of the certificate, there must be annexed thereto a permit signed and acknowledged by the local authorities of the municipality to be supplied. Section 81 enacts: "Every such corporation shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass, or wherein such corporations may have organized with pure and wholesome water at reasonable rates and cost"—and then provides that contracts may be made between such municipal officers and the company relative to the terms and conditions on which the water shall be supplied. By subdivision 2 of section 82 it is enacted that every such corporation shall have the power "to lay their water pipes in any streets or avenues or public places of an adjoining city, town or village, to the city, town or village where such permit has been obtained." It was upon this last provision that the decision in the case of Rochester & Lake Ontario Water Company v. City of Rochester (supra) proceeded. It was there said by Judge Haight, writing for the majority of the court: "The purpose of this provision of the statute is manifest. The Legislature did not propose that one municipality, which happened to be more favorably situated, should have the power to prevent another and adjoining municipality from obtaining water, where it becomes necessary to pass through the territory of such adjoining municipality to reach the source of supply. This was settled in the case of Village of Pelham Manor v. New Rochelle Water Company, 143 N. Y. 532, 38 N. E. 711." In the earlier case the village of Pelham Manor sought to restrain the water company, which was authorized to supply water to the village of New Rochelle, from connecting two dead ends of pipes along a highway in Pelham Manor. This court held that the section last cited empowered the company to lay its main, though in an adjoining village, because the trial court found that the connection was necessary to properly furnish and distribute the water in New Rochelle. Judge O'Brien there said: "So long as the defendant was without power to add to its revenues by furnishing water to the plaintiff or any of its inhabitants, no great mischief is to be apprehended from any extensive use of the streets by the defendant. But the Legislature evidently anticipated that a water company, in performance of its functions of supplying the town and every part of it, which granted the permit, with water, might, for some reason, find it necessary to cross the boundary line of an adjoining town and use its highways, not for the purpose of supplying that town, but for

the purpose of properly and effectively executing the purpose of its creation." Therefore no franchise to sell and distribute water in a town in which the company has not obtained a permit can be predicated on the right given in this section to lay mains in an adjoining town, and we understand that the claim of the appellants is based, not on this section, but on section 81.

As already quoted, that section provides: "Every such corporation shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass, or wherein such corporations may have organized, with pure and wholesome water at reasonable rates and cost." This section as originally enacted read: "Every such corporation shall supply the authorities or inhabitants of any town or village where they have been organized with pure and wholesome water," etc. By chapter 617, p. 1170, of the Laws of 1892, the section was amended so as to read in its present form. It is contended that by the addition of the language "through which the conduits or mains of such corporation may pass" the water companies were given the additional franchise to furnish water along the line of their mains in municipalities in which they had obtained no consent. We think such a construction inadmissible. It may well be doubted whether the section confers a franchise at all. It seems rather to impose a duty. However this may be, we are of opinion that the whole scheme of the statute is opposed to the construction for which the appellants contend. It is to be observed, first, that no valid incorporation of a waterworks company can be effected unless the consent of some municipality is obtained. The certificate of incorporation must state the municipalities to be furnished with water, and there must be annexed to that certificate "and as a part thereof" the permits from the local authorities "authorizing the formation of such corporation for the purpose of supplying such village or town with water." Despite the amendment of 1892 the Legislature cannot have intended to give to the local authorities in one municipality power to grant a franchise in another municipality. In his opinion, in the first litigation between these parties, Judge Haight further said: "We fully recognize the justice of the provision which permits the laying of water pipes through an adjoining municipality, and thus preventing such municipality from depriving its neighbors from receiving a supply of water, where such municipality happens to intervene between the source of supply and the place of distribution. * * * We think, however, that the Legislature might properly have placed some restriction upon the use of the streets in cities, and possibly in villages, that should be made by water companies; that the city or village authorities should be given some voice

as to the streets that should be used, and the place and manner in which the pipes should be laid therein; and that it should not be left entirely to the judgment and discretion of the officers of the water company to place its pipes wherever they please, without regard to the wishes or reasons of the officers of the city who may desire to have them placed elsewhere." The evils pointed out by Judge Haight that might result from leaving to the water company the unrestricted selection of its route through any intervening city or village are sufficiently great, but they would be immeasurably increased if we were to interpret the statute as authorizing the company to furnish water to consumers along the line of its mains in the intervening municipality. If such were the law, then the company would not select the best and most available route for conveying the water to the municipality it had contracted to furnish, but one on which it might pick up the most trade and the most valuable custom in the intervening municipality for which it had no permit, and a permit from an insignificant village or town might be made the pretense for invading the territory of a large city.

The appellants in their argument on this appeal limit their claim to furnish water to such consumers as they may be able to reach without going through the public streets. The language of the statute does not seem to admit of this limitation. The statute reads: "Every such corporation shall supply the authorities or any of the inhabitants of any city, town or village through which the conduits or mains of such corporation may pass." There is no limitation to inhabitants, the property of whom lies adjacent to or along the line of the company's mains. Surely the mains of the appellant water company pass through the city of Rochester, and if by this section it obtained a franchise to furnish any of the inhabitants of that city with water we do not well see why it may not invade the whole territory of the city. In fact, any construction of the provision of section 81 which would confer upon a water company organized to supply water to an adjacent town any franchise to supply water in an intervening town must lead to most incongruous and unreasonable results, while, on the other hand, the section may easily be given a natural and reasonable effect. The statute contemplates the case of an intervening municipality which, having either no water supply, or an insufficient one, might desire to obtain a supply from some company which had used its territory as a route for access to other municipalities. In such case the authorities of the intervening municipality might offer a permit to the water company, and thereupon it would become the duty of the company to contract to furnish water to such municipality and its inhabitants on reasonable terms, a duty which might be enforced by legal procedure. Until,

however, such permit is obtained the water company obtains no rights to furnish water in the intervening municipality.

As the appellant water company had at the time of the enactment of chapter 553, p. 1228, of the Laws of 1903, neither franchise nor property right to sell and furnish its water in the city of Rochester, that statute was valid. It practically gave to the city of Rochester within its limits a monopoly of the sale of water by any system of public distribution. It had, therefore, sufficient standing to maintain this action. Mayor, etc., of *N. Y. v. Starin*, 106 N. Y. 1, 12 N. E. 631; *Same v. New Jersey Steamboat Navigation Co.*, 106 N. Y. 23, 12 N. E. 435. Indeed, on this subject Judge Haight said in *Rochester & Lake Ontario Water Co. v. City of Rochester*, supra: "Under the statute, as we have seen, the company has the right to run its mains through the city, in order to comply with the purposes of its grant. When it attempts to supply water to the inhabitants of the city within its territorial limits, its power to do so may then be questioned by the municipality, and the courts may then be called upon to determine the extent of its powers in that regard."

The judgments of the Special Term and of the Appellate Division should be modified, so as to except from the injunction therein granted such water as the appellant the New York Central & Hudson River Railroad Company may take for use for railroad purposes, and, as modified, affirmed, without costs of this appeal to either party.

EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT, and HIS-
COCK, JJ., concur. GRAY, J., not sitting.

Judgments affirmed.

(189 N. Y. 361.)

ZELLER v. LEITER.

(Court of Appeals of New York. Oct. 29, 1907.)

1. GAMING — GAMBLING TRANSACTION — EVIDENCE — INTENT.

Where, in an action on a note given in settlement of losses on transactions in grain, defendant claimed that the transactions were intended by both parties to be settled by a payment of differences, and that neither intended an acceptance or delivery of the grain purchased and sold, defendant, after having testified that he intended simply to settle on differences, was also entitled to show, by conversations had with the other parties to the transactions, that such was also their intention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 101.]

2. SAME — VALIDITY OF CONTRACT.

A contract made in good faith for the actual sale of grain deliverable within a specified time in the future is not a gambling transaction, within Hurd's Rev. St. Ill. 1905, pp. 698-700, prohibiting gambling transactions in grain or other commodities for future delivery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, § 22.]

3. SAME — INTENTION — SETTLEMENT OF DIFFERENCES.

A contract for the purchase of grain for future delivery, where both parties intend to settle by the payment of differences without any delivery, is a gambling transaction, and insufficient to support a note given in settlement of losses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Gaming, §§ 25, 26.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by William F. Zeller against Joseph Leiter. A judgment in favor of plaintiff was affirmed by the Appellate Division (114 App. Div. 148, 99 N. Y. Supp. 624), and defendant appeals. Reversed.

Alton B. Parker, for appellant. Wm. F. Goldbeck, for respondent.

WILLARD BARTLETT, J. This is an action on a promissory note made at Chicago on December 15, 1898, whereby the defendant promised to pay to the order of Allen, Grier & Zeller Company in that city three years after date the sum of \$52,021.97, with interest at the rate of 8 per cent. per annum. The defense was that the plaintiff, being the liquidating trustee of Allen, Grier & Zeller Company, an Illinois corporation, and formerly its treasurer, had acquired the note with full cognizance of the fact that it was given for a balance arising out of wagering contracts for the purchase of wheat and other grain, and consequently that it was void under the law of Illinois, where the said note was given and was payable. After the defendant had introduced evidence in support of this affirmative defense, and had sought to give other evidence, which was excluded upon objection and over his exception, the trial court directed a verdict against him for the full amount of the note, with interest. The judgment entered upon this verdict has been unanimously affirmed by the Appellate Division.

The Illinois statutes upon which the defense is based read as follows:

"Sec. 130. Gambling in Grain. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity * * * or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both, and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.

"Sec. 131. Gaming Contracts. All promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages, or other securities, or conveyances made, given, granted, drawn or entered into or executed by any person whatsoever where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing won by any gaming * * * shall be void and of no effect."

"Sec. 136. No assignment of any bill, note, bond, covenant, agreement, judgment, mortgage or other security or conveyance as aforesaid shall in any manner affect the defense of the person giving, granting, drawing, entering into or executing the same, or the remedies of any person interested therein."

Cr. Code Ill. c. 38; Hurd's Rev. St. Ill. 1905, pp. 698-700.

It was conceded by counsel for the plaintiff upon the trial that, if a defense under these statutes was good against the payee of a note, it was good against the indorsee. The defendant endeavored to establish a defense thereunder against the payee by testifying that it was not his intention at the time of making any of the contracts which formed the basis of the note in suit to call for wheat or deliver wheat, but that he intended simply to settle with Allen, Grier & Zeller Company on differences. His counsel, realizing that the defendant's intention, alone and of itself, was not enough to bring the contracts within the prohibition of the law, but that such intention must be shared by the other party as well, tried to prove the existence of a like intention on the part of Allen, Grier & Zeller Company, by asking the defendant whether he had any conversation with any member of that concern which would tend to show what their intention was. This question was objected to as leading, and, if the ruling of the learned trial judge in sustaining the objection had been limited to the form of the interrogation, counsel for the defendant would doubtless have changed it. But the court went further than counsel for the plaintiff, and declared that the question was incompetent, saying, "The court also excludes it as incompetent," thus giving counsel for the defendant to understand, in the plainest and most unmistakable manner, that the court would not permit the defendant to prove, by means of conversations between him and the payees of the note, that they shared his intention merely to speculate in differences in the market value of grain, without contemplating any actual delivery or receipt thereof.

I think that the defendant's exception to this ruling presents error which requires the reversal of this judgment. If I understand the position of the learned Appellate Division on this question, it is that the ruling was correct under the authority of *Scanlon v. Warren*, 169 Ill. 142, 48 N. E. 410. That case, however, so far as it has any possible application here, only decided that the undisclosed intention of one party to a grain contract to violate the law, or make a contract which could not be enforced, did not affect the right of the other party to recover money advanced upon an agreement which by its terms was legally valid. The court says: "It was not claimed that his intention in this respect was communicated to the plaintiffs, or that they had any conversation with him on that subject." Here, on the contrary, the manifest

effort of defendant's counsel, in which he was thwarted by the ruling of the trial judge, was to prove a conversation with the payees of the note in suit which would show that they shared the plaintiff's intention as to what was to be the character of the contract between them. "I am asking for a conversation between him and the plaintiffs," said counsel for the defendant, to which the court responded, "I understand that fully."

The learned counsel for the respondent seeks to uphold the ruling which I have discussed on the ground that the question which the court would not allow to be put to the witness related only to put and call transactions, as distinguished from contracts for the future delivery of grain; and he argues that, inasmuch as puts and calls are illegal under the law of Illinois, irrespective of the intention of the parties, the exclusion of the evidence which the question called for was harmless. The following extract from the record will show precisely what the counsel for the defendant sought to obtain from the witness: "Q. I ask you, now, was it your intention, at the time these contracts or any one of them was made, to call for wheat on call contracts, or to tender the wheat on the put contract, or merely to settle upon differences? A. No. Q. It was not your intention? A. Simply to settle on differences. Q. Did you have any conversation with any member of the firm of the Allen, Grier & Zeller Company which would tend to show what their intention was? Mr. Goldbeck: I object to this question as leading. The Court: Objection sustained. I think you might add incompetent, but the court excludes it also as incompetent. He cannot give his opinion as to that. Mr. Baldwin: I am asking now for a conversation between himself and the plaintiffs. The Court: I understand that fully. (Exception.)"

The impression made upon my mind in reading these questions and the succeeding colloquy is that the inquiry of counsel conducting the examination was designed to relate and did relate to all the grain contracts out of which grew the note in suit, whether those contracts were put and call transactions or contracts for the future delivery of grain. If my view in this respect is correct, the error in excluding the evidence is manifest; but if I am wrong in this regard, and we are to ascribe to the question the restrictive meaning assigned to it by counsel for respondent, I think it was error to refuse to permit the defendant to answer whether it was his own intention to accept any delivery of wheat upon the contracts for future delivery. The learned Appellate Division upheld the ruling of the trial court sustaining an objection to a question designed to elicit a statement of the defendant's intention as to such contracts upon the ground that the question did not call for the further fact as to whether or not the defendant had communicated his intention to his brokers, saying that if

the defendant had entertained an intention not to accept delivery, and did not communicate that intention to them, the evidence was immaterial under the authority of *Scanlon v. Warren*, supra. This would be all very well, if it were possible for counsel to prove his entire case or defense by the answer to a single question. In order to establish the existence of a joint intention in the minds of both parties that there should be no actual deliveries of grain in fulfillment of contracts purporting to provide for such deliveries, it was essential to prove the existence of such intention in the mind of each party; and it was perfectly proper to attempt to do this first by inquiring of the defendant what his intention was, and then to follow that up, if possible, by proof of the intention of the other party to the contract. The Illinois authorities involving the construction of the statutes of that state directed against gambling contracts in grain all agree that the intention that there shall be no actual delivery must co-exist in the minds of both parties to the contract; and, when the trial court in the present case prevented the defendant from testifying as to what his intention was, it prevented him from proving an essential element of his defense. No matter what he might afterwards establish as to the intention of the other parties to the contract, this would not suffice to render the agreement illegal, in the absence of proof as to his own intention; and this proof, as we have already seen, he was precluded from giving.

Our attention is called in behalf of the respondent to a number of decisions to the effect that a contract made in good faith for the actual sale of grain deliverable within a specified time in the future is not a gambling contract within the meaning of the Illinois statutes. *White v. Barber*, 123 U. S. 392, 8 Sup. Ct. 221, 31 L. Ed. 243; *Logan v. Musick*, 81 Ill. 415; *Cole v. Milmine*, 88 Ill. 349. I do not understand, however, that the correctness of this proposition is questioned by counsel for the appellant. His position is simply that the contract for the purchase and sale of grain between parties who have no intention of receiving or delivering any grain, but intend to settle by the payment of differences between the contract price of the grain and its market price when sold, is a gambling contract, which cannot be enforced, and that a note made and delivered in settlement of losses in such a transaction is not enforceable in law. See *Jamieson v. Wallace*, 167 Ill. 388, 47 N. E. 762, 59 Am. St. Rep. 302; *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414. The conversations between the parties to a contract which is alleged to have been of this objectionable character must always be material evidence as to the true nature of the transaction, as appears by the opinion of the Supreme Court of Illinois in the case last cited. Not only so, but, as was said by the court in *Jamieson v. Wallace*, supra, the intention of the parties may be established, not

merely by their assertions, but by all the attending circumstances of the transaction. "The question of intention is a question for the jury, or for the court, to be determined by a consideration of all the evidence. The intention of the parties in such cases may be determined from the nature of the transaction, and from the manner and method of carrying on the business. * * * It makes no difference whether the real intention is formally expressed in words or not, if the facts and circumstances in proof show that it was the real understanding that there should be no actual purchase and no delivery or acceptance of the property, involved in the contract, but merely an adjustment of damages upon differences."

In the new trial, which must be granted in this case by reason of the erroneous rulings which we have considered, a greater liberality on the part of the trial court in the admission of evidence will undoubtedly lead to a true ascertainment of the character of the transactions which gave rise to the note in suit.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, and HIS-
COCK, JJ., concur.

Judgment reversed, etc.

(189 N. Y. 568)

STORM et al. v. MCGROVER et al.

(Court of Appeals of New York. Oct. 29, 1907.)

1. APPEAL—REVERSAL—GROUNDS—ERROR OF LAW.

Where a decision of the trial court that the committee of a lunatic paid the consideration for a conveyance of land to such committee out of money belonging to the lunatic was without evidence to support it, such decision constituted error of law, for which the judgment was properly reversed.

2. SAME—DECISION OF INTERMEDIATE COURT—REVIEW OF FACTS.

Where a trial court's finding that the consideration for land purchased by a lunatic's committee in her own name "did not consist wholly and entirely of funds belonging to" the lunatic was unanimously affirmed by the Appellate Division, the facts in support of such finding could not be reviewed on a further appeal to the Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4322-4352.]

3. TRUSTS—RESULTING TRUSTS.

Where a lunatic's committee did not pay for land, the title to which was taken in the committee's own name, entirely out of the funds of the lunatic, no trust resulted in the lunatic's favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 111, 112.]

4. DESCENT AND DISTRIBUTION—ESTATES DESCENDIBLE—LUNATIC'S COMMITTEE—MISUSE OF FUNDS.

Where a lunatic's committee used a portion of the lunatic's funds with which to pay for land, the title to which was taken in the committee's name, the lunatic acquired no legal estate in the land which would descend to his heirs at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Descent and Distribution, §§ 33-35.]

5. LIENS—EQUITABLE LIENS.

Where a lunatic's committee used certain of the lunatic's funds to pay a portion of the consideration for land taken in the committee's name, the lunatic acquired an equitable lien on the land for whatever money belonging to him that could be traced into such consideration.

6. DESCENT AND DISTRIBUTION—PERSONAL PROPERTY.

Where a lunatic's committee used certain of the lunatic's funds to pay a portion of the consideration for land taken in the committee's name, the lunatic's equitable lien in the land for the amount of his money so used passed as personal estate to his next of kin, and not to his heirs.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Theresa Storm and others against Sophie McGrover and others. From a judgment of the Appellate Division (100 N. Y. Supp. 1145, 114 App. Div. 910), unanimously affirming a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Eugene Cohn, for appellants. Robert H. Barnett, for respondents.

GRAY, J. I think that the reversal by the Appellate Division of the former judgment recovered by the plaintiffs, upon the law, was correct. The decision by the trial court that the committee of the lunatic paid the consideration for the conveyance to herself of the land in question out of the moneys belonging to the lunatic was without evidence to support it. This constituted error of law, for which the judgment was properly reversed. The judgment upon this last trial has been unanimously affirmed by the Appellate Division and this court is precluded from reviewing the facts, upon which the court has found that the purchase consideration paid by the wife of the lunatic, who was also his committee, and to whom the conveyance was made, "did not consist wholly and entirely of funds belonging to" her ward. No trust, therefore, resulted in favor of the lunatic, but any legal estate which would descend to his heirs at law, within the authority of *Schlerloh v. Schlerloh*, 148 N. Y. 106, 42 N. E. 409, and of *Leary v. Corvin*, 181 N. Y. 222, 73 N. E. 984. I find no error justifying a reversal of the determination below, and therefore the judgment should be affirmed, but without prejudice, however, to any proceeding by the administratrix of the deceased lunatic to subject the land in question to an equitable lien for whatever moneys of her intestate can be traced into the consideration paid therefor. If thus unauthorizedly invested by the committee, the right to compel an account as to them vested in the legal representative of the lunatic. Upon the lunatic's death the interest in the land would go, as personal estate, to his next of kin and not to his heirs; for the product of the moneys would follow their nature, so long as they could be ascertained. The case of *Awdley v. Awdley*, 2 Vernon, 192, is somewhat similar in its facts, and it is in point as an authority. See, also, *Earl*

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of *Winchelsea v. Norcliffe*, 1 Vernon, 435, and *Lockman v. Reilly*, 95 N. Y. 64. In the case of *Reid v. Fitch*, 11 Barb. 399, the plaintiff was the son of the lunatic, and therefore next of kin, as well as heir at law. The judgment in that case was correct; but, in so far as the opinion held that on the purchase of the land with the lunatic's moneys, a trust resulted, which descended as a legal estate to the lunatic's heirs at law, we should not follow it.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment affirmed.

(189 N. Y. 383.)

MACARDELL et al. v. OLCOTT et al.

(Court of Appeals of New York. Oct. 29, 1907.)

1. APPEAL—UNANIMOUS DECISION—CONCURRENCE IN RESULT.

A decision by the Appellate Division may be unanimous, though one or more justices concur only in the result.

2. SAME—AMENDMENT OF ORDER—COURT DIFFERENTLY CONSTITUTED.

The Appellate Division at a subsequent session, with different justices, may determine that each individual justice taking part in an original decision concurred, and direct an amendment of the order and judgment so as to show unanimity in the decision; such amendment being based on proof of concurrence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4636-4640.]

3. JUDGMENT—DETERMINATION OF ALL ISSUES.

Plaintiffs, on behalf of a corporation, sued many defendants, including a majority stockholder, alleging that defendants by fraud had stripped the corporation of its property, praying that the alleged wrongful proceedings and collusive transfer be set aside, and that the corporation be reinvested with the property of which it had been unlawfully deprived. The complaint was dismissed by a short-form decision, holding that a prior decree of a federal court under which the corporation's property was sold under foreclosure was conclusive as against the plaintiffs and others similarly situated; that the parties to the sale acquired a good title, not subject to any trust for the benefit of plaintiff or other stockholders; nor was the decree tainted with fraud on the part of any of the defendants. Held, that a claim by plaintiffs on appeal that they were suing as minority stockholders against the majority stockholder to enforce a trust and to compel such majority stockholder to account for profits and rights which it held to their exclusion in violation of such relation was not within the complaint, and hence it could not be urged that the decree was unsustainable, because such issue was undetermined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 355, 356.]

Edward T. Bartlett and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Cornelius MacArdell and others, as administrators, etc., against Frederic P. Olcott and others. From a judgment of the Appellate Division (93 N. Y. Supp. 799, 104 App. Div. 263), unanimously affirming a judgment of the Su-

preme Court dismissing plaintiff's complaint on the merits, plaintiffs appeal. Affirmed.

Edward M. Shepard and H. Snowden Marshall, for appellants. Adrian H. Joline, for respondents.

HISCOCK, J. The appellants' intestate was the minority holder of a large amount of the capital stock of the Houston & Texas Central Railway Company, which will be called the "Houston Company." The respondent Southern Pacific Company, indirectly and through its control of other corporations, was the holder of a majority of the stock of said company. In substance, the appellants claim upon this appeal that the Southern Pacific Company, on a foreclosure sale of the property of the Houston Company under and in accordance with a reorganization plan to which the former company was a party, acquired property, to wit, the capital stock of the reorganized company, which, because of its relation as majority stockholder, it should be decreed to hold as trustee for the proportionate benefit of the appellants as minority stockholders, and that since, upon uncontroverted facts, this relief has been denied, a new trial should be granted.

Before reaching the merits of this claim, appellants are compelled to avoid what purports to be a unanimous affirmation by an Appellate Division of a judgment dismissing their complaint upon the facts. This they seek to do by the argument, in the first place, that because of special circumstances the decision of the Appellate Division is not to be regarded as unanimous; and, secondly, that, even if the decision be regarded as unanimous, the decision of the trial court shows that it did not pass upon the issues involved in this action, and they are, therefore, still open for consideration by this court. I think that the appellants must fail in their contention upon these latter points. But, if this is not so, I think that they must fail upon the merits upon this appeal, for the reason that their present claims to relief are based upon a theory so absolutely and widely at variance with that upon which their action was commenced and tried that we cannot make them a basis for a new trial. In order that we may consider the questions of law which are involved it will be necessary to make a review of the facts, which at best will be somewhat extended, although there is practically no dispute concerning them.

The Houston Company was the owner of a railway consisting of three divisions, with rolling stock, and also the beneficiary of extensive land grants. It had executed to various trustees seven mortgages securing nearly \$20,000,000 of bonds. It also had a floating indebtedness of about \$3,000,000. Most of these mortgages—and the prior ones—covered, respectively, only one or two divisions of the road. None of them, with the excep-

tion of one securing an inconsequential amount of bonds, contained express provision for foreclosure and sale for the entire principal amount of bonds upon a default in payment of interest, or of other provisions short of a default in the payment of said principal; but they did contain provisions that the trustee might enter and take possession of the road until satisfaction was secured of payments in default. The road failed to meet its obligations under these mortgages, and foreclosure of several thereof was commenced. The company served answers, taking advantage of the provisions of the mortgage, which prevented a sale for the entire principal amount of the bonds. In addition, suit was commenced against the company on a large amount of floating indebtedness, and receivers therein appointed. In short, and without unnecessary recapitulation of all the details, the affairs of the road were in a most unfortunate and much confused condition, with a practical deadlock between various conflicting interests which prevented a solution and betterment of the situation. Under these circumstances a reorganization agreement was entered into between the Southern Pacific Company, which, as I have already stated, was indirectly the majority holder of the stock of the Houston Company, the bondholders secured by the various mortgages referred to, and various other parties; the Houston Company itself and plaintiffs' intestate not being parties thereto. This agreement in its general outline provided for a foreclosure and sale of the land and railroad property belonging to the Houston Company, and the transfer of this property to a new corporation to be organized, and which should issue bonds to replace the old ones outstanding, of which latter, however, the principal amount and rate of interest should be scaled down, and the execution of mortgages upon the railroad property and lands to secure all or part of these new bonds. Said agreement also provided for the issue of \$10,000,000 of capital stock of the new corporation, and it is in connection with this new capital stock that the appellants now make complaint against the Southern Pacific Company and seek to hold it as a trustee for their benefit.

It was provided in respect to this stock as follows: First, that the stockholders in the old company, respectively, should be entitled to a pro rata share of the capital stock of the new company upon payment of a like respective pro rata amount of the money necessary to pay the reorganization expenses, and the amounts to be paid to old bondholders in connection with the reduction of the principal and rate of interest of their bonds, and the \$3,000,000 of floating indebtedness; second, that if and so far as the stockholders did not see fit to exercise this privilege the floating debt creditors should be entitled to their respective pro rata shares of the new capital stock upon payment of like respective

pro rata shares of the same reorganization expenses and the amounts to be paid old bondholders as above indicated; third, that if and in so far as old stockholders and floating debt creditors did not avail themselves of the right to take new capital stock, the Southern Pacific Company should be entitled to take the same, providing for the expenses of reorganization and the payments to old bondholders above mentioned. It will be noticed that the substantial difference between the rights of the Southern Pacific Company and of plaintiffs' intestate in respect to acquiring stock in the new company was that the former was not compelled to provide for the payment of floating indebtedness of the old company, while the latter was compelled to contribute thereto. It is, however, to be noted in this connection, as bearing somewhat upon the merits, that the Southern Pacific Company was to guarantee the new bonds to be issued, and that it was the majority stockholder, and in control of corporations holding about \$2,300,000 of the \$3,000,000 of the floating indebtedness.

After this agreement was made, suits upon remaining mortgages were commenced against the Houston Company, and such proceedings taken in them and in the old suits that thereafter, without opposition upon the part of said company, upon a trial had in the United States Circuit Court of Texas, a judgment of foreclosure and sale was rendered as upon a default upon the principal of the outstanding bonds for a sale of the entire property of the mortgagor, including the lands granted to it. These lands were bid in by the defendant Olcott, and thereafter a new corporation was formed, and the provisions already recited with respect to the transfer to it of the property of the old company, the issue of new bonds, and the execution of new mortgages were carried out. The defendant Olcott still holds title to so much of the lands as have not been sold, and, as seems to be assumed upon all sides, in trust for the benefit of the new corporation, if there be any equity over and above the mortgages executed thereon. Neither the minority stockholders of the old company nor the floating debt creditors exercised the privilege secured to them, respectively, under the reorganization agreement of taking stock in the new corporation, and the result was that the Southern Pacific Company secured the entire issue upon the terms already recited. While not especially material, it appears that the amount which appellants' intestate would have been compelled to contribute per share as a condition of taking the new stock would have been a substantial sum. The important facts developed down to this point in the history of the railroad company and of subsequent proceedings, which are especially emphasized in the present claims of the appellants, are that the Southern Pacific Company was indirectly the majority stockholder and in control of the Houston Company; that the reor-

ganization agreement made by the Southern Pacific Company and others, which contemplated a foreclosure and sale, was followed by the cessation of opposition upon the part of the Houston Company to such foreclosure and sale, and subsequently by a sale of all of its property; that the Southern Pacific Company by such reorganization agreement secured to itself, upon more advantageous terms than were offered to other stockholders, the right to acquire all the capital stock of the new railroad company, and which capital stock represented all of the rights and equity which the old company and its stockholders had in the property originally belonging to it, and which property, by means of the foreclosure and sale, had been transferred to the new company which issued the capital stock. Thereafter this action was commenced, and because of the view, already indicated, that it does not comprehend within its scope the cause of action by minority stockholders to impress a trust upon property acquired by a majority stockholder, which appellants are now urging, it becomes necessary to consider at some length the complaint.

The latter is entitled in behalf of plaintiffs' intestate and all other stockholders similarly situated. It alleges the ownership by the Houston Railway Corporation (called in the complaint "Company No. 1") of the various properties involved, and the control of said company by the Southern Pacific Company and the former defendant Huntington; the formation of a scheme and conspiracy by these persons and other confederates, the various defendants, to acquire for themselves and the Southern Pacific Company said properties; that in pursuance of this scheme and conspiracy various acts were done, and especially certain bills for the foreclosure of mortgages were filed, defenses available to the company abandoned, it being under the control of the conspirators, and a decree finally entered for the sale of all its properties, in disregard of the rights of the plaintiff and other stockholders, and which decree was "nonjudicial and void as against the defendant company No. 1 and the stockholders thereof"; that in pursuance of the scheme and conspiracy the properties of the company were sold under this decree and bid in by various defendants; that after said sale, and in pursuance of the unlawful scheme and combination, a new company was organized, to which was conveyed part of the property of the company No. 1 bid off as aforesaid, and various mortgages were executed upon the property bid off to cloud the title of company No. 1, and the entire capital issue of the new company was turned over to the control of the Southern Pacific Railway Company, Huntington, and other confederates; that some of the defendants still held title to the lands and property bid off, but that they had no right thereto, and held the same for the benefit of and in equity and right as trustees for the said company No. 1. Said

complaint then contains allegations of a demand by plaintiffs upon the directors of said company No. 1 "to take action to remove the cloud upon the title to said lands caused by the said trust indentures, to have them declared invalid, and to reclaim said lands to and for said company No. 1, and to compel an accounting by said Olcott [one of the defendants] of and for the said lands, and to compel him to convey the said lands to said company No. 1, and to obtain the relief sought to be secured by this action," and that "said directors have failed, neglected, and declined to commence any action or any proceeding whatever, and that they are acting with and in the interests of defendants," etc.

The prayer for relief is especially significant, as indicating the character of the action. It demands judgment that each one of certain defendants be decreed "to hold and possess, for the benefit of and as trustee for the Houston & Texas Central Railway Company [said company No. 1] and its stockholders," the land acquired "under the so-called decree of foreclosure and sale"; that various defendants be required to account for all proceedings in connection with the lands bid off, or the sales thereof, and the proceeds received from such sales, and be directed to pay over to the said Houston & Texas Central Railway Company (said company No. 1) all proceeds received, and to convey to said company all lands remaining unsold; that the mortgages executed by various defendants upon the property bid off upon the foreclosure sale be declared void, and "a cloud upon the title of the Houston & Texas Central Railway Company [said company No. 1]," and that they be canceled and discharged of record; that all rents, issues, and profits realized be paid over, and all lands remaining unsold be conveyed by the various defendants, to said Houston & Texas Central Railway Company (said company No. 1).

The nature and character of the cause of action set forth in this complaint are perfectly well defined and familiar. It was one by stockholders, in behalf of a corporation which, on account of hostile control was unable or unwilling to act, against various defendants, who by fraud and conspiracy had stripped the corporation of its property, to have declared illegal and void various steps and proceedings by which this process had been accomplished, and to compel a restitution to the injured corporation of the property and proceeds thereof which had been taken from it. It was distinctly and decisively a stockholder's action in behalf of and for the benefit of the corporation. It is also apparent, as it seems to me, that an essential element in plaintiffs' cause of action was the alleged fraudulent and collusive character of the decree of foreclosure and sale under and by which the property of the original company was taken from it and transferred and passed to the various other parties and defendants, and which decree is especially con-

sidered in the decision of the trial court next to be referred to.

This decision in favor of the defendants upon the issues raised by the various answers to this complaint was in the so-called short form. The grounds stated for such decision were in effect that the United States Circuit Court "had complete jurisdiction of the subject-matter [of said foreclosure sale] and of the parties, and that its decree and the sale thereunder were final and conclusive as against all the parties of record in that action and as against the plaintiff herein and all others similarly situated; that the purchasers at such sale acquired a good and valid title to the property so sold, which title was not and is not subject to any trust for the benefit of the plaintiff or of other stockholders of said railway company; that such decree was made and the proceedings therein were had without fraud and collusion or wrongful conduct on the part of the defendants or any of them." It appears that upon appeal to the Appellate Division an opinion was written by one of the justices in favor of affirmance of the judgment appealed from, and upon somewhat different grounds than those adopted by the trial justice, and that, while all of the remaining justices concurred, two of them did so only in the result. The order and judgment as originally entered did not indicate that the decision was unanimous, and thereafter, by a court composed in part of different justices than those who took part in the decision, an order was made amending the order and judgment theretofore entered, so as to show that the decision was unanimous.

With this statement of what seem to be the important facts gathered from a voluminous record, we reach a discussion of the questions of law involved, and which already have been briefly outlined. The assertion by the appellants that they are not confronted by a unanimous decision rests upon the propositions, first, that a concurrence in the result by one or more justices does not make a unanimous decision; and, secondly, that the Appellate Division at a subsequent session, with different justices sitting, could not determine that each individual justice taking part in the original decision concurred therein, and direct an amendment of the order and judgment so as to show unanimity in the decision; moreover, that such amendment altered the scope and effect of the original decision.

We have had occasion so frequently to pass upon the first of these propositions adversely to the views of appellants that it is not necessary to discuss it now. We also have had occasion to decide that at a later term of the Appellate Division, composed in part of different justices, an amendment may be made of an order and judgment of the court, so as to show that the decision was unanimous; and the present argument does not persuade me that there is any objection as matter of law to such amendment upon

proper facts. It is requisite that there should be presented to the court sufficient evidence to convince it that as a matter of fact the decision was unanimous by the concurrence of each individual justice; and, this fact being established by proper means, I see no more difficulty in such instance in so amending the records of the court as to correct an inadvertence and make them conform to the truth, than would arise in the other cases conceded by counsel to present proper grounds for similar relief.

The next claim of appellants to be considered relates to the form and effect of the decision made by the trial court. This claim is that a decision in the short form does not so far have the effect of a general verdict that it is to be affirmed if some ground can be found upon which it may rest; that, inasmuch as the Code provided that a decision in such form should concisely state the grounds of the decision, we may look beyond the decision itself to such grounds, and, if they fail to support the decision or show that the court has not passed upon any or all of the real issues involved, such decision should not be allowed to stand; that in this case the main ground stated by the trial court for its decision is that the judgment of foreclosure and sale, already sufficiently described, and the sale thereunder, were valid and effective; that the validity of that judgment is not a sufficient ground for deciding this case against appellants, but that their cause of action is independent of its validity; and that, therefore, and inasmuch as there are material issues which have not been passed upon, the appellants are entitled to a new trial within the principles laid down in *Miller v. N. Y. & N. S. Ry. Co.*, 183 N. Y. 123, 75 N. E. 1111, that the examination of these questions is not barred by a unanimous affirmation. Without considering or deciding how far we should adopt appellants' views that the unanimous affirmation of the decision of the trial court does not preclude us from examining the statement of the grounds given for the latter, in order to determine whether they do sustain it, and from giving relief if they do not, I think that an answer may be made upon the merits to appellants' contention with respect to the sufficiency of the grounds stated for the decision.

It is necessary to revert briefly to the complaint, and to remember that, as outlined thereby, this action was brought in behalf of the Houston Company to recover back to it property and the proceeds of property which had been secured from it by the defendants through fraud and conspiracy. While various other steps in this fraudulent conspiracy are alleged, the main and absolutely essential one was the judgment of foreclosure and sale, whereby the company was divested of the title to the property in question and the same was transferred and passed to the various defendants. If plaintiffs were cor-

rect that this judgment was brought about by fraud, and was part of a conspiracy to defraud the company and its stockholders of property which belonged to them, then it may be conceded, certainly for the sake of the argument, at this point, that such judgment, however regular and valid upon its face, would not be a bar to success under the complaint which was filed. Upon the other hand, if that judgment was valid, honest, and in all respects binding and effective, I do not see how plaintiffs could reach beyond it to recover back to the company the property which had been purchased under it. The question whether it was fraudulent and collusive or honest and valid was made an issue of fact in the case. The ground or finding stated in the decision was to the effect that the court had full jurisdiction of the subject-matter and of the parties; "that said decree was made and the proceedings therein were had without fraud, collusion, or wrongful conduct on the part of the defendants, or any of them"; and "that the purchasers at such sale acquired a good and valid title to the property so sold, which title was not and is not subject to any trust for the benefit of the plaintiff or of other stockholders of said railroad company." It seems to me that this was the statement of a sufficient reason for deciding that the plaintiffs could not succeed in the action which they had brought.

With the disposition of the foregoing questions, we are brought to the final one, whether appellants in this action can urge any such claims to relief as those which they make the basis of their appeal. If, under their complaint, they are entitled to adopt the theory and urge the claims to relief which they now do adopt and urge, then certainly they may say with much force that the real issues which they are presenting do not appear specifically to have been passed upon; and, therefore, my final duty will be to demonstrate that their present theory and claims are so at variance with their complaint that they cannot be asserted in this action, and, therefore, cannot successfully be urged as a reason for reversing the judgment and granting a new trial to pass upon them. To recapitulate somewhat: If a careful consideration and analysis has enabled me to correctly appreciate the very elaborate and able argument made in behalf of appellants, their present contention in effect is that the Southern Pacific Company was a majority holder of stock in the original Houston Company; that as such it procured a foreclosure and sale of the property of that corporation; that as a party to the reorganization agreement which accompanied that foreclosure and sale it secured to itself, upon more advantageous terms than were permitted to the minority stockholders, the right to acquire the capital stock of the new Houston Company, and which capital stock represented all of the equity and rights which the old com-

pany and its stockholders had in the property which was sold and transferred; that as a majority stockholder said Southern Pacific Company owed such duties to the minority stockholders, including appellants' intestate, that now it may be compelled to allow them to share with it in the profits and advantages which it has derived from the sale of the property and the acquisition of the new capital stock. The defendant Olcott, as the present holder of the title to the land grants, may be dismissed from consideration; for the capital stock acquired by the Southern Pacific Company is assumed to represent any equity in that land.

In this contention the appellants have abandoned their complaint of fraud and collusion and conspiracy amongst the defendants against the corporation, whereby the latter has been stripped of its property, and inferentially they assume the validity of these steps and transfers as against the corporation, because they insist upon sharing with the Southern Pacific Company the advantages which it has secured thereby. In their brief they specifically affirm the validity and blinding effect of the judgment of foreclosure and sale, and do not dispute that a good and valid title to property was obtained thereunder. In their own words: "The plaintiffs seek—nothing more is necessary for them upon the present appeal—to impress upon the interest of the Southern Pacific Company in the shares of the new company and in the lands a trust obligation to account for profits to its associate stockholders." Thus the action now outlined and proposed is simply one by the appellants, as minority stockholders in their own interest, directly and solely against the Southern Pacific Company as a majority stockholder, based upon an alleged trust relationship between them, to compel the latter to account directly to the former for profits and advantages which it now holds to their exclusion in violation of such relationship. It is true that there may be found here and there in the briefs some chance expression respecting the corporation and its rights; but, interpreted as a whole, the claims of the appellants bear the construction and are of the nature indicated. Is there any place for doubt that such cause of action and such form of relief lie far outside the nature and limits of an action brought in behalf of a corporation against many defendants as alleged workers of fraud and conspiracy, whereby the corporation has been stripped of its property, to annul and get rid of the wrongful proceedings and collusive transfers, and to recover back to the corporation itself the property of which it has been unlawfully deprived?

It is urged that all of the facts have been proven which sustain appellants' present claim, and that a court of equity will not be technical or narrow in administering justice according to the rights of the parties

upon all the facts proven. Of course, I do not lose sight of these well-settled principles. But the facts which are now relied upon, so far as we are advised or have been able to ascertain, were properly admitted under a complaint which alleged a certain cause of action, and without amendment or notice of any new theory of the action which was to be tried, and the trial court has made a decision which, as it seems to me, passes upon the issues which were framed by that complaint and the answers to it. Under such circumstances there must be limitation to the power of the court to give redress upon the facts which have been proven, and I am aware of no authority which would permit it to utilize facts introduced under a complaint to sustain one well-defined cause of action as a basis upon appeal for an entirely distinct and different cause of action. Such a course would be unjust, and it is fully settled that it may not be followed.

The views which have been thus expressed lead to the conclusion that the judgment should be affirmed, with costs.

EDWARD T. BARTLETT, J. (dissenting). I am unable to vote for the judgment of affirmance about to be pronounced. In view of the complicated state of facts contained in a lengthy record, it is difficult to express within reasonable limits the grounds of dissent. The leading facts will bring out clearly the important question in this case.

The original plaintiff (now deceased and represented by his administrators) brought this representative action as a minority stockholder of the Houston & Texas Central Railway Company, on behalf of himself and all other stockholders similarly situated. This original company is hereafter referred to as "Houston Company No. 1," and the new company formed under the same name in pursuance of a reorganization agreement as "Houston Company No. 2." Houston Company No. 1, prior to 1885, owned and operated certain lines of railroad in the state of Texas, with an aggregate capital stock of some \$2,726,900 and a bonded indebtedness of more than \$18,000,000, secured by seven mortgages. The portion of the road covered by each mortgage it is unnecessary to point out at this time. It suffices to say that only under one mortgage, securing \$1,500,000, could there be a sale of the property by reason of nonpayment of interest. In 1883 a corporation known as "Morgan's Louisiana & Texas Railroad & Steamship Company" acquired a majority of the capital stock of Houston Company No. 1. Later the Southern Development Company acquired a majority of the stock of Morgan's Company, and thus secured the control of Houston Company No. 1. The defendant Huntington was the president and in control of a corporation known as the "Southern Pacific Company" and a large controlling stockholder of the Southern Development Company. The result was that

Huntington and his associates, by means of their control of Morgan's Company, elected the officers and directors of Houston Company No. 1. Thereupon the stock belonging to Morgan's Company, which included a majority of the stock of the Houston Company No. 1, was transferred to the Southern Pacific Company. It is unnecessary to go into the details of the procedure that placed Houston Company No. 1 in the hands of a receiver under a judgment recovered upon defaulted coupons amounting to \$600,000. Foreclosure suits were instituted on the various mortgages, and receivership extended to them, although six of those mortgages were not foreclosable to the extent of selling the property. The inability to sell led to the adoption of a reorganization agreement, which resulted in a sale, by consent of majority of bonds, of the entire property to pay more than \$19,000,000 of principal, when only \$1,500,000 was due under the terms of the mortgages.

A new corporation, the Houston Company No. 2, was formed, and Olcott, the purchaser at the sale under the agreement, transferred to it the railroad property, except the lands he purchased, which represented land grants to the old company by the state of Texas. Under trust indenture, executed by Olcott and Downs, a purchaser of some of these lands, they were to be sold and the proceeds applied to the payment of the bonds of company No. 2, issued in place of bonds of company No. 1. It thus appears that the holder of the majority of the stock of Houston Company No. 1, the Southern Pacific Company, participated in the reorganization proceedings and received substantial benefits thereunder. On the other hand, the minority holders of the stock of Houston Company No. 1, not being parties to the reorganization scheme, had no right to be heard, and were, indeed, subjected to terms that were essentially prohibitive. Houston Company No. 2 issued \$10,000,000 of stock, and it was provided that the Southern Pacific Company, the holder of the majority of the stock of Houston Company No. 1, should receive the entire issue upon certain conditions, unless some portion of it was taken by floating debt creditors or holders of the stock of the old company. The reorganization agreement further provided that, in the event a certain portion of said stock was not taken up, the Southern Pacific Company, or its appointee, upon providing such portions of the cash payments for interest and bonus to the holders of the first mortgage bonds and coupons, and for the necessary charges, etc., incurred as shall not have been provided for by the floating debt creditors, shall be entitled to the entire balance of stock of the new company not so taken, etc. If the stockholders availed themselves of the offer, they were required to pay a sum sufficient to liquidate what the Central Trust Company should fix as their share of the expenses of the reorganization and the amount of the floating debt. The Southern Pacific Company had to provide

only for its share of expenses of the reorganization. The outside minority stockholder was required to do this and pay his share of floating debt in addition. The Central Trust Company fixed \$73 a share as the assessment on stockholders for new stock, which was finally cut down to \$71.40. The statement made that the terms imposed upon the minority stockholders were prohibitive is thus commented upon by the learned counsel for plaintiffs: "No stockholder paid the prohibitory assessment, except one person, who afterwards withdrew the payment. The Southern Pacific Company, while not, by virtue of its control of a majority of the old stock, availing itself of the opportunity granted to stockholders, but rejecting the burdens of that opportunity, in its capacity as a direct party to the agreement took the whole \$10,000,000 of stock, free from the burdens imposed on stockholders."

Confronted by this situation and the decree of the United States Circuit Court for the Eastern District of Texas, what were the rights of the minority stockholders? The learned counsel for the plaintiffs claims that the Southern Pacific Company has acquired, and now claims to hold for its own benefit, either directly or through the defendant Olcott, as its agent, the entire net property of Houston Company No. 1. It is conceded that the rights of the mortgagees of Houston Company No. 2 are not involved in this controversy. It is a contest between the Southern Pacific Company as a majority stockholder of the old company and the minority stockholders, who are seeking to compel the due recognition of the legal rights of Houston Company No. 1 under the reorganization agreement. The claim is made that the bondholding creditors agreed to give the Southern Pacific Company, the majority stockholder of the railway company, the entire consideration of an agreement which was to be performed by the old railway company; that the minority stockholders are entitled to their share of such benefits of this composition agreement as should have gone to Houston Company No. 1. The counsel for plaintiffs states: "On this property we seek in this suit to impress a trust to give effect to the rights of the minority stockholders, and we seek, also, an accounting with the Southern Pacific Company." This brings us to the question whether the plaintiffs can enforce these alleged claims in the present action. It is true there are allegations in the complaint that there was a combination between the Southern Pacific Company, the Central Trust Company, and the defendant Olcott and others to ruin and defraud the minority stockholders. No proof of fraud was given at the trial, and the allegations are of no legal importance. The learned Special Term, in its grounds for a short decision, stated that this action "is in effect a suit to set aside or avoid a decree of foreclosure and sale duly made and entered by

the United States Circuit Court for the Eastern District of Texas." The learned Appellate Division, referring to this statement of the Special Term, says: "There is no attack made in this action upon the decree of the United States Circuit Court, or the sale under the decree. * * * It is quite clear that to this cause of action the decree of the United States Circuit Court, under which the property was sold, was not a bar." The Appellate Division then dealt with the claim of plaintiffs on the merits, and held that no trust could be impressed in their interest as contended.

The counsel for plaintiffs argues that the cause of action now sought to be enforced rests upon four facts, either admitted or proved by defendants: (1) The plaintiffs' ownership of the shares of stock of Houston Company No. 1 and his representation of other stockholders; (2) control by the Southern Pacific Company of the majority of the stock of Houston Company No. 1; (3) the various legal proceedings in the federal court in Texas, terminated by the decree of foreclosure and the sale under that decree, and the reorganization under which the decree was reached; (4) the fact establishing the trust obligation resting upon the defendant, the Southern Pacific Company, and its representative, the defendant Olcott, in favor of the minority stockholders of the railway company. In drafting a bill in equity covering a complicated situation, many allegations are inserted that prove to be irrelevant and unnecessary on the trial, and oftentimes the prayer for judgment rests mainly upon the general request for such other or further relief as to the court may seem just and proper. I am of opinion that on the uncontroverted facts in this record, set forth in the complaint and admitted by the answers, the learned Appellate Division erred in reaching the conclusion that, notwithstanding the decree of the United States Circuit Court for the Eastern District of Texas was not a bar to this action, there was no question of law presented for its consideration that entitled plaintiffs to judgment of reversal. This being the condition of the record, the unanimous decision of the Appellate Division has no bearing on the case.

It is unnecessary to state in detail the facts tending to show that the two reasons given by the Appellate Division for dismissing the complaint involve legal error. The plaintiffs' brief is very full in this connection. It is a conceded fact that the old company was practically insolvent, unless measures were taken for its relief. It is also conceded that the rights of the defendants, the mortgagees of the new company, are not involved in this litigation. The question is whether the minority stockholders are entitled to work out through the Houston Company No. 1 their claim that by the terms of the reorganization agreement the Southern Pacific Company has been permitted to appropriate the whole con-

sideration of an agreement to which the old company was a party and by which it was entitled to certain benefits. All the stockholders of the old company were vested with equal rights. The reorganization agreement became necessary by reason of the following situation: That out of a mortgage indebtedness of over \$19,000,000 only the income mortgage, securing \$1,500,000, was due; the remaining mortgages being unenforceable after default in payment of interest. The bonds secured by the \$1,500,000 were held by the trustees of the general mortgage as additional security for \$4,305,000 issued under it. The general mortgage was not then due. Under the agreement declaring all mortgages due, pending suits to foreclose the various mortgages were consolidated and carried to judgment. The suit to foreclose the income mortgage, the only one due by its terms, was filed as a cross-bill in the consolidated cause. The result was that \$17,521,000, the amount of principal represented by unenforceable mortgages, was declared due and foreclosed in the consolidated action. It is clear that the bondholders of the old company secured an immense advantage by reason of rendering immediately due millions of mortgage indebtedness having years to run before payment could be demanded.

It cannot be assumed, as was done by the Appellate Division, that a foreclosure of the only mortgage due, securing \$1,500,000, would have resulted in a situation as favorable to bondholders as was realized when the total indebtedness could be treated as due. It is apparent that any claim the minority stockholders have in equity and by way of lien against the Southern Pacific Company can only be worked out through the old company and in an action where all the parties in interest are represented, as in this case. The Appellate Division, referring to the Southern Pacific Company, said: "The Southern Pacific Company was a large creditor of the corporation, and as such became a party to this reorganization scheme. The fact that this creditor was also a stockholder of the company and controlled a majority of the stock is no reason why it should not protect itself as a creditor of the insolvent corporation; and all of its acts, so far as disclosed by this record, were entirely justified by its relation as creditor of the corporation."

Counsel for plaintiffs very properly points out that there is no allegation or proof that the Southern Pacific Company was a creditor of the railway company, except as the Southern Development Company and Morgan's Company were creditors of the railway company and were controlled by the Southern Pacific Company. The record contains no issue as to the right of the Southern Pacific Company as a creditor. The reorganization agreement, referring to the Southern Pacific Company, party of the seventh part, states: "And the said Southern Pacific Company is interested in connect-

ing roads in conjunction with which it desires such Houston & Texas Central Railway Company to be operated." Counsel also states there is no proof that the Southern Pacific Company, or the companies it controlled, ever sued upon the floating debt, or took judgment upon it, or acquired or enforced any right under such debt. It is the plaintiffs' claim that the Southern Pacific Company has secured the \$10,000,000 of the stock of the new company, being its entire stock, by reason of the fact that it owned and controlled a majority of the stock of the old company. I am of opinion that the Southern Pacific Company, in consenting as a majority stockholder to the scheme of the reorganization agreement, did so as the representative of the old company and all of its stockholders, and the minority stockholders are entitled to their share of the benefits. What that share is can only be ascertained upon an accounting with the majority stockholder. The Southern Pacific Company upon such an accounting will be afforded the fullest opportunity to establish credit for any loss or expense to which it has been put in consequence of additional consideration moving from it in order to bring about the settlement with the creditors. Olcott and Downs bid in, and hold title in their own names—the former to 4,840,339 acres, and the latter to 277,200 acres, of land granted to the old company by the state of Texas. These parties purchased under the reorganization agreement, and they are necessary parties to this action.

The present position of the plaintiffs is that the Southern Pacific Company occupies the same position towards minority stockholders as did the officers and directors of the old company. This position of the Southern Pacific Company prevents it from taking any advantage of minority stockholders. Furthermore, the plaintiffs ratify and confirm the composition agreement with creditors. They admit that the judgment of the United States Circuit Court for the Eastern District of Texas is final and conclusive. The present position of the plaintiffs is not inconsistent with the finding of the trial court that the purchasers at the foreclosure sale acquired a good title. The Southern Pacific Company, the majority stockholder of the old company, received the entire issue, \$10,000,000 stock of the new company, and plaintiffs seek, after a full accounting and adjustment of mutual rights between it and them, to impress a trust on the net property of the old company for the benefit of minority stockholders. The rule governing conflicting rights between majority and minority stockholders is discussed in *Farmers' Loan & Trust Company v. New York & Northern Ry. Co.*, 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689. A very interesting discussion of the general principles governing in such cases is found in *Ervin v. Oregon Ry. & Navigation Co.* (C. C.) 27 Fed. 625.

See, also, following cases: *Jackson v. Ludeling*, 21 Wall. (U. S.) 616, 22 L. Ed. 492; *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. App. 350.

The judgment appealed from should be reversed, with costs.

CULLEN, C. J., and GRAY, HAIGHT, and WILLARD BARTLETT, JJ., concur with HISCOCK, J. VANN, J., concurs with EDWARD T. BARTLETT, J.

Judgment affirmed.

(189 N. Y. 180.)

PEOPLE ex rel. BURNHAM v. FLYNN,
Warden of the City Prison, et al.

(Court of Appeals of New York. Oct. 1, 1907.)

1. CONSPIRACY—INJURING PERSON IN BUSINESS.

An agreement among members of a theater managers' association to refuse a dramatic critic admission to their theaters, made to protect themselves from public articles reflecting on their personal integrity, and as a protest against attacks on their patrons and members of a particular religious faith, and not as an attack on his right to exercise his calling as a dramatic critic, not a conspiracy within Pen. Code, § 168, subd. 5, making it a misdemeanor for persons to conspire to prevent another from exercising a lawful calling.

2. THEATERS AND SHOWS—RIGHT OF ADMISSION—TICKETS.

The proprietor of a theater has, in the absence of a statute, the absolute right to decide who shall be admitted to witness the plays he produces.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Theaters and Shows, § 4.]

3. SAME—REFUSAL OF ADMISSION—DAMAGES.

The holder of a ticket of admission to a place of amusement is, on being refused admission, entitled to recover the amount paid therefor and necessary expenses incurred to attend.

Appeal from Supreme Court, Appellate Division, First Department.

Habeas corpus by the people, on relation of Charles Burnham, against William J. Flynn, warden of the city prison, and another, city magistrate, to obtain relator's release from custody on a charge of criminal conspiracy. From an order of the Appellate Division (100 N. Y. Supp. 31, 114 App. Div. 578) reinstating the writ, and discharging the relator, rendered on appeal from an order of the Special Term (99 N. Y. Supp. 198, 49 Misc. Rep. 328) dismissing the writ and remanding relator to custody, defendants appeal. Affirmed.

Wm. Travers Jerome, Dist. Atty. (James W. Osborne, of counsel), for appellants. Herman Aaron, for respondent.

EDWARD T. BARTLETT, J. Complaint was made to a magistrate in the city of New York charging relator, Charles Burnham, with violating section 168, subd. 5, of the Penal Code, which reads as follows: "Sec. 168. Conspiracy defined.—If two or more persons conspire, either * * * (5) To prevent another from exercising a lawful trade

or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof. * * * Each of them is guilty of a misdemeanor." After examination before the magistrate, the relator, Burnham, was taken into custody by virtue of a commitment then issued. Thereupon he sued out a writ of habeas corpus. After a hearing, the Special Term made an order dismissing the writ and remanding the relator to custody. The Appellate Division reversed this order, reinstated the writ and discharged the relator. From the latter order, this appeal was taken by the defendants.

The petition for the writ alleged, among other facts, the following: That the relator, Charles Burnham, is a theatrical manager, and particularly manager of the theater known as "Wallack's Theater," situated at Thirtieth street and Broadway, in the city of New York; that the cause of imprisonment of petitioner is that he was and is a member of an association of theater managers having for its general object the promotion of the interests and welfare of the theatrical industry, in which the members of said association are interested; that, while a number of the members of the association were holding a meeting, the petitioner called attention of the members to certain scurrilous, libelous, and malicious attacks made by one James S. Metcalfe upon some of the members of the association, affecting their personal integrity and holding their religion up to ridicule; that petitioner at such meeting, or immediately after formal adjournment, presented and read to the members a written statement, as follows: "The attention of this association is called to the following matter: A certain writer on a certain periodical has for the past 10 years persistently, and without just cause, libeled in its columns a large portion of our theatergoers, and attacked the personal integrity of members of this association. Its continued malicious, vile and unjustifiable attacks upon those of the Jewish faith are unwarranted, and as it may affect our business interests should receive attention from all managers. For their so-called criticism on plays or business methods we make no mention—that does not concern us and is without our province—but when they persistently and for no discernible just cause (but a personal feeling, perhaps) make a butt of one's religion—be his faith what it may—then some action should be taken to give the members of this association so assailed its vote of confidence and support and to take necessary steps to prevent our business interests being injured." It further appears in the petition that no resolution was passed at the meeting where this statement was read, but that thereafter said Metcalfe was, by the purely voluntary action of individuals controlling their own theaters, in

several instances excluded from such theaters, not including, however, the theater controlled by the petitioner, and that thereupon the magistrate issued his mandate herein, ordering the arrest of the petitioner. The petition proceeds with certain formal allegations, and prayed that the writ of habeas corpus might issue to the end that after hearing relator be discharged from custody.

The return to the writ is exceedingly brief and formal, and the relator duly traversed the same. A hearing was had before the magistrate. The controlling facts are undisputed. It was proved that the relator did appear at this gathering of theater managers and read the statement, after formal adjournment, to which reference has already been made, and that later certain informal discussion and proceedings took place, when the managers separated. It also appears that some time thereafter said James S. Metcalfe, although provided with tickets of admission, was, without undue violence, prevented from entering some nine theaters in the city of New York, many or all of which were managed or controlled by a member or members of the so-called "Theater Managers' Association." On this general state of facts, Metcalfe, acting as complainant, charged the relator, Burnham, with a violation of section 168, subd. 5, Pen. Code, in that he had sought to prevent complainant from exercising his lawful trade or calling as a dramatic critic, which he had followed for many years. The city magistrate found the relator guilty as charged, and committed him to the custody of the warden of the city prison.

We agree with the conclusion reached by the learned Appellate Division. In the view we entertain of the case as presented to the city magistrate, it is unnecessary to construe the section of the Penal Code upon which the proceeding is founded. It is proved that the object of the relator, Burnham, and the other theater managers associated with him, was not to attack or rebuke Metcalfe in the legitimate exercise of his calling as a dramatic critic. The statement presented by the relator at the meeting of the theater managers avers, referring to certain alleged libelous articles appearing in the periodical for which Metcalfe wrote, as follows: "For their so-called criticism on plays or business methods we make no mention—that does not concern us and is without our province—but when they persistently and for no discernible just cause (but a personal feeling, perhaps) make a butt of one's religion—be his faith what it may—then some action should be taken to give the members of this association so assailed its vote of confidence and support and to take necessary steps to prevent our business interests being injured." We have here a clear and uncontradicted avowal of the motive that led the managers to exclude Metcalfe from their respective theaters. It was not an attack upon his right to exercise his

calling as a dramatic critic, but an effort on the part of the managers to protect themselves from public articles reflecting on their personal integrity, and a protest against unjustifiable attacks upon their patrons and members of the Jewish faith. It would be quite out of place, owing to its character, to quote from an article (Exhibit A) written, signed, and admitted by Metcalfe as genuine, and introduced in evidence by the relator, which is, to speak with moderation, an unexampled illustration of race bitterness and hatred. A dramatic critic indulging in such intemperate language may reasonably expect to arouse unpleasant antagonisms.

The remaining question in the case is whether the proprietor of a theater has the right to decide who shall be admitted to witness the plays he sees fit to produce in the absence of any express statute controlling his action. At this late day the question cannot be considered as open in this state. There are a number of cases arising out of the purchase of theater tickets from speculators on the sidewalk after notification by the proprietor that the same will not be honored at the door. *Collister v. Hayman*, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. (N. S.) 1188, 111 Am. St. Rep. 740; s. c., 71 App. Div. 316, 75 N. Y. Supp. 1102; *Purcell v. Daly*, 19 Abb. N. C. 303. These cases illustrate the absolute control that the proprietor of a theater exercises over the house and the audience. He derives from the state no authority to carry on his business, and may conduct the same precisely as any other private citizen may transact his own affairs. In *Burton v. Scherpf*, 83 Mass. 133, 79 Am. Dec. 717, it was held that the sale of a ticket of admission to a concert is only a revocable license to the purchaser to enter the building in which it is given, and to attend the performance; and, if revoked before the performance has commenced, and before he has taken the seat to which the ticket entitles him, and he remains therein after notice of the revocation and refuses to depart upon request, he becomes a trespasser, and may be removed by the use of force necessary for the purpose, and his only remedy therefor is by action upon the contract. The holder of a ticket which entitles him to a seat at a given time in a place of amusement, being refused admission, is entitled to recover the amount paid for the ticket, and, undoubtedly, such necessary expenses as were incurred in order to attend the performance. The case of *Commercial Telegram Co. v. Smith*, 47 Hun, 494, involves a kindred principle. It was an action brought to restrain the defendants, the president of the New York Stock Exchange and others, from interfering with the plaintiff in collecting upon the floor of the exchange the quotations of dealings in stock and distributing the same to its customers. Certain correspondence had passed between the parties and resulted in what was afterwards held by the court as a mere negotia-

tion, which did not amount to a binding contract, permitting the plaintiff to carry on its business upon the floor of the exchange. The plaintiff, misconceiving the force and effect of this correspondence, went on and made large expenditures in the preparation of its wires and instruments for the purpose of carrying on its business upon the floor of the Exchange, all of which would be entirely useless if it was denied the privilege for which application had been made. It was also urged that, even assuming the correspondence did not sustain a contract, nevertheless considerations of public policy would uphold the claim of the plaintiff. The learned General Term in the First department (Van Brunt, P. J., writing the opinion) said as to this point: "The claim that the Stock Exchange has no right to exclude the Commercial Telegram Company from the floor upon the ground of public policy evidently proceeds upon an entirely erroneous theory. The Exchange is a private association. It has the right to admit to its floor whom it pleases. It obtains nothing from the state except that protection which the law affords to every citizen. It has sought no special privilege and obtained no special powers. It is therefore just as much the master of its own business and of the method of conducting the same as any private individual within the state. It may make public the transactions which occur within its walls or it may refuse all information in respect thereto. No matter which course is pursued, so long as it violates no law, it has a right to conduct its business as it pleases." This language is particularly apposite to the case at bar.

We are of opinion that the relator and his associates in the Theater Managers' Association acted in the exercise of their strict legal rights.

The order of the Appellate Division appealed from should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

Order affirmed.

(189 N. Y. 198.)

SUTHERLAND v. CITY OF ROCHESTER.
(Court of Appeals of New York. Oct. 1, 1907.)

1. JUDGMENT—CONCLUSIVENESS.

A judgment foreclosing liens held by a city, directing a sale of land and adjudging that the corporation counsel shall be paid his taxable costs out of the proceeds before the city is paid, fixes the order of payment, and that question is not open for review in an action by the corporation counsel against the city for the costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

2. MUNICIPAL CORPORATIONS — OFFICERS — COMPENSATION — CORPORATION COUNSEL — TAXABLE COSTS.

Under Rochester City Charter, Laws 1898, pp. 434, 435, c. 182, §§ 414, 418, providing that the corporation counsel shall be entitled in ac-

tions in which the city shall be successful to costs collected from the adverse party, the corporation counsel, on the city succeeding in an action to foreclose tax liens, is entitled to the taxable costs, though it became the purchaser of the land.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Submission of controversy on an agreed statement of facts between William A. Sutherland as plaintiff and the city of Rochester as defendant. From a judgment of the Appellate Division (98 N. Y. S. 970, 112 App. Div. 712) ordered for defendant, plaintiff appeals. Reversed, and judgment ordered for plaintiff.

James S. Havens, for appellant. John M. Stull, Ass't Corp. Counsel, for respondent.

HAIGHT, J. The plaintiff, as corporation counsel of the city of Rochester, pursuant to a resolution of the common council, brought an action in behalf of the city against Alida R. W. Brown and others, for the foreclosure of certain tax liens held by the city against certain lands known as the "Warner property," amounting, with accumulated interest, to the sum of \$42,987.41. Such action resulted in a judgment in favor of the city, in which a sale of the premises was directed to be made by a referee appointed by the court, and out of the moneys arising from such sale, after deducting the amount of his fees and expenses, the referee was directed to pay William A. Sutherland, the plaintiff's attorney, the sum of \$125.18 adjudged to the plaintiff for costs and charges in the action, with interest thereon. Upon the sale of the premises they were bid in by the city for the sum of \$17,150; other responsible persons having bid \$17,000. The city thereupon paid to the plaintiff, out of the \$125.18 directed to be paid by the judgment, his taxable disbursements in the action, retaining the sum of \$89, being the amount of his taxable fees under the provisions of the Code of Civil Procedure. The question presented for consideration pertains to the right of the city to retain this item.

The provisions of the charter of the city of Rochester (Laws 1898, p. 434, c. 182), so far as material upon the question under consideration, provide as follows:

"Sec. 414. The salaries of the corporation counsel, his assistant, clerk and other subordinates shall be fixed by the board of estimate and apportionment and they shall receive no fees or other compensation of any kind whatever, except that the corporation counsel may receive to his own use the costs of suits, as hereinafter provided."

"Sec. 418. He shall be entitled in actions and proceedings in which the city shall be successful to receive to his own use all costs and allowances which shall be collected from the adverse party."

These provisions are so clear and specific that they admit of no room for doubt with reference to their meaning. The only ques-

tion that can be raised with reference thereto is as to whether the plaintiff has conformed to their requirements. As to that it appears, as we have seen, that he commenced the action pursuant to a resolution of the common council and recovered a judgment for the full amount of the city's claim, with interest, together with his taxable costs and disbursements, in which it is provided that the real estate of the defendant be sold by a referee appointed by the court, and out of the proceeds of such sale, after the payment of the referee's fees and disbursements, the plaintiff should first be paid his taxable costs. But the Appellate Division appears to have entertained the view that he had not collected his costs from the adverse party, and that the city was entitled to have its full judgment collected and paid to it before the plaintiff was entitled to be paid his taxable costs. We think this conclusion ought not to prevail. Under the very terms of the judgment entered, as we have seen, the plaintiff, as the attorney for the city, was to be paid his taxable costs out of the proceeds of the sale before that of the city. Here we have an adjudication in that action fixing the order of the payment, which is not open for review in this action. As to the other question, we are equally clear that the amount of the plaintiff's taxable costs has been collected from the adverse party. The adverse party's real estate has been sold, \$17,000 was bid therefor by other responsible persons, but the officers of the city evidently thought it was worth more, and bid a higher sum therefor, and thereby procured the property to be sold to the city. It has received a deed and is now the owner. It has therefore received the amount of its bid, \$17,150, which it has applied upon its judgment against the adverse party. It is true that the city did not receive this amount in cash, but it has received the amount in other property, the equivalent of money.

We are therefore of the opinion that the judgment should be reversed, and that judgment should be ordered for the plaintiff for the amount claimed in the submission of the controversy, with costs in both courts.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment accordingly.

(189 N. Y. 208.)

HATFIELD et al. v. STRAUS et al.

(Court of Appeals of New York. Oct. 1, 1907.)

1. MUNICIPAL CORPORATIONS—USE OF STREETS—PRIVATE RAILWAY—INJUNCTION—RIGHT TO SUE.

One occupying his property abutting on a street as his private residence may sue to restrain the construction of a track in the street for the movement of express cars thereon during

the night, pursuant to a grant from the municipality.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1449, 1477.]

2. SAME—CONSTRUCTION OF PRIVATE RAILWAY—AUTHORITY TO GRANT—STATUTES.

Greater New York City Charter, Laws 1901, p. 107, c. 466, § 242, as amended by Laws 1905, p. 1545, c. 629, § 14, conferring on the board of estimate and apportionment the exclusive power to grant "franchises or rights, or make contracts providing for * * * the occupation * * * of any of the streets for railroads * * * for the transportation of persons or property," does not authorize the board to grant to the owners of a department store the right to construct and operate a spur track in the street to connect its store with a street railway, to be used exclusively for the transportation of its goods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1467, 1468.]

Cullen, C. J., and Chase and Haight, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Edwin F. Hatfield and others against Isidor Straus and another, doing business under the firm name of R. H. Macy & Co., and others. From an order of the Appellate Division (102 N. Y. Supp. 934, 117 App. Div. 671), granting the relief prayed for, defendants appeal, and questions are certified. Questions answered, and order affirmed.

Granville Clark, for appellants Straus, Wm. B. Ellison, Corp. Counsel (Theodore Connolly, of counsel), for appellants city of New York et al. Arthur H. Masten, for respondents.

O'BRIEN, J. The plaintiffs in this action, as property owners, seek to restrain the defendants from carrying into effect a resolution of the board of estimate and apportionment of the city of New York, which authorizes, or purports to authorize, certain of the defendants to lay down and construct a spur railroad track in front of their premises.

The plaintiffs are residents and property owners in the city of New York. They own and occupy the house and lot at No. 149 West Thirty-Fourth street as a private residence, having resided there for many years. The defendants Isidor and Nathan Straus compose the firm of R. H. Macy & Co., and that firm occupies, as lessees, the premises on the northwest corner of Sixth avenue and Thirty-Fourth street, eastward of and immediately adjoining the plaintiffs' property, as a large department store. The other defendants are the city of New York and certain of its municipal officers having control of the streets, or whose official action in some form is necessary in order to carry out the purposes of the resolution. The immediate purpose of the action was to restrain the defendants from obstructing the street near the plaintiffs' residence by carrying into effect the permit, consent, or ordinance of the board of estimate and apportionment, which, it is claimed, permitted the proprie-

tors of the department store to lay down railroad tracks and operate express cars thereon for the conveyance of goods to their store from the street railroad in Thirty-Fourth street. The only relief demanded in the complaint was a perpetual injunction.

In May, 1906, the firm of Macy & Co. made a written application to the board of estimate and apportionment for the consent of the city to construct, maintain, and use a single track railroad spur for the purpose of transporting express cars from their premises on the north side of Thirty-Fourth street, between Broadway and Seventh avenue, to and from the surface railroad tracks on Thirty-Fourth street in front of their premises. In July following the board to which the application was addressed passed a resolution granting such consent. The resolution so passed was to the effect that the consent of the city be, and the same was thereby, given to the said firm to construct, maintain, and use two spur surface railroad tracks; one in front of their premises in the borough of Manhattan, and the other on the east side of Webster avenue, south of McLean avenue, to the surface railroad tracks in front of said premises in the borough of the Bronx. The validity of the ordinance, so far as it relates to the spur last described, is not directly involved in this action, since no property owner or other person interested has raised any question in regard to it. The precise location of the tracks was described in the resolution in detail, and it was stated in the grant that the consent so given should be for a term not exceeding 10 years from the time of the granting thereof, and it was provided that the same might be canceled and annulled upon six months' notice in writing to the firm, its successors or assigns, by the board or its successors in authority, and thereupon all the rights of the firm, its successors or assigns, in and upon said street and avenue, should cease and determine. The resolution then proceeds to state the sums of money which the firm stipulated to pay into the city treasury from time to time as compensation for the privilege or right granted. It was also stipulated that the consent of the board thus given was for the exclusive use of the grantee, and that it should not be assigned either in whole or in part, or leased or sublet in any manner, and that no title thereto or right, interest, or property therein would pass to or vest in any other person or corporation whatsoever, either by the acts of the grantee, its successors or assigns, or by operation of law, without the consent in writing of the city acting by the said board, or its successors in authority. The various stipulations and conditions incorporated in the grant covered seven printed pages of the record, but it is unnecessary to refer to them at greater length, since the power attempted to be exercised by the board is sufficiently indicated by what has been already stated. The prayer of the com-

plaint is to the effect that the defendants be enjoined and restrained from the execution of this ordinance or resolution.

The court granted an injunction, pendente lite, which was accompanied by an order to show cause why the same should not be continued until the final judgment in the action. On the return of this order, and after a hearing, the court or judge refused to continue the temporary injunction and ordered that it be vacated. On appeal by the plaintiffs from this order, the Appellate Division, by a divided court, reversed the action of the judge at Special Term in refusing to continue the injunction and vacating it, and that court also reinstated the temporary injunction and ordered that it be continued during the pendency of the action, and from this order the defendants have appealed to this court. No appeal lies to this court from such an order as matter of right. It is only upon permission granted by the court below that the defendants are entitled to be heard in this court. The appeal comes to this court upon two specific questions, which have been certified to us by the learned court below, and they are: (1) Whether the board of estimate and apportionment has the power to grant to the defendants the permit described in the complaint and moving papers pursuant to section 242 of the revised charter of New York (chapter 466, p. 107, Laws 1901, as amended by chapter 629, p. 1533, Laws 1905), or other sections of the charter; and (2) are the plaintiffs entitled to maintain an action for an injunction restraining the defendants from taking any steps under the permit granted? Our jurisdiction in this appeal is limited to the decision of the questions certified and stated above. Briefly, our inquiry must be directed to the questions as to the right of the plaintiffs to maintain the action and the power of the board, under the section of the city charter, to grant the permission or privilege embodied in the resolution.

There is not, I think, any serious difficulty in the case concerning the right of the plaintiffs to maintain the action. They are residents and property owners upon the street, and their premises adjoin those of the defendants operating the department store and for whose private and exclusive benefit the grant was made. It is quite conceivable that the private residences so near to the obstruction may be rendered more inconvenient and uncomfortable in consequence of the existence of the railroad track and the movement of the cars thereon during the night, since the ordinance limits the right to operate the cars to the hours between 8 in the evening and 5 in the morning. It cannot therefore be held, as matter of law, that the plaintiffs will sustain no special damages in consequence of the occupation of the street by the railroad tracks, or that the inconvenience of which they complain is only such as is common to the public generally. It seems

to me that the plaintiffs' private residence is so situated that the damage to it in consequence of the occupation of the street is special and peculiar within the rule which has sanctioned private actions in such cases. *Flynn v. Taylor*, 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556; *Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *Beekman v. Third Avenue R. R. Co.*, 153 N. Y. 144, 47 N. E. 277; *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, 70 N. E. 213; *Ackerman v. True*, 175 N. Y. 353, 365, 67 N. E. 629; *Pierce v. Dart, 7 Cow. (N. Y.) 609*; *Crooke v. Anderson*, 23 Hun, 266; *Joyce on Nuisances*, § 222; *High on Injunctions* (4th Ed.) 562; *Wetmore v. Story*, 22 Barb. (N. Y.) 414.

The fundamental and important question in the case is with respect to the validity of the ordinance expressing the consent of the city, through its municipal authorities, for the use of the street in the manner described and specified therein. There can be no doubt that the board of estimate and apportionment possessed all the powers concerning the use of the streets by the public and by private parties that were formerly possessed by the board of aldermen. *Wilcox v. McClellan*, 185 N. Y. 9, 17, 77 N. E. 986. There can be no doubt that municipal authorities having the care and control of the streets in a city may authorize their temporary use by private parties for private purposes to a limited extent. The precise limits beyond which that power cannot be exercised have not been very specifically or accurately defined and perhaps cannot be. The governing body in a city may permit private parties to deposit building materials in the streets, to construct and use coal holes, cellarways, areas, vaults under the sidewalks, awnings above, and the like. But all these and all similar uses of the public streets for private use are either expressly authorized by statute or sanctioned by the courts as being exceptions to the general rule, born of necessity, and justified by public convenience and custom. The right to such use is given to the general public and enjoyed by all citizens alike. In the present case, the privilege has been granted to private parties, and is special and peculiar. *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 831; *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. 85; *Jorgensen v. Squires*, 144 N. Y. 280, 39 N. E. 373. These cases, however, affect only in a very slight way the general rule that the primary purpose of streets and highways is the use of the public for traveling and transportation, and that any encroachment thereon which interferes with such use is a public nuisance. There can be no doubt that an abutting owner in a city has the right of free access to and from his property in the usual way. He may use for that purpose such means of conveyance for the transportation and delivery of goods and merchandise as are usual and customary, but the

right of ingress and egress with railroad cars running upon railroad tracks has not yet, I think, been sanctioned by custom or by law. The claim of a right in that regard is far in advance of any use of the public streets that has heretofore been recognized. It may be argued that if the abutting owner may use carriages, wagons, trucks, and even motor cars for the purpose of free access and the transaction of his business, why not permit him to use railroad cars upon a railroad track? Such an argument is misleading, since if carried to its logical conclusion the result would be that the governing body in a city would have the power to surrender the use of the streets to private parties for exclusively private purposes. The courts must draw the line at some point beyond which private interest and convenience must yield to the general public good. The general current of authority on the question concerning the use of public streets in cities indicates quite clearly that the line has been extended and the domain of discretionary power very much expanded by the ordinance adopted in this case. If we are prepared to hold that the defendants are empowered to adopt and carry out the resolution in question, then, as was suggested in the learned opinion of the court below, the same claim of right must be sanctioned when like privileges are granted to all merchants in the city who are similarly situated. In this view the result of our decision in this case must be important and far-reaching to the whole community. We are not concerned with the question whether the exercise of the power embodied in the resolution was necessary or reasonable. The defendants do not attempt to justify the grant upon any such ground, and these considerations are not pertinent to the questions certified to us by the learned court below, and which confer upon this court the only jurisdiction it has over the case.

It is suggested, not by the counsel in the case in their oral arguments, nor in their printed briefs, but among ourselves in the discussion of the case, that the power of the board of estimate and apportionment, under section 242 of the charter, to grant the permission in question, is controlled in some way by the charter powers of the street railroads to operate freight or express cars upon their tracks. If this means that the language of the charter is to be construed as meaning one thing in case the railroads have such powers, and another and different thing in case they have not, then it seems to me that such a rule for the construction of a statute is without the sanction of reason or authority. The section of the charter referred to must be construed according to its own terms, and the general charter powers of street railroads have nothing whatever to do with the meaning of the words that the Legislature has employed in conferring certain powers upon the city authorities. If the rail-

roads are exceeding their charter powers, the remedy is in the hands of the public authorities in a direct proceeding, where all concerned have the right to be heard. I have refrained from discussing that question in this case, since no railroad is a party, and it would be unwise to intimate anything in regard to such a question when not raised by any one in the case. It is undoubtedly true that the owners of the department store and the city authorities have assumed in their application and in the grant made that the street railroads have the right to operate freight or express cars upon their tracks, otherwise the application would never have been made or granted. In acting upon this assumption, they have followed what seems to have been decided by the courts, including this court, which is to the effect that such business is within the powers conferred upon street railroads. *De Grauw v. Long Island Elec. Ry. Co.*, 43 App. Div. 502, 507, 60 N. Y. Supp. 163, affirmed on the opinion below, 163 N. Y. 597, 57 N. E. 1108; *Matter of Stillwater & M. St. R. Co. v. B. & M. R. R. Co.*, 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489.

But, conceding the power of street railroads to embark in the business of carrying goods as well as passengers, what has that to do with the meaning of the section of the city charter to which reference will be presently made? Grant that the street railroads may carry goods for hire. Does it follow that the board of estimate and apportionment has the power to authorize private persons to construct spur railroad tracks and operate railroad cars thereon in front of every department store and warehouse where it is convenient to ship and receive merchandise? If such power exists, it should be exercised fairly in favor of all who ask for the privilege and without discrimination. The railroads may have the power to carry goods, but it by no means follows that the city authorities have the power to furnish railroad facilities to merchants, who, instead of using trucks and wagons for the shipment and delivery of goods, find it more convenient to use railroad tracks and railroad cars. The power of the railroads to carry goods is one thing, but the power of the city authorities to incumber the public streets with railroad spur tracks is quite another and different thing. No railroad applied for the consent in question, and no right was granted to any such corporation. Neither the pleadings, the certified questions, nor the arguments at the bar attempt to deal with any question concerning the power of street railroads in that regard. This case turns upon the question whether the board of estimate and apportionment had the power, under the section of the charter referred to, to enact the resolution in question. There is no claim in behalf of any one that there is any provision of the city charter conferring such power upon the board, except the section referred to in the

certified question, and the rest of the discussion will be confined to an inquiry as to the powers conferred by that section upon the board. It may be important at the outset of that inquiry to state the rule of statutory construction in such cases that has been adopted by this court in numerous cases, and which in a very recent case is expressed in the following words: "To justify an act which would constitute a nuisance, without making compensation therefor to those who are specially injured and without their consent, the statute must be express, or the right to permit such act given by a clear and unquestionable implication from the powers expressly conferred, so that it can be fairly said that the Legislature contemplated the doing of the act which occasioned the injury, and it may not be presumed from a general grant of authority." *Ackerman v. True*, 175 N. Y. 366, 67 N. E. 629. The argument in behalf of the defendants and in support of the appeal in its last analysis rests upon the broad proposition that the statute (section 242 of the city charter) conferred the power upon the board of estimate and apportionment to make the grant and enact the ordinance in question. If this contention is well founded, it would follow that the appeal should be sustained. The material part of the section is expressed in these words, omitting terms that are unnecessary and irrelevant: "The board of estimate and apportionment shall hereafter * * * have the exclusive power in behalf of the city to grant to persons or corporations franchises or rights or make contracts providing for or involving the occupation or use of any of the streets * * * for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power." Nothing can be found in these words which confers power upon the board in express terms, or by any clear and unquestionable implication, to authorize private individuals to use the streets for the purpose of constructing thereon spur railroad tracks and operating freight or express cars thereon. The section does confer upon the board undoubtedly the right to grant franchises to persons or corporations for railroads, but the word "railroads," as used in the section, obviously means those public service corporations for the transportation of persons and possibly of property, as already suggested. The ordinance in question grants no right to construct or maintain a railroad. It does grant to private individuals facilities to use the railroads already in operation. The consent confers no franchise upon any person or corporation. It does grant to private individuals a revocable license for ingress and egress to and from their store for the delivery of merchandise. The grant is limited by the term of 10 years, and is subject to revocation at any time by the city upon giving the notice specified in the

resolution. Such a license is in no sense a franchise and is not referred to at all in the section of the charter under consideration. Indeed, the defendants all disclaim any purpose to exercise any franchise. They distinctly insist that the privilege conferred is not a franchise at all. A franchise is property assignable, taxable, and transmissible; whereas, the consent in question is not assignable and is subject to revocation on six months' notice. So that the power exercised by the board in this case cannot be upheld or justified under the authority to grant franchises. The grant in itself was not of a franchise, and the grantees were not a railroad, nor any other corporation described in the section, but private individuals.

Except for the presence in the section of the words "or make contracts providing for or involving the occupation or use of any of the streets," no one, I think, would contend that any power was conferred by the section to authorize railroad tracks to be laid down in the streets and across the sidewalks upon which to operate cars for the transportation of merchandise. The section does confer upon the board the power to make contracts involving the occupation or use of the streets for railroads, but the board in enacting the resolution in question did not exercise any power to make a contract for the use of the streets for railroads. It made no contract with any railroad, and no railroad has any interest in the right granted. No railroad asked for any privilege such as is embodied in the resolution. The privilege was applied for and granted to private individuals to enable them to use railroad tracks for the transportation and delivery of goods instead of wagons, trucks, and the usual conveyances for distributing merchandise in cities. It is said by the learned counsel for the defendants that the power to grant a revocable license for the use of a street, such as is embodied in the resolution of the board, can be "spelled out" in view of the use of the words to make contracts. But the courts will not apply the process of spelling out from vague or equivocal words or expressions the power to appropriate the public streets to private use. Even if there were any doubt as to the true construction of such language in a statute the doubt would be resolved in favor of the public, rather than private persons who claim the right to use public property. The power to surrender the streets, or any part of them, to private use does not exist unless plainly conferred by express words, or by "clear and unquestionable implication." It seems very clear to me that no words can be found in this section capable of being tortured into an authority by the board to authorize every owner of a department store or warehouse to connect his business with the street railroads by building a spur from his store or warehouse to some point on the railroad.

Moreover the use of the words "make con-

tracts" is subject to the limitations and restrictions which follow in the section. What contracts? Obviously contracts "for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property"; not contracts for the use of the streets by private individuals in order that their convenience may be promoted by greater facilities to reach the railroad. In other words the section refers to contracts relating to municipal interests with public service corporations. The section does not in terms or by any fair implication confer upon the board of estimate and apportionment any such power as is attempted to be exercised by the adoption of the resolution in question, and this conclusion is reinforced by the terms of section 20 of the railroad law (Laws 1890, p. 1091, c. 565). That section permits individuals and corporations engaged in any lawful private business to lay down and maintain such railroad tracks on or across any street or highway not exceeding three miles in length as shall be necessary for the transaction of its business. In other words, private parties are permitted by that section to do in localities just what the defendants desired to do under the consent in question; but it is very significant that cities are expressly excepted from the operation of that statute. Having excepted cities from the benefits of a law clearly enacted to promote private business and private interests, it is very difficult to impute to the Legislature the intention to nullify the exception and confer upon the board of estimate and apportionment the very power which was expressly withheld in the enactment of this section of the railroad law by the use of the words "to make contracts," etc., inserted in the section of the charter under consideration. The section of the railroad law referred to and the section of the charter upon which the power to make the grant in question must rest, when read together, have almost the force of a prohibition upon the municipal authorities of the city of New York against the exercise of the power to permit the use of the streets contemplated in the enactment of the ordinance in question. If the city charter of New York conferred the same power upon the board of estimate and apportionment that section 20 of the railroad law conferred upon the local authorities, why was the exception inserted excluding cities from the operation of the law? If cities already had the power which section 20 conferred upon other localities, what possible reason can be suggested for the exception? It is very plain, it seems to me, that the exception was made for the purpose of taking cities out of the operation of the law, for the very reason that it was not deemed to be wise or proper to incumber the public streets with railroad tracks which would be comparatively harmless on the country roads or in villages sparsely inhabited.

Keeping in view the fact that the questions

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certified to this court call simply for the construction of a specified section of the city charter, it is not necessary to call attention to the numerous authorities in this state that deal with the general question, concerning the power of the city authorities having control of the streets, to authorize obstructions to be placed therein for the benefit or convenience of private parties. It is quite sufficient to observe that the authorities already cited in support of the right of the plaintiffs to maintain this action also deal with the question of power in the local government to authorize interference with a street by individuals or corporations for their own use and benefit. The general question as to the power of local authorities to permit such obstructions has been dealt with and discussed in the courts of other states in a very broad and comprehensive manner. In those cases the court was not limited, as this court is, to the mere question concerning the meaning and construction of a section of the city charter or other statute. On the contrary, the discussions in these courts took a very wide range, and the results announced denote the general trend of judicial authority against the power of municipal authorities to permit obstructions of the character involved in this case to be placed in the public streets of cities. *Glaessner v. Anheuser Busch B. A.*, 100 Mo. 508, 13 S. W. 707; *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 545; *Heath v. Des Moines Ry. Co.*, 61 Iowa, 11, 15 N. W. 573; *State v. Trenton*, 36 N. J. Law, 79; *Mikesell v. Durkee*, 34 Kan. 509, 9 Pac. 278; *Mayor v. Harris*, 73 Ga. 428. A single extract from one of these cases will sufficiently disclose the views of the court in all of them: "Everything which is fairly within the idea of regulating streets with a view to their use as streets, may be done by corporate legislation. In measuring the extent of the power, the object and purpose for which it was given must always be regarded as the test. Is one of those objects or purposes subserved by permitting one individual to enjoy a use of the highway which is denied to all others? I think not. If such power is conceded, its exercise is limited only by the discretion of the common council, who must be the sole judges of the extent to which obstructions may be placed in the streets. If they can license one to build a railroad across the highway for his own exclusive benefit, of which the public can have no user or advantage of convenience, it is difficult to perceive why they cannot empower another to place therein a structure which would more effectually impede the public passage and maintain it there during their pleasure. How considerable must the obstruction to the way become, before the judgment of the common council can be controverted, and the judicial arm interpose? A grant to every one on the street of a like nature with that now resisted would render the highway well nigh impassable. The right

to license one necessarily implies authority to license all, and thus municipal corporations under the general power to regulate streets become the source from which franchises to favored individuals in the public ways derive their existence. Streets and highways are intended for the common and equal use of all citizens, to which end they must be regulated. An appropriation of them to private individual use from which the public derive no convenience, benefit, or accommodation is not a regulation but a perversion of them from their lawful purposes and cannot be regarded as an execution of the trust imposed in the city authorities. * * * The power of the common council to permit owners of stores or other buildings to erect awnings over streets, or to leave boxes on the sidewalks, under certain regulations, rests upon a different principle and has been sanctioned by usage as the exercise of a right in the owner of the fee, not inconsistent with the public right of passage." *State v. Trenton, supra.*

The order appealed from should be affirmed, with costs, and the first question answered in the negative, and the second question answered in the affirmative.

EDWARD T. BARTLETT, J. I agree in the result of Judge O'BRIEN'S opinion. I also adopt as part of this memorandum the opinion of Mr. Justice Clarke in the Appellate Division. This case involves questions of far-reaching importance. The defendants R. H. Macy & Co. claim to have obtained the consent of the city of New York, through its board of estimate and apportionment, to construct, maintain, and use two spur surface railroad tracks, as follows: A spur track from the northerly surface railroad in West Thirty-Fourth street, between Broadway and Seventh avenue, in the borough of Manhattan, across the sidewalk and into the store of R. H. Macy & Co. on the northerly side of West Thirty-Fourth street; also a spur track from the easterly surface railroad track in Webster avenue, in the borough of the Bronx, between 236th street and McLean avenue, in the said borough, to the building of R. H. Macy & Co. on the easterly side of Webster avenue north of the northerly side of 236th street. The distance between these termini, according to the official maps of the city of New York, is at least 10 miles, allowing 20 blocks to the mile. These spur tracks are to be connected with the street surface railroad tracks in West Thirty-Fourth street and Webster avenue, respectively, and R. H. Macy & Co. are authorized, subject to certain restrictions, to transport their goods, wares, and merchandise from their downtown place of business to their distributing station in the borough of the Bronx over these many miles of intervening street railway tracks. The plaintiffs, as owners of a private residence located immediately west of the store of R. H. Macy & Co. on West Thirty-Fourth street,

object to the construction of the spur track in the vicinity for good and sufficient reasons, which have been duly considered in the opinions to which reference has already been made. There is, however, a broader question which affects the property holders of the city of New York and calls for careful judicial scrutiny. Are our already overcrowded streets and railroads to have imposed upon them an additional easement, viz., the transportation of freight—of goods, wares, and merchandise—and that, too, not by legislative grant, but by the consent of the board of estimate and apportionment? It is argued that this consent of the board is not a franchise. It runs for 10 years and can be renewed; the facts that it is nonassignable and revocable do not militate against the legal conclusion that the consent is to all intents and purposes in the nature of a valuable franchise. This court has held that the right to construct and operate a street railway is a franchise which must have its source in the sovereign power. Also that the legislative power over the subject has this limitation: The franchise must be granted for the public, not for private purposes. *Fanning v. Osborne*, 102 N. Y. 411, 7 N. E. 307. The proposed spur tracks, if constructed as contemplated, would clearly be a public nuisance. Whether the consent of the board of estimate and apportionment be regarded as in the nature of a franchise or as a license, it is absolutely void. *Potter v. Collis*, 156 N. Y. 16, 50 N. E. 413. If the claim of the appellants were to be sustained, then, as suggested in the opinions, the proprietors of every department store in the city would assert the right to lay spur tracks and transport freight through the already overcrowded streets.

Judge O'BRIEN has clearly pointed out the scope of the present inquiry in view of the questions certified. The first question requires this court to determine whether the board of estimate and apportionment had the power to grant the permit under the charter of Greater New York. The second question involves the power of plaintiffs to maintain this action. If the board had no power to grant the permit, and the plaintiffs are entitled to maintain this action, then the injunction must stand. If the contrary result is reached, the present state of the record does not raise the question whether the trolley lines involved are authorized to transport freight in the streets of the city of New York. The names of the companies over the tracks of which it is contemplated to conduct this freight traffic and the charters under which they are operated do not appear in the record before us. The tendency of the modern trolley line to carry freight through the crowded streets of large cities, in the absence of charter authority, is a growing evil.

I vote for affirmance; the first question to be answered in the negative, and the second question answered in the affirmative.

CHASE, J. (dissenting). The facts are sufficiently stated in the opinion of Judge O'BRIEN, except that it may aid in interpreting the purpose and character of the consent given to the defendants by adding that the defendants have a driveway from Thirty-Fourth street into their department store. The entrance is about 53 feet easterly from the line between the plaintiffs' and defendants' property, and at such driveway the sidewalk and curb are depressed to permit wagons to pass in and out of said store. The defendants in transporting goods from their department store to said distributing station in the Bronx use five heavy trucks, each drawn by a team of horses, and they pass over said sidewalk in and out of said department store at irregular intervals. Express cars are run over the street surface railroads in the city of New York. The defendants have arranged to have all of the goods heretofore conveyed to said distributing station in said five trucks transported in one express car to be run over said street surface railroads, and the spur track is necessary to enable the defendants to load said car within their said store. The work of transporting such goods with the present business of the defendants can be performed with one trip of said car each way daily, and the consent provides that the car can only be moved over the spur track in Thirty-Fourth street between the hours of 8 o'clock in the evening and 5 o'clock in the morning. The proposed spur track will be wholly opposite the real property of the defendants.

It is conceded that the right to construct and operate a street railway is a franchise which must have its source in the sovereign power, and that the legislative power over the subject is also subject to the limitation that the franchise must be granted for public, and not for private purposes, or at least public considerations must enter into every valid grant of a right to appropriate a public street for railroad uses. This court has frequently so held. *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307; *Palge v. Schenectady Railway Co.*, 178 N. Y. 102, 70 N. E. 213. I agree with Judge O'BRIEN that the consent given to the defendants on behalf of the city is not a franchise, but a license to the defendants as private parties to use the spur track to transfer the car from the street surface railroad tracks to and from their abutting property; but as the spur track is confined to that part of the street immediately adjoining and in front of the defendants' real property, I do not agree with him in so far as he holds as a matter of law that such consent authorizes an unreasonable use of a street by abutting owners. The general rule that streets and highways are solely for passage by the public is subject to some exceptions born of necessity and public convenience. The primary purpose of streets and highways is for use. If a physical or other

barrier should be erected on all lot lines adjoining streets and highways, such streets and highways would become wholly useless. There is no prohibition against an owner of lands abutting a highway from passing to and from the same. Such right of passage is not confined to the owner of the abutting lands, but extends to all persons lawfully desiring to pass to and from such abutting lands, and also to the transportation of all goods, wares, and merchandise in any way lawfully used in connection therewith. An owner of a building abutting on a street may not only freely pass to and from the same, but incident to his ownership he may use the street and sidewalk in front of his property as a place to load and unload his goods and for all usual and necessary purposes of his business, although it may occasion a temporary obstruction, provided he does not interfere unreasonably with the public right. *Jorgensen v. Squires*, 144 N. Y. 280, 39 N. E. 373; *Welsh v. Wilson*, 101 N. Y. 254, 4 N. E. 633, 54 Am. Rep. 698; *Callanan v. Gilman*, 107 N. Y. 360, 14 N. E. 264, 1 Am. St. Rep. 531.

It is competent for the Legislature to authorize abutting owners to temporarily deposit building material in the streets (*Callanan v. Gilman*, supra); also to authorize abutting owners to build within the street lines underground vaults (*Deshong v. City of New York*, 176 N. Y. 475, 68 N. E. 880), area ways (*Devine v. National Wall Paper Company*, 95 App. Div. 194, 88 N. Y. Supp. 704, affirmed 182 N. Y. 565, 75 N. E. 1127), stepping stones (*Wolff v. District of Columbia*, 196 U. S. 152, 25 Sup. Ct. 198, 49 L. Ed. 426; *Robert v. Powell*, 168 N. Y. 411, 61 N. E. 699, 55 L. R. A. 775, 85 Am. St. Rep. 673), and many other things which tend to the convenient and beneficial enjoyment of abutting property (*Jorgensen v. Squires*, supra). In the *Robert v. Powell* Case, this court says: "There are some objects which may be placed in or exist in a public street, such as water hydrants, hitching posts, telegraph poles, awning posts, or stepping stones such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the street as a public highway. The hitching post, for instance, in front of a private residence, is intended not only for the convenience of the private individual, but for the safety of the public as well, since it is intended to guard against accidents resulting from runaway teams or horses. It is quite conceivable that a shade tree located within the boundaries of the street or highway may cause an accident or injury to a private individual using the street. But it does not follow that it constitutes a public nuisance in the highway. * * * While it is said that these cases involved only the question of liability on the part of a municipality for negligence, they also decided that the existence

of objects of this character in the streets is lawful." This court, in *Jorgensen v. Squires*, supra, say: "While such uses may restrict somewhat the free and unembarrassed use of the streets for pedestrians, the general interests are subserved by making available to the greatest extent valuable property, increasing business facilities, giving encouragement to improvements and adding to taxable values." In the use of streets, sidewalks are built for pedestrians, and spur walks are commonly constructed therefrom to residences and other property. Spur roads are run across sidewalks to stables and business property. If the express car to be used in transporting the defendants' goods, wares, and merchandise should be constructed with sufficient power as a motor car, I assume there would be no question as to the legal right of the defendants to run the car over the sidewalk on their driveway into their department store as trucks with teams are now driven therein.

I have assumed that the street surface railroads have authority to run express cars on their tracks. It is important to inquire into such power because in interpreting the city charter for the purpose of answering the first question submitted to us it is necessary to consider the circumstances and conditions affecting the Legislature at the time the charter was enacted. At that time street surface railroad cars were run in many of the streets of the city of New York. At that time also this court had held that the Legislature had power to grant to street surface railroads the right to transport freight or passengers or both over its tracks. *De Grauw v. Long Island Elec. Railway Co.*, 43 App. Div. 502, 60 N. Y. Supp. 163, affirmed on opinion below, 163 N. Y. 597, 57 N. E. 1108. Subsequently, in *Matter of Stillwater & M. Street Ry. Co. v. B. & M. R. R. Co.*, 171 N. Y. 589, 64 N. E. 511, 59 L. R. A. 489, this court say: "It is said that the rights of the public in the streets and highways of our cities, towns, and villages should be protected, and that cars loaded with merchandise and freight should not be permitted to be run over street surface railroads. It may be that additional regulations should be provided either by statute or by ordinance, limiting the time in which cars of this character should be permitted to run over street surface railroads, especially in cities and large villages; but that the power exists to run such cars is no longer an open question in this court. This question was elaborately considered in the case of *De Grauw v. Long Island Electric Railway Co.*, 43 App. Div. 502, 60 N. Y. Supp. 163, which case was affirmed in this court on the opinion below, 163 N. Y. 597, 57 N. E. 1108." The corporations over whose roads it is proposed to run an express car are not parties to this action, but it is assumed by the parties, or at least not disputed, that they have been given the right to run express

cars over their tracks. I admit that running freight and express cars on street surface railroad tracks through the cities and villages of our state may in itself, wholly apart from the question of spur tracks, become a serious menace to the public at large, but the right to grant to corporations authority to run such cars is given by statute, and any prohibition or regulation thereof must come from the legislative branch of the government. For the purpose, therefore, of answering the first question, I think we should assume, as I have assumed, that the street surface railroads, over which the express car between the department store and the distributing station of the defendants is to be run, have the right to run such express car thereon. The right to lay pipes or other conduits for the transmission of gas, electricity, steam, light, heat, or power, like the right to lay tracks for cars in which to transport passengers and property, must be granted for public use; but for the purpose of using the gas, electricity, steam, light, heat, and power individual members of society, constituting the public, are granted permission to excavate in the public streets and highways and permanently lay pipes and other conduits to connect their abutting property with the pipes and other conduits in the streets and highways through which to take the gas, etc., for private use. Unless spur tracks of some kind are allowed to the owners of abutting property, the loading and unloading of express cars must necessarily be confined to the public streets, and thus public travel will be delayed, and the general public as well as individuals be greatly inconvenienced.

For the purpose of confining abutting owners to a reasonable use of the public streets, it is no more necessary to require that express cars be loaded and unloaded in the streets and highways than it is that individual consumers of gas or water be required to take the same in some way from the distributing pipes in the public streets. A reasonable use of all public service corporations would seem to require that abutting owners of property be allowed to make such reasonable connection with the public service pipes, conduits, or tracks as will tend to public utility. The defendants' goods, wares, and merchandise must be transported from place to place, and I cannot say that running one car over a spur track from the street surface railroad would be more inconvenient to the public than running heavy motor cars or trucks drawn by horses at irregular intervals over the defendants' driveway. If such a use of the street tends to public benefit, it cannot be said to be an unreasonable use thereof. No actual permanent taking of a portion of the street for private purposes is proposed. The board of estimate and apportionment in their discretion may have found that the use of such spur track within the hours mentioned would relieve a congested

street and generally tend to the public good. Where the power to grant street privileges or franchises is conferred upon a municipality, the exercise of the power is discretionary with the municipality, and its action is not as a rule subject to control by the courts. 15 Am. & Eng. Ency. of Law (2d Ed.) p. 153. The legislative control over public streets and highways may be delegated to the governing body of a municipal corporation. *Hoey v. Gilroy*, 129 N. Y. 132, 29 N. E. 85. Such power seems by the plain language of section 242 of the city charter, as amended by chapter 629, p. 1533, of Laws 1905, to have been granted to the board of estimate and apportionment. The material parts of that section are as follows: "The board of estimate and apportionment shall have * * * control of all the streets, avenues, highways * * * within or belonging to the city; except as in this act otherwise provided. The powers by this act granted to the board of aldermen with respect to the streets, avenues, highways, * * * which are within or belong to the city shall be subject to such control of the board of estimate and apportionment. If and when the board of estimate and apportionment shall deem it proper in the case of any application or matter affecting any street, avenue, highway * * * within or belonging to the city, whether the board of aldermen or any other department or officer shall have acted or omitted to act, the board of estimate and apportionment may itself originally act, * * * and if and when the board of estimate and apportionment shall so act or exercise such control, such action or control shall be fully and finally operative, notwithstanding any resolution, ordinance, grant or other action adopted or had by the board of aldermen or any other department or officer of the city or any omission to act on the part of the board of aldermen or other department or officer. The board of estimate and apportionment shall hereafter * * * have the exclusive power in behalf of the city to grant to persons or corporations, franchises or rights or make contracts providing for or involving the occupation or use of any of the streets, avenues, highways * * * within or belonging to the city, whether on, under or over the surface thereof, for railroads, pipe or other conduits or ways or otherwise for the transportation of persons or property or the transmission of gas, electricity, steam, light, heat or power. * * * The board of estimate and apportionment are given "the control of all the streets." When, "in the case of any application or matter affecting any street," such board may "itself originally act," and its action is "fully and finally operative, notwithstanding any resolution, ordinance, grant or other action adopted or had by the board of aldermen or any other department or officer of the city." In connection with such general control of the streets, said board is given express and exclusive

power "to grant to persons and corporations franchises or rights or make contracts providing for or involving the occupation or use of any of the streets * * * for the transportation of persons or property." This statute, by its plain language, authorizes the making of contracts separate and distinct from that of granting a franchise or right.

The consent involved in this action is a contract involving the use of Thirty-Fourth street by the defendants within the meaning of the section quoted. Doubtless, the reason why no general authority is given in the railroad law for individuals, associations, or corporations to lay down and maintain spur tracks necessary for the transaction of business with railroad corporations, is that it was deemed best to leave all questions relating to such spur tracks, and as to whether they should be allowed, and, if so, upon what terms and conditions, to the city officers or board having control of the streets.

I think the first question should be answered in the affirmative, and the second in the negative, and that the order appealed from should be reversed.

VANN, J., concurs with O'BRIEN and E. T. BARTLETT, JJ. HISCOCK, J., concurs with O'BRIEN, J. CULLEN, C. J., and HAIGHT, J., concur with CHASE, J.

Order affirmed.

(189 N. Y. 202)

In re FARMERS' LOAN & TRUST CO.
(Court of Appeals of New York. Oct. 1, 1907.)

1. WILLS—CONSTRUCTION—INTENT.

In determining a testator's intent in the construction of a will, it must be assumed that he contemplated the reasonable and natural construction of the language used, rather than that which would produce an absurd and illogical result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 974.]

2. SAME—SUPPLYING WORDS—TRANSPPOSITION OF SENTENCES.

In construing a will, courts may supply words or phrases, punctuation, and even transpose sentences, in order to ascertain and determine testator's intent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 978-981.]

3. SAME—REMAINDERS.

Ordinarily, in providing a gift over, in case of death of a legatee without issue, the time of death, unless a different intent appears, will be construed to refer to a death occurring during the life of testator; but where the disposition of property devised over, in case of death, is preceded by a prior estate for life or years, then the general rule is that the time of death refers to that occurring during the period of the intervening estate.

4. SAME—TESTAMENTARY TRUSTS—RIGHTS OF REMAINDERMEN.

Testator created a trust of certain railroad bonds to pay the income to S. for life and at her death to pay the principal and accrued interest, if any, to C.; that in the event of C.'s death without leaving issue, after the death of S., then testator bequeathed the trust fund to his grand-

niece. *Held*, that the gift over to the grandniece was based on a double contingency, to wit, the death of C. without issue during the lifetime of the life tenant, or his death during the same period with issue, on a failure of such issue to survive the life tenant, and C., having survived the life tenant, but being unmarried, was entitled to the trust estate in fee, subject only to the charges of the trustee.

Appeal from Supreme Court, Appellate Division, Second Department.

Proceedings by the Farmers' Loan & Trust Company, as trustee under the will of Israel Corse, for a judicial accounting and for a construction of the third clause of the will. From an order of the Appellate Division (104 N. Y. Supp. 1127), affirming a surrogate's decree (100 N. Y. Supp. 862, 51 Misc. Rep. 162), judicially settling the trustee's account and construing the will, Israel Corse, Jr., appeals. Modified and affirmed.

George M. Pinney, Jr., for appellant. Philip E. Connell, for respondent Katharine Corse Ingersoll. George M. Thompson, for respondent Thorne.

HAIGHT, J. These proceedings were instituted by the Farmers' Loan & Trust Company, as trustee under the last will and testament of Israel Corse, deceased, for a judicial settlement of its accounts and for a construction of the third clause of the testator's will. The only question brought up for review pertains to the construction to be given to the clause of the will in question. It is as follows: "Third. I do give and bequeath to the Farmers' Loan and Trust Company of New York City, in trust nevertheless, ten first mortgage bonds of one thousand dollars each, and which are a lien on any division or branch road of the Chicago, Milwaukee and St. Paul Railway Company, bearing six per cent. interest, for the following named persons, uses and purposes, viz.: To pay said interest or income thereof to my niece, Eliza L. Saunders of Flushing, Long Island, during the period of her life, and at her demise with respect to the principal of this fund and accrued interest thereon, if any, I do give and bequeath the same to my namesake, Israel Corse, Junior, the son of the late Frederick Corse of Flushing, Long Island. In event of the death of said Israel Corse, Junior, without leaving issue after the demise of said Eliza L. Saunders, then I give and bequeath this trust fund to my grandniece, Katharine Corse Saunders."

The will was executed on January 8, 1885. The testator died on the 18th day of July, 1885, and his last will and testament was duly admitted to probate by the Surrogate's Court of Suffolk county. The bonds specified in the third clause of the will were thereupon turned over to the Farmers' Loan & Trust Company, which received the same as such trustee, and ever since has discharged its duties as such, and which still holds the bonds on which interest becomes due and payable on the 1st day of January and July in each

year. Eliza L. Saunders, the life beneficiary mentioned in the clause, died November 11, 1905, leaving a last will and testament, which has been duly admitted to probate in Queens county, in which letters testamentary were issued to Edwin Thorne, who is now the executor thereof. Israel Corse, Jr., is still living, but has never married or had issue. Katharine Corse Saunders is also living, has married, and is now Katharine Corse Ingersoll. The surrogate held that upon the death of Israel Corse, the testator, Israel Corse, Jr., took a vested remainder in fee in the estate created by the third clause of the will, limited upon the life estate of Eliza L. Saunders, subject, however, to be defeated by a condition subsequent, viz., the death of Israel Corse, Jr., without issue at any time after the death of Eliza L. Saunders, in which event the substituted remainder given in that contingency to Katharine Corse Ingersoll will vest in possession, and that the interest accruing upon the bonds between July 1, 1905, the date of the last payment to Eliza L. Saunders, and November 11, 1905, the date of her death, is payable to Edwin Thorne, as the executor of her last will and testament, less the legal commissions of the trustee, and that the balance of said income in the hands of the trustee is payable to Israel Corse, Jr., less the legal commissions of the trustee; and that the trustee continue to hold the fund and pay the income therefrom to Israel Corse, Jr., during his life, and upon his death that it pay over the principal to his issue, if any, and that in default of issue that it pay over said principal to Katharine Corse Ingersoll. From this decree Israel Corse, Jr., appealed, contending that, having survived Eliza L. Saunders, he became the absolute owner and entitled to the possession of the bonds constituting the trust, and to the interest that matured thereon after the 1st day of July, 1905.

With reference to the question of the interest accruing after July 1, 1905, up to the date of the death of the life tenant, we think it was correctly disposed of by the learned surrogate in his decree, but with reference to the principal of the trust fund we differ with the conclusion reached by him. It may be conceded that the question presented is one of intent which must be drawn from the provisions of the will and the surrounding circumstances; but in determining the testator's intent we must assume that he contemplated the reasonable and natural construction of the language used, rather than that which would produce an absurd and illogical result. If the surrogate is correct in his conclusion, then the testator created a trust during the lives of two persons, Eliza L. Saunders and Israel Corse, Jr., and prohibited Israel from ever taking the remainder of the estate upon the death of Eliza, or at any other time. He could not take, even upon the death of Katharine, for upon his death without issue then the grandniece Katharine, if living, or in case of her

death her personal representatives, would take. We find nothing in the provisions of the will that indicates an intent on the part of the testator to create a trust to continue for more than one life, that of Eliza L. Saunders. Upon her death, the testator gives the principal of the fund to his namesake, Israel Corse, Jr., the son of the late Frederick Corse of Flushing, Long Island. Here we have an absolute, unqualified gift which would terminate the trust, which is inconsistent with the existence of an intent on the part of the testator to continue it during the life of his namesake. But it is said that the provision following operates to cut down the absolute estate to a life estate, and thus continues the trust: "In the event of the death of said Israel Corse, Junior, without leaving issue after the demise of said Eliza L. Saunders, then I do give and bequeath this trust fund to my grandniece, Katharine Corse Saunders." The learned surrogate was of the opinion that this clause referred to the death of Israel as occurring after the death of Eliza, and in case Israel's death should occur without leaving issue the grandniece would take. If this construction is to be adopted, what then would the result be in case Israel had died during the life of the life tenant? He survived the testator, and consequently the provisions of the will in his behalf did not lapse. The estate would therefore go to his personal representatives, unless it was otherwise bequeathed. Having died before the life tenant, the grandniece could not take, for the provision in her favor only permits her to take in case Israel died without issue, after the death of the life tenant. Such a construction would be illogical and lead to a result which the testator never contemplated. To our minds he intended, as he has stated, to give the trust estate, upon the death of the life tenant, absolutely to Israel; and then to meet the contingency that might happen in the event of the death of Israel, without issue, during the life of the life tenant, he provided that the trust fund should be given to his grandniece. This, we think, would become plain if a comma should be inserted between the words "issue" and "after." In the event of the death of Israel without issue, after the demise of Eliza, then—that is, upon or at the time of the demise of Eliza—he gave the trust fund to his grandniece. The word "then" should be given the same force and effect as if it were transposed and inserted between the words "issue" and "after." It thus appears that the testator's intent was that at the death of Eliza the trust estate created by him should terminate, and the principal then be distributed, and if at that time Israel be alive, he should take the estate in possession; but, if he then should be dead, leaving no issue, the grandniece becomes entitled to the fund.

The rule with reference to the construction

of wills is so familiar as to require no citation of authorities. The courts may supply words, phrases, punctuation, and even transposed sentences in order to ascertain and determine the intent of the testator. Ordinarily, in providing a gift over, in case of the death without issue of a legatee, the time of death, unless a different intent appears, will be held to refer to a death occurring during the lifetime of the testator. But where the disposition of the property which is devised over in case of death is preceded by a prior estate for life or years, then the general rule is that the time of death refers to that which occurs during the period of the intervening estate. *Fowler v. Ingersoll*, 127 N. Y. 472, 28 N. E. 471; *Lyons v. Ostrander*, 167 N. Y. 135-140, 60 N. E. 334. So that, unless it be held that the time of the death of Israel is intended as occurring after the demise of Eliza, it must be held that the testator intended to refer to his death as occurring within the lifetime of the life tenant. This rule suggests still another construction of the provision which may be adopted, which reaches the same conclusion and avoids the unreasonable results which might have eventuated from the construction that prevailed below. The words "after the demise of Eliza L. Saunders" are found, not after the words "in the event of the death of said Israel Corse, Jr.," but after the words "without leaving issue," and may well be considered to qualify and to refer to the issue of Israel. The will reads, "without leaving issue after the demise of said Eliza L. Saunders," and should be construed as meaning without leaving issue, living or surviving, after Eliza's death. In other words, it created a double contingency, in either of which the gift over, to the respondent, was to take effect. First The death of Israel Corse without leaving issue, which, under the authorities referred to, means a death during the lifetime of the life tenant. Second. The death of Israel during the same period, with issue, but a failure of such issue to survive the life tenant. So construed, this provision of the will is but natural and harmonious.

The decree of the surrogate and order of the Appellate Division should be modified so as to provide that Israel Corse, Jr., on the death of Eliza L. Saunders, the life beneficiary, became the absolute owner of the trust estate, subject only to the charges of the trustee, and was entitled to the possession thereof, and as so modified affirmed, with costs of this appeal to Edwin Thorne only, as executor of Eliza L. Saunders, deceased, payable out of the principal of the trust fund.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, VANN, HISCOCK, and CHASE, JJ., concur.

Ordered accordingly.

(189 N. Y. 233)

PEOPLE v. NEW YORK BUILDING-LOAN BANKING CO.

(Court of Appeals of New York. Oct. 1, 1907.)

1. JUDICIAL SALES—RELIEF AGAINST DEFECTS OF TITLE.

A purchaser at a judicial sale cannot demand damages as for a breach of contract made by the court through its officers or agent for interest, expenses, and costs, where the title is found defective, but must rely upon the court to do equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Judicial Sales, §§ 100, 101.]

2. RECEIVERS—SALE OF PROPERTY—RIGHTS OF PURCHASERS—DEFECTIVE TITLE—COMPENSATION DISCRETIONARY.

In case of private sale of land by a receiver, where there is a failure to convey good title, the court may withhold compensation in its discretion, for there is no warranty of title, express or implied, since the purchaser has time for investigation before purchase, and it is the duty of the court to protect the property from waste, etc.

3. SAME—COUNSEL FEES—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 3240, providing that in case of special proceedings, where costs are not specially regulated by the act, they may be allowed in the discretion of the court at the rates allowed for similar services in other actions, allowance for counsel fees in a proceeding to recover payments on land bought of a receiver, when there was a failure of good title, is discretionary with the court.

4. APPEAL—REVIEW—DISCRETION OF LOWER COURT—COSTS AND ALLOWANCES TO PURCHASER OF DEFECTIVE TITLE AT RECEIVER'S SALE.

Plaintiff made a written offer to purchase a parcel of land under the control of a receiver, and on application to the court permission to sell was granted. When the time for closing the deal came, it appeared there was a defect in the title, which the receiver asked for time to cure; but, upon objection of plaintiff, this was refused. Plaintiff asked for the recovery of the amount paid, with interest, costs of examining title, etc. *Held*, a refusal to allow interest and expenses would not be reviewed, since it was a matter within the discretion of the trial court.

Vann and Hiscock, JJ., dissenting.

Appeal from Special Term, Appellate Division, First Department.

Action by the people of the state of New York against the New York Building-Loan Banking Company, on the petition of Giuseppe Seccafico and another, asking to be relieved from taking title to land under a purchase at private sale from the receiver, and for interest, costs, and expenses of examining title, etc. From an order refusing allowance for interest and expenses, petitioners appeal. Appeal dismissed.

Leo C. Stern and Alonzo G. McLaughlin, for appellants. Charles W. Dayton, Jr., for respondent.

HAIGHT, J. In an action prosecuted by the people of the state against the New York Building-Loan Banking Company, one Charles M. Preston was, by a final judgment entered in that action, appointed permanent receiver of all of the property, real and personal, of that corporation. On the 18th day of Janu-

ary, 1906, he received the following from Giuseppe Seccafico and his wife: "I hereby agree to purchase property situate and known as Nos. 336 and 338 Water street, borough of Manhattan, city of New York, for the sum of twenty thousand dollars, taking the same subject to outstanding mortgages twelve thousand dollars at 5 per cent., and any tenement house violations, and a certain lease expiring June 1, 1906, paying the difference between outstanding mortgages of twelve thousand dollars and purchase price, eight thousand dollars in cash. As an evidence of my good faith I accompany this offer with a deposit of \$300, which is to be returned to me in the event the receiver of the New York Building-Loan Banking Company declines to accept this offer, or, if accepted by him, is rejected by the court upon application for order to sell. In the event of being accepted by the receiver and the court, the said amount will be forfeited by way of liquidation of damages if agreement as indicated herein is not fulfilled on my part. I hereby agree to pay an additional sum of three hundred dollars on account of purchase money within three days after notice of court's acceptance of this offer, and to take title within thirty days after said notice of acceptance." Thereupon the receiver presented a petition to the Supreme Court setting forth the facts with reference to the offer, upon which the court made an order authorizing and empowering the receiver to accept the offer and to convey the premises to the parties named. Giuseppe Seccafico then deposited with the receiver an additional \$300, called for by his offer, for which the receiver gave a receipt, and upon the instrument indorsed the words: "Approved. Charles M. Preston, Receiver." Subsequently the closing of the contract, at the request of the purchasers, was adjourned to March 15, 1906, at 2 o'clock. At that time they refused to take title, upon the ground that the receiver's title was not marketable, and thereupon a petition was presented to the court asking that the purchasers be relieved from taking title, and that the receiver be compelled to pay them the amount deposited with him, together with interest, \$200 for the costs and expenses of having the title examined, and \$100 for the costs of the proceedings. To this the receiver objected, alleging that the defect in the title was such that it could be cured if he was given a reasonable time. The court, however, made an order relieving the purchasers from taking title and requiring the receiver to return to them the amount deposited with him, but refused their application for allowances, interest, and attorney's fees. The purchasers appeal, claiming that they are entitled to the items disallowed.

A person who contracts to sell real estate to another and convey good title is bound by his contract; and, if it subsequently turns out that he is unable to do so, he is liable

as for a breach of contract, not only for the return of the money paid to him on the contract, with the interest accruing thereon, but also to make good to the other party his reasonable expenses in having the title examined and the costs of the action to compel such payments. With judicial sales, however, the situation is different. The contract is made with some officer or agent appointed by the court, who acts under its direction, judgment, or decree. In such cases, the purchaser cannot demand damages as for a breach of contract made by the court through its officer or agent, but has to rely upon the court to do equity under the circumstances. Therefore the awarding of compensation to an innocent purchaser for his reasonable expenses in examining title, where it is found defective, is founded upon equity, and not upon the breach of contract. In cases of public sales under judgments and decrees such as the foreclosure of mortgages and the partition of real estate, it has been the usual practice of the courts to protect innocent purchasers at such sales by awarding them reasonable compensation for the examination of the title, in case it turns out to be unmarketable and different from that represented by the officer making the sale. In case of private sales by receivers appointed by the court, of insolvent corporations or individuals, or by special guardians of infants or of persons of unsound minds, a further duty devolves upon the court, that of protecting estates from waste and depletion. It therefore warrants no title, express or implied, and the purchaser takes only the title which the insolvent corporation, individual, infant, or person of unsound mind had in the property. In such cases the situation is different from that existing upon the public sale, where the purchaser has had no time to examine the title and has made his bid upon the supposition that it was marketable. In case of private sale the purchaser may take such time as he chooses before he closes the contract and make such investigation of the title as he may desire, knowing that the power of the court to convey is limited only to such title as is possessed by the persons for whom the court is acting. In such cases we think the court may award or withhold such compensation as in its judgment and discretion appears to be equitable as between the parties. In 5 Pomeroy's Equity Jurisprudence, § 212, it is said of private sales by receivers: "A purchaser is bound to take such title as an examination of the proceedings shows that he will get. He is bound to examine for himself beforehand to see what title he will obtain by the sale." In *Campbell v. Parker*, 59 N. J. Eq. 342, 45 Atl. 116, Pitney, V. C., says: "A purchaser at a judicial sale is bound to take such title as an examination of the proceedings will show that he will get. He is bound to examine for himself beforehand to see what title he will

obtain by the sale. The court, however, treats a contract made with one of its officers as being made with the court itself, and will deal with its contractee upon equitable principles." In *Matter of Coleman*, 174 N. Y. 373, 66 N. E. 983, E. T. Bartlett, J., says: "As in case of other judicial sales, there is no warranty of title, express or implied, and the purchaser takes only the title which the corporation had, and he takes this title subject to any paramount liens or equities subsisting against the property"—citing 5 Thompson's Commentaries on the Law of Corporations, § 7013. In *Matter of Attorney General v. Continental Life Insurance Co.*, 94 N. Y. 199, Andrews, J., in affirming an order of the court refusing the application of a purchaser at a receiver's sale of an insolvent insurance company to complete the sale, says: "The court could, in the exercise of a just discretion, sanction or disapprove it, and the purchaser must be deemed to have purchased subject to this implied condition." In the case of *Parish v. Parish*, 175 N. Y. 181, 67 N. E. 298, Cullen, J., says: "An application to compel a purchaser to take title and that of a purchaser to be relieved from his bid are regarded as special proceedings. When the applications involve questions of fact or the exercise of discretion, the determination of such questions cannot be reviewed here; but, when they present solely questions of law, their examination is open to this court." In the case of *Farmers' Loan & Trust Company v. Bankers' & Merchants' Telegraph Company*, 119 N. Y. 15, 23 N. E. 173, Earl, J., after reviewing the facts in that case, says: "It is clear that the appellant had no absolute legal right to have the sale set aside, and it cannot be said that the court below was without discretion to deny the application, or that it abused its discretion." See, also, *Fisher v. Hersey*, 78 N. Y. 387; *Dennerlein v. Dennerlein*, 111 N. Y. 518, 19 N. E. 85; *Howell v. Mills*, 53 N. Y. 322. In the case of *People v. Open Board of Stock Brokers B. Co.*, 92 N. Y. 98, the purchaser was relieved from his purchase, and his deposit, interest, and reasonable expenses of investigating the title were directed to be paid to him. This case was a sale by a receiver; but the question raised and reviewed upon the appeal pertained to other matters, and no question appears to have been raised or discussed with reference to the allowances of these items. In *Drake v. Goodridge*, 6 Blatchf. 531, Fed. Cas. No. 4,063, it was held that if a purchaser refuses to complete his purchase on a sale of real estate by a receiver, on account of defect of title, and the receiver waives and consents that the sale should be held void, the purchaser is entitled to be paid by the receiver his legal expenses, including reasonable counsel fees, incurred in examining the title. This, however, was where the receiver waived and consented that the sale would be void. These are the prin-

cipal authorities upon the subject, to which our attention has been called by the respective parties, as well as those that we have been able to discover by our own examination. The courts doubtless have, in numerous cases, made allowances such as is claimed by the appellants in this case. They, however, have done so in the exercise of discretion in cases where it appeared just that an allowance should be made.

In the case under consideration, the court saw fit to deny the application of the purchasers for relief, so far as these items were concerned. As to the \$100 that the petitioners claimed for counsel fees in the presenting of the application for relief, that was discretionary, under the provisions of section 3240 of the Code of Civil Procedure. As to the justice of allowing the other items claimed, it depends upon the circumstances of the case. Upon referring to the contract, we find that the receiver simply approved the written offer that was presented to him, and is only bound in so far as such an acceptance would imply a promise on his part to perform. He does not appear to have known of the defect in the title until the adjourned day, when his attention was called thereto. It being a defect that could be cured, he asked the court to give him a reasonable time within which to perfect the title. This the court, in the exercise of its discretion, under the contract, had the power to grant. But the purchasers objected, and the court saw fit to refuse the application and ordered a return of the deposit without further allowances to the purchasers, possibly for the reason that they objected to giving the receiver reasonable time to perfect the title. This determination has been unanimously affirmed by the Appellate Division. We think that the order was discretionary, and that consequently this court has no power to review it.

The appeal should be dismissed, with costs.

VANN, J. (dissenting). It is an unjust rule which imposes an unequal burden upon the parties to a contract. In the case before us, if the purchaser had refused to complete his purchase without adequate cause, the court would have compelled him to perform his contract, and would have required him to pay all reasonable expenses arising from his default. In fact, however, the default was not made by the purchaser, but by the seller, and the courts have thus far relieved him from the payment of such expenses as, mutatis mutandis, it would have imposed upon the purchaser. He has thus been exempted from a liability which would have been cast upon his adversary under like circumstances. The reason given for this discrimination is that the seller is a receiver, and that his agreement to sell is virtually the agreement of the court. This distinction has no adequate founda-

tion, for a court which compels all persons to perform their contracts, or make good the default, should not fail to keep its own promise, and then refuse to compensate the other party for the expenses incurred in reliance thereon. It is an agreement made by an officer of the court, under its direction, less sacred than one made by an individual? The failure to perform by either party results in certain damages of the same nature, and why should not the duty of compensation be the same? If a promise made under the sanction of the court means less in law than the same promise made upon individual responsibility, there should be some plain reason for it capable of easy statement. The only reason given is that an individual represents himself only, while a receiver represents creditors. But why should creditors, thus promising through their representative appointed by the court, be under no legal obligation to pay damages for a default which, if made by the other party, would call for compensation as matter of law? The promise of the receiver was made for the purpose of benefiting the creditors, and the consequences of his mistake should fall upon them, if he acted in good faith, otherwise upon himself, but in no event upon the innocent purchaser. Creditors are entitled to their own, but they must get it from their debtor. If they directly or indirectly contract with a third party, they are entitled to no exemption because they are creditors. The law is not guilty of favoritism in the enforcement of contracts or in awarding or withholding damages for a violation thereof. Even interest on the sum deposited by the purchaser when the contract was made was not allowed him. Thus the representative of the creditors is permitted to retain for their benefit the amount earned by the deposit while it was in his possession. The rule laid down by the prevailing opinion will lead to a want of confidence in dealing with receivers, even when their action is approved by the court, and the result will be that they cannot sell property by executory contract for what it is really worth. Every risk lowers the price.

The purchaser, as I think, was entitled to some compensation, as a legal right, for the violation of his contract by the receiver. While the amount to some extent may depend upon the sound discretion of the court, the refusal to allow anything whatever was an error of law which requires the reversal of the order appealed from.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, and CHASE, JJ., concur with HAIGHT, J. HISCOCK, J., concurs with VANN, J.

Appeal dismissed.

(189 N. Y. 187.)

PEOPLE ex rel. LODES v. DEPARTMENT OF HEALTH OF CITY OF NEW YORK.

(Court of Appeals of New York. Oct. 1, 1907.)

1. HEALTH — REGULATIONS—VALIDITY—SALE OF MILK—PERMIT.

Sanitary Code of New York City, § 56, continued in force by the city charter (Laws 1901, p. 499, c. 466, § 1172), providing that no milk shall be received, held, kept, offered for sale, or delivered in the city without a written permit from the board of health, and subject to the conditions thereof, is a reasonable and valid exercise of the police power of the city, and not violative of the state or federal Constitution.

2. SAME—REVOCATION OF PERMIT.

The board of health of New York City may revoke a permit to sell milk, though no ordinance had been adopted by the board authorizing such revocation.

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—PROPERTY PROTECTED—PERMITS.

A permit granted by the board of health of New York City to relator to sell milk is not property of which, under the Constitution, he cannot be deprived without due process of law, but a mere license revocable by the board without notice or hearing, though, authorized by the permit, he has established a business of selling milk which has become property within the meaning of the Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 780, 831.]

4. HEALTH—ORDERS OF BOARD—REVIEW—APPEAL—CERTIORARI.

The statutes give the board of health of the city of New York no power to hear, try, or determine cases, and hence their powers are administrative merely, and their action in revoking a permit to sell milk is not subject to review by appeal or certiorari.

5. MANDAMUS—SUBJECTS AND PURPOSES OF RELIEF—ACTS OF MUNICIPAL BOARDS—MAKING AND ENFORCEMENT OF POLICE REGULATIONS.

Where the relator was charged with selling or offering for sale adulterated milk, and his permit to sell revoked by the board of health of New York City, if he wished to compel the board to rescind their action and to show that he was not guilty of the acts charged and a proper person to sell milk, his remedy was by an alternative and not a peremptory writ of mandamus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 143, 324, 325.]

6. HEALTH—LOCAL BOARDS—STATUTES.

Greater New York Charter, § 1173, 3 Laws 1901, p. 500, c. 466, relating to the city board of health, and providing that the actions of the board shall at all times be regarded as in their nature judicial and be treated as *prima facie* just and legal, and that all meetings of the board in every suit and proceeding be taken to have been duly called and regularly held, and all orders and proceedings to have been duly authorized, unless the contrary be proved, and that courts shall take judicial notice of the seal of the board and the signature of its secretary and chief clerk, does not change the members of the board from administrative to judicial officers.

7. SAME—REGULATIONS—PERMIT TO SELL MILK.

A person convicted four times of selling or offering for sale adulterated milk is an unfit person to receive a permit to traffic in milk.

Vann, J., dissenting.

Appeal from: Supreme Court, Appellate Division, Second Department.

Mandamus by the people of New York, on the relation of George Lodes, against the department of health of the city of New York, to compel the board of health of the respondent to rescind its action revoking permits issued to the relator to sell milk in the borough of Brooklyn. From an order of the Appellate Division (102 N. Y. Supp. 1145¹), affirming an order of the Special Term (100 N. Y. Supp. 788²), granting a peremptory writ, respondent appeals. Reversed, unless the relator within 20 days elects to demand an alternative writ, in which case proceedings should be remitted to the Special Term.

Wm. B. Ellison, Corp. Counsel (James D. Bell, of counsel), for appellant. Albert R. Moore, for respondent.

HAIGHT, J. On the 17th day of April, 1903, the board of health of the department of health of the city of New York issued to the relator, George Lodes, six permits to sell and deliver milk from wagons and from his store in the borough of Brooklyn, which permits were revoked by the board of health, without notice to him, on the 17th day of January, 1906. Thereupon the relator applied for a peremptory writ of mandamus to compel the board of health to rescind its action in revoking the permits, alleging that there was no public necessity for the revocation of the permits; that the action of the board was arbitrary and unreasonable, tyrannical and oppressive in the extreme, and beyond the power and authority conferred upon it by law. On the hearing of such application, the board of health presented affidavits showing that the relator, his wife, and the drivers of his wagons had been four times convicted of selling, or offering for sale, adulterated milk, and that their action in revoking his permits was based upon such repeated violations of the law, and that by reason thereof they deemed him an unfit person to traffic in milk. The Special Term granted the peremptory writ prayed for, and the affirmance of that order by the Appellate Division is now brought up for review.

The Sanitary Code of the city of New York, which was continued in force by the charter of the city (section 1172, c. 466, p. 499, Laws 1901), provides: "Section 56. No milk shall be received, held, kept, offered for sale or delivered in the city of New York without a permit, in writing, from the board of health and subject to the conditions thereof." The provisions of the Sanitary Code, alluded to, have been held to be reasonable and a valid exercise of the police powers, and violative of no provision of the Constitution, either state or federal. *People ex rel. Lieberman v. Vandecarr*, 175 N. Y. 440, 67 N. E. 913, 108 Am. St. Rep. 781, affirmed 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 305. It has also been held that the board of health has power to revoke permits to sell milk, notwithstanding no ordinance had been adopted by the board au-

¹ 116 App. Div. 890.

² 51 Misc. Rep. 180.

thorizing such revocation. *Metropolitan Milk & Cream Co. v. City of New York*, 113 App. Div. 377, 98 N. Y. Supp. 894, affirmed in this court 186 N. Y. 533, 78 N. E. 1107. These questions we regard as settled.

The only question remaining to be disposed of is as to whether the relator was entitled to notice and a hearing by the board of health before revoking his permits. The answer to this question may depend upon the soundness of the relator's contention that the permits issued to him were property, of which, under the Constitution, he cannot be deprived without due process of law. He maintains that he has established and built up a business of selling milk at his store and has a regular line of customers whom he supplies daily; that he has established a milk route over which his wagons are sent daily distributing milk to the inhabitants of the city in that locality; and that this established business has become property, of which he cannot be deprived. But the good will of his business, so established, must not be confounded with the permits granted to him to engage in that business. He was never licensed to sell impure and adulterated milk and after he had obtained his permits to sell and undertook the securing of customers, he knew that he was engaging in a business which must be conducted under the supervision of the board of health of the city subject to the police powers of the state, and that such permits were subject to revocation. He knew that the permits contained no contract between the state, or the board of health, and himself, giving him any vested right to continue the business, and that it would become the duty of the board to revoke his license, in case he violated the statute, or the conditions under which it was granted. Milk is an article of food extensively used by our inhabitants and is chiefly relied upon to support the lives of infant children. If impure or adulterated, or polluted with germs of dangerous or infectious diseases, its use becomes highly dangerous; and the health and welfare of the public demand speedy and, in some cases, instant prevention of its distribution to the people. While it is the duty of the board of health to watch and, through its inspectors, detect violations of the statute and the conditions imposed by it, it has been given no judicial power to hear, try, and determine such violations, but must act upon the information obtained by it through its own channels of inquiry. In *Cooley's Constitutional Limitations* (7th Ed.) p. 887, it is said that: "Dealers may also be compelled to take out a license, and the license may be refused to a person of bad reputation, or be taken away from a party detected in dishonest practices." In *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620, Mr. Justice Field says: "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful

trade or business, under such restrictions as are imposed upon all persons of the same age, sex, and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." In *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623, the same justice, in speaking of the interest or estate acquired by persons, says: "It is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure, or tend to secure, them against the consequences of ignorance and incapacity as well as of deception and fraud." In the case of *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 667, Wright, J., in delivering the opinion of the court, says: "Licenses to sell liquors are not contracts between the state and the persons licensed, giving the latter vested rights, protected on general principles and by the Constitution of the United States against subsequent legislation; nor are they property in any legal or constitutional sense. They have neither the qualities of a contract nor of property, but are merely temporary permits to do what otherwise would be an offense against a general law." In other words, a license is not a contract or property, but merely a temporary permit issued in the exercise of the police powers to do that which otherwise would be prohibited. *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Commonwealth v. Kinsley*, 133 Mass. 578; *Volght v. Board of Excise*, 59 N. J. Law, 358, 36 Atl. 686, 37 L. R. A. 292.

Matter of Lyman, 160 N. Y. 96, 54 N. E. 577, is not in conflict with the authorities above referred to. The question arose under our liquor tax law. That statute, as its title indicates, imposed a tax which was required to be paid in advance. It, however, could be transferred from one place to another, could be sold and assigned to other persons, and, in case a person who had paid the tax desired to discontinue the business, he could have a rebate for the period of time for which he had paid, accruing after he had ceased to traffic in liquor. It was therefore regarded as property, and could not be taken from the person paying the tax, except in the manner designated by the statute. *Laws 1896*, pp. 67, 68, c. 112, §§ 25, 26, 27.

We incline to the view that the authorities to which reference has been made are conclusive upon the subject; and, although the relator had established a business and se-

cured customers under the permits granted to him, the permit itself cannot be treated as property in any legal or constitutional sense, but was a mere license revocable by the power that was authorized to issue it. The statute, as we have seen, has given the board of health no power to hear, try, or determine cases. Its duties are therefore not judicial, but executive or administrative, and at times must be exercised summarily, as was said in *Metropolitan Board of Health v. Heister*, 37 N. Y. 661: "The power to be exercised by this board upon the subjects in question is not judicial in its character. It falls more properly under the head of an administrative duty." The court in that case had under consideration the question of the abating of a nuisance, or the recovery of a penalty therefor, occasioned by the alleged maintenance of a slaughterhouse in a densely populated portion of the city in such a manner as to endanger the health of the inhabitants. But we see no reason why the power of the board of health in that case should differ from the powers of the board in this case. Each have reference to the preservation of the public health, and, if their powers are administrative in that case, they must be in this case. In *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 35 N. E. 320, 23 L. R. A. 481, 37 Am. St. Rep. 522, the board of health of the city of Yonkers ordered the abatement of a nuisance. The relator, affected by the determination, sought a review by certiorari. Earl, J., after reviewing the statute creating the board and defining its powers, says: "There is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given and cannot be implied from any language found in either act or from the nature of the subjects dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so." It was consequently held that the determination of the board of health as to the existence of a nuisance was not reviewable by certiorari. See, also, *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785, in which Chief Judge Cullen has recently reviewed the authorities upon the subject, pointing out the difference between judicial powers and the action of administrative or executive officers.

The powers of the members of the board of health being administrative merely, they can issue or revoke permits to sell milk in the exercise of their best judgment, upon or without notice, based upon such information

as they may obtain through their own agencies, and their action is not subject to review either by appeal or by certiorari. *Childs v. Bemus*, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57; *State ex rel. Cont. Ins. Co. v. Secretary of State*, 40 Wis. 220; *Wallace v. Mayor, etc., of Reno*, 27 Nev. 71, 73 Pac. 528, 63 L. R. A. 337. If, however, their action is arbitrary, tyrannical, and unreasonable, or is based upon false information, the relator may have a remedy through mandamus to right the wrong which he has suffered. If the relator can show that he and those acting for him have not been convicted of violating the statute and the conditions imposed in the granting of the permits, and that consequently he is a fit and proper person to engage in the sale and distribution of milk among the inhabitants of the city, then he would be entitled to the relief asked for. But if he desired to submit such evidence, he should have asked for an alternative rather than a peremptory writ. If, however, the charge of the board is true that he has been convicted of the offenses charged the number of times stated, the conclusion is irresistible that he was an improper person to be intrusted with the permit of the city to dispense to the inhabitants of the city a food product that was liable, if adulterated, to endanger the health of the people.

It is now contended, however, that the members of the board of health are judicial officers and act as such by virtue of the provisions of section 1173 of the Greater New York charter. 3 Laws 1901, p. 500, c. 466. It will be necessary to consider the whole section, for we think the subsequent provisions indicate the intention and purpose of the former. It is as follows: "The actions, proceedings, authority, and orders of said board of health shall at all times be regarded as in their nature judicial, and be treated as *prima facie* just and legal. All meetings of said board shall in every suit and proceeding be taken to have been duly called and regularly held, and all orders and proceedings to have been duly authorized, unless the contrary be proved. All courts shall take judicial notice of the seal of said board and of the signature of its secretary and chief clerk." Were these provisions intended to change the character of the board of health from administrative to judicial officers? We think not. They do not state that the board shall act judicially, or that its orders shall be regarded and treated as the orders of a judge or court, but merely that they shall be regarded in their nature judicial, and that they shall be treated as *prima facie* just and legal, and that all orders and proceedings have been duly authorized. To our minds it is quite apparent that the legislative purpose and intent was to invest the orders and proceedings of the board of health with the presumption that they were duly authorized and were just and legal, and that it was not intended to change the members of the

board from administrative to judicial officers. These provisions have already been the subject of judicial consideration, with a result that accords with our views. In the case of *Golden v. Health Department of City of N. Y.*, 21 App. Div. 420, 421, 47 N. Y. Supp. 623, Justice Rumsey says: "It is quite true that it is provided that the action, proceedings, authority, and orders of the board of health shall at all times be regarded as in their nature judicial, and be treated as *prima facie* just and legal. This provision of the statute has been in existence for many years, but it has never been regarded as making the board of health a court whose orders are final and conclusive. Indeed, it makes no provision for any such thing. The statute prescribes the effect which shall be given to these orders, and that is that they shall be regarded as *prima facie* legal. Thus much was clearly within the power of the Legislature; and the statute imposes upon persons who question the orders of the board of health in such cases the duty of establishing that the facts upon which they are based do not exist, or that the orders themselves are beyond the authority given to the board by the law. Further than that the statute does not go."

City of Buffalo v. Chadeayne, 134 N. Y. 163, 31 N. E. 443, was an action to recover a penalty for an alleged violation of an ordinance prohibiting the erection of a wooden building within the fire limits of the city. The common council had passed a resolution giving the defendant permission to erect such building. He thereupon entered upon the construction of the building and incurred liabilities for work and material and had a property interest in them. Thereafter the common council rescinded the permit, and after the defendant had completed the building the city brought action for a penalty. It was held that, after the defendant had entered upon the construction of the building pursuant to the permit, and had entered into contracts and incurred liabilities, he acquired a vested right of property therein of which he could not be deprived. This case is not in conflict with those to which we have referred, but rather is in accord therewith, and illustrates the difference that exists between permits under which a vested right may be acquired and those in which such rights do not vest. One is a permit to construct a building, and the other a permit to peddle milk. To the same effect is *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, and *City of Lowell v. Archambault*, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. (N. S.) 458.

The order should be reversed, and the application for a mandamus denied, with costs in all courts, unless the relator within 20 days elects to demand an alternative writ, in which case the proceedings should be remitted to the Special Term, and the costs should abide the final award of costs.

VANN, J. (dissenting). If the order revoking the license of the relator was an administrative act, no notice to him was required; but, if it was an act done in the exercise of judicial power, notice and an opportunity to be heard were essential before he could be deprived of the right to carry on a lawful business. The Greater New York charter provides that: "The actions, proceedings, authority and orders of said board of health shall be at all times regarded as in their nature judicial and be treated as *prima facie* just and legal." Laws 1901, p. 500, c. 466, § 1173. While it is difficult to see how all acts of the board of health can be "in their nature judicial," the Legislature had the right to provide that they should be so regarded, and in view of its express command I fail to see how we can hold that the order of revocation was an administrative act. Notice was given in the only case involving the power to revoke that has been before us prior to the one now under consideration. *Metropolitan Milk & Cream Co. v. City of New York*, 113 App. Div. 377, 98 N. Y. Supp. 894; 186 N. Y. 533, 78 N. E. 1107. While summary action is often necessary in cases affecting the public health, still the danger from delay caused by giving short notice is less than the danger that may arise from action with no notice at all. The respondent should at least have had an opportunity to raise an issue as to whether he had ever been convicted by a court of competent jurisdiction of violating the Sanitary Code, or to show that any judgment of conviction had been reversed or set aside.

Moreover, a license under the police power, as distinguished from the taxing power, involves the right to regulate, but not to prohibit, and it cannot be exercised capriciously or arbitrarily. As the right to revoke is not expressly conferred, but is implied from the right to grant, the rule against arbitrary or capricious action applies with equal force to the revocation of licenses. One of the most effective safeguards against the arbitrary acts of public officials is an opportunity to be heard. The revocation of the respondent's license involved the destruction of his business, which was useful, legitimate, and profitable. Since the power to revoke is not expressly given, but is implied from the power to grant, I think the law also implies that notice must be given before an act can be done which involves such serious loss to the licensee. This involves the conclusion that the revocation of such a license as the one in question is in its essence judicial, independent of the statutory requirement that it shall be so regarded. I vote to affirm.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HISCOCK, and CHASE, JJ., concur with HAIGHT, J. VANN, J., reads dissenting opinion.

Order reversed, etc.

(189 N. Y. 241)

GRANT v. CANANEA CONSOL. COPPER CO. et al.

(Court of Appeals of New York. Oct. 1, 1907.)

1. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—SERVICE OF PROCESS.

Code Civ. Proc. § 1780, providing that an action may be maintained by a citizen of the state against a foreign corporation for any cause of action, and section 432, subd. 1, providing that personal service of summons upon a foreign corporation may be made within the state by delivering a copy thereof to its president, etc., do not violate the provision of Const. U. S. Amend. 14, which prohibits depriving any person of property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 929.]

2. CORPORATIONS—FOREIGN CORPORATIONS—PROCESS—SERVICE.

Under the express provisions of Code Civ. Proc. § 432, subd. 1, service of summons upon a foreign corporation may be made within the state by delivering a copy to its president, etc., even if the foreign corporation has not designated or authorized any person to accept service upon it in the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2603-2626.]

3. SAME—VALIDITY UNDER FEDERAL RULE.

The president of a Mexican corporation was also the president and owner or controller of all the stock of a West Virginia corporation organized as a holding corporation for the stock of the Mexican corporation and another. The office of the holding corporation was in this state, where the president conducted its business, which included the management and control of the business of the Mexican corporation, which had a sum of money to its credit with the holding corporation in this state, and which also owned a bank that carried deposits in banks of this state. In an action in the Supreme Court against the Mexican corporation and others, personal service was had on the president of the Mexican corporation in this state. *Held*, that the business and property relations were such that the service was good even under the decisions of the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2603-2626.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by James A. Grant against the Cananea Consolidated Copper Company, impleaded with William C. Greene and others. From an order of the Appellate Division (102 N. Y. Supp. 642, 117 App. Div. 576), reversing an order of the Special Term, denying a motion to vacate service of summons, plaintiff by permission appeals, and the Appellate Division certifies a question to the Court of Appeals. Reversed, and question answered.

Samuel S. Watson, for appellant. F. W. M. Cutcheon, for respondent.

HAIGHT, J. The Appellate Division, in allowing an appeal to this court, certified the following question: "Upon the facts appearing upon this application, did the Supreme Court of this state acquire jurisdiction of the Cananea Consolidated Copper Company, Sociedad Anonima, in this action."

It appears from the allegations of the complaint that James A. Grant, the plaintiff, is

the owner of stock in the defendant Cobre Grande Copper Company, an Arizona corporation, of which the defendant William C. Greene is the president and the owner of the majority of the stock; that the plaintiff brings this action in behalf of himself and of all other stockholders of the corporation similarly situated, to have the defendant Cananea Consolidated Copper Company, a Mexican corporation, adjudged to be the holder, in trust, for the benefit of the Cobre Grande Copper Company of certain mines and mining properties situate in the republic of Mexico, of which the defendant William C. Greene is also the president and owner or controller of substantially all of the stock of the corporation, and to compel such corporation and William C. Greene, its president, together with the Greene Consolidated Copper Company, a West Virginia corporation, of which he is also the president and the owner or controller of substantially all of its stock, to account to the Cobre Grande Copper Company and to the plaintiff for the income and profits arising from the work, use, and occupation of such mines and mining properties. The complaint alleges, in substance, that the Greene Consolidated Copper Company was organized as a holding company of the stock of both the Cananea and Cobre Grande Companies, and to take over and dispose of the ores produced by those companies. The action was commenced by the personal service of a summons within this state upon William C. Greene, individually and as president of the three corporations named. The uncontroverted facts, as appear from the affidavits read upon the hearing of the motion, are substantially as follows: William C. Greene is a resident of the city of New York, and the Greene Consolidated Copper Company maintains an office at No. 24 Broad street in that city, where its president, Greene, conducts the general business of the corporation. The Cananea corporation was organized for the purpose of holding legal title to the mines and properties situated in the republic of Mexico belonging to the Cobre Grande Company, to which under the Mexican laws it was unable to hold legal title, unless it incurred heavy taxes and expenses of legalization. As such it is engaged in the mining, reducing, and refining of ores at and near the city of Cananea in the state of Sonora, in the republic of Mexico, and the ores produced from such mines as soon as smelted and treated are transferred and delivered to the Greene Consolidated Copper Company, which company causes the same to be sold and shipped to such parts of the world as the purchasers may order. The Cananea corporation also owns and controls the Banco de Cananea, a bank doing business in the city of Cananea, which bank at times has credit balances with its correspondent bank in the city of New York. The Cananea Company draws drafts upon the Greene Consolidated Company for the purpose of meeting its expenses in

the working of the mines, and at the time this motion was made it had a sum of money to its credit with the Greene Consolidated Company. While the Cananea Company maintains no office, clerk, or employé in this state, and does not transact business here other than that referred to, the stock of the Cananea Company is owned by the Greene Company, and the business of the former company is managed, controlled, and its business conducted by the Greene Company through its president and officers at its office in Broad street in the city of New York. The question is thus presented as to whether, under the facts here presented, the courts of this state acquired jurisdiction of the plaintiff's cause of action by the service of a summons upon the president of the Cananea Company.

It will readily be seen that the situation is peculiar and differs from that of any other reported case, either in our own or the federal courts, to which our attention has been called. The Cananea Company certainly is a proper party in an action for an accounting. Whether it be a necessary party we do not now determine. If it is a necessary party, and the courts of this state have not acquired jurisdiction of it by the service of a summons in the manner set forth, it is not apparent how the minority stockholders of the Cobre Grande Company can obtain relief. Should they commence their action in the federal court, they would be met with the same difficulty with reference to the acquiring of jurisdiction over the Mexican corporation; and, should they go to Mexico and institute their action there, they would meet with a similar difficulty with reference to acquiring jurisdiction over the Cobre Grande and the Greene Consolidated corporations. We are not now concerned with the question as to whether the complaint states a cause of action, for the motion to set aside the service of the summons was based upon the grounds that the Cananea Company was a Mexican corporation which did not carry on business or maintain an office or possess property within this state, and did not have any officer, agent, or employé authorized to accept service of papers, and that the service made was in violation of the first section of the fourteenth amendment of the Constitution of the United States, and consequently did not give our courts jurisdiction. The provision of the Constitution referred to is that which prohibits the depriving of any person of property without due process of law. If the defendant Cananea Company is here to such an extent that we may acquire jurisdiction of it by the service of a summons, then our courts may determine as to the rights of the company in so far as it has property here over which the courts may acquire jurisdiction. If it has property or profits arising from the mining of ores in the hands of the Greene Consolidated Corporation which in equity belongs to our own citizens, they may apply to

the courts, either state or federal, to recover that which belongs to them, and such application is the due process of law which the Constitution recognizes and requires.

Section 1780 of the Code of Civil Procedure provides that an action against a foreign corporation may be maintained by a resident of the state for any cause of action, and section 432, subd. 1, provides that personal service of a summons upon a foreign corporation may be made within the state by the delivering of a copy thereof to its president, vice president, treasurer, or secretary. The service made herein strictly conforms to the requirements of the Code, and thereby operates to give our courts jurisdiction to hear and determine the claims of the parties and award the proper judgment, upon which process may issue to reach any property of the judgment creditor that may be within this state and subject to our jurisdiction. *Pope v. Terre Haute Car & Mfg. Co.*, 87 N. Y. 137; *Atl. & Pac. Tel. Co. v. Balt. & O. R. Co.*, 87 N. Y. 355. But it is contended that the provisions of the Code are violative of the provision of the Constitution of the United States, already referred to. This we cannot admit. The great business and commercial transactions of our citizens are now largely conducted through corporations, and no reason is apparent why foreign corporations should be treated differently from foreign individuals. If our citizens have claims against such corporations or individuals, who can be found here within our jurisdiction, they should be permitted to apply to the courts for relief, rather than be compelled to follow their debtors into foreign jurisdiction. It must be borne in mind that the provisions of the Code alluded to have reference to actions brought by residents of the state, and not to actions brought by non-residents or foreign corporations. The provision with reference to bringing such actions is very different. It is as follows: "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: (1) Where the action is brought to recover damages for the breach of a contract, made within the state, or relating to property situated within the state, at the time of the making thereof. (2) Where it is brought to recover real property situated within the state or a chattel, which is replevied within the state. (3) Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state." Code Civ. Proc. § 1780. Here we have specific limitations to the cases in which such actions may be brought which relate to causes of actions arising within the state for the breach of contracts made within the state, and to property situated within the state, which do not apply to actions by residents or domestic corporations. These provisions are violative of no provision of the

federal Constitution to which our attention has been called, nor do they conflict with the federal authorities upon the subject.

It is contended that the defendant the Cananea Company had not designated or authorized any person to accept service upon the company in this state. Very true, it had not; but under the provisions of the Code such designation is not necessary, provided the head officers of the corporation are here and can be served, such as the president, vice president, treasurer, or secretary. Section 432, subd. 2, of the Code contains provisions with reference to the designating of persons by corporations in this state upon whom service of process may be made. These provisions are only important when there is no president, vice president, treasurer, or secretary here. Under the third subdivision of the section further provision is made for cases where no designation has been made, and when neither of the officers above specified can be found within the state then service may be made upon a cashier, a director, or a managing agent of the company, if the corporation has property within the state or the cause of action arose therein. It will thus be seen that the Legislature has proceeded with much care in framing these provisions, carefully safeguarding the rights of foreign corporations as well as those of our own citizens. While the first subdivision of the section is exceedingly broad and authorizes the personal service of the summons upon the head officers of a corporation, specifically naming the president, vice president, treasurer, or secretary, the third subdivision, which authorizes the service upon the director, cashier, or managing agent, is limited to cases only in which the corporation has property within the state or the cause of action arose therein.

It must be conceded that, in so far as the service of process is concerned, the decisions of our own court are not in entire accord with those of the Supreme Court of the United States. In *Pope v. Terre Haute Car & Mfg. Co.*, supra, it was held that when the action was brought by a resident of this state the service of a summons upon the president of a foreign corporation while temporarily in this state was valid, even though the corporation had no office, transacted no business, and had no property within the state. In the case of *Goldney v. Morning News*, 156 U. S. 513, 15 Sup. Ct. 559, 39 L. Ed. 517, it was held that in such a case the service was not good. While we regret the difference in the views of the two courts, we recognize the fact that arguments may be presented in support of either position. It may be unjust to a corporation to be compelled to go into a foreign state to litigate actions when its president was served while traveling through the state upon other business. On the other hand, individuals so traveling may be served, and if a citizen has a cause of action against such a corporation, it would be equally un-

just to compel him to go into a foreign state to litigate his claim. In view of the fact that in recent years we have had many corporations organized in other states for the purpose of taking over the profits and proceeds of other corporations and distributing the same, whose officers and owners reside within our own state, the question of service of process upon such corporations has become one of importance. While we entertain the view that our statute upon the subject furnishes the safer and wiser rule to follow, we shall in this case recognize and attempt to follow the rule laid down by the federal court. In the case of *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113, the plaintiff, a resident of this state, brought an action in the state court against the defendant, a Virginia corporation. The record, however, does not show that the cause of action arose in this state. The defendant had designated no agent upon whom service could be made in this state, and none of its head officers were present within the state. It was doing no business and had no property within the state. Service was made upon a director who resided here. It was held that the service was not good. This decision was in accord with the provisions of the Code to which we have referred, for, under it, service can only be made upon a director where there is no designation of a person upon whom service could be made, and where the officers of the corporation cannot be found within the state, in cases where the corporation has property within the state, or the cause of action arose therein. In the case of *Lumberman's Insurance Co. v. Meyer*, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810, Meyer being the plaintiff below, it was held that, to obtain jurisdiction in New York, personal service of the summons upon the corporation must be made in the manner designated by section 432 of the Code of Civil Procedure of that state, and if the corporation has no property in the state, and service cannot be made on the president, vice president, treasurer, or secretary, and no person has been designated, such service can only be made on a director or person specified in subdivision 3 of that section, in case the cause of action arose within the state. The loss having occurred in that state, the service upon a director was good. In the case of *Brush Creek Coal & M. Co. v. Morgan-Gardner Elec. Co.* (C. C.) 136 Fed. 505, the defendant was an Illinois corporation, and the plaintiff a Missouri company. The defendant's general manager was in Wyoming on business, and when returning passed through Kansas City, Mo., at which place he stopped off to confer with the plaintiff's president with reference to the adjustments of their differences. While there the plaintiff's president caused to be served upon him, as an officer of the defendant, a summons in the action. The service was held good. *Amidon, J.*, in delivering the opinion

of the court, says: "If the officer served was a general officer of the corporation, then the extent of the business transacted by him in this state is of no importance in determining the question as to whether he is of an official rank such as to make him properly representative of the company. The precise question under consideration was before the Circuit Court for the Northern District of Illinois in the case of *Houston v. Filler & Stowell Co.*, 85 Fed. 757, and it was there held that, when the manager of a corporation goes into another state on the business of the corporation, service of summons against the corporation in a suit relating to that business may be made on him there, although the corporation does not transact business in the state so as to make it an inhabitant thereof. In my judgment the opinion in this case is a correct exposition of the law. Any individual may be served in any state where he is found without regard to the place of his residence. A corporation is entitled to no greater exemption." See, also, *Revans v. Southern Missouri & A. R. Co.* (C.) 114 Fed. 982.

We have already stated the facts under which the service was made in this case. As we have seen, Greene was the president of the Cananea Company, owning or controlling all the stock of the company. He had caused to be organized the Greene Consolidated Corporation as a holding company, to which he had transferred the principal part of the Cananea stock. He was also the president and owner, or controller, of all of the stock of the Greene Consolidated Company. Its office was located in New York City, where Greene resided and conducted its business, which included the management and control of the business of the Cananea Company. It appears to us that, under the facts appearing in this case, the service was valid, not only under the decisions of our court, but under those of the federal court as well.

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs in both courts, and the question certified answered in the affirmative.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, VANN, HISCOCK, and CHASE, JJ., concur.

Ordered accordingly.

(229 Ill. 85.)

KADISH et al. v. LYON.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. VENDOR AND PURCHASER—OPTION TO PURCHASE—INTEREST ACQUIRED.

Under a contract that decedent, his heirs or assigns, might purchase certain land at any time within 10 years at a fixed price, decedent and those succeeding him would acquire no interest in the land through such contract for an option until he or they had exercised their right to purchase; a provision that the contract

should be a covenant running with the land not altering the situation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 85, 87.]

2. EXECUTORS AND ADMINISTRATORS—DECEDENT'S CONTRACTS—PERFORMANCE BY ADMINISTRATOR.

An administrator may perform a contract of his intestate for the estate's benefit, without an order therefor from the county court, as expressly required by Hurd's Rev. St. 1905, c. 3, § 126, where the contract is not of a strictly personal nature, assuming the risk of being required to make good any loss that may ensue, and if he acts in good faith, without such order, to comply with intestate's contract, his acts as to the other party to the contract are binding upon the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 403-406.]

Error to Superior Court, Cook County; Marcus Kavanagh, Judge.

Bill by Hiram B. Kadish and others against Thomas R. Lyon. From a decree dismissing the bill for want of equity, complainants bring error. Affirmed.

On October 7, 1902, Hiram B. Kadish, Clara L. Kadish, and Marion B. Kadish, plaintiffs in error, by their guardian, Hiram Barber, filed their bill in the superior court of Cook county against Thomas R. Lyon, defendant in error, for the purpose of ascertaining and establishing their interest in certain real estate in the city of Chicago, the title to which was in said Lyon, and for other relief. The following statement is taken in large part from that found in plaintiffs in error's brief and argument: The bill alleges: That complainants are infant children and heirs at law of Leopold P. Kadish, deceased. That on September 1, 1890, Kadish, in his lifetime, entered into a 99-year lease, in writing, with Mendell and others, the then owners of lots 7 and 8 in a certain block in a subdivision in the city of Chicago, Ill., reserving as rent \$2,400 per year. That in said indenture it was, among other things, provided that said Kadish should, within one year from September 1, 1890, erect buildings upon said premises of the value of not less than \$50,000. That to secure the agreement to erect said buildings Kadish was required to and did enter into a bond to the said lessors in the penal sum of \$5,000. That said indenture contained a provision that said Kadish, his heirs or assigns, might acquire the full legal title to the said lots 7 and 8 in said indenture described, upon the payment of \$40,000 at any time within 10 years after the date thereof, "and this agreement shall be considered a covenant running with the land and be binding upon the heirs and assigns of said lessors." That by reason of said provision Kadish became seised and possessed of a conditional fee in the said premises and lots. That Kadish began the erection of certain structures thereon, but departed this life at Chicago, intestate, on December 28, 1890, leaving, him surviving, his widow, Helen L. Kadish, and the complainants, his only heirs at

law. That during his lifetime very little progress was made in the erection of said buildings. That the entire excavation for the foundations had not been made, nor had the major part of the foundations been completed. That complainants are not advised as to what, if any, contracts for the erection of said buildings were let by Kadish or by his authority during his lifetime, and show, upon information and belief, that if any contract had been let by him or by his authority during his lifetime the same did not involve an expenditure of more than \$15,000. That only a small amount of work had been done on said premises at the time of the death of Kadish, and the value of said work did not exceed \$5,000. That on January 8, 1891, Elbridge Hanecy, Edward Bertalot, and Helen L. Kadish were appointed administrators. That during the course of administration a large sum of money came into the hands of said Hanecy and Bertalot, as such administrators, to wit, more than \$100,000, and complainants were, respectively, entitled to a share of this sum as the heirs at law of said Kadish, deceased. That said moneys so received by said administrators, Hanecy and Bertalot, were trust moneys in their hands, held by them for the following purposes only, to wit: First, payment of expenses of administration; second, payment of such claims as should be allowed against the estate by the probate court of Cook county, Ill.; third, for distribution among the several heirs at law of the said Kadish, deceased. That said Hanecy and Bertalot, as such administrators, during the year 1891, without any authority in law whatever, diverted and misapplied the same, to the extent of \$90,000 and upwards, in and about the erection of said buildings. That the buildings comprise a four-story and basement brick and stone building situated on the west end of said lots, with a frontage of 100 feet on Wabash avenue and a depth of 48 feet, divided into stores below and 12 flats above, and a rear brick and stone building 134 feet deep by 92 feet wide, three stories high, entered by an inclosed passageway from the front of Wabash avenue. That Hanecy and Bertalot, immediately after their appointment as administrators, took possession of said premises and held possession and control thereof until on or about April 1, 1893, when such possession or control was surrendered by them to the said Helen L. Kadish and complainants, who thereupon entered into the possession and control of said premises and retained such possession and control until on or about July 1, 1902, when such possession was surrendered by them to the defendant, Lyon, the assignee of said Mendell and others, upon his demand therefor. That at the time of and during the progress of the erection of said buildings the said Mendell and others had notice and knowledge of the fact that said Hanecy and Bertalot, as such administrators, had taken possession of said premises and were improperly making use of

the moneys held by them in trust, as administrators, in the erection and construction of said buildings. That a very large proportion of the work, labor, and material made use of in the erection of said buildings was done and furnished under contracts made by various contractors with the said Hanecy and Bertalot, or with Messrs. Furst & Rudolph, the architects of said buildings, by the direction of said Hanecy and Bertalot, after the death of said Kadish, and that such contracts were made and entered into without any authority in law whatever, and were not the contracts of said Kadish, deceased. That in the then condition of the estate, and in view of the large amount of annual fixed charges upon said premises, including ground rent, taxes, etc., it was the plain and manifest duty of said administrators, upon their appointment as aforesaid, to so manage the affairs of said estate as to facilitate and provide for the early exercise of the right to acquire the fee-simple title to said premises under and in accordance with the terms and provisions of said written indenture of lease, and thus prevent the ultimate forfeiture of the interest of said estate therein, and that it was not within the scope of the lawful powers and authority of said administrators of said estate to engage in the erection of said buildings after the decease of Kadish. That the share or interest of the complainants in the said fund was \$60,000 and upwards. That no claims or demands allowed against the estate of said Kadish, deceased, now remain unsatisfied. That afterwards, on or about September 21, 1893, Mendell and others, owners of said realty, conveyed the same, and their interest in said lease, to defendant, Lyon. That afterwards, on May 13, 1902, defendant, Lyon, served upon complainants a notice of forfeiture of their right in said premises for the nonpayment of rent claimed by him to be due and payable under the terms of said lease, and subsequently, on June 30, 1902, said Lyon caused to be served upon complainants a final declaration of forfeiture of their interests, and that afterwards, on July 1, 1902, Lyon took possession and now claims to be the exclusive owner of said premises and the buildings thereon. That complainants are in equity entitled to a share or interest in said buildings for the said sum of \$60,000 and upwards, for their share in the said money so improperly diverted and misapplied by the said Hanecy and Bertalot, as administrators, and that such share or interest is in no manner subject to the rights or interest of said Lyon, and that complainants are entitled to have the same declared superior to the rights and interests of Lyon in said premises. The bill prays that defendant be required to answer, and that complainants may be declared to have a share or interest in and to said buildings to the extent of their interest in the moneys so diverted and misapplied by the said administrators in the erection and construction there-

of, and that such share or interest may be declared superior to the rights and interest of the said defendant, Thomas R. Lyon, in said buildings; that a receiver be appointed for the said buildings and income; that said Thomas R. Lyon may be required to account for rents and profits of said buildings; and that complainants may have such further and other relief in the premises as the nature of their case may require.

The only parties to the suit were the Kadish children, who were complainants, and Lyon, who was defendant. To the bill Lyon interposed a general and special demurrer, which was sustained by the court, and the bill was dismissed for want of equity. Complainants below bring the record here by writ of error, and urge that the superior court erred in sustaining the demurrer and dismissing the bill.

George F. Ort, for plaintiffs in error. Charles L. Bartlett and Sherman C. Spitzer (Harrison B. Riley, of counsel), for defendant in error.

SCOTT, J. (after stating the facts as above). Plaintiffs in error urge that by the indenture of September 1, 1890, which provided that Kadish, his heirs or assigns, might purchase from the lessors, their heirs or assigns, the property at any time within 10 years for the sum of \$40,000, and that this agreement should be considered a covenant running with the land, binding upon the heirs and assigns of said lessors, Kadish became, in equity, the holder of the fee in the premises, and that the same, upon his death, descended to his heirs. We think this ignores the distinction between a contract for the purchase of real estate and a contract by which the owner gives to another the option to purchase lands. Kadish and those who succeeded him would acquire no interest in the land by virtue of this contract for an option until he or they had exercised their right to purchase. *Bostwick v. Hess*, 80 Ill. 138; 18 Am. & Eng. Ency. of Law (2d Ed.) p. 632. The provision that the agreement to sell should be a covenant running with the land does not alter the situation. That was probably inserted by the parties to make certain the fact that the land, as well as the owners thereof, should be bound for the performance of the contract in the event that Kadish, or those succeeding to his rights, elected to purchase.

It is next urged that the administrators wrongfully used the trust fund in their hands in the construction of the buildings which had been begun by their intestate, and that for this reason plaintiffs in error have the right to follow the trust fund into the real estate, and be decreed to be the owners of the real estate, to an extent equal in value to the amount of the trust fund so improperly diverted. It appears from the bill that the administrators used the funds

of the estate to carry out the contract of the intestate, made with Mendell and his associates. Knowledge of that fact possessed by the owners of the real estate would not charge them with any equity in favor of the plaintiffs in error. The latter, however, by their brief and argument, urge that this fund was wrongfully used in the construction of the building, that the owners of the real estate had knowledge of that fact, and that for this reason the relief prayed by the bill should be awarded. The complaint is that the administrators did not obtain from the probate court any order or direction to carry out the contract of their intestate, as contemplated by section 126 of chapter 3, Hurd's Rev. St. 1905, which reads: "All contracts made by the decedent may be performed by the executor or administrator when so directed by the county court." We think that no case is by the bill made which authorizes the intervention of a court of equity. If an administrator elects to perform a contract entered into by his intestate for the benefit of the estate without obtaining the order or direction contemplated by section 126, supra, where the contract is not of a strictly personal nature, he may do so, taking upon himself the risk of being required to make good any loss that may ensue. If he obtains the order or direction contemplated by the statute after having fully disclosed to the court all the facts and circumstances proper for the court's consideration, and carefully and exactly carries out the order or direction, he will, no doubt, be thereby relieved from personal liability. If he acts without such order or direction, but in good faith, for the purpose of complying with the contract of the deceased, his acts, so far as the living parties to the contract are concerned, are binding upon the estate. *Smith v. Wilmington Coal Mining Co.*, 83 Ill. 498; *Jessup v. Jessup*, 102 Ill. 480. If the administrator and the living parties to the contract, under the guise of performing the contract, should fraudulently collude together for the purpose of making such disposition of the funds of the estate as that such funds would be lost to the estate and pass into the hands of and become the property of such living parties, a question not arising upon this record would be presented.

The decree of the superior court will be affirmed.

Decree affirmed.

(229 Ill. 42)

ROEBLING CONST. CO. v. THOMPSON.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF VICE PRINCIPAL.

The rule that a master is not liable for injuries to a servant through the negligence of a vice principal while acting as a collaborer with the injured servant, and where the injury is not the result of the exercise of the authority of

the vice principal, does not exempt the master from liability, where the injury results from the negligence of the vice principal as such, in combination with his negligence in the capacity of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 436.]

2. SAME.

Where defendant's foreman assumed to perform the duty of another servant, and negligently gave a signal for the descent of an elevator, whereby plaintiff, an employé, was injured, defendant was liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 436.]

Error to Appellate Court, Second District, on Appeal from Circuit Court, Kane County; H. B. Willis, Judge.

Action by Robert Thompson against the Roebling Construction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action of case, brought by Robert Thompson, against the Roebling Construction Company for damages resulting from a personal injury alleged to have been caused by the negligence of the servants of the Roebling Construction Company. A verdict for \$1,500 was recovered in the circuit court of Kane county, upon which, after a remittitur of \$500 was entered, judgment was rendered, which has been affirmed by the Appellate Court for the Second District. The Roebling Construction Company has sued out a writ of error from this court for the purpose of bringing into review the judgment of affirmance in the Appellate Court. At the time the injury was received plaintiff in error was engaged in fireproofing a four-story and basement factory building for the Elgin National Watch Company, in the city of Elgin. An elevator was being used for hoisting concrete to the fifth floor on the day of the injury to defendant in error. The concrete was placed in wheelbarrows and rolled onto the elevator, and then hoisted by steam to the fifth floor. The loaded wheelbarrows were then rolled off the elevator, and the material wheeled to the places where it was needed, dumped out, and the empty wheelbarrows returned to the elevator, and thence down the shaft of the elevator to be again loaded and sent up. The elevator was operated on its down trips by a signal, which was given by means of a bell rope which ran from the fifth floor of the building and was connected with a bell in the basement. Morrison was the foreman of plaintiff in error, and had entire charge of all the work connected with the fireproofing of the said building. The defendant in error, together with other employés, was engaged in removing the loaded wheelbarrows from the elevator and returning the empty barrows to and placing them upon the elevator. A boy was employed to operate the bell rope when the elevator was ready to descend. On the occasion when the accident happened the boy was temporarily absent from his post of duty. In the

absence of the bell boy Morrison gave an order to defendant in error and another laborer to "double those barrows up." This order was given in a sharp, peremptory manner, and the foreman manifested some irritation because the men on the fifth floor had allowed five or six empty barrows to accumulate, and ordered the defendant in error to "double them up" and to "hurry up." Defendant in error was then on the north side of the elevator, and another laborer was on the south side, and the two undertook to place two wheelbarrows on the elevator, one on top of the other, and while the defendant in error was placing the barrow, and standing with one foot on the elevator and the other on the floor and leaning over, Morrison, without any warning to defendant in error, pulled the cord and gave the signal to the engineer in the basement to start the elevator down. Defendant in error did not know that the signal had been given, and without any warning the elevator started down, and defendant in error followed it, bumping on the sides down the elevator shaft to the basement below, thereby receiving the injuries complained of.

Frank M. Cox and J. F. Damman, Jr., for plaintiff in error. Fisher & Mann and N. J. Aldrich, for defendant in error.

VICKERS, J. (after stating the facts as above). Plaintiff in error insists that this court should hold, as a matter of law, that the relation of fellow servants existed between Morrison, the foreman, and defendant in error, in relation to the act of Morrison in giving the signal to lower the elevator. It is contended that if Morrison was a vice principal in a general sense, yet when he undertook the performance of a duty which usually belonged to a fellow servant, he was, as respects that particular act, a fellow servant and not a vice principal. This rule invoked as applicable to the case of plaintiff in error is well established in this state and has been frequently applied by this court. *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288; *Gall v. Beckstein*, 173 Ill. 187, 50 N. E. 711; *Baier v. Selke*, 211 Ill. 512, 71 N. E. 1074, 103 Am. St. Rep. 208. The rule applied in the foregoing cases is that the master is not liable for an injury received by a servant through the negligence of a vice principal while acting as a collaborer with the injured servant, and where the injury is not the result of the exercise of the authority of the vice principal. It is no longer open to question in this state that the vice principal may, as regards certain acts, be a fellow servant with other servants over whom, in his capacity as vice principal, he has control and power of direction. This rule, however, will not exempt the master from liability where the injury results from the negligence of the vice principal as such, in combination with the negligence of such vice principal in

the capacity of fellow servant. This is the application of the well-recognized rule that where the injury results from the combined negligence of the master and the fellow servant, and the negligence of the master is such that the injury would not have happened but for his negligence, the master is liable.

The case of Norton Bros. v. Nadebok, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842, is in point on this question. Other authorities cited in the Nadebok Case are in line with it and fully sustain the conclusion there reached. That case is much like the case at bar in all of the essential facts. There the vice principal had commanded the servant to place his hand into a machine and take out a "catch," and while the servant's hand was in this machine the vice principal by his own act started the machinery going, resulting in an injury. In disposing of that case this court, on page 599 of 190 Ill., page 844 of 60 N. E. (54 L. R. A. 842), said: "It is admitted that Banning was a superior servant, and had authority from appellant to direct appellee to put his hand into the machine and take out the catch; but it is contended that as to the manual act of starting the machine at the instant when the injury occurred, as Banning had no delegated authority from the common master to order some one else to set the machine in motion instead of himself doing so, but was himself employed to do that act with his own hand, he was not, as to that act, the superior, but was the fellow servant of the appellee, and that appellant is not liable for the consequences of Banning's negligence in starting the machine while appellee's hand was in the same, as such negligence did not consist in the abuse of his delegated authority. In other words, it is conceded that Banning was a superior servant when he ordered appellee to put his hand into the machine and take out the catch; but, it is said, in the act of immediately starting the machine he was his fellow servant, and it is contended, as it is conceded that Banning was employed to operate said machine, the question as to whether he was the fellow servant of appellee at the immediate time when he started the machine is a question of law. We cannot agree with such contention. When the appellee was ordered by his superior servant to put his hand into the machine and take out the catch, in the absence of any warning or notice, he had the right to assume that his superior, who gave the order, would not by his own negligence make the act which he had commanded him to do, and which he was bound to obey, unsafe." This doctrine has been reaffirmed by this court in numerous later cases. Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Chicago & Eastern Illinois Railroad Co. v. Driscoll, 207 Ill. 9, 69 N. E. 620; Consolidated Coal Co. v. Fleischbein, 207 Ill. 593, 69 N. E. 903; Illinois Southern Railway Co. v. Marshall, 210 Ill. 562, 71 N. E. 597 66 L. R. A. 297. In our opinion the case at

bar is controlled on this question by the rule laid down in the foregoing authorities.

Plaintiff in error complains of improper and prejudicial remarks made by counsel for defendant in error during the trial; but upon examination it appears that the court sustained objections to all that was improper in this respect, and there is no ruling of the court upon this branch of the case that is complained of. We have carefully examined all of the objectionable statements of counsel, and we find nothing that would warrant us in reversing this judgment. There are no other errors insisted upon in plaintiff in error's brief.

The judgment of the Appellate Court for the Second District is affirmed.

Judgment affirmed.

(229 Ill. 81)

KELLY et al. v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. HOMICIDE—EVIDENCE—REPUTATION OF DECEDENT.

The prosecution in a homicide case cannot show the good reputation of decedent for peaceableness unless first attacked by accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 312, 313.]

2. SAME.

The prosecution in a homicide case cannot prove the good reputation of decedent for peaceableness, though accused offers evidence of his own good reputation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 313.]

3. SAME.

The testimony of the defense in a homicide case that decedent was a large and strong man, capable of taking care of himself, and that he was not a boxer and not a sparring partner of a pugilist, is not evidence of the bad reputation of decedent for peaceableness essential to permit the prosecution to prove his good reputation.

4. SAME.

In a homicide case, the reputation of decedent for peaceableness is presumed to be good until the contrary appears, and unless accused, though relying on self-defense, attacks the reputation, the prosecution cannot give evidence on that subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 313.]

Hand, C. J., and Scott and Carter, JJ., dissenting.

Error to Criminal Court, Cook County; J. W. Mack, Judge.

Thomas Kelly and another were convicted of murder, and they bring error. Reversed and remanded.

Symmes & Kirkland (John A. Rose, of counsel), for plaintiffs in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (James J. Barbour, of counsel), for the People.

FARMER, J. This is a writ of error sued out to the criminal court of Cook county to reverse a judgment of conviction for murder, rendered at the March term, 1907, against plaintiffs in error. Thomas Kelly, Ole Olson, Lant Maloney, and Charles Nyquist were

jointly indicted in Cook county for the murder of Joseph F. Messenie. Olson and Kelly were convicted of murder, and their punishment was fixed by the jury at imprisonment in the penitentiary for the term of 15 years each. Maloney and Nyquist were found guilty of manslaughter. A motion for a new trial was sustained as to Maloney and Nyquist and overruled as to Kelly and Olson, who sue out this writ of error and assign numerous errors on the record.

In the view we take of this case it will not be necessary to make an extended statement of the facts, nor will it be necessary to consider all of the assignments of error that have been argued in the briefs. After the prosecution had offered evidence tending to make out a case against plaintiffs in error, evidence was offered on behalf of the accused in support of the claim that the killing of the deceased was done in necessary self-defense. The evidence on behalf of the prisoners tended to show that the deceased had committed a serious assault upon Olson about four hours before the fatal difficulty, and the version given by plaintiffs in error of the difficulty in which the deceased was killed tends to show that the deceased was the aggressor on this occasion also. The evidence of plaintiffs in error was confined to the question of self-defense. The reputation of the deceased for peaceableness was not attacked by plaintiffs in error. After plaintiffs in error had rested their case, the people called Erich H. Ladish in rebuttal, and he testified as follows: "I live 632 Larrabee street. Am a druggist. Have been at 632 Larrabee street since April, 1894. I knew Joe Messenie in his lifetime very well, something like four or five years. I knew his reputation for peace and quiet. Q. What was that reputation? Mr. Symmes: I object to the state's showing the reputation of the deceased, for the reason that the defendants have not attacked his reputation for peace and quiet, and because it is not rebuttal. (Objection overruled. Exception by defendant.) A. Good." The state was permitted, over the objection of plaintiffs in error, to introduce Hamm, Ford, Killen, Weber, and Boch, all of whom testified that the general reputation of the deceased for peaceableness was good. The court instructed the jury that if they believed that the deceased, Joseph Messenie, at and before the commission of the crime charged in the indictment against the defendants, was of peaceable, quiet, and inoffensive disposition, and a man of good moral character, then these facts are to be received and weighed, together with the other evidence, in determining whether the defendants, or any of them, are guilty of the crime charged in the indictment. The errors assigned upon the admission of this evidence and the giving of this instruction may be considered together.

It is contended by the state that evidence of the general reputation of the deceased for

being a peaceable and quiet man was competent upon two grounds, namely, because the defendants sought to prove that the killing was done in self-defense, and also that it was proper in rebuttal of proof offered by defendants of the character of deceased. The exact question whether the state can introduce evidence of the good character of the deceased for peaceableness, in rebuttal, when defendant claims that the deceased assaulted him in such a manner as to justify a resort to self-defense, has, so far as our examination has disclosed, not been passed upon by this court. The question is therefore to be determined from a consideration of the principles of the common law as evidenced by the judicial decisions outside of this state. In the American and English Encyclopedia of Law (volume 25 [2d Ed.] p. 282) it is said: "The general rule is that the prosecution cannot introduce evidence to sustain the reputation of the deceased for peace and quietness until the defendant makes an attack upon him." In 21 Cyc. 907, it is said: "Ordinarily the character or reputation of the deceased person is not involved in the issue of murder, and proof relative thereto is generally inadmissible." In support of this text cases are cited in the notes from Alabama, California, Delaware, Georgia, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, New York, North Carolina, Pennsylvania, Tennessee, Texas, and Wisconsin. Again, on page 908, (21 Cyc.) the following qualifications of the rule above stated are given: "The general rule excluding evidence of the character of the deceased applies with equal force against the state and the defendant. The state will not be permitted to offer primary evidence of the character of the deceased for morals or for peace and quiet, although defendant offers evidence of his own good reputation; but where defendant attempts to show that the deceased was a violent and dangerous man the state may properly offer proof of his peaceable and law-abiding character, although defendant does not attack the general reputation of deceased for peaceableness and good disposition." In 3 Greenleaf (section 27) the rule is laid down as follows: "In regard to the character of the person on whom the offense was committed, no evidence is, in general, admissible; the character being no part of the *res gestæ*." To the same effect is Elliott on Evidence, § 2722. In McClain on Criminal Law (volume 1, § 423) the rule is laid down as follows: "Evidence of the character of the deceased as a quiet and peaceable man is not admissible as original evidence in behalf of the prosecution. The general character of the deceased as a violent and quarrelsome man cannot be shown in behalf of the defendant except as bearing on the question of self-defense, as already explained. Where such evidence is admitted on behalf of the defendant, the state may, in

rebuttal, prove that the deceased was of a peaceable character." In *Bishop on Criminal Procedure* (volume 2, § 612) the rule is stated as follows: "It is never competent for the prosecution to show, in the first instance, against the defendant, that the person slain was of good or peaceable character, but such evidence may be given in rebuttal if the opposite has been testified to by the defense."

A leading case on this subject is *State v. Potter*, 13 Kan. 414. Potter was on trial for murder. He relied on self-defense. The trial court allowed the state to introduce evidence of the character of the deceased for peace and quiet. In disposing of this question the Supreme Court of Kansas, speaking by Mr. Justice Brewer, said: "On the trial, and before closing their case, the prosecution was permitted, over objection, to ask witnesses, who had testified that they knew the deceased, this question: 'State if you knew his general reputation for being a peaceable, quiet, and law-abiding citizen,' and the witnesses testified that he was a peaceable, quiet and law-abiding man. No attack was made by defendant at any time during the trial upon the character of the deceased, and no attempt made to show that he was a quarrelsome or turbulent man. The question, then, is fairly presented whether the prosecution, on a trial for murder, may in the first instance, and as a part of the case, show the character and reputation of the deceased. We do not understand counsel for the state as claiming that such testimony is admissible in all cases, but only in cases where there is doubt as to whether the killing was done in self-defense, and where such testimony may serve to explain the conduct of the deceased, and is therefore a part of the *res gestæ*. In such cases it is said that the authorities hold that the defendant may show the bad character and reputation of the deceased as a turbulent and quarrelsome man. And if the defendant may show that the deceased was a known quarrelsome, dangerous man, why may not the state show that he was a known peaceable, quiet citizen? The argument is not good. The books are full of parallel cases. The accused may in some cases show his own good character. A party can never offer evidence to support a witness' credibility until it is attacked. The reasons for these rules are obvious. Such testimony tends to distract the minds of the jury from the principal question and should only be admitted when absolutely essential to the discovery of the truth. Again, the law presumes that a witness is honest, that a defendant has a good character, and that the party killed was a quiet and peaceable citizen, except so far as the contrary appears from the testimony in the case; and this presumption renders it unnecessary to offer any evidence in support thereof. No authorities have been cited sustaining the admission of such testimony, and the following are in point against it"—citing cases.

In *State v. Woodward*, 191 Mo. 617, 90 S. W. 90, the Supreme Court of that state expressed the following view: "It is insisted that the court erred in permitting the state to prove the good reputation of the deceased. This testimony, under the rules of evidence, could only be admissible to rebut the testimony elicited by the appellant affecting the reputation of the deceased. Unless the reputation of the deceased was put in issue by the appellant, then this testimony was clearly inadmissible." This case was not reversed, because the defendant had opened up the question of the reputation of the deceased. The same rule is announced in the decisions of many other courts, and among them the following may be cited: *Gregory v. State* (Tex. Cr. App.) 94 S. W. 1041; *Bowles v. Commonwealth*, 103 Va. 816, 48 S. E. 527; *Kennedy v. State*, 140 Ala. 1, 37 South. 90; *Jimmerson v. State*, 133 Ala. 18, 32 South. 141; *Pound v. State*, 43 Ga. 88; *People v. Bezy*, 67 Cal. 223, 7 Pac. 643; *Parker v. Commonwealth*, 96 Ky. 112, 28 S. W. 500; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *State v. Hogue*, 51 N. C. 381; *Commonwealth v. Ferrigan*, 44 Pa. 386; *Brucker v. State*, 19 Wis. 539; *State v. McCarthy*, 43 La. Ann. 541, 9 South. 493; *State v. Thawley*, 4 Har. (Del.) 562; *State v. Field*, 14 Me. 244, 31 Am. Dec. 52.

The Supreme Court of Indiana, in *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95, has determined this question the other way, holding that the reputation of the deceased for peaceableness is admissible as original evidence against one charged with murder where self-defense is relied upon. That decision does not appear to be supported by any authority, and we are not impressed with the reasoning upon which the conclusion rests. In *Carr v. State*, 21 Ohio Cir. Ct. R. 43, in commenting on this case, it is said that the Supreme Court of Indiana is alone in holding such evidence competent. Our own investigation will not justify us in a statement so broad, and we therefore prefer to limit our observation to this: that it appears to us that the decision in Indiana is opposed to the great weight of authority on this question.

Paul Messenle, brother of deceased, testified as a witness for the prosecution. On cross-examination he was asked: "Q. How tall are you? A. Five foot ten. Q. Your brother was a much bigger man than you? A. Yes, sir. Q. Weighed more? A. He did. Q. Your brother was a very muscular man? A. He was well capable of taking care of himself. Q. I am afraid the jury can't hear you, Mr. Messenle. A. Yes, sir; he was a strong man. * * * Q. Did he ever do any boxing? A. No, sir. Q. Wasn't he known as a sparring partner for Jack Root, the pugilist? A. Never." This is the only testimony that in any way related to the character of the deceased, and it is this evidence that counsel for the state claim it was com-

petent to rebut by proving the general reputation of the deceased as a peaceable and quiet man. It will be observed that the evidence quoted has no bearing whatever upon the character of deceased as to being peaceable and quiet, or quarrelsome and turbulent. It relates only to his size and strength. That a man is large and strong does not tend to prove that he has a violent temper, or was quarrelsome, aggressive, and addicted to fighting. A man may be large and strong and yet be peaceable and quiet, or he may be small in stature and be very quarrelsome, violent, and belligerent. Proof that deceased was peaceable and quiet did not rebut testimony that he was large and strong. To rebut means to contradict by counter proof, or repel by opposing testimony. Evidence to rebut the proof that deceased was large and strong would be required to be confined to a contradiction of that proof, and this would necessarily limit it to evidence that the fact was otherwise than as testified to on behalf of the plaintiffs in error.

Counsel for the state rely upon *Davis v. People*, 114 Ill. 86, 29 N. E. 192, as an authority supporting the ruling of the court in admitting the testimony complained of. That was a murder case, and the defense was self-defense. It was complained in this court that the trial court erred in permitting the prosecution to prove, in rebuttal, the character of the deceased as a peaceable man. The court said (page 95 of 114 Ill., page 195 of 29 N. E.): "It seems defendant had proved deceased was regarded as a 'good man in a fight,' and many other things that tended to show his character as a quick-tempered, violent, and rash man. After such evidence had been admitted, the prosecution was permitted to prove the character of deceased as a peaceable man, and this is the evidence that is complained of as being incompetent and hurtful. What defendant proved concerning deceased was equivalent to proving his general character as a violent and fighting man, and there was certainly no serious error, if there was any at all, in permitting the prosecution to rebut such evidence of character by proving, as was done, his general character as a quiet and peaceable man."

It is clear from this statement that the proof made in the *Davis* Case by defendant as to the character of the deceased was of an entirely different nature from the proof here made. In the case before us there was no proof made by plaintiffs in error tending to show that deceased was "a good man in a fight," or "a quick-tempered, violent, and rash man," or evidence "equivalent to proving his general character as a violent and fighting man." If such proof had been offered, then the evidence introduced by the state, under the authorities hereinbefore cited and many others that might be noted, would have been competent; but under the state of this record we are of opinion proof of the peaceable and quiet character of deceased

was incompetent. The rule to be deduced from the authorities upon this subject is that the character of the deceased as a peaceable and quiet man is presumed to be good until the contrary appears, and unless defendant introduces evidence attacking the general reputation of the deceased in that respect no evidence upon that subject is admissible; and this is true notwithstanding self-defense may be interposed and relied upon. It necessarily follows that if the proof offered in rebuttal by the state was incompetent it was erroneous for the court to instruct the jury as to the weight to be given it.

Other errors insisted upon need not be considered. Any question that may exist as to whether issue was properly joined upon a plea of not guilty can be obviated on the next trial by requiring an arraignment and plea before the trial is entered upon.

For the errors committed in admitting this evidence and in giving this instruction the judgment of the criminal court of Cook county is reversed, and the cause remanded.

Reversed and remanded.

HAND, C. J. (dissenting). I do not agree to the conclusion reached by the majority opinion in this case. The killing of Joseph F. Messenie by the plaintiffs in error was admitted, and the only defense interposed by them in the trial court was that they took his life in self-defense. Messenie, some hours before he was killed, and Olson, had a fight upon a street car in the city of Chicago, and thereafter they met upon one of the public streets of the city; Kelly, Maloney, and Nyquist being in company with Olson. A second fight ensued, in which the four assaulted Messenie, and during the fight Messenie was shot and killed by Olson or one of his companions. It was claimed by plaintiffs in error the deceased was the aggressor on both occasions, and proof was brought out by the plaintiffs in error, upon the cross-examination of a brother of the deceased, that the deceased "was a strong man"—that he was "capable of taking care of himself." In view of the contention of the plaintiffs in error and the testimony brought out on cross-examination by the plaintiffs in error, I am of the opinion proof that the deceased was a quiet and peaceable man was properly made under the authority of *Davis v. People*, 114 Ill. 86, 29 N. E. 192. I think the jury were clearly justified in finding, from the evidence, that the deceased was attacked by Olson and his three companions, four in all, as he was on his way home, in company with a friend; that he was knocked down; that one of the Olson party shot and killed him while he was down; that the jury were right in finding, from the evidence, that the four men, one of whom was armed with a revolver, were not justified in taking the life of the deceased, who was not armed, on the ground that they were acting in self-defense.

There was no element of self-defense in the case. If, therefore, the evidence that the deceased was a quiet and peaceable man was improperly admitted, the evidence of guilt of the plaintiffs in error was so strong that the judgment should not be reversed by reason of the admission of such evidence, as the law is well settled in this state, if the competent proof clearly justifies a verdict of guilty in a criminal case, a judgment of conviction should not be reversed by this court by reason of the admission of incompetent evidence, if it appears, as it does here, the admission of the evidence complained of could not reasonably have affected the result of the trial. *Jennings v. People*, 189 Ill. 320, 59 N. E. 515.

SCOTT, J. (dissenting). In my judgment the admission of evidence that the deceased was a quiet and peaceable man does not warrant reversal in this case.

CARTER, J. (dissenting). Even though the evidence in question be considered improper, its admission, in my judgment, should not reverse this case.

(229 Ill. 98)

EAST ST. LOUIS CONNECTING RY. CO. v. MEEKER.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DUTY OF FOREMAN OF SWITCH CREW.

Where a foreman ordered a switchman to cross over moving cars and uncouple a car from the wrong side, it was the foreman's duty not to stop the train until the switchman had made the uncoupling and reached a place of safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 267.]

2. SAME—ACTIONS—QUESTIONS FOR JURY.

In an action for injuries to a switchman while uncoupling a car, the questions of proximate cause, contributory negligence, and assumed risk held under the evidence to be for the jury.

3. SAME—FELLOW SERVANTS.

Where the master has conferred upon a member of a class of workmen carrying on a particular branch of his business authority to control or direct the movements of men under his charge, while in the exercise of such authority the relation of fellow servants does not exist.

4. SAME—QUESTION FOR JURY.

In a negligence action, the question whether a foreman of a switching crew and a member of the crew are fellow servants held under the facts to be for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1062.]

5. SAME—PLEADINGS AND PROOF—VARIANCE.

There is no material variance between an allegation that plaintiff was injured while upon the left side of a coal car attempting to uncouple a box car therefrom, and proof that he was injured while upon the north end of the coal car pulling the pin with the lever on the left side of the box car.

Appeal from Appellate Court, Fourth District, on Writ of Error to City Court of East St. Louis; W. J. N. Moyers, Judge.

Action by Jesse Meeker against the East

St. Louis Connecting Railway Company. From a judgment of the Appellate Court for the Fourth District (119 Ill. App. 27), affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action on the case commenced in the city court of East St. Louis by the appellee, against the appellant, to recover damages for a personal injury alleged to have been sustained by him while in the employ of the appellant as a member of a switching crew in its yards at East St. Louis, through the negligence of the foreman of the switching crew of which he was a member, in consequence of which he was thrown from a coal car to the track between the cars of a moving train, and run over and so injured as to necessitate the amputation of both legs and his left arm. The case has been twice tried. The first trial resulted in a verdict and judgment for the appellee in the sum of \$25,000, which judgment was reversed, on appeal, by the Appellate Court for the Fourth District for errors in two of the appellee's given instructions. The second trial resulted in a verdict and judgment in the same amount, which was affirmed on appeal to the Appellate Court for the Fourth District for the sum of \$15,000, after the appellee had, by direction of that court, to avoid a reversal, consented to a remittitur of \$10,000, and the case is brought to this court by the defendant by a further appeal.

The case was tried, upon the first hearing, upon an amended declaration which contained six counts, all of which counts were eliminated upon the second trial but the first and second, which, in substance, are as follows:

First Count. For that, whereas, the said defendant was on, to wit, April 10, 1903, possessed of and operating certain locomotive engines, cars, trains of cars, railroad tracks, and railroad yards in or near the city of East St. Louis, in St. Clair county, Ill., and on the said date defendant was engaged in switching certain railway cars by means of a certain locomotive engine, which said engine and train of cars were in charge of a night switching crew of defendant, which crew, including plaintiff, was under the direct supervision and control of a certain foreman by the name of Dwyer, who was not then and there a fellow servant of plaintiff, and plaintiff was then and there in the employment of the said defendant as a member of said switching crew in the capacity of switchman, it being the duty of plaintiff to couple and uncouple cars and to do the work usually and ordinarily done by a switchman of a switching crew, and plaintiff was then and there inexperienced in said work and was unfamiliar with the hazards and dangers incident thereto; that one of the couplers with which the said cars were coupled, and which said plaintiff was attempting to operate, was defective and out of repair, so that said cars could not be uncoupled from the side on

which plaintiff was working; and that, in obedience to the direct and specific order of the said foreman, who then and there had authority to direct and order the plaintiff in and about said work, plaintiff got upon one of said cars and crossed over the same to uncouple said cars from the opposite side, and said foreman then and there knew, or should have known, that to suddenly check the motion of said moving cars while the plaintiff was uncoupling said cars, or before he had fully regained his balance after having uncoupled the same, would necessarily place plaintiff in a perilous and very dangerous position, and would in all probability cause him to fall upon said railroad tracks in front of said cars; that while plaintiff was attempting to uncouple said cars, or after having just uncoupled the same, and while in the exercise of reasonable and ordinary care and caution for his own safety, the said foreman of the defendant negligently and carelessly signaled and caused the engineer in charge of said locomotive engine to suddenly check the motion of said locomotive engine and cars thereto attached, which caused the said cars to jerk or jolt, thereby throwing said plaintiff from said car to the ground there and upon the tracks over which said cars were being propelled, and some of said cars then and there ran over said plaintiff, thereby crushing, mashing, and mangling said plaintiff's legs and left arm so that it became necessary to amputate both of said legs and said arm, whereby said plaintiff was seriously and permanently injured, and became sick, sore, lame, and disordered, and so remained from thence hitherto, and thereby plaintiff suffered great pain of body and mind, and will continue so to suffer through his entire lifetime, and has lost a large amount of wages and has been deprived of his means of livelihood, and has expended and will expend a large amount of money for nursing, medicines, and medical attention in endeavoring to be cured of said injuries, which said injuries were directly and proximately caused by the negligence of the foreman in carelessly causing the engineer to suddenly slacken the speed of such locomotive engine and cars thereto attached while plaintiff was attempting to uncouple said cars, or was in the act of regaining his balance after having uncoupled same, in obedience to a direct and specific command and order of said foreman.

Second Count. For that, whereas, also, the said defendant, on the date aforesaid, was possessed of and operating certain other locomotive engines, cars, and trains of cars, railroad tracks, and railroad yards in or near the city of East St. Louis, in St. Clair county, Ill., and was on the date aforesaid engaged in switching railway cars by means of a certain locomotive engine, which said engine and train of cars were in charge of a certain night switching crew of defendant, which said crew, including plaintiff, was un-

der the direct supervision and control of a certain foreman by the name of Dwyer, who was not then and there a fellow servant of the plaintiff, and plaintiff was then and there in the employment of the said defendant as a member of said switching crew, in the capacity of a switchman, it being the duty of the plaintiff to couple and uncouple cars and to do the work usually and ordinarily done by a switchman of a yard switching crew, and plaintiff was then and there inexperienced in said work and was unfamiliar with the dangers and hazards incident thereto; that occasionally couplers by which the cars were uncoupled would become out of repair on the working side, so that the same could not be used or the cars uncoupled, and it would thus become necessary to uncouple said cars from the opposite side, and it was, under such circumstances, great negligence in a foreman of a switching crew to order or knowingly permit the switchman to get upon the cars and uncouple the same therefrom on the opposite side while in motion, and plaintiff did not then know of the dangers and hazards incident to the uncoupling of cars in this manner; that on the date aforesaid, at nighttime, it became and was the duty of plaintiff to uncouple certain cars then and there being pushed and propelled in said yards by a certain locomotive engine, and plaintiff was unable to uncouple said cars on the regular and proper side for uncoupling the same on account of a certain coupler being out of repair, and said foreman then and there wrongfully, negligently, and carelessly ordered and directed plaintiff to cross over said cars while in motion and uncouple said cars from a certain car on the opposite side while in motion, and plaintiff, in obedience to said direct and specific order and command of his superior, which order and command he was then and there bound to obey, and while in the exercise of ordinary care and caution for his own safety, got upon one of said cars, crossed over to the opposite side thereof and uncoupled said cars from said side while in motion, and while uncoupling the same, or just after having uncoupled the same, the speed of said cars was suddenly slackened, which caused a jolt or bump, and thereby plaintiff was thrown off of said car to and upon the ground there and upon the tracks over which said cars were being propelled, and some of said cars then and there ran over plaintiff, thereby crushing, mashing, and mangling plaintiff's legs and left arm so that it became necessary to amputate both of said legs and said arm, whereby plaintiff was seriously and permanently injured, and became sick, sore, lame, and disordered and so remained from thence hitherto, and thereby plaintiff suffered great pain of body and of mind and will continue so to suffer during his entire lifetime, and the plaintiff has lost a large amount of wages and has been deprived of his means of livelihood, and has expended and will expend a

large amount of money for nursing, medicines, and medical attention in endeavoring to be cured of said injuries, which said injuries were directly and proximately caused by the careless and negligent order of said foreman, Dwyer, in directing and commanding the plaintiff to get upon and cross over to the opposite side of one of said cars and to uncouple therefrom certain of said cars while in motion—to the damage of the plaintiff in the sum of \$50,000, and therefore he brings his suit, etc.

There is little conflict in the evidence, which fairly tends to show that the appellee, on the 10th day of April, 1903, was in the employ of the appellant as a member of a switching crew, consisting of an engineer, fireman, foreman, two switchmen, and a pin puller; that appellee had been in the employ of the appellant from the previous fifth day of October; that for the first three months he was an extra man and only worked a part of the time; that for the next three months he worked usually as a switchman but occasionally as a pin puller; that the switching crew to which he belonged worked at night, and that the appellee had worked as a pin puller all the night of the 9th of April and from 6:30 P. M. to the time he was injured, which was at eleven o'clock P. M. of the night of the 10th; that it was the duty of appellee, when acting as a pin puller, to pull the coupling pins and cut the cars loose as they were being run over the lead track to different switches; that the switch tracks in the yard where appellee was injured ran north and south and at their southern extremity connected with the main lead track running northwest and southeast; that at the southern extremity of said switchyard a single track runs south across Cahokia creek. In carrying on the work of switching each car was marked in a way to indicate which switch it was to go upon. The cars thus marked were then pushed ahead of the engine toward and over the lead track with such rapidity that, when the speed was suddenly checked by the application of the brake upon the engine, sufficient momentum had been acquired by the head car, which had been formerly uncoupled from the train by the pin puller, to go upon the switch, which had been adjusted to receive it by a switchman, without the application of other force. The usual method employed by the company in its switchyard to uncouple cars, when being thus handled, was for the pin puller to go upon the moving cars on the right-hand side, and after the cars were in motion to pull the coupling pin between the cars to be detached from the rest of the train, and when the cars had attained sufficient speed to kick the car in upon the switch and to the place where it was sought to be placed, the foreman, who also worked upon the right-hand side of the train, would signal the engineer to apply the brake, and the car detached would then go forward upon the

switch prepared for it by a switchman. The cars were equipped with what are called "Janney automatic couplers," and when the cars are connected they are about four feet apart. They were uncoupled by pulling a lever at the end of the car, located near the bottom of the car and about one foot from the side. The lever, which was perpendicular, was attached to a horizontal rod which operated the coupler. On the side of each car, near said lever, was an iron stirrup and handhold. On the night of the accident, at about 11 o'clock, the engineer took seven cars from track No. 9, on the east side of the yards, north of Cahokia creek, and pulled them south beyond the end of the lead track and across the trestle over the creek, intending to push them back and kick the seven cars onto the proper switches. They were all box cars but one, which was a coal car, and which was the second from the north end of the train. The night was dark, with a drizzling rain, and the headlight of the engine came close up against the end of the box car. The car at the north end was to be run in on switch No. 6, which was some distance from track No. 9, and the coal car next to it was to be let in on a different track. As the train started up appellee got on the coal car while it was north of the trestle, and, standing in the stirrup on the right-hand side of the car, tried to pull the pin with the lever on that car. At that time the engineer was in his cab on the right-hand side, and Dwyer, the foreman, was standing a few feet north of the second switch, on the right-hand side of the train. Hennebery, one of the switchmen, was at the third switch north of the bridge over the creek, standing on the left-hand side of the track. The switches were from 60 to 70 feet apart. After pulling at the lever several times without effect appellee discovered that it was broken, and as he approached Dwyer he called to him that "the damned old thing is broke," when Dwyer called back to him to "hip over," which expression was shown by the evidence to mean to go on the other side of the car. Appellee then went over to the other side of the car. The lever on that side to be used in uncoupling the car was not upon the coal car, but upon the end of the box car just north of the coal car. The endgate of the coal car was lying flat upon the car floor, but the upright wooden stanchion that the gate closed against was standing, and appellee took hold of it with his right hand, stooped down, and with his left hand reached over and took hold of the lever on the box car to make the uncoupling. He pulled the lever, when the car upon which he was riding jerked suddenly, and he fell forward upon the track, and three cars of the train passed over him. The jerking of the train was caused by the application of the brake, made by the engineer in response to the signal given by Dwyer. There is evidence in the record to the effect that it was the custom of the appellant, when a car

could not be uncoupled from the right-hand side by the throwing of the lever, to stop the train and make the uncoupling from the left-hand side.

The negligence relied upon as a basis of recovery in the first count is the giving to the engineer, by Dwyer, of a signal to stop the train after he had ordered appellee to uncouple the car from the left-hand side while the train was in motion, before he had given the appellee time to make the uncoupling, and that relied upon in the second count is the giving of the order by Dwyer to appellee to "hip over" after he knew the appellee was unable to make the uncoupling from the right-hand side, instead of stopping the train while the uncoupling was being made from the left-hand side.

J. M. Hamill, M. V. Joyce, and E. C. Kramer, for appellant. Daniel McGlynn, M. W. Schaefer, and M. W. Borders, for appellee.

HAND, C. J. (after stating the facts as above). It is first contended that neither of the counts of the declaration upon which the case was submitted to the jury is sufficient to sustain a judgment in favor of the appellee, as it is said no facts are stated in either of said counts from the existence of which the law will imply a duty on the part of appellant to protect the appellee from the injury of which he complains. In *McAndrews v. Chicago, Lake Shore & Eastern Railway Co.*, 222 Ill. 232, 78 N. E. 603, it was said that, in an action on the case to recover for a personal injury three facts must be made to appear: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complains; (2) a failure of the defendant to perform that duty; and (3) an injury to the plaintiff resulting from such failure. From an examination of the averments of the first and second counts of the declaration as they appear in the statement preceding this opinion, we think it clearly appears that a duty rested upon the appellant to not stop said train until the appellee had made the uncoupling and reached a place of safety, and that a duty rested upon the appellant not to send the appellee into a dangerous place, and while he was executing the order of his foreman, in such place, to increase the danger of the place by suddenly stopping said train. We think therefore the counts of the declaration upon which the case was tried sufficient to support the judgment rendered in favor of the appellee.

It is next urged that the negligence averred in the first and second counts of the declaration was not the proximate cause of the injury, as it is said the proximate cause of the injury was the negligence of the appellee in attempting to make the uncoupling while upon the coal car, instead of from the stirrup of the box car. It is also said the appellee

should be barred of a right of recovery by reason of the fact that he was guilty of contributory negligence, and that he assumed the risk of being injured in the manner in which he was injured. We think these positions of the appellant entirely ignore the fact that there is evidence in this record which tends to show that the usual method of uncoupling, when the uncoupling could not be made from the right-hand side of the train, was to stop the train and make the uncoupling from the left-hand side, and that the appellee notified the foreman that the lever upon the right-hand side of the coal car would not work, and the foreman then ordered him to go upon the other side, and that while he was making the uncoupling upon the left-hand side the foreman gave the engineer the signal to stop the train before the appellee had time to make the uncoupling and assume a place of safety, and that by reason of such signal the train was suddenly stopped, and the car upon which the appellee was standing was jerked, and he, by reason of that fact, was thrown from the car and injured. The questions of proximate cause, contributory negligence, and assumed risk usually are questions of fact to be determined by the jury, and in this case, in view of the evidence, we think those questions were properly left to the jury, and that this court cannot say, as a matter of law, that the sending of appellee to the left side of the car, and then ordering the train suddenly stopped, was not the proximate cause of the injury, or that the appellee, by attempting to uncouple the car while standing upon the coal car, was guilty of such contributory negligence as to defeat a recovery, or that he assumed the risk of being injured in the manner in which he was injured when he entered the employ of the appellant, as the cause of his injury was the result of the improper order of the foreman in ordering the appellee to "hip over," and then ordering the train to be suddenly stopped before he had time to make the uncoupling from the left-hand side and regain a place of safety. We think therefore the court did not err in declining to take the case from the jury for those reasons.

It is next urged that appellee and the foreman, Dwyer, were fellow servants, and that, although it be conceded that Dwyer was guilty of the negligence which caused the injury of appellee in signaling the engineer to stop the train before appellee had time to make the uncoupling, there can be no recovery. This contention of appellant ignores the negligence averred in the second count of the declaration, which is said to consist of the action of Dwyer in giving a negligent order to the appellee to "hip over," in disregard of the established custom in appellant's yard to stop the train when an uncoupling was to be made from the left side of the car. The question whether the servants of the common master are fellow servants is usually a question of fact, and where,

as here, the master has conferred upon a member of a class of workmen carrying on a particular branch of his business authority to control or direct the movements of the men under his charge while in the exercise of such authority, the relation of fellow servants does not exist. *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288. In *Chicago, Rock Island & Pacific Railway Co. v. Strong*, 81 N. E. 1011, the foreman of a switching crew and a switchman were held not to be fellow servants; and in *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 207 Ill. 9, 69 N. E. 620, it was held whether an assistant yardmaster, who was acting as vice principal of the railroad company, was a fellow servant of the members of a switching crew, in giving a signal to the crew to move a train of cars, was a question of fact for the jury. The trial court, we think, properly submitted the question of whether Dwyer and appellee were fellow servants to the jury.

It is also insisted that there is a material variance between the declaration and the proofs, in this: That the counts of the declaration upon which the case was tried averred that the appellee was injured while he was upon the left side of the coal car uncoupling the box car therefrom, while the evidence showed he was upon the north end of the coal car. The real contention of the appellant, is not that the appellee should have been upon the outside of the left side of the coal car, but that he should have been in the stirrup upon the left side of the box car in front of the coal car at the time he attempted to make the uncoupling. The undisputed evidence is that in making an uncoupling the pin puller remains upon the car attached to the train from which the car is cut, otherwise he would be carried away with the car cut from the train. We think therefore the jury were justified in finding, from the evidence, that, when Dwyer ordered appellee to "hip over," he meant that he should get onto the coal car and pull the pin with the lever on the left side of the box car, leaving it to appellee to select the place upon the coal car where he would stand while in the act of pulling the pin, as there was no stirrup and handle upon the left side of the north end of the coal car; and that the language used in the first and second counts of the declaration does not signify that appellee was upon the outside of the left side of the coal car when he attempted to pull the pin and uncouple the box car, but that he was upon the left side of the car, which language would as well apply to the left side of the coal car inside the car, as to the left side of the coal car outside the car. We do not think there was any material variance between the declaration and the proofs.

It is finally urged that the court erred in giving to the jury appellee's third instruction and in modifying two, and in refusing to

give one of appellant's instructions, and that the court erred in admitting evidence on behalf of the appellee and in rejecting evidence on behalf of appellant. We have examined these contentions and do not think the court committed reversible error in instructing the jury or in ruling upon the evidence. The appellee's third instruction announced the rule which should govern the jury in fixing the amount of appellee's damages in case the jury found in his favor, and is not subject to the criticism that they were not to be confined to the evidence. The modified instructions did not change the rules of law announced therein, but only tended to bring them into harmony with the entire series of instructions offered upon behalf of the appellant, and the instruction refused was covered by other instructions given to the jury, and the rulings upon the evidence were upon immaterial matters which in no way could have affected the result of the suit.

The law governing this case is well settled; the only difficulty being its application to the facts in proof. There was but little opportunity for controversy over the facts in the trial court, and the facts and the inferences to be drawn therefrom having been found by the jury in favor of the appellee, and the findings of the jury having been approved by the trial and Appellate Courts, this court is powerless to disturb such findings.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(229 Ill. 119.)

DILLARD et al. v. JONES et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. EVIDENCE — PAROL — INVALIDATING WRITTEN INSTRUMENTS — MISTAKE.

Parol evidence, in support of mistake, fraud, surprise, or accident, may, in proper modes and limits, be admitted to vary written instruments.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1969–2029.]

2. REFORMATION OF INSTRUMENTS — GROUNDS — MISDESCRIPTION IN DEEDS.

Equity has jurisdiction to correct misdescriptions in instruments conveying property, under decree of court, when the proof is clear and the rights of innocent third parties have not intervened, even though the mistake runs through the entire judicial proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 42–60.]

3. SAME.

Where plaintiff under a decree of sale purchased for cash 85 acres of land, and has since been in undisputed possession of all of it, and the court papers and the master's deed, while showing that the 85 acres, being all of the real estate left by the deceased, was intended to be sold to plaintiff, yet so misdescribed the land that two tracts thereof overlapped, thereby decreasing the number of acres, and this mistake was common to all the parties in interest, equity will correct the master's deed and declare the plaintiff the owner in fee simple of the entire 85 acres, provided no rights of innocent third parties have intervened.

Appeal from Circuit Court, Franklin County; E. E. Newlin, Judge.

Bill to quiet title and correct decree by E. N. Dillard and others against William M. Jones and others. From a decree granting part of the relief prayed, plaintiffs appeal. Reversed and remanded.

This is a bill to quiet title and correct decree, filed in the circuit court of Franklin county to the November term, 1905. It alleges that Kinchen H. Jones died testate March 15, 1890, in that county, seised in fee simple of 85 acres of land, described as follows: The S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 33, township 7 S., range 2 E. of the Third principal meridian, in Franklin county, Ill.; also 10 acres off the north side of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 4, township 8 S., range 2 E.; and 15 acres off of the N. W. corner of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 4, 40 rods east and west and 60 rods north and south—the two last-mentioned pieces being in Williamson county, Ill. By his will Jones divided said land equally between his wife, Susan A., and three of his children, Sophia, Le Roy, and Robert M. The widow intermarried with one Michael Lipsey, and there was born of this union one son, Michael S. Lipsey. Robert M., one of the legatees under the will, died in 1894, intestate, leaving his mother, a brother, and a sister of the whole blood and nine brothers and sisters of the half blood, his only heirs at law. Michael S. Lipsey died intestate the next day after his half-brother, Robert M., and left, him surviving, as his only heirs at law, his mother and father, a brother and a sister of the whole blood and four half-sisters. Susan A. Lipsey died intestate January 20, 1896, leaving surviving as her only heirs at law her husband, Michael Lipsey, and Sophia and Le Roy Jones, her children.

At the April term, 1896, of the Franklin circuit court, Cave J. Jones and six of the other children of Kinchen H. Jones by his first wife filed their bill for partition of the lands willed by said Kinchen H. Jones to his second wife, Susan A. Jones, and his three children by her, claiming an interest therein and making all other persons interested parties. By mistake of description said lands in Williamson county were erroneously described as 10 acres off of the north side of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 4 and the N. W. part of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 4, containing 15 acres, all in township 8 S., range 2 E., in Williamson county, Ill. The land in Franklin county was correctly described. It will be noted that said erroneous description as to said 10 acres made that tract overlap and take in a part of the 15 acres; that the error consisted in describing the 10 acres as part of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section 4, instead of as part of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$. The cause was referred to a master in chancery

to take and report proofs. The court decreed partition, and commissioners were appointed and reported that the premises were not divisible without manifest prejudice. The report is, in part, as follows: "We further report the value of said premises as follows, to wit: Ten acres off the north side of the S. E. N. W. of sec. 4, T. 8, R. 2 E., in Williamson county, Illinois, we value at \$150 (one hundred and fifty dollars). The N. W. part of the S. E. $\frac{1}{4}$ N. W. of sec. 4, T. 8, R. 2 E., in Williamson county, Illinois, containing fifteen acres, we value at \$225 (two hundred and twenty-five dollars). Part of the S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of sec. 33, T. 7, R. 2 E., in Franklin county, Illinois, containing sixty acres, we value at \$1,000 (one thousand dollars)." The court approved the commissioners' report and ordered that the lands be sold by the master. The master advertised the property and sold it to appellant E. N. Dillard, as the highest and best bidder, on December 12, 1896. In his report he described the property sold, as follows: "Ten acres off of the north side of the southeast quarter of the northwest quarter, also the northwest part of the southeast quarter of the northwest quarter, all in section four (4), township eight (8), south, and range two (2), east of the Third principal meridian, in Williamson county, Illinois, containing fifteen (15) acres; also part of the south half of the southwest quarter of section thirty-three (33), township seven (7), south, and range two (2), east of the Third principal meridian, in Franklin county, Illinois, containing sixty (60) acres." Said appellant Dillard paid for said land, and the money is shown by this report to have been distributed by the master to the heirs of Kinchen H. Jones. January 12, 1897, the master gave a deed to said E. N. Dillard of said property, reciting that it had been sold to him at public auction, and that, he being the highest and best bidder and having fully complied with the terms of the sale, said master did grant, bargain, sell, and convey to said Dillard, his heirs and assigns, real estate described substantially the same as in the report of sale. Appellant E. N. Dillard went into immediate possession of the entire 85 acres, including the 10 acres in the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 4, but which was improperly described in all the papers that are a part of the partition proceedings as being in the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$. E. N. Dillard had, prior to the filing of the bill herein, sold to two other parties portions of the land bought by him at the master's sale, but had made no conveyance of the 10-acre tract in the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 4. Shortly before the filing of the bill in this case appellant E. N. Dillard sought to have an abstract prepared covering the lands, and then discovered the mistake in the description of the 10-acre tract.

The proof showed that in probating the estate of said Kinchen H. Jones, his wife, who was administratrix, in giving the de-

scription of the property, made the same error in describing the said 10 acres, but she listed the land as three separate tracts and gave each a value, making it evident that this 10-acre tract was intended to be described as a separate piece, even though the description partially included it in the 15-acre piece. The chancellor in this proceeding, after hearing evidence at the November term, 1906, entered a decree setting up substantially the facts as hereinbefore stated, finding that said Kinchen H. Jones died seised of said 85 acres of land, properly describing all the pieces, including said 10 acres. That said partition proceedings had been instituted; that it was intended therein to properly describe said land, but that said error was made in describing the 10-acre tract. That all parties had properly been brought into said partition proceedings and were also made parties to this proceeding, and said partition proceedings "were regular in all respects save in this: That the 10 acres of land so owned by the said Kinchen H. Jones at the time of his death, hereinafter particularly described, was imperfectly and incorrectly described in all the proceedings had therein." That the master in chancery, under the order of court, attempted to sell all the real estate of which the said Kinchen H. Jones died seised, and the sale was made in accordance with proper notice. That E. N. Dillard became the purchaser of said lands. That the master executed and delivered to said Dillard a deed to the lands, and said Dillard immediately went into the actual, open, and notorious possession and control of the lands of which the said Kinchen H. Jones died seised and which were so imperfectly described in said deed. That he and his grantees had been in actual, open, and notorious possession and control of the premises since January 12, 1897, and had paid all the taxes and assessments and were then in the possession of the same. The court further found that E. N. Dillard and his grantees were the legal owners of all the other real estate hereinbefore described of which said Kinchen H. Jones died seised, except the 10 acres improperly described in said partition proceedings, and as to that the decree found that appellants were "not entitled to the relief prayed for in their said bill as to 10 acres off the north side of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 4, township 3 S., range 2 E. of the Third principal meridian, in Williamson county, Ill., and the complainant E. N. Dillard is not the owner of said 10 acres last above described as he has in said bill of complaint alleged," and as to this 10 acres the bill of said complainants was dismissed by the decree. From this decree appellants prayed an appeal to this court.

James P. Mooneyham and Joplin & Spiller, for appellants

CARTER, J. (after stating the facts as above). Appellees filed no brief in this case.

The work therefore of investigating and deciding the legal questions involved has been greater than if the customary aid in that regard had been received.

The doctrine is elementary that parol evidence is not, in general, admissible between the parties to vary a written instrument, whether the same has been voluntarily adopted or made in pursuance of legal necessity. It is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to this otherwise universal doctrine. Parol evidence in support of these exceptions may, in proper modes and limits, be admitted to vary written instruments. These exceptions rest upon the highest motives of policy and expediency, for otherwise an injured party would generally be without remedy. 2 Pomeroy's Eq. Jur. (1st Ed.) § 858; 1 Beach on Modern Eq. Jur. §§ 48-51; 1 Story's Eq. Jur. (12th Ed.) § 138, and note on "Mistake of Fact." This doctrine has been applied many times by this court in the correction of deeds and contracts made out of court where the mistake was one of fact, mutual and common to all the parties to the instrument, and the proof clear and convincing. *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 431; *Hunter v. Bilyeu*, 30 Ill. 228; *Lindsay v. Davenport*, 18 Ill. 375. This court has also, upon bill in equity, corrected the description of the land in a master's deed in a foreclosure proceeding, where the property was properly described in the mortgage and in the advertisement of sale (*Foster v. Clark*, 79 Ill. 225), and in a sheriff's deed where the proceedings leading up to it were regular (*Gilbreath v. Dilday*, 152 Ill. 207, 38 N. E. 572); but so far as we are advised there has been no case in this court similar to the one here presented, where the misdescription occurs in all of the court papers, including the bill for partition, decree of sale, advertisement, and master's deed.

This question, however, has been passed upon in other jurisdictions. In *Waldron v. Letson*, 15 N. J. Eq. 126, a parcel of land had been struck off under foreclosure decree and conveyed to the purchaser under a mistaken impression that the mortgage covered the entire tract; the price for the entire tract being bid and paid and the purchaser put in possession. It was afterwards discovered that from a mistake in the description in the mortgage a portion of the premises was not covered by it. The description in all of the foreclosure proceedings followed the mistake found in the original mortgage. The court held that the mistake could be corrected in equity, stating that the fact that the mistake originated in the mortgage and was repeated throughout the entire proceedings, "while it increases the apparent difficulty in administering relief, does not affect the substantial equity of the case; * * * that where a parcel of land is sold under decree of foreclosure and is struck off and conveyed to the purchaser under an erroneous impression that

the mortgage covered the entire tract, the price as for the entire tract being bid and paid and the purchaser put in possession, and it is afterward discovered that from a mistake in the description the mortgage does not cover the entire premises intended to be mortgaged, by reason whereof the legal title fails, the purchaser is entitled to be protected in the peaceable possession of the land purchased." To the same effect are *Loss v. Obry*, 22 N. J. Eq. 52, and *Zingsem v. Kidd*, 29 N. J. Eq. 516. In *Fore v. Foster*, 86 Va. 104, 9 S. E. 497, it was held that chancery had jurisdiction to correct mistakes, whether occurring in the course of legal proceedings or elsewhere, and in case there was no neglect or laches this could be done even though the statute of limitations had run. In *Pulliam v. Wilkerson*, 66 Tenn. 611, it was held that chancery had jurisdiction to correct errors of description of land sold under proceedings for partition instituted in the county court. In that case the land was described as being in district 2, when, in fact, it was in district 3. In *Gill v. Pelkey*, 54 Ohio St. 348, 43 N. E. 991, it was held that equity had jurisdiction to correct a mistake in a deed in proceedings by an administrator in the probate court to sell land of an intestate. The mistake in that case was not only in the deed, but in the report of the appraisers to the probate court before the land was ordered sold, and the purchaser, on account of the mistake, obtained more land than was intended to be sold and more than he paid for. In *Smith v. Butler*, 11 Or. 46, 4 Pac. 517, a misdescription of the land originated in the report of the referees and was confirmed by the court and incorporated in the decree. It was held that equity would grant relief and correct the mistake. In *Cosby's Heirs v. Wickliffe*, 51 Ky. 202, a commissioner appointed by decree of the chancellor sold two-thirds of the estate, but reported that he had sold the entire estate, and in obedience to the order of court conveyed the whole; but, it clearly appearing that it was intended to sell only two-thirds, the court there held that equity could correct the error. The Supreme Court of Indiana has held that where the property was misdescribed in the mortgage, and was sold under foreclosure by this wrong description, equity did not have jurisdiction to correct the mistake in the foreclosure proceedings. *Miller v. Kolb*, 47 Ind. 220; *Lewis v. Owen*, 64 Ind. 446. It has been held, however, by that court that equity had jurisdiction to correct the description in the original mortgage, and that another sale by the proper description could be ordered. *Armstrong v. Short*, 95 Ind. 326; *Conyers v. Mericles*, 75 Ind. 443. The courts of New Jersey, California, and Florida have held that equity had jurisdiction to correct the error in one proceeding without first re-

forming the mortgage and ordering another sale. *Waldron v. Letson*, supra; *Quivey v. Baker*, 37 Cal. 465; *Greeley v. De Cottes*, 24 Fla. 475, 5 South. 239.

We think the great weight of authority is that equity has jurisdiction to correct such mistakes when the proof is clear, and the rights of innocent third parties have not intervened, even though the mistake runs through the entire judicial proceedings. In addition to the cases already referred to, the following authorities tend to support this conclusion: *Jeremy's Eq. Jur.* *492; 2 *Pomeroy's Eq. Jur.* (1st Ed.) § 871; *Baxter v. Tanner*, 35 W. Va. 60, 12 S. E. 1094; *Dodson v. Lomax*, 113 Mo. 555, 21 S. W. 25; *Howlett v. Central Carolina L. & I. Co.*, 50 S. C. 1, 27 S. E. 533; *First Nat. Bank v. Brenneeman's Ex'rs*, 114 Pa. 315, 7 Atl. 910; *Gillespie v. Moon*, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec. 559; *Snyder v. Ives*, 42 Iowa, 157; 12 *Ency. of Pl. & Pr.* p. 111, and cases there cited.

Appellant E. N. Dillard cannot be charged with negligence or laches in this matter. The record in this case discloses that the partition proceedings, the report of the commissioners, the master's report, the decree, and the master's deed all described 85 acres of land, and that the 10 and 15-acre tracts, which by this description overlapped, were clearly separate pieces, otherwise there would have been less than 85 acres. That all of the said 85 acres, being all of the real estate left by said Kinchen H. Jones, deceased, was intended to be sold to said E. N. Dillard in said partition proceedings. That he paid for all of it. That he has been in undisputed possession of all of it since that time. That the purchase money was distributed to the parties entitled by law to receive it; that no rights of innocent third parties have intervened as to the land in question. That there was a mistake of fact in the partition proceedings; that is, that said 10 acres were incorrectly described. That this mistake was common to all parties connected with the proceedings, and that all persons interested were made parties to said proceedings. Manifestly, on this showing, under the authorities cited, equity and justice require that the master's deed in the partition proceedings should be corrected as prayed, and that the decree should find that appellant E. N. Dillard was, at the time the bill herein was filed, the owner in fee simple of said "10 acres off of the north side of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ " of section 4, in township 8 S., range 2 E. of the Third principal meridian, in Williamson county, Ill., in accordance with the prayer of said bill.

The decree of the circuit court will accordingly be reversed and remanded to that court, with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded.

(229 W. 170)

DAVID BRADLEY MFG. CO. v. CHICAGO & SOUTHERN TRACTION CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. EMINENT DOMAIN—STATUTORY PROVISIONS—INTERURBAN RAILROADS.

The general railroad act (Hurd's Rev. St. 1905, p. 1564, c. 114, § 1) authorizes any number of persons, not less than five, to incorporate, to construct and operate a railroad. The act of 1889 (Hurd's Rev. St. 1905, p. 507, c. 32), authorizes any corporation to enlarge or change the purpose for which the corporation was formed. The articles of a corporation organized under the general railroad act recited that it was its purpose to construct and operate a street railroad on and through the streets of cities therein named and an interurban railroad through and between such cities. Subsequently its articles were amended by changing the words "street railway" to "railway" wherever they appeared therein. Held that, though the same corporation could not be both a street railroad and a commercial railroad corporation, yet the corporation had the power, under the act of 1889, to amend its charter as it did, and should thereafter be deemed as organized under the general railroad act solely for the purpose of operating a commercial railroad, having as such the power of eminent domain.

2. RAILROADS—INCORPORATION.

A corporation organized under the general railroad act (Hurd's Rev. St. 1905, p. 1564, c. 114) should be deemed a commercial railroad, notwithstanding its articles of incorporation called its line of railroad, to run through and between cities named, a street railroad, as the statute under which it was organized would control as to its charter powers rather than the statements found in its charter as to the objects of its organization.

3. EMINENT DOMAIN—PROCEDURE—ASSESSMENT BY JURY—INSTRUCTIONS.

An instruction that if the strip sought to be taken was a part of an entire tract, which the owner used for manufacturing purposes, and for such purposes the strip had a greater value than the bare land as part of the entire tract, the owner was entitled to such special value of the strip considered in connection with the entire tract, sufficiently presented to the jury the owner's contention that its property should be considered as a unit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 565, 566.]

4. SAME—WEIGHT OF EVIDENCE.

An instruction that, if the jury believed that any witness had magnified the value of the land taken or the damages to land not taken, then the jury had the right, and it was their duty, to disregard the evidence of such witness in so far as the same was unjustly magnified, either as to the value of the land taken or the damages to property not taken, did not constitute error.

5. SAME—EVIDENCE AS TO COMPENSATION.

Where it was contended by the owner that the premises had a special value, in that they were needed for the future growth of its business, and witnesses testified that plans had been drafted for new buildings on the vacant land on the opposite side of the strip proposed to be taken from its then improvements, cross-examination wherein it was made to appear that the plans had been made several years prior to the commencement of the proceeding, and that the owner had been financially embarrassed for some months, was proper.

Appeal from County Court, Kankakee County; A. W. Deselm, Judge.

Condemnation proceedings by the Chicago & Southern Traction Company against the

David Bradley Manufacturing Company. From a judgment awarding it damages in a certain amount, defendant appeals. Affirmed.

W. R. Hunter, for appellant. Small & Brock, for appellee.

HAND, C. J. This was a proceeding commenced by appellee, against the appellant, in the county court of Kankakee county, under the eminent domain act, to condemn a strip of land for right of way purposes across a tract of land containing about twenty acres, located in the village of Bradley, in said county, owned by the appellant, and upon a portion of which was located the manufacturing plant of appellant. The land taken consisted of a strip 20 feet in width by 1,200 feet in length, and contained $\frac{55}{100}$ of an acre. The jury found the land taken to be of the value of \$375 and the damage to the land not taken to be \$1,000. The court rendered judgment upon the verdict, and the manufacturing company has prosecuted an appeal to this court.

The appellee was organized under the provisions of the general railroad act of 1872. Hurd's Rev. St. 1905, c. 114. The articles of incorporation of the appellee recite: "The undersigned hereby organize a corporation under and by virtue of the laws of the state of Illinois, for the purpose of acquiring, purchasing, constructing, owning, maintaining and operating a street railroad in accordance with the laws of said state." And paragraph 2 provides: "Second. It is proposed to construct the said railroad from the city of Chicago to the city of Kankakee, and it is the purpose of this corporation to acquire, purchase, construct, own, maintain and operate a street railroad, with switches, side tracks and turn-outs, upon and through the streets, avenues, alleys and other public ways of the following named cities and towns, with such rights, powers, privileges, immunities and franchises in the said cities and towns as may be conferred by law, to wit: In Chicago, Harvey, Homewood and Matteson, in the county of Cook; in Peotone, in the county of Will; and in Manteno and Kankakee, in the county of Kankakee, all in the said state. And it is also the purpose of this corporation to acquire, purchase, construct, own, maintain and operate an interurban railway, by electricity or other power, from the said city of Chicago to, into, through and between the said cities and said towns of Harvey, Homewood, Matteson, Peotone, Manteno and Kankakee." At the adjourned regular annual meeting of the stockholders of the appellee, held at its office in Chicago on December 28, 1905, at which all the capital stock of the appellee was present and voting, the following resolution was unanimously adopted: "Whereas, heretofore, on the 4th day of November, 1904, there were executed, and thereafter, on the 10th day of November, 1904, duly filed in

the office of the Secretary of State of the state of Illinois, articles of incorporation of this corporation as Chicago & Southern Traction Company, since which last-named date this corporation, under the name aforesaid, has been engaged in locating and constructing a line of interurban railroad between the city of Chicago, Cook county, Illinois, and the city of Kankakee, in the county of Kankakee, Illinois; and whereas, it was and is the intention of this company, by its articles of incorporation, as aforesaid, to be and become a railway corporation under the general railroad act of the state of Illinois, to the end that it may enjoy all the privileges created by the said act and be subject to all of the obligations and liabilities thereof; and whereas, by inadvertence, the charter of this company called its said line of railroad a street railroad, for the reason that this company intended to pass through certain cities and villages in the state of Illinois and to lay its tracks upon certain of the public streets in such cities and villages; and whereas, it is now the desire of this corporation to eliminate the word 'street' whenever it occurs in said charter, for the purpose of defining more exactly the purposes of its incorporation: * * * Be it therefore resolved, by the stockholders of Chicago & Southern Traction Company, in annual stockholders' meeting duly assembled, that the articles of incorporation of said Chicago & Southern Traction Company be and the same are hereby amended by changing the words 'street railway' to 'railway' (the word 'street' being expunged), whenever the same occurs in said articles of incorporation." The appellant, upon being brought into court, filed a traverse to the petition, in which it averred that the appellee was not authorized and empowered to construct and operate a line of railroad, and denied that it had any legal right to condemn private property for right of way purposes. The traverse was overruled, whereupon appellant filed a demurrer to said petition, which was also overruled, and, having excepted to the action of the court in that regard, it now urges in this court, as grounds of reversal, that the appellee had no power to organize under the general railroad act for the purpose of constructing a street railroad in the cities and villages through which its line proposed to pass and to construct and operate between said cities and villages an interurban railroad, as it is said a railroad corporation cannot be lawfully organized under the general railroad act to construct and operate street and interurban railroads, and, as appellee was not properly incorporated under said act, it is without power to condemn land for right of way purposes, and that the court erred in declining to dismiss the petitioner's petition for condemnation.

Section 1 of the general railroad act provides: "That any number of persons, not

less than five, may become an incorporated company for the purpose of constructing and operating any railroad in this state." Hurd's Rev. St. 1905, p. 1564, c. 114. While the language above quoted is broad, it has been held (*Chicago & Southern Traction Co. v. Flaherty*, 222 Ill. 67, 78 N. E. 29, and *Gillette v. Aurora Railways Co.*, 228 Ill. 261, 81 N. E. 1005) that the same corporation cannot be both a street railway corporation and a commercial railroad corporation. We think, however, the appellee had the power, under the provisions of the act of 1889 (Hurd's Rev. St. 1905, p. 507, c. 32), to amend its charter by eliminating therefrom the word "street" wherever it occurred therein, and that at the time the petition to condemn was filed appellee was organized under the general railroad act solely for the purpose of operating a commercial railroad from the city of Chicago to the city of Kankakee. *Calro, Vincennes & Chicago Railway Co. v. Woodyard*, 226 Ill. 331, 80 N. E. 882. We are also of the opinion that if the amendment to appellee's charter made December 28, 1905, were disregarded, as the appellee was organized under the general railroad act, it should be considered and treated as a commercial railroad, as the statute under which it was organized would control as to its charter powers, rather than the statements found in its charter as to the objects of its organization. We think it clear, therefore, the appellee, by virtue of the statute under which it was organized, had the right to construct a commercial railroad from Chicago to Kankakee and to pass through the cities and villages along its route and to condemn real estate for right of way purposes, subject to the limitation that it could not construct its railroad longitudinally in the streets of cities and villages without the consent of such municipalities. We conclude, therefore, the appellee had the right to condemn the strip sought to be taken for right of way purposes, and that the court did not err in declining to dismiss the petition.

The legal principles here involved were fully considered by this court at its last term in *Gillette v. Aurora Railways Co.*, supra. The contention is made by the appellant that the amount of compensation and damages allowed to it by the jury are wholly inadequate to compensate it for the injury done to its plant by reason of the railroad of the appellant crossing its premises. The premises of appellant consisted of three village blocks and an intervening vacated street, and the right of way sought to be acquired is located upon said vacated street and the improvements of appellant are located upon its land situated west of the proposed right of way, and the property east of the right of way, including the right of way, is vacant and unimproved, and the railroad, when constructed, will be on a level with the surface of the ground. The jury viewed the premises, and, while the witnesses who tes-

tified upon behalf of the respective parties differ greatly, as is usually the case in this class of cases, as to the compensation and damages which should be awarded the property owner, as the jury saw the premises and had a better opportunity than we to judge of the effect of the construction and operation of appellee's railroad across appellant's property, we are not disposed to disturb the judgment on the ground that the verdict did not award to the appellant adequate compensation and damages. The main contention upon this branch of the case by appellant is that its property should be considered as a unit—that is, as a whole—and its witnesses estimated the value of the plant, with the entire tract of land upon which it was located, at from \$325,000 to \$350,000, and it is contended that as $\frac{55}{100}$ of an acre, or 2.75 per cent. of its property, is taken, it should receive as compensation for the strip taken 2.75 per cent. of the value of the entire plant, including all its lands, and some of its witnesses placed its damages to the property not taken at from \$25,000 to \$30,000, while the witnesses for the appellee placed the value of the strip taken at \$500 per acre, and stated that there would be but little, if any, damages to the portion not taken. The court instructed the jury, upon behalf of the appellant, that if they found the strip sought to be taken was a part of an entire tract, which tract was used by appellant for manufacturing purposes, and for such purposes said strip had a greater value than the bare land as part of the entire tract, under the law it was their duty to allow the defendant such special value of the strip as the evidence showed it to be worth when considered in connection with the entire tract. We think it evident, therefore, that the view of the appellant that it was entitled to have the jury consider the strip proposed to be taken as a part of the entire tract was fairly presented to the jury, and that it has no just ground of complaint that its view that the strip of land sought to be taken should be considered as a part of its entire tract of land was not submitted to the jury.

The appellant also sought to show that the ownership of its vacant property, including the strip sought to be taken, was necessary to the future growth and expansion of its manufacturing business, and that to sever its property by constructing and operating a railroad across the same would greatly damage the entire property. The witnesses of appellant were fully examined upon that view of the case, and the jury had such testimony before them when they viewed the property and arrived at their verdict. That view of the case was therefore also before the jury. We cannot see that this case involves the application of any new principles of law in the assessment of compensation or damages, but think the case was fully and fairly submitted to the jury upon all the questions involved.

It is next complained that the court misdirected the jury as to the law. A special complaint is made of appellee's fifteenth given instruction, which reads as follows: "You are further instructed that if you believe, from the entire testimony and from your inspection of the premises, that any witness has magnified or exaggerated the value of the land taken or the damages to the land not taken, on account of his interest in the suit or his prejudice or want of knowledge or experience or truthfulness, then you have the right, and it is your duty, to disregard the evidence of such witness in so far as the same is unjustly magnified or unjustly increased, either as to the value of the land taken or the damages to the property of defendant not taken." This instruction was given and approved in *Kiernan v. Chicago, Santa Fé & California Railway Co.*, 123 Ill. 188, 197, 14 N. E. 18, and a similar instruction was approved in *Goss Printing Press Co. v. Lempke*, 191 Ill. 199, 60 N. E. 908. What was said in the *Kiernan* Case applies with equal force here, and needs not be repeated. We do not think the giving of appellant's fifteenth instruction constituted reversible error.

The appellant complains of other instructions given on behalf of the appellee. We think, however, the instructions given, when considered as a whole, were as favorable to the appellant as the law would permit, and that the court did not commit reversible error, as against the appellant, in instructing the jury.

It is next urged the court erred in refusing to give to the jury appellant's eighteenth instruction. The appellant insisted that the premises in question had a special value to it for expansion purposes—that is, its future need of more space, by reason of the growth of its business, for building purposes, etc.—and to sustain this view it proved, by its president and other witnesses, that plans for new buildings to be erected upon the vacant land east of the strip proposed to be taken had been formulated and drafted. The plans, if any, were not offered in evidence, and upon the cross-examination of its president it appeared the plans referred to had been made several years prior to the commencement of this suit, and that the appellant had been financially embarrassed for some months. This cross-examination, we think, was proper to test the good faith of the claim put forward by the appellant that it had been and was then contemplating the enlargement and expansion of its plant and business, and that said claim was not made with a view to enhance the amount of damages which it might sustain by the construction of appellee's railroad, which it was contended would postpone, and in part prevent, the carrying into effect of the said expansion plans. The appellant's eighteenth instruction asked the court to eliminate such cross-examination from the consideration of

the jury. While, ordinarily, the financial standing of a party to a condemnation suit would be entirely foreign to the issue on trial in such suit before the jury, in this case the cross-examination of the president of the appellant, we think, under the circumstances, proper, and that the court did not err in declining to give to the jury the appellant's eighteenth instruction.

Finding no reversible error in this record, the judgment of the county court will be affirmed.

Judgment affirmed.

(229 Ill. 191)

CHICAGO CITY RY. CO. v. NONN.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. APPEAL—MATTERS REVIEWABLE—WEIGHT OF EVIDENCE.

On an appeal from a judgment of the Appellate Court affirming a judgment for plaintiff, the Supreme Court cannot determine whether the verdict is contrary to the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4268, 4322.]

2. SAME—BRIEFS—DISCUSSION OF QUESTIONS NOT DETERMINABLE.

The Supreme Court will not consider briefs and arguments discussing a question, which by plain and unmistakable statutory provision is not for its determination.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Action by Fred Nonn against the Chicago City Railway Company. From a judgment of the Appellate Court for the First District Court affirming a judgment for plaintiff, defendant appeals. Briefs stricken.

This is an appeal from the judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county recovered by appellee against the Chicago City Railway Company, appellant, in an action on the case for personal injuries. The declaration, which contained but one count, alleged that on the 8th day of March, 1904, the defendant possessed and operated a certain double track street railway upon and along Sixty-Third street, in the city of Chicago; that said cars were operated by electricity; that at that time plaintiff was employed by Siegel, Cooper & Co. as a helper to the driver upon one of their delivery wagons; that at the time and place aforesaid he was riding in one of said company's wagons being driven across the street car tracks of defendant in a northerly direction, at the intersection of Yale avenue and said Sixty-Third street; that, while exercising ordinary care and caution for his own safety, the defendant, through certain of its servants in charge of an east-bound car on said tracks, so negligently, carelessly, and improperly ran, managed and operated said car that as a direct result thereof it collided with the wagon in which the plaintiff was riding,

and he was thereby hurled violently a great height in the air and fell violently to and upon said wagon and ground, and was severely and permanently injured. The general issue was interposed. At the close of all the evidence defendant moved the court for a peremptory instruction to the jury to find the defendant not guilty, which was denied. After overruling a motion in arrest of judgment and a motion for a new trial, judgment was entered upon the verdict. The grounds relied upon for reversal, to quote appellant's counsel, are: "(1) That the verdict is not justified by evidence; (2) for errors in the refusal to submit to the jury proper instructions at the request of appellant and in the submission of improper instructions at the solicitation of appellee."

William J. Hynes and Watson J. Ferry, for appellant. James C. McShane, for appellee.

PER CURIAM. In this case appellant has filed a brief and argument in which the statement occupies 6 pages, the brief 4 pages, and the argument 40 pages. One page of the argument is devoted to demonstrating that the court erred in passing on instructions, and practically the whole of the remainder thereof is an attempt to show that the verdict is contrary to the weight of the evidence, the conclusion of counsel on that subject being that "the overwhelming weight of the evidence shows that he [the motorman] was in the exercise of all the care that would have been required of him had the point in question been at a street crossing, and shows with equal force that the driver of the wagon was in the exercise of none whatever." Whether or not the statement just quoted is true is in this court wholly a matter of indifference.

Appellee states that the judgment of the Appellate Court is final as to the facts, but says that, in order to meet the issue raised by his opponent, he argues the same question of fact discussed by it, and then proceeds to do so. In the preparation of his brief appellee has not followed rule 15 of the rules of practice, but has intermingled brief and argument, and has used 14 pages of the document in setting out, as part of his argument, an abstract of the evidence of certain of the witnesses. We will not consider briefs and arguments given to the discussion of a question which by the plain and unmistakable provisions of the statute is not for our determination.

The order taking the cause under advisement will be set aside, the briefs of the parties will be stricken from the files, and the cause continued. Appellant will be given until the 10th day of November next in which to file a brief and argument presenting questions open to consideration in this court. Appellee will have until the 20th day of the same month in which to file his brief and argument devoted to like questions, and appellant will then have five days in which to re-

ply, all the briefs and arguments to be so prepared as to conform to the rules with reference thereto. Briefs stricken.

(229 Ill. 194)

DONK BROS. COAL & COKE CO. v. REZLOFF.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where two methods of coupling coal cars, one of which was employed by plaintiff at the time he was injured, were in use at defendant's mine whether plaintiff was negligent in attempting to make the coupling in the manner described by him was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

2. SAME—APPLIANCES—CARE REQUIRED.

Where bumpers on coal cars, though not placed there to enable employes to make couplings in safety, were of material assistance to that end, it was defendant's duty to exercise reasonable diligence in keeping the bumpers in a reasonably safe condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 215.]

3. DAMAGES—INJURIES TO MINOR—LOST TIME.

Where, in an action for injuries to a minor, there was no evidence that his father had relinquished his right to the minor's services, nor that the minor had been emancipated, an instruction authorizing the jury to allow the minor damages for lost time was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 553.]

4. PARENT AND CHILD—EMANCIPATION.

Emancipation of a child may be inferred from circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, §§ 172, 174.]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Madison County; J. E. Dunnegan, Judge.

Action by Harry Rezloff against the Donk Bros. Coal & Coke Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals. Reversed and remanded.

Wise & McNulty, for appellant. Brown & Geers, for appellee.

FARMER, J. Appellee was a coal miner, and at the time of his injury, hereinafter referred to, was a driver in appellant's coal mine, and had been so engaged three days. Prior to that time he had worked in another mine in other capacities. While engaged as a driver in appellant's mine he was injured in attempting to couple cars, and brought this suit to recover damages for said injury. The substance of the charge in the declaration is that appellee was employed by appellant in its mine at Maryville, Madison county, to drive a mule in hauling loaded cars to the bottom of the shaft and there couple cars brought in by him to other cars on the track, and that it was appellant's duty to use reasonable diligence to provide cars in a reasonably safe condition and repair for use by ap-

pellee, but that it "negligently permitted one of said coal cars to be and remain out of repair in this: That it permitted the bumper on one end of said car to become broken and damaged, and to become so out of repair as to permit said car to approach so near any other car adjacent to said car on said track as to cause the coupling together of said damaged car with any other car to be attended with great peril and danger," and that, while appellee was endeavoring to couple said damaged car to another car, said cars were precipitated together by another loaded car being rolled down the track and striking one of the cars appellee was endeavoring to couple, and by reason of the defective and insufficient bumper upon one of the cars he was endeavoring to couple, his head was caught between the two cars, and he was thereby injured. Appellee recovered a verdict and judgment in the circuit court of Madison county for \$2,000. This judgment was affirmed by the Appellate Court for the Fourth District, and from that judgment appellant has appealed to this court.

The proof shows appellee, at the time of his injury, was attempting to couple the cars while standing by the side of the track and leaning over with his head between the cars and reaching over to make the coupling by means of a hook on one car and a link on the other underneath the bumpers. The bumpers were constructed of timbers fastened underneath the ends of the cars, extending their full width, and projecting out beyond the ends of the cars from 4 to 4½ or 5 inches when new and in good condition. The projection of the bumpers beyond the ends of the car was not that great the full width of the car. The greatest projection was near the middle of the car, and on either side the timber was cut sloping back toward the car, so that, when the bumpers came together at the center of the cars, there was a space on either side, so they did not touch each other. Constant use wore away these bumpers, so that the space between the cars, when brought together, was thereby reduced. Appellee testified he was ordered by the boss driver to make the coupling; that the hook on one of the cars was caught in some way, so that it was turned partially upwards; and that he could not see how it was fast until he went between the cars, when his lamp enabled him to see it. He testified there was no bumper on the other car. Appellant contends appellee was guilty of contributory negligence in attempting to couple the cars in the manner described, and insists the proper and safe method was by either kneeling or lying down and reaching up underneath the bumpers. The proof shows both methods were used, and it was a question for the jury to determine whether appellee was guilty of negligence in attempting to make the coupling in the manner described by him.

It is also argued by appellant that the proof shows the bumpers were not placed on

the cars for the protection of employes, but were placed there to prevent the bodies of the cars from striking against each other when the cars came together, and that appellee, therefore, failed to prove a material allegation in his declaration. It is apparent from the evidence that the bumpers were of material assistance in enabling employes to make couplings, and whether the primary purpose of placing them on the cars was to enable couplings to be made by employes and to protect them while being made, or not, they did serve that purpose, which appellant was bound to know, and it became its duty, therefore, to exercise reasonable diligence in keeping them in a reasonably safe condition for use. As we have reached the conclusion that the judgment must be reversed on account of an erroneous instruction given for appellee, we shall not further set out the substance of the testimony or comment upon that branch of the case. We think the court was warranted in submitting the case to the jury under the evidence.

Appellee was 19 years old at the time of his injury. He testified he had been working in mines about 5 years. His first employment was in carrying dull picks to the blacksmith and sharp ones to the miners. He was engaged in this manner about 1 year, and then began loading coal with an older brother as his buddy. After working in that capacity for about 2 years he worked a few months on a railroad, and then went to loading coal in a mine at Glen Carbon with his father as his buddy. Appellee testified that after having been thus engaged for about a year his brother-in-law, in whose name the suit was brought as next friend, secured him a job in appellant's mine. The brother-in-law worked in the same mine, and appellee lived at his house while engaged there. In the first instruction given for appellee the court told the jury, if they found in his favor, in assessing his damages they should take into consideration his loss of time. It is not denied that unless he had been emancipated appellee's services belonged to his father, in whom a right of action existed to recover for their loss; but it is contended the proof justified the inference that appellee had been emancipated by his father. While it is true, proof of an express agreement of the father relinquishing his claim upon the services of a minor son is not necessary, but such relinquishment may be inferred from circumstances, there must be something in the circumstances proven from which an intention on the part of the parent to relinquish his right to the earnings of his minor child fairly appears. There is nothing in the testimony in this case showing to whom the wages of appellee had been paid, nor any other circumstance that would justify the assumption that his father had relinquished his right to the value of his services. This case is unlike *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583, and *American Car & Foundry Co. v.*

Hill, 226 Ill. 227, 80 N. E. 784. In those cases the suit was in the name of the father, as next friend of the minor.

Some general objections are made to other instructions given for appellee, but no valid reasons are given why they were erroneous. For the error indicated, the judgments of the appellate and circuit courts are reversed, and the cause remanded.

Reversed and remanded.

(229 Ill. 198.)

WINN v. BLACKMAN.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. ELECTIONS—CONTEST—SUFFICIENCY OF EVIDENCE.

In an election contest, evidence held to support a finding that certain ballots were cast for contestant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 297-299.]

2. SAME—MARKING BALLOTS—DISTINGUISHING MARKS.

The mere fact that the imprint of the pencil used to mark the face of the ballot may be discernible on examination of the back thereof does not constitute a distinguishing mark, where done through inadvertence and without the voter's knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]

3. SAME—INDORSING INITIALS OF JUDGE ON BALLOT—NECESSITY.

2 Starr & C. Ann. St. 1896, p. 1688, § 22, par. 186 (Australian ballot law), provides that one of the judges shall give the voter one ballot, on the back of which such judge shall indorse his initials in such manner that they may be seen when the ballot is properly folded. Section 26 provides that no ballot without the official indorsement shall be deposited, and none but ballots provided in accordance with the provisions of the act shall be counted. Held, that the indorsement is mandatory, and that the statute contemplates that the judge who passes the ballot to the voter shall indorse his initials on the ballot in his own handwriting. (By a divided Court.)


[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 149.]

4. SAME—SUFFICIENCY OF BALLOT.

A blank ballot, on the face of which there is nothing to indicate that it had ever been voted, except a slight roughing of the surface inside the circle, indicating that something might have been erased by the use of a rubber, is invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 151.]

5. SAME.

A ballot, on which, opposite the name of a candidate, was a pencil mark like , was invalid; there appearing no attempt on the part of the voter to make a cross.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]

6. SAME.

A ballot having one line drawn across the circle of the Republican ticket and a cross on each of the squares of the Republican ticket was not invalid as bearing a distinguishing mark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]


7. SAME.

A ballot marked with a cross in the Republican circle, but showing an irregularity consisting of a semicircle connecting three points of

the cross together, was not invalid as bearing a distinguishing mark; the semicircle being evidently a little flourish of the pencil.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]

8. SAME.

A ballot, the only mark upon which was in the Republican circle and in form as follows:  was not invalid either as bearing a distinguishing mark or for lack of a cross in the circle; the character indicating that it was probably so made through nervousness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]

9. SAME.

A ballot was properly marked in the Republican circle with a cross, but on the lower right-hand corner of the face of the ballot was a light pencil line almost straight, about an inch and a quarter long. The line turned almost at right angles and ran in a curve of about one inch. There was a little jog or fork, and the line ran back toward the first stroke almost parallel with the second line, forming a somewhat triangular figure. *Held*, not a distinguishing mark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]

10. SAME — DISTINGUISHING MARK — WHAT CONSTITUTES.

The "distinguishing mark" prohibited by law is such a mark as will separate and distinguish a particular ballot from other ballots cast at the election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 166, 167.]

11. SAME.

Whether a given mark on a ballot is or is not a distinguishing mark, within the meaning of the Australian ballot law, is largely, if not wholly, a question of fact, and must be determined from an inspection of the original ballot itself.

12. SAME.

In order to warrant the rejection of a ballot because of a distinguishing mark, the court should be able to say that such mark was placed there by the voter for the purpose of distinguishing his ballot from others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]

13. SAME—NAME OF CANDIDATE.

5 Starr & C. Ann. St. Supp. 1903, p. 200, c. 46, par. 7 (amendatory act of 1903), prohibits any candidate from having his name printed under more than one party appellation, and in case a candidate has been named by two or more political parties he may withdraw his name from all but one of the nominations and elect on which ticket he desires to have his name appear, and if he fails to exercise his right of election his name cannot be on either ticket. *Held*, that the statute does not deny the voter the privilege of writing the name of any person for whom he desires to vote on the ticket, and the fact that the printed name of a candidate on a ticket was erased by drawing a lead pencil therethrough, and the name of another candidate was written in lead pencil, did not render the ballot invalid; the fact that the name was not written in immediately opposite the square on the ticket being immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 156.]

14. SAME.

A ballot had the name "George Meyers" written on the face thereof, though there was no office designated in connection with the name, and the same was not printed on any of the tickets for any office. Another ballot had the name "George Mares" written above the Democratic ticket. The Democratic tickets had no

name printed on them under the title of "Representative in the General Assembly"; a blank space being left under the title of that office. A large number of persons who voted the ticket wrote the name of "George Meyers" in such space. *Held*, that the purpose of the voter was to vote for "George Meyers," and the ballots were not invalid as containing distinguishing marks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 156, 167.]

15. SAME.

A ballot marked on the back with the letter "V," in imitation of a printed "V," was invalid as bearing a distinguishing mark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]

16. SAME.

The marking of two or more party tickets in the circle on the ballot only nullifies the ballot in so far as both tickets bear the name of candidates for the same office.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, §§ 155, 168.]

17. SAME.

A ballot was mutilated by being cut across the left-hand end thereof, taking off a part of the names of all the candidates for state officers on the Democratic ticket, with one exception. The Democratic circle was gone entirely, as were also all the squares opposite the name of the Democratic candidates. There was a cross in the Republican circle and a cross above the name of a candidate for county judge, and a cross to the left of the name of one of the candidates on the Democratic ticket, but neither of the crosses nor any part of the lines thereof were within the squares. *Held*, that the ballot was properly rejected as plainly distinguishable from other ballots.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 167.]

18. SAME.

A ballot marked in the Republican circle by three straight lines crossing in the center, forming a six-pointed star, and having a cross in the square opposite the name of the candidate on the Democratic ticket, should have been counted for the Democratic candidate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 155.]

19. SAME.

In an election contest the court properly refused to count for either party a ballot picked off the floor after the count was over, marked void, and never placed in the ballot box.

20. SAME.

A ballot having no crosses in any of the circles nor any of the squares on the entire ballot, the voter having undertaken to blacken the whole face of several squares with a lead pencil, instead of making a cross, was properly rejected as not being a vote for any one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 151.]

Appeal from Edgar County Court; W. S. Lamon, Judge.

Election contest by John I. Blackman against Howard M. Winn. Judgment for contestant, and contestee appeals. Reversed.

J. E. Dyas and F. K. Dunn, for appellant.
H. S. Tanner, Frank T. O'Hair, James K. Lauber, and Stewart W. Kincaid, for appellee.

VICKERS, J. At the election in November, 1906, Howard M. Winn was the Republican and John I. Blackman was the Demo-

cratic candidate for sheriff in Edgar county. By the official canvass of the votes Winn received 3,448 votes, and Blackman 3,422. Blackman filed a petition to contest the election, alleging errors in the count of the votes in the various precincts of the county. Winn answered the petition and denied the alleged errors, charged counter errors, and alleged that in the second precinct of Young America township the ballots had been fraudulently changed so as to show a greater number of votes for Blackman and a less number for Winn than were cast for them, respectively, and counted by the judges. On the trial of the contest in the county court of Edgar county, the court found that Blackman had received 3,421 votes, and that Winn had received 3,396 votes and declared Blackman duly elected, and rendered judgment against Winn for costs, from which he has prosecuted this appeal.

On the hearing the ballots were all produced and recounted, and there were 3,348 votes counted for appellant and 3,346 for appellee without objection. Included in appellee's 3,346 votes are 8 votes from the second precinct of Young America township, which appellant charges were changed after the ballots had been cast, so as to increase the vote of appellee 8 votes and decrease the vote of appellant 8 votes. There were 174 ballots that were objected to by one or the other of the parties. Of these 174 ballots the court counted 48 for appellant and 75 for appellee, making the total vote as finally determined by the court, 3,396 for appellant and 3,421 for appellee. The remaining 51 ballots of the 174 that were objected to the court held illegal and refused to count them for either party. The errors and cross-errors assigned bring up for review the rulings of the court on substantially all of these various ballots.

Appellant insists that the evidence shows that eight ballots counted by the court for appellee were shown to have been tampered with and marked for the appellee, when they should have been counted for appellant. These ballots were marked in the Republican circle and were straight Republican ballots, except that a distinct cross appears on each of them opposite the name of appellee. There is nothing on the face of any of these ballots that tends to discredit them or to raise a suspicion that they were not in the same condition when opened in court that they were in when they left the hands of the voters. The evidence upon which appellant relies to prove that these eight ballots had been changed after they were voted is the testimony of the three election judges in the township where they were cast and the Republican and Prohibition challengers who were present, together with the fact that the returns from that precinct showed that these eight ballots had been counted by the election judges for appellant. There were 195 votes

cast in the Second precinct in the town of Young America, of which, by the returns of the election judges, the appellant received 85 and appellee 94. The remainder of the voters either cast their ballots for the Prohibition candidate or did not vote for sheriff. On the final count by the county court appellant's vote was reduced to 77 and appellee's was increased to 102.

The testimony of the witnesses upon which appellant relies shows that when the judges were ready to commence the canvass of the votes the ballots were first taken out of the ballot box, unfolded, and examined, and the straight Republican ballots were placed in one pile on the table, the straight Democratic ballots in another, the straight Prohibition ballots in a third, and the mixed or scratched ballots were placed in a fourth pile. One of the judges, Mr. Stone, drew the ballots from the ballot box and passed them to Mr. Bren, another of the judges, who unfolded them and determined which of the piles they belonged to, and placed them accordingly. After the ballots were all drawn from the ballot box and classified, as above stated, they were then counted three times, in order to determine whether the number of ballots corresponded with the number of names on the tally sheet. The eight votes in question were placed in the pile of straight Republican ballots. After the ballots had all been canvassed they were then strung on a wire, the Republican ballots first, Democratic second, Prohibition next, and then the mixed or scratched ballots; the ballots going on face down. The ends of the wire were then brought together and fastened, and the ballots placed in a sack and sealed up and put in charge of one of the judges of the election. It is not contended that the sack had been opened or the ballots disturbed in any way after they were sealed up by the judges on the night of the election. When the sack was opened in court the ballots were taken off in the reverse order from which they were placed on the wire; the Republican ballots coming off first, the Democratic ballots second, the Prohibition next, and the mixed ballots last. The ballots came off face upward. This is accounted for by the fact that the ballots were taken off of the opposite end of the wire from where they were put on. Upon an examination of the so-called straight Republican ballots, the eight ballots in question were found plainly marked in the Republican circle and a plain, distinct cross opposite appellee's name on the Democratic ticket. These eight ballots were not found in a group, but were scattered promiscuously through the Republican straight ballots.

Appellant's contention is that, if these ballots had been marked for appellee at the time the canvass was made, the persons present making the canvass would necessarily have discovered it, and the fact that they did not see a cross opposite the name of appellee in

any of these ballots is sufficient to warrant the court in finding that the ballots were not so marked at the time the canvass was made. It must be admitted that it is very extraordinary that these judges and the two challengers would overlook this number of scratched ballots. Such a mistake could not happen except through the gross carelessness and inattention of these election officers. A glance at the ballots is all that is necessary to see a cross opposite appellee's name, and still there is not a particle of evidence that any one had any opportunity to falsify these ballots unless it was some one of the persons who were in the room during the time the canvass was being made. There is some evidence that other persons than the challengers and the election officers were in the room occasionally when the canvass was being made (persons who were admitted to make inquiry as to the result), but it is not pretended that any of these persons handled any of the ballots or had any opportunity to do so. If the ballots were fraudulently tampered with, it must have occurred during the canvass and in the presence of the election judges. It is not to be presumed that any of the election officials would be guilty of committing a criminal offense by tampering with these ballots, nor can it be supposed that they would be so utterly indifferent to the discharge of their duties as to permit any unauthorized person to handle the ballots, whereby an opportunity would be afforded to perpetrate such a fraud. The most charitable view, and to our minds the most reasonable, is that the election officials overlooked these ballots, and when they saw the cross in the Republican circle they did not make an examination further, but concluded that the ballots were straight Republican ballots and classified them accordingly. We more readily come to this conclusion when we consider that in the counting of the ballots that occurred after they had been separated into piles the ballots were not handled, but they were counted by turning up the corners of the ballots as one would count the leaves in a book. Mr. Bren testifies that, while he did not see any cross opposite the name of appellee on these ballots, yet he says that such crosses might have been there and he overlooked them. Bren is the election judge who unfolded the ballots and determined which class they belonged to. The other witnesses did not examine them as much as Bren did. In our opinion the county court properly counted these eight ballots for appellee.

Appellant next insists that the court erred in rejecting 23 ballots (being Exhibits 11 to 33) in the Second precinct of Embarrass township. These ballots were all very similar and were all straight Republican ballots, and they were all rejected for the same reason—that they had distinguishing marks on them. These 23 ballots were each marked with a proper cross in the Republican circle and by a cross opposite the name of each

candidate for a county office on the Republican ballot. There were no other marks of any kind or character upon any of these ballots, except in ballots 17 and 29 a cross was placed opposite each of the candidates for the General Assembly, and in ballot 24 a cross was placed in the square opposite the name of Charles A. Allen, candidate for representative. In all other respects these ballots are regular and free from any marks or blemishes. The ballots, when examined from the back, show a trace of the pencil mark; that is, there is a slightly raised or embossed appearance on the back of the ballots, indicating that the marking had been done with a somewhat heavier hand than was necessary, or that a hard lead pencil had been used, so as to make the imprint of the marking visible from the back. Appellee contends that marking a ballot in this way is a distinguishing mark, and the county court sustained that view. To this we cannot assent. Upon an examination of a large number of other ballots we find that it is possible to locate the cross from the imprint of the pencil on the back of the ballots. In fact, there are many ballots in the record on which one can locate the marking by simply rubbing the fingers over the surface of the back of the ballot, without looking at it at all. The paper upon which the ballots are printed is a white, soft, cheap book paper, and by placing a sheet of blotting paper under the ballot an ordinary stroke of a lead pencil will be plainly traceable on the back. It is true that it was not necessary that the voter should mark both the circle and the squares in order to vote a particular ticket, but it is well known that many voters do so mark their tickets. It is not shown or claimed that the persons who voted these tickets did not intend to vote them exactly as they were marked, and there is no evidence that these ballots were marked in this particular manner in order to distinguish them from other ballots.

Appellee contends that because 23 of these ballots were voted in the same precinct, marked in substantially the same way, it is evidence that there was some one on the outside interested for appellant who was buying these votes and some one on the inside watching for the appearance of the crosses on the back of the ticket, and that in some way information would be conveyed to the purchaser on the outside that the ballot had been delivered according to contract, so that the voter could receive the consideration that was agreed to be paid. The most serious objection to appellee's contention on this point is that there is no evidence in this record to support it. We are of the opinion that it would be a very dangerous rule to hold that a ballot is to be rejected and the voter deprived of his constitutional right to vote, if, upon an examination of the back of the ballot, the marking of the ballot can be traced. If such rule were applied in this case it would deprive appellant of 23 votes, and appellee

would lose as many for the same reason, and perhaps more. In fact, our attention is called to 65 ballots which were counted for appellee, the markings on which are discernible from the back of the ballot. While it is true a distinguishing mark which will justify the rejection of a ballot may appear upon the back as well as upon the face of the ballot, still the mere fact that the imprint of the pencil with which the voter marks the face of his ballot may be discernible upon examination of the back of the ballot, and which occurs through mere inadvertence and without the knowledge of the voter, cannot be held to be such distinguishing mark. There is no contention that these 23 Republican ballots were cast by Democrats, or that there was any corresponding decrease from the normal Democratic vote in this precinct. The court erred in rejecting the 23 ballots for appellant in the Second precinct of Embarrass township, and they should be counted for appellant.


It is next urged by appellant that the court erred in refusing to count five ballots for appellant (being Exhibits 166 to 170, inclusive), cast in the First precinct of Young America. The objection that appellee makes to these five ballots is that they did not have the initials of one of the judges indorsed on the back thereof by the same judge whose initials appeared thereon. The judges of this township were T. J. Coffman, S. S. Gough, and William Turley. The evidence shows that when the polls were opened it was agreed among the judges that Coffman should indorse his initials on the ballots, that Turley should take them from the voters and place them in the ballot box, and that Gough should attend to the register. This method was followed. When Coffman went to dinner some question was made as to whether he had signed up enough ballots for use in his absence. Before he went to his dinner Coffman said to the other judges: "If you need any more, go ahead and sign them yourselves." One of the other judges, in the absence of Coffman, signed Coffman's initials, "T. J. C.," on the five ballots in question, and they were handed out to voters and were voted. The county court sustained the objection to these ballots. They were all cast for appellant. Section 22 (paragraph 186) of the Australian ballot law (2 Starr & C. Ann. St. 1896, p. 1688, c. 46) provides that "one of the judges shall give the voter one, and only one, ballot on the back of which such judge shall indorse his initials in such manner that they may be seen when the ballot is properly folded." And section 26 of the same chapter provides that "no ballot without the official endorsement shall be allowed to be deposited in the ballot-box and none but ballots provided in accordance with the provisions of this act shall be counted." The indorsement of the initials of one of the judges under these sections of the statute is mandatory,

and without it the vote cannot be counted. *Kelly v. Adams*, 183 Ill. 193, 55 N. E. 837; *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012. The statute contemplates that the judge who passes the ballot to the voter should indorse his initials on the ballot in his own handwriting. *Cholsser v. York*, 211 Ill. 56, 71 N. E. 940. In the case last above cited, in condemning the use of a rubber stamp for indorsing the ballots, this court said (page 68 of 211 Ill., and page 944 of 71 N. E.): "The statute is, not only that the initials of one of the judges shall be placed upon the ballot, but that the particular judge who hands the ballot to the voter shall indorse his initials thereon. Every man's handwriting possesses certain peculiarities which tend to distinguish it from every other handwriting. By writing his initials upon ballots the judge doing so should be able to distinguish those which are genuine; and could generally do so." If the judge who passed out these five ballots had indorsed his own initials upon them, there would be no question about the regularity of the ballots, but the statute was not complied with by his indorsing the initials of Coffman thereon. There was no error in refusing to count these five ballots for appellant.


We have thus far disposed of 28 of the 51 rejected ballots, leaving 23 yet to be considered. Of the remaining 23 ballots that were not counted for either party by the court, appellee insists that Nos. 95, 103, 104, 110, 111, 118, 119, 121, 161, and 173 should have been counted for him, while appellant insists that these ballots were properly rejected by the court, and that Nos. 96, 97, 101, 102, 106, 107, 164, and 172 should have been counted for appellant, and that Nos. 35, 94, 116, 117, and 120 should not have been counted for appellee. Appellee objects to 43 other ballots that were counted for appellant, but has not insisted upon his objections in his brief, and for that reason these objections will be considered as waived. We will now consider appellant's specific objections to individual ballots.


Ballot No. 96 is a blank ballot. There is nothing on the face of it to indicate that it had ever been voted, except there is a slight roughing of the surface inside the Republican circle, indicating that something might have been erased by the use of a rubber. It is impossible to say what mark or sign may have been erased from this circle. The closest investigation does not disclose a trace of a cross. The court properly rejected No. 96.

Ballot No. 97 was rejected by the court because there is no cross either in the circle or opposite the name of appellant. This ruling appellant insists is erroneous. The ballot is marked with a cross opposite the name of each candidate on the Republican ticket for which the voter intended to vote on that ticket. Opposite the name of appel-

lant, inside the square, is a pencil mark like this . There is no point inside the square where there is an intersection of the lines which can be called a cross. The character seems to have been made by a short stroke of the pencil, followed by another short stroked at right angles with the first. There does not appear to have been any attempt on the part of the voter to make a cross, and this ballot was properly rejected under the authority of *Parker v. Orr*, 158 Ill. 609, 41 N. E. 1002, 30 L. R. A. 227.

Ballot No. 101 was rejected by the court on the ground that there was a distinguishing mark upon it. This ballot has one line drawn across the circle of the Republican ticket, and then it has a cross in each of the squares of the Republican ticket. It is this pencil line drawn across the circle which led the court to reject the ballot. In this we think there was error. Evidently the voter, knowing the two methods by which he could vote a straight Republican ticket, first concluded to make a cross in the circle and drew one line, then changed his mind, and concluded to mark each of the squares, and accordingly put a cross in all of the Republican squares of the ticket, thereby voting a Republican ticket by that method. We reach this conclusion from the fact that the ballot shows an intention to vote a straight Republican ticket. A mark of this character, which can reasonably be explained consistently with the honest purpose of the voter, and which was manifestly made through mistake, inadvertence, or because he changed his mind as to the method by which he intended to mark his ballot, is not a distinguishing mark, within the meaning of the law. This ballot, in our opinion, should have been counted for appellant.

Ballot 102 was rejected by the court for the alleged reason that it also had distinguishing marks upon it. This ballot was marked in the Republican circle in this way . There is in this ballot a perfect cross in the Republican circle, and the only irregularity is in the semicircle which connects three points of the cross together. This was evidently simply a little flourish of the pencil, and not made as a distinguishing mark. We think this ballot should have been counted for the appellant under the authority of *Parker v. Orr*, supra.

Appellant insists that ballot 106, which was rejected by the court, should have been counted for him. The only mark upon this ballot is found in the Republican circle, and is like this . The court rejected this ballot, either because there was no cross in the circle, or because the marking in the circle was a distinguishing mark. There are two crosses in the Republican circle. We think the ballot should have been counted. The character found in the Republican circle indicates to our minds that it was probably put there by some one who was very nervous, so much so that it was with great dif-

ficulty that a cross was made. We think that the marking on this ballot belongs to the same class as two ballots passed on in *Parker v. Orr*, supra, and under the authority of that case the manifest intention of the voter should prevail, and the ballot be counted as it was manifestly intended by the voter. This ballot should be counted for appellant.

Ballot 107 was rejected by the court because in the opinion of the court there was a distinguishing mark upon it. This ballot is properly marked in the Republican circle with a cross. On the lower right-hand corner, on the face of the ballot, there is a light pencil line almost straight, about one inch and a quarter long; the line then turns almost at right angle and runs in a curve about one inch; there is then a little jog or fork, and the line runs back toward the first stroke almost parallel with the second line, forming a sort of triangular figure that does not resemble anything with which we are acquainted. The lines of this character are very lightly and somewhat irregularly drawn. We are of the opinion that this mark ought not to be held as a distinguishing mark. It is true that it is possible that it might have been placed on the ballot by the voter for the purpose of distinguishing it from other ballots, yet it is also possible that such a character might have gotten on the ballot through inadvertence or mistake. It is a mark that is very difficult to describe, and we do not see how a voter could with any certainty describe such mark so that another person would be able with certainty to identify the ballot. The distinguishing mark prohibited by the law is such a mark as will separate and distinguish the particular ballot from other ballots cast at the election. It is some sort of a mark put upon the ballot to indicate who cast it and to furnish the means of evading the law as to secrecy. *Pierce v. People*, 197 Ill. 432, 64 N. E. 372; *Rexroth v. Schein*, 206 Ill. 80, 69 N. E. 240. In the case last above cited, on page 100 of 206 Ill., page 248 of 69 N. E., this court said: "Therefore not every mark made by a voter on his ballot which may separate and distinguish the particular ballot from other ballots cast at the election will necessarily result in the declaration that the ballot is invalid. If it appears from the face of the ballot that such marks or writings were placed thereon as the result of an honest effort on the part of the voter to indicate his choice of candidates among those to be voted for at the election, and that the voter did not thereby intend or attempt to indicate who voted the ballot, the ballot should not be rejected as to candidates for whom there is thereon a choice expressed in compliance with the requirements of the statute."

Whether a given mark upon a ballot is or is not a distinguishing mark, within the meaning of the Australian ballot law, is

largely, if not wholly, a question of fact. *Kelso v. Wright*, 110 Iowa, 560, 81 N. W. 805; *Perkins v. Bertrand*, 192 Ill. 58, 61 N. E. 405, 85 Am. St. Rep. 315. This question must be determined from an inspection of the original ballot itself. The original ballots in this case have been certified to this court, and we have examined them, consequently the trial court did not have any better opportunity for determining these questions than is afforded this court by an inspection of the original ballots. In order to warrant the rejection of a ballot because of a distinguishing mark, the court should be able to say that such mark was placed there by the voter for the purpose of distinguishing his ballot from others. 3 Current Law, p. 1172; *Rexroth v. Schein*, supra. It is not every mark or blot that may be placed on the ballot by the voter himself that is a distinguishing mark, nor should a ballot be rejected because there appears upon it some mark which the court believes would enable the voter who cast the ballot to identify it as the ballot voted by him. The Australian ballot law does not contemplate that the voter will ever see his ballot again after it is deposited in the ballot box. By carefully studying the face of his ballot, the voter could readily recognize the ballot he had voted by the manner in which the crosses had been made, or by an almost inconceivable number of things which might be upon the ballot or be placed there by the voter without any thought that he was marking it for the purpose of identification. The title of the act, as well as the general scope of its various provisions, indicates that one of the main purposes sought to be accomplished by the Australian ballot law is to preserve the secrecy of the ballot. There is no express provision in our statute that a ballot containing a distinguishing mark is to be rejected, and the ground upon which such a ballot is rejected is that it violates both the letter and the spirit of the law intended to guard the secrecy of the ballot. In many of the states having a similar election law there are express provisions declaring all ballots illegal and void which bear any distinguishing marks, and where the courts have had occasion to construe such provisions the evil sought to be remedied has entered into the construction given and influenced the conclusion reached. Thus, the Supreme Court of Indiana, in *Sego v. Stoddard*, 136 Ind. 297, 36 N. E. 204, 22 L. R. A. 468, in discussing the subject of distinguishing marks under the statute of that state, said: "So that the statute was the outgrowth of the desire of all to rid the state of the burning disgrace and ominous danger to popular government, and the leading idea and thought of the whole act was, not to afford relief against the fraud of vote buying and bribery at elections after its commission, but it was to devise a plan by which the honest voter could not only be freed from intimidation by mak-

ing his vote a secret known only to himself and his God, but it was to absolutely shut the door against making merchandise of his vote by the corruptible voter, as near as human ingenuity could devise such a plan. That the plan has proven eminently successful is evidenced by the fact that all political parties warmly approve of the law, and that thirty odd of our sister states have since substantially adopted it. The idea was not, as appellant's counsel seem to think, to so provide as to render it impossible for the purchased or bribed voter to afterwards identify the ticket he voted by looking at and inspecting it, because the other provisions of the act provide for a destruction of the ballots after they are counted and before anybody except the officers can see them, but it was to guard against the possibility of the vote seller indicating to the buyer in advance how his ballot would be distinguished from the other ballots in the box, so that the buyer or his agent, who may be one of the election officers, could tell, when the bribed voter's ballot was reached in the count, that such bribed voter had carried out his contract. It was believed that, if it could be rendered impossible for the buyer or his agent to identify the ballot voted by the purchased voter from a mere indication beforehand how it should be marked, the desired end would be reached, because it was believed that, as a general thing, a vote buyer would not risk his money on a vote seller without some assurance other than the mere word of the bribed voter." In the American and English Encyclopedia of Law (vol. 10 [2d Ed.] p. 728), it is said that unless the ballot has been marked intentionally, and so as to enable a third person to determine from an inspection of it, without other aid, that it was deposited by a particular person, the judges of the election should presume that the marking was inadvertently done and count the ballot. In our opinion ballot 107, being otherwise fair and free from suspicion, should not have been rejected on the ground that it contained a distinguishing mark, and the ballot should have been counted for appellant.

Ballot 164 was rejected by the court because it had a distinguishing mark upon it. The mark upon this ballot is a small letter "t" near the bottom of the ballot and to the right of the center. The letter bears evidences of having been made carefully and is placed near an ink blot. A careful examination of this mark leads us to conclude that it might easily be a distinguishing mark. While it is not at all clear to our minds that it was so intended, still we are inclined to agree with the court below that the ballot was properly rejected.

The court refused to count ballot 172 for appellant, and this is assigned as error. This ballot is marked with a cross in the Prohibition circle and with a cross in each of the squares on that ticket. Marion Clark's name

was printed on the ballot as the Prohibition candidate for sheriff. The square opposite Clark's name was marked with a cross. The name "Marion Clark" was erased by several lines of lead pencil being drawn through it. The paper near the name "Marion Clark" is slightly torn, which was evidently done by the voter in his attempt to erase Marion Clark's name from the ballot. Below the name "Marion Clark" the name of appellant is written in lead pencil. The ballot in all other respects is free from objection. We are satisfied that the erasing of Clark's name and the writing of "Howard M. Winn" below it was done by the voter in attempting to express his choice for sheriff. The voter adopted a rather clumsy method of casting his vote for sheriff, but there is nothing illegal in the method adopted. Appellee insists that by writing the name of appellant in the Prohibition ticket, thereby making his name appear under both the Republican and Prohibition appellations, the amendatory act of 1903 is thereby violated, and for that reason this ballot should be rejected. The amendatory act referred to, which is found in 5 Starr & C. Ann. St. Supp. 1903, c. 46, par. 7, p. 200, prohibits any candidate from having his name printed under more than one party appellation, and provides that in case a candidate has been nominated by two or more political parties he may withdraw his name from all but one of said nominations and elect upon which ticket he desires to have his name appear, and if he fails to exercise his right of selection then his name cannot be printed upon either ticket. This statute deals with the right of the candidate to have his name printed upon more than one ticket, but does not purport to deny the voter the privilege of writing the name of any person for whom he desires to vote upon the ticket. In *Pierce v. People*, 197 Ill. 432, 64 N. E. 372, it was decided that every legal voter has a right to vote for the candidate of his own selection, and if the name of such candidate is not printed on the official ballot he has the right to insert it in some blank space on the ticket and vote for the candidate of his choice. See, also, *Sanner v. Patton*, 155 Ill. 553, 40 N. E. 290. And in the late case of *Smith v. Reid*, 223 Ill. 493, 79 N. E. 148, it was held that the writing in of names on a ticket and voting for them on that ticket was not illegal, even though the names so written in were printed in other places on the ballots as those of candidates for the same office for which the names were written in, and that the names so written in were not distinguishing marks. Under the authority of these cases, ballot 172 should have been counted for appellant. The fact that his name is not written in immediately opposite the square does not affect the legality of this vote. The erasure of the name of the Prohibition candidate for sheriff and writing the name of appellant immediately below it clearly indi-

cate the intention of the voter to cast this vote for appellant, and it should be so counted. *Parker v. Orr*, supra.

Ballots 35 and 94 were counted by the court for appellee. These ballots are objected to by the appellant on the ground that they contain distinguishing marks. They may be considered together. Ballot 35 has the name "George Meyers" written in ink on the face of the ballot, about one-half inch from the lower edge of the ticket. There is no office designated in connection with the name of George Meyers, and George Meyers' name is not printed upon any of the tickets as a candidate for any office. Ballot No. 94 has the name "George Mares" written above the Democratic ticket. The Democratic tickets had no name printed on them under the title of representative in the General Assembly. A blank space was left under the title of that office, in which a large number of persons who voted that ticket wrote the name of George Meyers. By referring to those tickets the conclusion must be reached that by some sort of concert of action or common understanding the Democratic party was trying to elect said George Meyers to the lower branch of the State Legislature. To vote for him it was necessary to write his name under the title of that office in the space left for that purpose. In view of the fact, which is clearly shown by the ballots introduced in evidence, that George Meyers was being voted for, generally, by persons who voted the Democratic ticket, the writing of the name of "George Meyers" on ballot 35 and "George Mares" on ballot 94 was no doubt the result of an effort to vote for him. At all events it seems probable that such was the purpose of the voter, and we are not inclined to disturb the decision of the court below in regard to these two ballots.

Ballot 116 is objected to by appellant on the ground that it contains distinguishing marks. This ballot has three small strokes of the pencil near the margin below the Prohibition ticket. It belongs to the same class as ballot 107, already discussed, and what is there said with respect to that ballot will apply to 116. The ballot was properly counted for appellee.

Ballot 117 was counted for appellee, over appellant's objection. The objection is that it bore a distinguishing mark. The mark on this ballot was a letter "V" on the back of it, in imitation of a printed "V." This ballot should have been rejected for the reasons heretofore given in discussing ballot 164.

Ballot 120 was objected to by appellant, but was properly counted for appellee. The small mark on the back of the ballot cannot be regarded as a distinguishing mark, within the rules heretofore laid down by the authorities cited.

We now come to consider ballots that were objected to by appellee. Ballot 95 was a straight Democratic ballot, marked with a cross in the circle. There was also a cross

in the circle opposite the Socialist party name, and another cross in the circle opposite the Socialist Labor party, and there was a small check mark in the circle opposite the Prohibition party appellation, but there is no cross in this circle. Neither the Socialist nor Socialist Labor party had any candidates' names printed on its ticket for county officers. The cross in the Democratic circle indicated a vote for all the candidates on that ticket. This vote, however, was neutralized for all the candidates except the county candidates by the crosses made in the Socialist and Socialist Labor party tickets, but these crosses could have no effect on the vote for county officers. The marking of two or more party tickets in the circle only nullifies the ballot in so far as both tickets bear the names of candidates for the same office. *Parker v. Orr*, supra. The little check mark in the Prohibition circle will not justify the rejection of the ballot as a distinguishing mark. The court erred in not counting this ballot for appellee.

Ballot 103 was rejected by the court. The ballot is mutilated by being cut across the left-hand end of the ballot, taking off a part of the names of all the candidates for state officers on the Democratic ticket, with one exception. The Democratic circle is gone entirely, and all the squares opposite the names of the Democratic candidates are gone. There is a cross in the Republican circle and a cross above the name of Walter S. Lamon, candidate for county judge, and a cross to the left of the name John I. Blackman on the Democratic ticket, but neither of these crosses, nor any part of the lines thereof, is within the squares. This ballot was properly rejected because it was plainly distinguishable from the other ballots, and was properly not counted for either party.

Ballot 104 is a straight Democratic ballot, marked in the circle of that party ticket, except there is a cross in the square opposite the name of Clay F. Gaumer, candidate for member of the General Assembly. To the right, and below the name of Gaumer, is an index hand pointing to the name of Gaumer, made in pencil. Undoubtedly the purpose of the voter was to call the attention of the judges to the fact that he had voted for Gaumer, to prevent his ballot being counted as a straight Democratic ballot. While such a character might be a distinguishing mark, still we are satisfied that the index finger pointing to the vote for the prohibition candidate for the Legislature was placed there with an honest purpose and out of an abundance of caution lest the vote should be overlooked. In our opinion the court erred in refusing to count this ballot for appellee.

Ballot 110 was thrown out by the court. This is a straight Republican ticket, except for William Morton, Democratic candidate for county treasurer. There is a cross in the square opposite the blank space on the Democratic ticket for member of the Legis-

lature, and there are two pencil marks in the square opposite appellee's name. The character is more like a check mark, the points of which come together outside the square, the points extending up into the square, than it is like a cross. This mark is not a distinguishing mark, and the ballot should have been counted for appellant. But appellant has not saved his exception to this ruling of the court on this ballot, but concedes that the court properly ruled thereon, and therefore the ballot will not be counted for either party.

Ballot 111 is marked in the Republican circle by three straight lines crossing in the center, forming a six-pointed star. There is a cross in the square opposite appellee's name on the Democratic ticket. This ballot should have been counted for appellee, and the court erroneously threw it out. The marking of the circle on this ballot is like the marking of the circle shown in *Tandy v. Lavery*, 194 Ill. 372, 373, 62 N. E. 774. Under the authority of that case this ballot should not have been rejected, and it will accordingly be counted for appellee.

Appellee insists that ballot 118 should have been counted for him. To this we cannot assent. This ballot stands on the same footing as ballot 110. We think it might properly have been counted for appellant, but he does not claim it. It certainly cannot be counted for appellee. It is a Republican ticket, and there is no cross in the square opposite the appellee's name.

Ballot 119 stands in the same class with 110 and 118. It might have been counted for appellant, but he has not insisted upon it, and appellee is not entitled to it.

Ballot 121 was marked "void" by the judges of the election and was not strung or counted by them for either party. The evidence of the judges shows that this ballot was picked up off the floor after the count was over and marked "void," and it never was in the ballot box. The court properly refused to count it for either party.

Ballot 161 was properly rejected because it does not bear the initials of any of the judges on the back of it. *Caldwell v. McElvain*, supra.

Ballot 173 was properly rejected for the reason that there are no crosses in any of the circles nor in any of the squares on the entire ballot. It was not a vote for any one. Instead of making a cross, the voter has undertaken to blacken the whole face of several squares with a lead pencil. The voter either did not know how to vote, or did not try to vote. There is no attempt to comply with the law, and the ballot was properly rejected.

The result reached by us after going through this record very carefully and considering every ballot separately to which objection has been made by either party, may be summarized as follows: Appellant has 3,348 votes that are unquestioned. The trial court gave

appellant 48 votes out of the 174, which we find he is entitled to. We also find that appellant was entitled to 23 votes in the Second precinct of Embarrass township, and that he is entitled to ballots 101, 102, 106, 107, and 172, making his total vote as ascertained by this court, 3,424. Appellee had 3,346 votes which were unquestioned, and the trial court properly gave him 72 out of the 174 ballots that were in question. The trial court improperly gave him ballot No. 117 and improperly refused to count for him ballots Nos. 95, 104, and 111, making his total vote as ascertained by this court 3,423. It therefore follows that appellant, Howard M. Winn, was duly elected sheriff of Edgar county by one vote, and that the county court erred in finding that John I. Blackman had been elected and in rendering judgment against appellant for costs.

The judgment of the county court of Edgar county will be reversed, and the cause remanded to that court, with directions to enter a judgment in favor of appellant.

Reversed and remanded.

DUNN, J., took no part in the consideration or decision of this case.

CARTWRIGHT, J. (concurring). I agree with the conclusion that appellant was elected sheriff of Edgar county, but think the county court erred in refusing to count the five ballots cast for him in the first precinct of Young America, which bore the initials of one of the judges indorsed thereon by another judge. I do not think a voter should be deprived of his vote by a mistake of the election officers, where the voter is not at fault, and the ballot itself shows that it is a genuine official ballot delivered to the voter by the judges. That, I think, is the purport of the decision in *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012. In the case of *Cholsser v. York*, 211 Ill. 56, 71 N. E. 940, the initials of one of the judges were stamped upon the ballots with a rubber stamp, which could be used by any person, and such initials afforded no means of identifying the ballots. The decision was upon the ground that the statute contemplates an indorsement in the handwriting of one of the judges, for the very good reason that every man's handwriting possesses certain peculiarities which distinguish it from every other, and if the initials are written by one of the judges the genuine ballots delivered to the voters may be distinguished from spurious ones. In this case the initials of one of the judges were written by another judge in his own handwriting, and the purpose of the statute was accomplished. The ballots were the genuine official ballots delivered to the voters who cast them, and I think they should have been counted.

CARTER, J. I concur in the views of Justice CARTWRIGHT.

SCOTT, J. (specially concurring). I concur in the conclusion stated in the opinion delivered by Mr. Justice VICKERS, but not in all that is said therein. I deem it necessary to state my adverse views only in so far as the five ballots cast in Young America precinct, which are exhibits 166 to 170, inclusive, are concerned. It is my judgment that these five ballots should be counted for the Republican candidate. In *Cholsser v. York*, 211 Ill. 56, 71 N. E. 940, it was held that the use of a rubber stamp by one of the election judges for the purpose of indorsing his initials on the ballots was improper, and that all ballots so indorsed were unlawful and should be rejected, even where they were otherwise free from legal objection. I was not in accord with the majority of the court in that case, and my views are fully stated in the dissenting opinion therein. If the opinion of Mr. Justice VICKERS as to the five ballots here in question should ever become the opinion of the majority of this court, the doctrine of *Cholsser v. York*, in this regard, would be extended, which I think should not be done.

(229 Ill. 223)

GLOS et al. v. BRAGDON.

(Supreme Court of Illinois. Oct. 23, 1907.)

RECORDS—PROCEEDINGS FOR REGISTRATION OF TITLE—EVIDENCE.

In a proceeding for the registration of title to a certain lot, as belonging to applicant, a conveyance describing the lot as a certain lot in a certain block, in an addition named, is insufficient to identify the lot, where no plat of the addition appears in the record.

Error to Circuit Court, Cook County; J. W. Mack, Judge.

Proceeding by Merritt C. Bragdon against Jacob Glos and others for registration of title. Decree for applicant, and defendants bring error. Reversed and remanded.

John R. O'Connor, for plaintiffs in error.

DUNN, J. The defendant in error filed his application in the circuit court of Cook county for registration of title in fee simple in him to lots 21, 22, 23, and 24, in block 5, in Union addition to Evanston, being in the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 19, township 41, range 14, in said county. The petition alleged that Jacob Glos claimed some interest in lot 21 under an alleged tax deed. Jacob Glos answered claiming title to lot 21 under a tax deed, and the application was referred to an examiner, who heard the evidence and made a report finding that the applicant was the owner of the premises in fee simple, and that the tax deed of Jacob Glos to lot 21 was void and should be set aside upon the payment of \$198.40. Exceptions to the report were overruled, and a decree entered for the registration of the title. To reverse this decree a writ of error has been prosecuted from this court.

It was necessary for the applicant to show

title to the premises in himself, and therefore essential that the conveyance under which he claimed should identify the premises so that they could be ascertained by the description. The evidence is insufficient in this respect, for the reason that no plat of Union addition to Evanston appears in the record. It is impossible from the evidence to locate block 5 of that addition, or any lot therein. *Glos v. Ehrhardt*, 224 Ill. 532, 79 N. E. 605. In accordance with the request of plaintiffs in error, the examiner made report of all the evidence, as was his duty under section 18 of the act providing for registration. 4 Starr & C. Ann. St. 1902, p. 263. The report contains an abstract of title showing that a plat of Union addition to Evanston, dated August 25, 1871, was filed for record, but neither the plat itself, nor any part of it, is copied, nor is there any description given by which any lot or block of the addition can be located. A book was produced from the recorder's office containing a map entitled "Union Addition to Evanston." The applicant offered the plat in evidence, and, upon objection, the examiner merely stated that it was part of the public records of Cook county. He made no ruling on the objection, and the map does not appear in his report. The record contains no evidence by which the premises involved in the proceeding can be located.

The decree will be reversed, and the cause remanded to the circuit court.

Reversed and remanded.

(229 Ill. 226)

PEOPLE ex rel. BOARD OF SCHOOL INSPECTORS v. CITY COUNCIL OF PEORIA.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. COURTS—APPELLATE JURISDICTION—CAUSES RELATING TO REVENUE.

In order to confer jurisdiction on the Supreme Court on the ground that the cause relates to revenue, revenue must be directly, and not incidentally, involved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 552.]

2. SAME—TEST OF JURISDICTION.

Whether a cause relates to revenue, so as to justify a direct appeal to the Supreme Court, depends on whether some recognized authority of the state or some of its municipalities authorized by law to assess or collect taxes are attempting to proceed under the law, and questions arise between them and those of whom the taxes are demanded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 552.]

3. MUNICIPAL CORPORATIONS—CITY GOVERNMENT—SCHOOL INSPECTORS.

The board of school inspectors is a branch of the city government of the city of Peoria.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 567.]

4. COURTS—APPELLATE JURISDICTION—SUPREME COURT—CAUSE RELATING TO REVENUE.

A mandamus proceeding involving only the question whether the board of school directors or a city council was authorized to fix the rate

of tax levy for school purposes was not appealable direct to the Supreme Court as involving revenue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 552.]

5. APPEAL—CONSENT TO JURISDICTION.

Jurisdiction of the Supreme Court to hear and determine an appeal depends on the statute, and cannot be conferred by stipulation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 88-97.]

Appeal from Circuit Court, Peoria County; N. E. Worthington, Judge.

Petition by the people, on the relation of the board of school inspectors, for mandamus against the city council of Peoria. From a judgment sustaining a demurrer and dismissing the petition, petitioners appeal. Cause transferred to Appellate Court.

H. C. Fuller, for appellant. Henry Mansfield, Corp. Counsel, and W. H. Moore, for appellee.

DUNN, J. The board of school inspectors of the city of Peoria, in July, 1906, having determined the amount of money which, in their opinion, would be required to be raised by taxation for the support of the public schools of the city for the ensuing year, notified the city council to levy a tax of 2.25 per cent for educational purposes. The city council levied for educational purposes only 1.277 per cent, whereupon the board of school inspectors filed in the circuit court of Peoria county their petition praying for a writ of mandamus requiring the city council to make an additional levy of $\frac{978}{1000}$ per cent. From the judgment sustaining a demurrer and dismissing the petition, the petitioners have prosecuted an appeal to this court.

This court has no jurisdiction to entertain the appeal. The purpose of the suit was to determine the question whether the board of school inspectors or the city council had the authority to fix the rate of the tax levy for school purposes. The determination of that question rested upon the construction of the various statutes affecting the powers of the respective parties. No franchise or freehold, no construction of the Constitution or validity of a statute, was involved. The case was not one relating to the revenue, within the meaning of the statute authorizing appeals to this court in such cases. To give jurisdiction in such cases the revenue must be directly, and not incidentally, involved. *Reed v. Village of Chatsworth*, 201 Ill. 480, 66 N. E. 217; *Wilson v. County of Marion*, 205 Ill. 580, 68 N. E. 793; *School Trustees v. School Inspectors*, 208 Ill. 73, 69 N. E. 781; *City of Chicago v. Cook County*, 224 Ill. 246, 79 N. E. 571. In the first case cited the test of jurisdiction given is "that the question of revenue can only be at issue when some recognized authority of the state, or some of the municipalities authorized by law to assess or collect taxes, are attempt-

ing to proceed under the law and questions arise between them and those of whom the taxes are demanded." The board of school inspectors is a branch of the city government. *School Trustees v. School Inspectors*, supra. No question arises in regard to the right of the city of Peoria to levy taxes for school purposes. The controversy is as to what particular branch of the city government shall fix the rate.

The record contains a stipulation of the parties that the appeal shall be taken directly to the Supreme Court. But jurisdiction of the subject-matter depends upon the statute, and cannot be conferred by consent. *Foot v. Lake County*, 198 Ill. 638, 64 N. E. 1015.

The appeal was improperly taken to this court, and the clerk will be directed to transmit the transcript and files to the clerk of the Appellate Court for the Second District. Cause transferred.

(329 Ill. 237.)

LOWELL v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CONSPIRACY—INDICTMENT—SUFFICIENCY.

An indictment for a conspiracy to cheat and defraud need not set out the names of the persons intended to be cheated and defrauded, if the conspiracy was not aimed at a particular or definite individual, but to cheat and defraud the public generally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 79-99.]

2. CONSPIRACY—INDICTMENT—VARIANCE.

The rule that under an indictment for larceny a variance between the proof and allegations of the indictment as to the ownership of the property is fatal applies to an indictment for conspiracy to cheat and defraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 90.]

3. SAME.

Allegations of a conspiracy with intent to cheat and defraud a certain person are not sustained by proof of an attempt to cheat and defraud the public generally.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 90.]

4. SAME—EVIDENCE—SUFFICIENCY.

In a prosecution for conspiracy with intent to cheat and defraud prosecutor collecting premiums for a fraudulent and worthless insurance policy issued by defendants, it could not be inferred from proof that some persons who insured with defendants and paid their premiums sustained losses that were not paid, that prosecutor, who sustained no loss, would have been refused payment if his property had been destroyed.

5. INDICTMENT AND INFORMATION—ISSUES AND PROOF.

It is not sufficient to sustain a conviction on a particular charge to prove that defendant was guilty of some other charge, or general bad conduct, but the proof must establish his guilt of the particular charge set forth in the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 536-574.]

Error to Appellate Court, First District, on Writ of Error to the Criminal Court, Cook County; W. M. McEwen, Judge.

Wallace A. Lowell was convicted of crime, and brings error. Reversed.

M. L. Thackaberry, for plaintiff in error. John J. Healy, State's Atty., and F. L. Barnett (Frank M. Fairfield, of counsel), for the People.

FARMER, J. Plaintiff in error and one Walter M. Cowell were at the November term, 1904, of the criminal court of Cook county indicted for conspiracy. The indictment contained two counts, each charging that the defendants conspired together to cheat and defraud, by false pretenses, one Nelson R. Jackson out of \$12, the property and money of the said Jackson. The case was tried in February, 1905. After the jury were impaneled defendant Cowell withdrew his plea of not guilty, entered a plea of guilty, and became the principal witness for the prosecution in the trial of the plaintiff in error.

The means used by plaintiff in error and Cowell in the alleged conspiracy to cheat and defraud Jackson out of his money were, as appears from the proof, by writing worthless fire insurance policies, collecting premiums thereon from the property owner without any ability, and, it is claimed by the prosecution, without any intention, to pay losses if any occurred. The method of conducting their business appears to have been as follows: They organized a corporation under the laws of Wisconsin, which they called the "Wisconsin Insurance Agency Company." This corporation was not an insurance organization, but merely acted as agent in soliciting and writing insurance for such Lloyd companies as plaintiff in error and Cowell organized or represented. A Lloyd company is explained in the proof to mean an association of men who agree to conduct an insurance business, and give to some person or corporation, as their agent, authority to represent them and write insurance policies of a limited liability. The names of a number of men would be used as one association and styled the "United Lloyds"; another, the "United Fire Underwriters"; another, "Equitable Fire Insurance Company"; another, "Fire Underwriters' Alliance," and so on. Eight of such associations or companies appear to have been organized, or pretended to have been organized, by the plaintiff in error and Cowell. With possibly one exception, it appears that the men whose names were used as the underwriters by the plaintiff in error and Cowell were financially worthless, and neither the plaintiff in error nor Cowell was worth anything. Cowell had some stocks, securities, and alleged title papers to lands aggregating a considerable sum of money, but he testified they were all worthless, and that this was known to the plaintiff in error, as well as to himself. These stocks, securities, and title papers were the only assets, as far as the

evidence shows, that were behind the policies written by the Wisconsin Insurance Agency Company. They were made to answer for each one of the associations purporting to write insurance by Cowell turning them over to one of the parties in such association, and then procuring the affidavit of the person to whom the conveyance or transfer was made, stating that, for the purpose of procuring a financial standing and for the benefit of policy holders and others interested, the affiant was the owner of the property described in the affidavit, worth a certain value. This part of the business appears to have been done by Cowell, and, when for any reason it was inconvenient to get the affidavit of the party, Cowell testifies he wrote the signature to the affidavit and attached his jurat to it as notary public. One illustration is what purports to be the affidavit of Thomas M. Bell. In said affidavit said affiant is represented as swearing that he is the owner of real estate in the city of New Orleans, La., Omaha, Neb., Pierre, S. D., Long Island, N. Y., farm lands in Michigan and Missouri, and that said property is free from liens and incumbrances and is reasonably worth \$470,500, and that affiant places his financial worth at more than \$1,000,000 above all exemptions and offsets. Bell's name is one of those represented by plaintiff in error and Cowell as being one of the underwriters of the United Fire Underwriters. He is described in their literature giving what is purported to be a statement of the assets and liabilities and a list of the underwriters, as a "capitalist, Chicago, Ill." In the same statement the assets of the United Fire Underwriters are represented to be \$332,979.64, and liabilities "none." Cowell testified that Bell did not sign the affidavit and was not sworn to it, but that he (Cowell) wrote Bell's name to the purported affidavit and signed his own name to the jurat as notary public, certifying that it had been sworn to by Bell. Cowell further testified that the assets thus passed from one person to another from whom affidavits were secured or pretended to be secured for use by him and plaintiff in error in securing business were "hot air and blue sky." Plaintiff in error was not sworn on the trial, but a large amount of correspondence between him and Cowell and others associated with them in the business was introduced in evidence, and it is claimed this correspondence shows plaintiff in error thought the "assets" held by Cowell were good and that Cowell so represented them to him. It is not shown by the abstract of the testimony how much business the parties did during the period of something like two years they were operating. The proof tends to show they did considerable business; but it is not shown how many losses occurred. One witness who was employed by the plaintiff in error and Cowell testified that during the first four months of 1903 he heard people talking to plaintiff in error every day

about losses because they were not paid. The witness testified he did not know how many losses occurred while he was employed, but gave it as his opinion that 35 or 40 occurred. Cowell testified there were from 20 to 25 losses during the time they were conducting the business. The proof shows that two small losses were paid. The testimony does not show whether any other losses were paid or not.

Differences and ill feeling arose between plaintiff in error and Cowell and they separated; plaintiff in error retiring from the business. Whether this occurred in April or October, 1903, is a disputed question. At a meeting of the Wisconsin Insurance Agency Company held in its office in Kenosha on April 18, 1903, the following resolution was adopted: "Resolved, that whereas the insurance business of this company has proved to be unsatisfactory, that we, from and after this date, discontinue this branch of the business, and furthermore resolve that we hereby sell and deliver all the property, of every kind and nature, belonging to the Wisconsin Insurance Agency Company, connected with their insurance department, together with all that belonging to the Union Lloyds and the United Fire Underwriters of Chicago, Ill., to E. M. Green & Co., and do hereby appoint the said E. M. Green & Co. attorneys for the said Union Lloyds and the United Fire Underwriters, with full power of substitution and revocation." This is signed by plaintiff in error, the owner of 124 shares of the stock of the corporation, Cowell, the owner of 124 shares, and John F. Pershing, the owner of 1 share. The total capital stock of the corporation appears to have been 250 shares. Numerous letters from Lowell, running all through the years 1902 and 1903, were offered in evidence, which tended to show that he did not retire from the business, as the resolution would indicate. The date of the retirement of plaintiff in error from all connection with the business is urged as being very important, for the reason, it is contended, that if he did retire in April, 1902, then the offense was barred by the statute of limitations before the indictment was returned. The policy to Jackson was issued September 9, 1902, and the indictment returned November 23, 1904. There is a large mass of testimony in the record, consisting of over 1,600 pages—a great deal of which is of a documentary character, including a large number of letters written by plaintiff in error down to as late as January, 1904—which is inconsistent with his claim that he severed his connection with the business and retired from it in 1902. There is also the oral testimony of witnesses to the same effect.

The testimony abundantly shows that the assets, which were practically the sole reliance of persons taking policies in any of the associations represented by plaintiff in error and Cowell for the payment of losses, if any were sustained by the insured, were

entirely worthless, and the persons whose names were used as underwriters of the various insurance organizations were tools of the plaintiff in error and Cowell, and owned no property or means that could be reached for the payment of losses. Practically the only capital or property of plaintiff in error and Cowell, or the insurance organizations they represented, was the premiums collected from persons who took policies with them. It is insisted by plaintiff in error that he did not know Cowell possessed no means or that the assets before referred to were worthless, but this contention we think is not sustained by the evidence. Cowell testified that he told him they were valueless, but it is argued that Cowell should not be believed, because after the jury were impaneled he withdrew his plea of not guilty, entered a plea of guilty, and then became the chief witness for the state under an arrangement with the prosecutor that for so doing he would be allowed to go without punishment. In his testimony he admitted his unfriendliness to plaintiff in error, and that he had said he would like to get him in the penitentiary. Plaintiff in error's knowledge of the worthlessness of the assets and securities of Cowell does not depend alone upon Cowell's testimony. From the manner in which this alleged property was used to secure business, and from other testimony in the record, including letters written by plaintiff in error, the conclusion is irresistible that he knew they were of no value; and, if this were the only question to be determined in this case, we could not say that this fact was not sufficiently proven by the evidence.

The proof on the part of the state as to losses sustained by policy holders, and the practice of plaintiff in error and Cowell as to paying or refusing to pay them, is not of a very definite character. Frank Wetterhahn, who worked from July or August, 1902, until January, 1904, in the office of plaintiff in error and Cowell as superintendent of agents, a part of the time under the direction of plaintiff in error, testified that during this period he thought there were 35 or 40 losses; that he knew of two losses, one of \$4.50 and one of \$62, being paid; that people were talking to Lowell the first four months of 1903 about losses not being paid; and that Lowell would tell them he would pay every honest loss. This is substantially the testimony relating to the failure or refusal of the insurance organizations operated by plaintiff in error and Cowell to pay losses.

The most serious question raised in this record is whether the proof sustains the allegations of the indictment. The indictment does not charge plaintiff in error with obtaining money by false pretenses, but with entering into a conspiracy with Cowell to obtain money and property, to wit, \$12, from one Nelson R. Jackson. It is contended by plaintiff in error that as the indictment

charges a conspiracy to defraud a particular individual it must be proven as alleged, and that it is not sufficient to prove a conspiracy to defraud the public generally, or all persons whom they could procure to deal with them. The proof shows that Jackson took a policy in the Union Lloyds through plaintiff in error and Cowell, and paid premiums amounting in all to \$11.50. He did not, however, sustain any loss. Whether he would have been paid if he had sustained a loss can only be conjectured from the proof relating to the methods and practices of the parties toward others who did sustain losses. Cowell testified that he never knew Jackson, and that, when he and plaintiff in error associated themselves together, he had no intention of cheating or defrauding him out of any money or property, and that he never had any such intention at any time afterwards. It is clear from the proof that plaintiff in error and Cowell never conspired together to procure money from any particular person or persons, and that Jackson, a colored man running a barber shop, was to them unknown. The object and purpose of the parties in associating themselves together in the insurance business was to procure money from any and all persons whom they could induce to take policies in the organizations they represented.

In *Commonwealth v. Harley*, 7 Metc. 506, the indictment charged defendants, Robert Harley and Philenia Harley, with conspiring, combining, and agreeing together to cheat and defraud one Stephen W. Marsh out of a pianoforte. The trial court instructed the jury that it was not necessary for the prosecution to prove an agreement or conspiracy to cheat and defraud Marsh in particular; but if the proof showed, beyond a reasonable doubt, that the defendants united and agreed together to cheat the public generally, or any individual whom they might meet, and be able to defraud, and in pursuance of that agreement one of the defendants made and delivered to the other defendant promissory notes to enable him to carry into effect the unlawful agreement, that the notes were received by said defendant with intent to use them for the purpose of cheating said Marsh, and that he did use them for that purpose and thereby cheat and defraud Marsh of a pianoforte, the offense against the defendants was proven, although it did not appear that Philenia Harley (the one who gave the notes) knew Marsh was the individual to be defrauded, or that the defendants had agreed together to perpetrate this particular fraud on him. The court held it was competent, in an indictment, to charge a conspiracy to defraud the public generally, but said: "The government having elected to set forth in the indictment a special intent to defraud Stephen W. Marsh as the object of the conspiracy on the part of both conspirators, Philenia Harley and Robert Harley, that allegation was a

material one, and the government was bound to establish it by proof. But that allegation could not be established by proof that the defendants conspired and agreed together to cheat the public generally, or any individual whom they might be able to defraud. Such fact of a conspiracy to cheat Stephen W. Marsh cannot be said necessarily to result, nor can it be legally inferred, from the fact of a conspiracy to cheat the public generally, or any person whom they might meet." This rule was followed and the above case cited with approval in *Commonwealth v. Kellogg*, 7 Cush. 473.

In 2 Wharton on Criminal Law, § 1396, after quoting from *Tindal, C. J.*, it is said: "Where, therefore, the persons injured were defined at the time of the conspiracy and ascertainable by the pleader, their names should be specified in the indictment. Where, however, the conspiracy was to defraud a class not capable of being at the time resolved into individuals, or to defraud the public generally, then the specification of names is impracticable and hence unnecessary. An intent to cheat A. as an individual is not sustained by evidence of an intent to cheat the public generally."

In 2 McClain on Criminal Law, § 982, it is said: "Where the charge is of a conspiracy to defraud in general, it is not necessary to specifically allege the name of the person or persons intended to be defrauded. It is enough to charge the intent to defraud persons of a particular class or description. But, if the conspiracy charged is to defraud a particular person, he should be named, and the proof must correspond to the allegation in this respect. If the charge is of a conspiracy to defraud the public generally, proof of an intent to defraud a particular person will constitute a variance; but it is not necessary to allege the names of all persons intended to be injured. It is sufficient to state the names of some and that the names of others are to the grand jurors unknown."

It is not necessary to the validity of an indictment for a conspiracy to cheat and defraud that it should set out the names of the persons intended to be cheated and defrauded if the conspiracy was not aimed at a particular or definite individual, but was aimed to cheat and defraud the public generally. In such case an indictment containing appropriate averments that a conspiracy was entered into by the defendants for the purpose of defrauding the public generally, or the State, or the United States, as the case may be, would be a good indictment. 2 Bishop on Crim. Proc. § 210. The rule has been long established that under an indictment for larceny a variance between the proof and the allegations of the indictment as to the ownership of the property is fatal. The rule appears to be the same in prosecutions for conspiracy to cheat and defraud. This indictment charges the defendants with

conspiring to cheat and defraud Jackson, who was unknown to the defendants, or either of them, so far as the proof shows, before he took a policy in one of their companies. Jackson never sustained any loss, and no liability accrued to him on account of the insurance policy written for him in one of the organizations represented by plaintiff in error and Cowell. It cannot be said that the allegations of a conspiracy with the intent to cheat and defraud Jackson are sustained by proof of an intent to cheat and defraud the public generally. Neither can it be inferred from proof that some persons who insured with plaintiff in error and Cowell and paid their premiums sustained losses that were not paid, that, therefore, Jackson, who sustained no loss, would have been refused payment if the insured property had been destroyed. In criminal cases it is not sufficient, to sustain a conviction on a particular charge, to prove that the defendant was guilty of some other charge or of general bad and criminal conduct; but the proof must establish his guilt of the particular charge set forth in the indictment. This rule was not complied with in this case, and we are of opinion, therefore, the court erred in overruling the motion for a new trial.

The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

(229 Ill. 240)

NELSON v. PETTERSON.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. LIMITATION OF ACTIONS—NEW PROMISE—WAIVER OF BAR—ACTIONS EX DELICTO.

The rule that a subsequent promise will remove the bar of limitations does not apply to actions ex delicto, and an action founded on tort once barred cannot be revived by a subsequent promise, though the tort was waived and the action brought in assumpsit upon a liability ex contractu implied by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 574.]

2. SAME.

The rule that in actions ex contractu where a subsequent promise is relied upon to take a case out of the bar of limitations the original promise, and not the subsequent one, is the cause of action, and the subsequent promise only operates to restore or revive the remedy on the original cause of action, does not apply to actions ex delicto where the only cause of action is a tort.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 574.]

3. BANKRUPTCY—DISCHARGE OF BANKRUPT—DEBTS AND LIABILITIES DISCHARGED.

A discharge in bankruptcy is a complete bar to an action of indebitatus assumpsit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 772.]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Action in assumpsit by Louis A. Nelson against Charles A. Petterson. From a judg-

ment of the Appellate Court, affirming the judgment of the superior court sustaining a demurrer to plaintiff's replication, he appeals. Affirmed.

Appellant (hereafter referred to as plaintiff) sued appellee (hereafter referred to as defendant) in the superior court of Cook county for \$1,750, which plaintiff claimed defendant had cheated and defrauded him out of in the sale of a tract of land by defendant to plaintiff.

The declaration is in assumpsit, and contains three counts. The first count charges that the plaintiff purchased of defendant a certain described tract of land in Chicago, Ill., for \$1,750; that to induce the plaintiff to purchase said lands, and, for the purpose of deceiving, defrauding, and injuring plaintiff, defendant falsely and deceitfully represented to the plaintiff that he (defendant) and his wife were the owners of said land in fee simple, and that there was no incumbrance nor mortgage thereon; that the plaintiff believed said representations to be true, and, relying upon them, bought said land for said sum of \$1,750 and paid the purchase price to the defendant November 15, 1892, and before he discovered the falsity of the promises and representations made by the defendant. The count further avers that on November 2, 1892, defendant and his wife incumbered said land, together with other lands, by executing a trust deed thereon to Isaac Drake to secure the payment to Lucy B. Sims of \$13,000 and interest, and that said trust deed, and the indebtedness secured thereby, were in full force and effect and an incumbrance upon the land at the time of the purchase by plaintiff. It is further averred that said incumbrance was not removed from said land by defendant, and that on February 2, 1898, a bill was filed by the trustee and the owner of the indebtedness secured by the trust deed to foreclose said trust deed, and such proceedings were had thereunder that a decree was entered for a sale of said land for the payment of said indebtedness, and the lands were afterwards sold under said decree to persons other than the plaintiff; that the time for redemption from said sale had expired and no redemption from said lands had been made, and that by virtue of said foreclosure proceedings and sale the lands had been taken from plaintiff and wholly lost to him. The count further avers that within five years next before the commencement of this suit and the filing of the amended declaration the defendant admitted, in writing, to the plaintiff, the existence of the cause of action set forth in the declaration and his indebtedness to plaintiff based thereon, and promised plaintiff, in writing, to pay the same. The second count is not materially different from the first, except that it alleges the trust deed was in existence at the time plaintiff purchased the land, but had not yet been recorded, and that defendant failed to advise plaintiff of its existence, and

that defendant knew plaintiff would conclude, from his failure to inform him of the incumbrance, that no incumbrance existed; that plaintiff did so conclude, and, relying upon defendant's silence, paid the \$1,750. The third count charges that defendant represented the land to be free and clear of incumbrances; that plaintiff, believing in and relying upon said representations as true, entered into a contract with defendant for the purchase of the land, and that before plaintiff discovered the falsity of said promises and representations made by the defendant, and while relying on and believing them to be true, carried out and performed his contract for the purchase of said land for \$1,750; that at the time of the making and performing said contract by the plaintiff the land was not free and clear of incumbrances, but was incumbered to the extent of \$13,000. The declaration concludes in assumpsit, laying plaintiff's damages at \$4,000.

The præcipe was filed and summons issued January 7, 1904. From them it would appear that the suit was originally brought in assumpsit. On November 17th leave was obtained to change the form of action from trespass to assumpsit, and on that day the declaration above quoted in substance was filed. It is denominated in the record the amended declaration, and is the only declaration copied in the record.

Defendant pleaded the general issue and two special pleas, viz.: (1) The five-year statute of limitations; (2) a discharge in bankruptcy on the 12th day of September, 1904, by the District Court of the United States for the Northern District of Illinois. This plea avers that the cause of action in the declaration mentioned "is in respect of a debt and claim by the said act of Congress made provable against the estate of the defendant which existed on the said 12th day of May, 1904, and that the said supposed causes of action are not, nor is any one of them, in respect of any such debt or debts as are or is by the said act excepted from the operation of a discharge in bankruptcy." etc. Plaintiff demurred to the two special pleas, which demurrer was overruled. Plaintiff elected to stand by his demurrer to the plea of discharge in bankruptcy, and to the plea of the statute of limitations replied that within five years before the commencement of the suit, and within five years before the filing of the amended declaration, and before defendant's alleged discharge in bankruptcy, defendant admitted, in writing, to plaintiff, the causes of action declared on, his indebtedness to plaintiff, and promised plaintiff, in writing, to pay the same. A demurrer by defendant to this replication was sustained, and, plaintiff electing to stand by his replication, judgment was entered for defendant for his costs. On appeal to the Appellate Court by plaintiff this judgment was affirmed, and he has prosecuted a further appeal to this court.

Helmer, Moulton & Whitman, for appellant. Johnson & Moltrop and Henry C. Belter, for appellee.

FARMER, J. (after stating the facts as above). The basis of the action was the tort committed by defendant in 1892. Clearly the statute of limitations would be a good plea to a declaration in case filed in 1904 counting on a tort committed in 1892. Appellant's counsel say in their brief the only question involved is whether the promise set up in the replication to the plea of the statute of limitations restored the remedy, and contend that a recovery is authorized because, first, "appellant declares in assumpsit upon a liability *ex contractu* created and imposed by law by reason of the fraud stated in the declaration; second, if the action be one in reality to recover for a tort and the law of torts governs, still the acknowledgment and new promise in writing waived the statute of limitations, removed the bar and restored the remedy for the tort committed."

The rule that a subsequent promise will remove the bar of the statute of limitations applies to actions on contracts but not to actions *ex delicto*. 19 Am. & Eng. Ency. of Law (2d Ed.) 289. In *Oothout v. Thompson*, 20 Johns. (N. Y.) 277, the action was for fraud in the sale of a slave. The statute of limitations was six years, and suit was brought after the expiration of that time. To the plea of the statute of limitations plaintiff replied a subsequent promise within six years next before the commencement of the suit. The court held the action could not be revived, and said: "A case of this kind does not stand upon the same principle as the acknowledgment of a debt within six years. There the acknowledgment is evidence of a new promise; here it is not evidence of a new trespass, and therefore there is no analogy between the two cases." In *Peterson v. Breitlag*, 88 Iowa, 418, 55 N. W. 36, a suit was begun to foreclose a mortgage made to secure a note which was given in settlement of damages claimed by the payee and mortgagee to have been sustained by him as a result of a tort committed by the mortgagor. The tort was committed in 1877 and the note and mortgage were executed in 1889. By the statute of limitations of the state of Iowa an action in tort was barred in two years. The court held there was no consideration for the note and mortgage, and that they could not be enforced because the liability resulted from a tort, which was barred by the statute of limitations before the note and mortgage were given, and the giving of them could not operate to revive the cause of action. On page 421 of 88 Iowa, page 87 of 55 N. W., the court say: "But it must be conceded that it is always permissible for the defendant in such an action to show, by pleading and proof, what the consideration for the note and mortgage was. When this is done, the transac-

tion is just the same as if the defendant had inserted in the note and mortgage an admission of guilt, and that the note and mortgage were given to pay the damages occasioned thereby. Any other holding would sacrifice the substance of the transaction to the mere form. In whatever way the question is viewed, in connection with the pleadings and agreed statement of facts, there is no escape from the conclusion that the rights of the parties are the same as if the defendants had signed a writing acknowledging liability and promising to pay for the wrong." In *Holtham v. City of Detroit*, 136 Mich. 17, 98 N. W. 754, it was said: "An action of tort once barred by the statute of limitations cannot, like an action arising out of contract, be revived by either an express or implied agreement."

We are of opinion that if, as contended by plaintiff, the fraudulent representations and concealments of defendant alleged in the declaration created a liability from which the law implied a promise to pay, so that *indebitatus assumpsit* would lie, still the liability results from a tort, and not a contract. If the tort might be waived and an action of assumpsit maintained, still the very foundation of the action is the tort, and it is only by a fiction of law that a promise to pay is said to be implied. It is true, as contended by counsel for plaintiff, that in this state the authorities are to the effect that in actions *ex contractu*, where a subsequent promise is relied upon to take the case out of the bar of the statute, the original promise, and not the subsequent one, is the cause of action, and the subsequent promise only operates to restore or revive the remedy on the original cause of action. But as this rule does not apply to actions *ex delicto* where the only cause of action is a tort. It would be illogical to say that an action in tort, when barred, cannot be revived by a subsequent promise, but, as the law implied a promise to pay the alleged damages resulting from the commission of the tort, the action in form *ex contractu* may be revived by a subsequent promise. If the declaration, instead of setting out the tortious acts out of which the liability arose, had been in the ordinary form of *indebitatus assumpsit*, it could not be contended that the discharge in bankruptcy would not be a complete bar.

Each count of the declaration alleges that within five years before the declaration was filed defendant admitted his liability and promised to pay. If the suit be treated as upon the original tort, it was barred before the declaration was filed. If it be treated as upon a liability growing out of the subsequent promise to pay, then the plea of defendant's discharge in bankruptcy releases the bankruptcy from all his provable debts, except such as are "liabilities for obtaining property by false pretenses or false representations, or for willful or malicious injuries to the person or property of another."

We are of opinion the judgment of the Appellate Court was correct, and it is accordingly affirmed.

Judgment affirmed.

(229 Ill. 260)

CHICAGO UNION TRACTION CO. v.
GIESE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. NEGLIGENCE—ELEMENTS.

To constitute actionable negligence there must exist a duty of the person charged to protect the complaining party from injury, a failure to perform the duty, and an injury resulting from the failure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 1-3.]

2. SAME—EVIDENCE—RES IPSA LOQUITUR.

While it is a rule that the burden of proving the existence of a duty, its breach, and the resulting injury, is upon plaintiff, yet when a thing causing an injury is shown to be under the management of the person charged, and the accident is one which ordinarily does not happen when proper care is used by those in charge, the accident itself affords evidence, in the absence of an explanation by the party charged, that it resulted from a want of proper care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 217, 224.]

3. STREET RAILROADS—STREET CAR LEAVING THE TRACK—RES IPSA LOQUITUR.

An injury caused by a street car leaving the track and striking a wagon in which plaintiff was riding is within the maxim "Res ipsa loquitur," and proof of the injury will justify a recovery unless defendant shows that it was not at fault.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 227.]

4. EVIDENCE — OPINIONS BASED ON SELF-SERVING DECLARATIONS.

The opinions of physicians as to a person's condition, based upon statements made by him while they were examining him to discover the extent of his injuries, but not for treatment, are inadmissible as based upon self-serving declarations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2348, 2376.]

5. APPEAL—PRESENTATION OF OBJECTIONS IN LOWER COURT—MOTION FOR NEW TRIAL—SPECIFICATION OF ERRORS—SUFFICIENCY.

The ground in a motion for a new trial that the court admitted improper testimony, over objection, is broad enough to include an exception to a refusal to strike out objectionable testimony so as to save the point on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1744.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Action by Albert Giese against the Chicago Union Traction Company. From a judgment of the Appellate Court for the First District affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action by Albert Giese for a personal injury, against the Chicago Union Traction Company, in which a judgment against the street car company for \$2,000 has been affirmed by the Appellate Court for the First District. The declaration consists of three counts, the first and second of which charge

that the defendant, by its servants, carelessly, improperly, and negligently drove and managed a train, consisting of two coaches, so that the rear car struck the wagon of the plaintiff in which he was riding, and thereby he received the injuries complained of. The charge of negligence in these two counts is general. The third count charged that the defendant negligently drove a train of two cars at so high a rate of speed that the rear car necessarily and unavoidably left the track, and through the negligence of its servants the car struck the wagon of the plaintiff, thereby injuring him. On May 7, 1902, the appellee and his son, a boy 11 years of age, were going west on Division street, in the city of Chicago, in a wagon drawn by one horse. Appellee was sitting on the north end of the seat, and his son by his left side. Appellee was driving, and his wagon was in the tracks of appellant used for its west-bound cars. There were tracks immediately south and parallel to the tracks upon which appellee was driving upon which appellant ran its east-bound cars. On the south, and almost immediately opposite the place where the injury occurred, appellant's car barns were located, from which tracks ran north, connecting by a sharp curve with the tracks on Division street. A train, consisting of a motor car and a trailer, came out of the car barn, and while passing around the curve to reach the east-bound track the front wheels of the trailer left the track and collided with the wagon on which appellee was riding on the west-bound tracks. Appellee offered no evidence of any defect in the track or the construction of the car, and the only evidence relating to the management of the car is the statement by appellee that the car came around the curve "fast," and by appellee's son that the car was "coming out pretty fast." The errors relied upon for a reversal are the overruling of appellant's motion to direct a verdict, the giving of erroneous instructions, and the admission of incompetent and improper evidence.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant. Wickett, Meler & Booth, for appellee.

VICKERS, J. (after stating the facts as above). Appellant insists that the court erred in refusing to direct a verdict because the evidence does not show that the derailment of the car was the result of its negligence. We do not find it necessary to decide whether the general statements of appellee and his son that the car in question was "coming fast" can be regarded as such evidence of a negligent rate of speed as to warrant the court in submitting that question to the jury. The first requisite in establishing negligence is to show the existence of some duty and its violation. Negligence consists in the violation of a duty owing by the party inflicting the injury to the person injured. Back of every instance of negligence must be found

a duty to the individual complaining, an observance of which would have avoided the injury. To state the principle in other language, in every case involving actionable negligence there must exist three essential elements: First, the existence of a duty on the part of the person charged to protect the complaining party from the injury received; second, a failure to perform that duty; and, third, an injury resulting from such failure. When these elements concur they unitedly constitute actionable negligence, and the absence of any of these elements renders the pleading bad or the evidence insufficient, as the case may be. 2 Cooley on Torts (3d Ed.) p. 1411, and cases cited. Duties may be general and owing to everybody, or particular and owing to a single person only, by reason of his peculiar position. A general duty becomes a personal and particular duty when some individual is placed in a position which gives him special occasion to insist upon its performance. That the burden of proving the existence of the duty, its breach, and the resulting injury is on the complaining party, is so well settled in the law of negligence that it requires no elaboration or citation of authority to sustain it. While this is true, there is a class of cases which are made out by showing the injury and connecting the defendant with it. When a thing which has caused an injury is shown to be under the management of the party charged with negligence, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation by the party charged, that it arose from the want of proper care. This rule of law results from the maxim "*Res ipsa loquitur*." Many cases are to be found illustrating the application of this rule. In some of them it is said that the rule is an exception to the general rule that negligence will never be inferred, while in others it is not treated as an exception, but is treated as an evidentiary rule, under which the charge of negligence is regarded as proven, *prima facie*, by proof of facts showing that the thing which caused the injury was under the management and control of the defendant or his servants, and that the accident is such as in the ordinary course of things does not happen if those who have the management use proper care. Webb's Pollock on Torts, p. 550. The more accurate statement of the law is that negligence is never presumed, but that the circumstances surrounding a case where the maxim "*Res ipsa loquitur*" applies amount to evidence from which the fact of negligence may be found. In the case before us, all of the elements of the accident were within the complete control of appellant, and the result is so far out of the usual course of things that there is no fair inference that it could have been produced by any other cause than negligence. Experience and observation teach us

that with proper care street cars will remain on the tracks. If this were not true, municipalities would not license them to use public streets. If, with proper construction and management, street cars cannot be kept upon their tracks, then the safety of the public would require that they be done away with altogether. It is a matter of common knowledge, however, that it is possible, by the exercise of ordinary care, to so construct and operate these conveyances that they will not leave the tracks, and when they do so, and inflict an injury upon another who is lawfully in the street and free from contributory negligence, we think that no hardship is imposed upon these corporations to hold that such an injury is within the maxim "*Res ipsa loquitur*," and that proof of the injury, under the circumstances stated, will justify a verdict, unless such *prima facie* case is met by proof showing that the company is not at fault.

Appellant relies with much apparent confidence on Chicago & Eastern Illinois Railroad Co. v. Reilly, 212 Ill. 506, 72 N. E. 454, 103 Am. St. Rep. 243, as an authority against the application of the doctrine of "*Res ipsa loquitur*" to the case at bar. That case is clearly distinguishable from the case in hand. There the plaintiff was struck by a projecting piece of lumber on a passing freight car while the plaintiff was standing at a street crossing. There was no proof as to when, how, or where the car was loaded, nor how long the timber had been projecting, and no proof that the defendant had notice of such condition. The freight car did not leave the track, nor did the timber fall off the car against the party who was injured. This court held in that case that the condition of the projecting timber could be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course itself is improper. In the case at bar the derailment of the car was out of the usual course of business, and it would not have happened but for some act of negligence, either as to the condition of the car, track, or management. There was no error in refusing to direct a verdict in this case.

Appellant complains of the giving of instructions 3 and 4 for appellee. These instructions are not open to the criticism made upon them. There is, however, an error in the ruling of the court as to the admission of evidence for which this judgment must be reversed. On the trial Drs. Hardon and Marcusson were examined, for appellee, as experts, as to the nature and extent of appellee's injuries. Their examination of appellee was not for the purpose of treating him, but to find whether there was any injury and the extent of it. One of them, Dr. Hardon, examined him for the purpose of reporting to the attorneys so that they could

determine whether to take his case, and Dr. Marcusson for the purpose of testifying as a witness. These physicians obtained the history of appellee's case from him, and testified, basing their opinions partly upon their own observation and partly upon the statements of the case obtained from appellee. The fact that the physicians based their opinions partly upon the statements obtained from appellee was brought out on the cross-examination of these witnesses by appellant, who thereupon moved to strike out such portions of their statements as appeared to be based, in whole or in part, upon information obtained from appellee's statements. This motion was overruled by the court except as to the ejaculations of pain testified to by Dr. Marcusson. In his examination Dr. Hardon said: "I was not called to treat the patient at the first examination. As part of the examination I took the history of this accident. I asked him the usual questions to determine his feelings, his pain, and his ability to discharge business. In reaching the conclusions which I reached as to the condition I found and which I concluded existed, which I stated to the gentleman, I took into consideration the history as given me by the plaintiff and the subsequent course of the effect of that injury upon him, and took into consideration the injury, and the effect of it, as he gave it to me, together with the examination; each being a part of the other." This evidence was material and tended to corroborate appellee as to the character and extent of his injury. It has been held by this court that declarations made by an injured party to a physician, not with a view to treatment, are self-serving and inadmissible. *West Chicago Street Railroad Co. v. Carr*, 170 Ill. 478, 48 N. E. 992. In this case this court said (page 483 of 170 Ill., page 994 of 48 N. E.): "We think, however, the correct rule to be deduced from that laid down by Greenleaf, and most conducive to justice, is that such declarations, being in favor of the party making them, are only competent when made as part of the *res gestæ*, or to a physician during treatment, or upon an examination prior to and without reference to the bringing of an action to recover damages for the injury complained of, unless the examination should be made at the instance of the defendant, with a view to the trial." A similar question was before this court in *Chicago & Eastern Illinois Railroad Co. v. Donworth*, 203 Ill. 192, 67 N. E. 797, where it was held that the statement by a physician testifying as a witness for the plaintiff that the latter had lost his power of hearing in his left ear should be excluded when such testimony is not based upon a physician's actual knowledge, but upon the declarations of the plaintiff. See, also, *Stevens v. People*, 215 Ill. 593, 74 N. E. 786; *City of Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23. If the statements of a party in his own interest are improper, clearly an opinion based thereon, the value of which depends on

the truth of the statements, must for the same reason be rejected, otherwise a party would have, indirectly, the benefit of his self-serving statements which the law will not allow him directly. Our conclusion is that when it developed that the opinions of these physicians were based, in part, upon the statements made by appellee, the court should have stricken out such portions of the evidence of these physicians as were not based upon their own personal examination. Appellee suggests that this point was not saved in the motion for a new trial. One of the causes set up in the motion for a new trial is that the court admitted, over the objections of appellant, improper, incompetent, and irrelevant testimony on behalf of appellee.

Appellee insists that the ruling of the court to which exception was taken was the refusal to strike out the objectionable testimony, and not in admitting it in the first instance. It is true that the objectionable testimony was not objected to in the first instance, for the reason that its objectionable character was not disclosed until the cross-examination, when appellant immediately moved to strike it out. The ruling of the court in refusing to strike out this evidence was, in effect, a holding that it was competent. In our opinion the grounds set out in the motion for a new trial were broad enough to include the exception preserved on the motion to strike out.

For the error indicated the judgment is reversed, and the cause remanded to the circuit court of Cook county.

Reversed and remanded.

(229 Ill. 272)

GLOS v. WHEELER.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. ADVERSE POSSESSION—COLOR OF TITLE—STATUTORY PROVISIONS.

To establish title by limitation under Laws 1839, p. 266, § 1 (Starr & C. Ann. St. 1896, c. 83, § 6), three things are necessary: First, color of title obtained in good faith; second, payment of taxes for the full period of seven years by the holder of such color of title or by some one acting for him; and, third, continuous and uninterrupted possession for the full period of seven years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 65-76.]

2. SAME.

The fact that a party took possession of land, recorded his deeds, and made entries on the books showing what property he owned in the neighborhood of such property, was not such open and visible possession as the law requires to establish possession under color of title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Adverse Possession, §§ 124, 125.]

3. EVIDENCE—ABSTRACT OF TITLE.

An abstract of title may only be read in evidence when it is shown by preliminary proof in accordance with the statute that the original of any deed or conveyance or other written or recorded evidence has been lost or destroyed, or that it is not within the power of the party wishing to use it to produce the same, and the record thereof had been destroyed by fire or otherwise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 570-594.]

Error to Circuit Court, Cook County; C. G. Neeley, Judge.

Application by Samuel H. Wheeler to register title to certain lands. Jacob Glos answered. From the judgment, said Glos brings error. Reversed.

Jacob Glos (John R. O'Connor, of counsel), for plaintiff in error. Charles R. Napier, for defendant in error.

VICKERS, J. Samuel H. Wheeler, defendant in error, filed his application on May 3, 1902, to register title to certain lands in Cook county under the act concerning land titles. The property is described as lot 35 in subblock 2 in the subdivision of blocks 7 to 11 in Seymour Estate subdivision of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 2, town 39, N., range 13 E. of the third principal meridian, in Cook county, Ill. The application alleges that defendant in error is the owner of the fee simple of the premises, that the land is occupied by Catherine C. Sullivan and her husband under a contract of sale from defendant in error, and that no other person is interested in the premises except Jacob Glos, plaintiff in error herein, who holds a tax deed on the premises. Plaintiff in error answered, denying that defendant in error was the owner or that he was entitled to the relief prayed for, and alleged that he was the owner of the property by virtue of his tax deed. The case was referred to the examiner of titles, with instructions to take the evidence and report the substance thereof, together with his conclusions on the question of title. Before any evidence was taken plaintiff in error requested the examiner of titles to return with his report all of the evidence upon which the said report would be based. The examiner took the evidence and reported that defendant in error was owner of the premises described in the application, and that plaintiff in error held a tax deed, which should be set aside upon the payment to him of the sum of \$49.55 within 30 days, and that defendant in error's title was entitled to registration. Objections were filed before the examiner, which were overruled, and a decree was entered in accordance with the report; the objections standing before the court as objections to the decree and being also overruled. The case is before this court upon a writ of error.

To entitle the defendant in error to registration of title, he must show title in himself good against all the world. Prima facie title is not sufficient in a proceeding of this kind. *Glos v. Kingman & Co.*, 207 Ill. 26, 69 N. E. 632; *Glos v. Cessna*, 207 Ill. 69, 69 N. E. 634; *Glos v. Talcott*, 213 Ill. 81, 72 N. E. 707; *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80. In order to show such title in himself, defendant in error relied upon color of title, payment of taxes, and possession, and also upon a chain of title from the United States government. To establish title by limita-

tion under section 1 of the law of 1839 (Laws 1839, p. 266; *Starr & C. Ann. St. 1896*, c. 83, § 6), three things are necessary: First, color of title obtained in good faith; second, payment of taxes for the full period of seven years by the holder of such color of title or by some one acting for him; third, continuous and uninterrupted possession for the full period of seven years. These three conditions must exist concurrently, without interruption, and must continue throughout the same seven years. *Clark v. Lyon*, 45 Ill. 388; *Timmons v. Kidwell*, 149 Ill. 507, 36 N. E. 974; *Taylor v. Lawrence*, 148 Ill. 388, 36 N. E. 74; *Wright v. Stice*, 173 Ill. 571, 51 N. E. 71.

Defendant in error offered in evidence a quitclaim deed from Thomas Divens and wife, dated September 3, 1892, which showed color of title. The evidence is insufficient, however, as to possession for the full period of seven years. In response to the question, "In what way did Wheeler take possession of this lot?" William G. Benson, a witness testifying on behalf of defendant in error, said: "He took possession, he recorded the deed, and he made entries on the books showing what property he owned in the neighborhood of this property, and one thing and another." This is not such open and visible possession as the law requires to establish possession under color of title. *Hubbard v. Kiddo*, 87 Ill. 578; *Travers v. McElvain*, 181 Ill. 382, 55 N. E. 135; *Stalford v. Goldring*, 197 Ill. 156, 64 N. E. 395. It appears that defendant in error built a house on this lot, but the evidence fails to disclose when he did so. Mrs. Catherine Sullivan, who occupied the property under contract to purchase from defendant in error, testifying in his behalf, stated that she had lived there five years. It does not appear that any one else occupied the property prior to her occupancy. Neither does it appear that the defendant in error paid the taxes for the period of seven years. The property was sold for taxes in 1897, and plaintiff in error paid the taxes in 1898 and in 1899, as is shown by his tax receipt. This constitutes a fatal break in the payment of taxes for a continuous period of seven years, as is required by law. Defendant in error failed to establish his title under the statute.

To establish his chain of title from the United States government, the defendant in error, in addition to the quitclaim deed from Divens, introduced, over objections by the plaintiff in error, an abstract purporting to show title vested in Divens. An abstract of title may only be read in evidence when it is shown by preliminary proof that the original of any deed or conveyance, or other written or record evidence, has been lost or destroyed, or that it is not within the power of the party wishing to use it to produce the same, and the record thereof had been destroyed by fire or otherwise. It must be established that such abstract was made in the

ordinary course of business prior to such loss or destruction. In *Glos v. Hallowell*, 190 Ill. 65, 60 N. E. 62, this court said: "It appears from the record that the examiner to whom the cause was referred by the court, over special objections made by appellant, allowed appellee to introduce in evidence certain abstracts of title purporting to show abstracts of the record of a number of conveyances of and for said lot, without requiring any preliminary proof that the original deeds so purporting to be shown by the abstract had been lost or destroyed, by fire or otherwise, or that it was not in the power of the appellee to produce them, or that the abstract of title had been made in the ordinary course of business, etc., or in any manner complying with the requirements of either section 23 or 24 of chapter 116 (3 Starr & C. Ann. St. 1896, p. 3360, pars. 23, 29), or with the provisions of section 36 of chapter 30, entitled 'Conveyances' (1 Starr & C. Ann. St. 1896, p. 955, par. 37). * * * Compliance with the provisions of the statute is essential to the admissibility of secondary evidence of deeds. *Chicago & Alton Railroad Co. v. Keegan*, 152 Ill. 413, 39 N. E. 33; *Scott v. Bassett*, 186 Ill. 98, 57 N. E. 835. It was therefore error to receive the abstracts of title in evidence over the objection of the appellant." This court made substantially the same ruling in *Walton v. Follansbee*, 165 Ill. 480, 46 N. E. 459, in *Glos v. Cessna*, supra, and in *Glos v. Talcott*, supra. The evidence shows that the abstract was admitted without a proper foundation having been made by the requisite preliminary proof. The only evidence with reference to the abstract was the statement by W. G. Benson that he ordered it from the parties who made it, subsequent to the fire of 1871, and that it was a merchantable abstract. There was no attempt made to account for the absence of the deeds or of the records. The provisions of the statute were not complied with, and it was error to admit the abstract without such compliance. Without the abstract, defendant in error established no chain of title from the United States government.

The decree of the circuit court is reversed, and the cause remanded.

Reversed and remanded.

(229 Ill. 277)

THOMAS et al. v. THOMAS et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WILLS — CONSTRUCTION AGAINST INTENT.

Testator, by the nineteenth clause of his will, directed his executors to lease for 10 years after his death, and until the death or remarriage of his widow, certain real estate, and after paying taxes, etc., to distribute the net proceeds as directed in the eighteenth clause, which directed the executors to sell all his property not otherwise disposed of and all property which by any contingency might revert to the estate, "except the property described in clause nineteen," and certain other property, and after

deducting costs, etc., to divide the balance between his widow and children. By the sixteenth clause he directed his executors to dispose of the property therein described in accordance with the eighteenth clause. Held, that the title to the real estate described in the nineteenth clause was not vested in the executors in trust to be sold and proceeds distributed under the eighteenth clause, but descended to testator's heirs as intestate property, subject to the right of the executors to lease, and that, the widow having died and 10 years elapsed, the executors had no further control of the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 964, 965.]

2. SAME.

The presumption that testator intended by his will to dispose of all his property and to leave none as intestate estate cannot be permitted to overcome the express language of the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 964.]

Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Bill by John E. Thomas and others against James F. Thomas and others for the construction of certain clauses of the will of John Thomas, deceased. Decree for defendants, and complainants appeal. Affirmed.

On December 15, 1894, John Thomas, a resident of St. Clair county, departed this life testate, leaving an estate composed principally of realty. His will, dated January 2, 1881, a codicil dated March 20, 1882, and a codicil dated February 28, 1884, were on January 23, 1895, duly admitted to probate by the probate court of St. Clair county. The will consists of 21 clauses. By clauses 1 to 15, inclusive, excepting clauses 11, 13, and 14, the testator makes specific devises of land to his children and grandchildren. By clause 11 a promissory note is bequeathed to a grandson, and by clauses 13 and 14 specific sums of money are bequeathed to a granddaughter and grandson, respectively. By clause 16 he devises to his wife, for and during her natural life, so long as she remained unmarried after his death, certain lands, but upon the death or remarriage of his wife said lands were to be disposed of by his executors in the manner directed in the eighteenth clause. By clause 17 he gives to his executors all the rents, issues, and profits of his property to become due on or before the 1st day of August next after his death, and that portion of all crops growing on his land at the time of his death which but for his death would have gone to him, also that portion of the wheat crop grown on his land in the year in which he died which but for his death would have gone to him, all to be disposed of according to clause 18. Clause 18 is as follows: "I direct my executors to reduce to money, at public or private sale, at such time or times and in such manner and upon such terms as they may deem best for the interest of my estate, all my property, of every kind and nature soever, not otherwise specifically bequeathed or devised hereby, and all property which, by the happening of any contingency in this will mentioned, may re-

vert to my estate, except the property described in clause 19 hereof, and except, also, the furniture and fixtures in the Thomas house, and, after deducting all proper charges, costs and taxes, to pay first my funeral expenses and just debts, and the balance to divide between such and so many of the following named persons as do not in any manner contest the validity of this will,—that is to say, to my wife one-fourth and the balance in equal parts to my children, George D. Thomas, James F. Thomas, Martha J. Holliday, Isabella I. Stafford, Malvina V. Lemen, Mary Thomas, Caroline Thomas and John E. Thomas: Provided, that this clause shall not be construed as directing the sale of any notes or mortgages: And provided further, that upon the death of any of the same persons who shall not have taken any steps to contest or dispute the validity of this will, that portion of his or her share not paid to him or her shall go to his or her heirs at law." Clause 19 is as follows: "I direct my executors to lease for ten years after my death and until my wife dies or marries, upon such terms and for such times, within said limitation, as they may think best, the following described property situated in the county of St. Clair and State of Illinois, to wit: The east half of lot 32 and the east half of lot 33, and the west half of lot 29 and part of the east half of lot 29, commencing the survey thereof at the south-east corner of said lot, thence west fifty-five feet, thence north sixty-six feet, thence east to High street, thence south to the place of beginning, and part of the east half of lot 34, being fifty-five feet on First North street and fifty feet on High street, all in the original town (now city) of Belleville; and after paying all proper taxes, assessments, repairs and insurance, and the proper costs and charges of executing this trust, as far as the land described in this clause is concerned, to distribute and divide the net proceeds according to the distribution directed in clause 18 hereof and subject to all the restrictions, conditions and limitations therein named." By clause 20 of the will it is provided that if any of the persons mentioned in the will shall attempt, by or in any sort of legal proceedings in any court, to call in question or contest the validity of the will, the property thereby given to such person shall revert to the estate and shall be disposed of as directed by clause 18 thereof. By clause 21 the testator nominated his nephew, Charles W. Thomas, and his sons James F. Thomas and John E. Thomas, executors of the will, and empowered any two of his executors, in case of differences, to execute any and all of the trusts imposed upon the executors. The first codicil to the will amends certain clauses not material here to be noticed, and amends clause 21 by adding the name of testator's son-in-law, Morris Lewis, as one of the executors. The second codicil amends clauses 14, 16, and 21 of the will. The amendment

to the sixteenth clause consists in providing that his wife shall also have the use and occupation of the house in which testator then resided and the lot on which it stands, in the city of Belleville, so long as she lives a widow after his death. The amendment to the twenty-first clause, consists in revoking the appointment of Charles W. Thomas as one of the executors, and providing that the executors shall consist of the testator's sons John E. Thomas and James F. Thomas, and his son-in-law, Morris Lewis.

The testator was married twice. By his first wife he had seven children. By his second wife he had three children. James F. Thomas, one of the executors and one of the appellees in this case, is a son of the first wife; John E. Thomas, another of the executors and one of the appellants, is a son of the second wife, and Morris Lewis, the third executor and the other appellant, married Mary Thomas, a daughter of the second wife. Two of the children by the first marriage died before the testator and before the execution of his will, leaving children. On June 21, 1903, Magdalena Thomas, the widow of the testator, died intestate, leaving, her surviving, as her only heirs, Kate A. Heldinger (née Holdner) and Fred Holdner, children by her first marriage, and Mary Lewis, Caroline Thomas Alexander, and John E. Thomas, children by her second marriage. Kate A. Heldinger died on June 10, 1905, leaving two children as her heirs. The persons nominated by the testator in the second codicil were appointed executors of the will by the county court of St. Clair county immediately after the will was admitted to probate. On November 29, 1905, John E. Thomas and Morris Lewis, two of said executors, filed their bill in the circuit court of St. Clair county praying for the construction of certain clauses of the will and for other relief. James F. Thomas, the other executor, the living devisees and legatees named in the will, the heirs of John Thomas, deceased, the heirs of Magdalena Thomas, deceased, and others in possession of the premises described in said will, were made defendants. Afterwards, on October 3, 1906, an amended bill was filed, which, after setting out the above facts and the deaths and heirship of certain devisees named in the will, alleges that more than 10 years have elapsed since the death of said John Thomas, and the said Magdalena Thomas, the widow, being dead, it is the duty of the executors to sell the real estate described in the sixteenth and nineteenth clauses of said will, but that the executors are unable to agree upon what is the true and correct meaning of said will in reference to the sale and distribution of the proceeds of the real estate described in the nineteenth clause thereof; that complainants contend that the title to said real estate is vested by the will in the executors, in trust, to be sold at public or private sale, and the net proceeds therefrom to be distrib-

uted and divided according to the distribution directed in the eighteenth clause of the will, while James F. Thomas, the other executor, insists that the title to said real estate is not in the executors for the purposes mentioned, but is in the heirs at law of John Thomas, deceased; that as to such real estate said John Thomas died intestate, and the executors have no interest therein and have no right to sell said real estate or to distribute the proceeds thereof among the persons mentioned in said eighteenth clause. The bill then alleges that complainants, as two of the executors, have made repeated efforts to sell said real estate, but have been unable to sell the same, or any part thereof, on account of the refusal of James F. Thomas to join in the execution of the deed or deeds of conveyance. The prayer of the bill is that the court will ascertain and adjudge the true meaning of said will, and enter a decree directing all of said executors to join in selling and executing deeds of conveyance for the transfer of said real estate to such persons as may purchase the same at public or private sale, in accordance with the provisions of the eighteenth clause, and after paying all taxes, assessments, repairs, and insurance, and the costs and charges of carrying out the provisions of said will, to distribute and divide the net proceeds according to the distribution directed by the testator in the eighteenth clause of said will, and that the complainants be authorized and directed to perform said duties and execute said trust in case of the neglect or refusal of James F. Thomas to join with them therein. Certain of the defendants interposed a general and special demurrer to the bill; one of the special grounds of demurrer being that the title to the real estate described in clause 19 of the will is vested in the heirs of John Thomas, deceased, and not in his executors. The circuit court rendered a decree sustaining the demurrer and dismissing the bill as to that portion thereof calling in question the nineteenth clause of the will; the court holding that the title to the real estate described in that clause descended to the heirs of John Thomas, deceased, as intestate property, and did not vest in the executors of his will, in trust, for the purpose of making sale and distribution according to the provisions of the eighteenth clause. John F. Thomas and Morris Lewis, the complainants below, have prosecuted an appeal to this court, and have assigned as error the action of the court in sustaining the demurrer and dismissing the bill as to that portion of the real estate described in the nineteenth clause of the will, and in holding that the said real estate descended to the heirs of John Thomas, deceased, as intestate property.

J. M. Hamill, for appellants. Winkelmann & Ogle, for appellees.

SCOTT, J. (after stating the facts as above). The controversy in this case is over the con-

struction of the eighteenth and nineteenth clauses of the will of John Thomas, deceased. By the nineteenth clause the executors of the will are directed to lease for 10 years after the death of the testator; and until the death or remarriage of his widow, certain real estate, and, after paying taxes, assessments, repairs, insurance, and the costs and charges of executing the trust in reference to said real estate, to distribute the net proceeds according to the distribution directed in the eighteenth clause. By the eighteenth clause the executors are directed to sell at public or private sale, "at such time or times and in such manner and upon such terms" as they may deem best for the interests of the estate, all the testator's property not otherwise specifically bequeathed or devised by the will and all property which by the happening of any contingency in the will mentioned may revert to the estate, "except the property described in clause 19 hereof," and certain other property, and, after deducting costs and taxes and paying funeral expenses and debts, to divide the balance between the widow and eight children of the testator; the widow to receive one-fourth of such balance, and the other three-fourths to be divided equally among the eight children. In case of the death of any of the persons mentioned in this clause, that portion of his or her share not theretofore received by him or her is to be paid to his or her heirs at law.

Appellants contend that by these two clauses the title to the real estate described in the nineteenth clause is vested in the executors of the will, in trust, to be by them sold after the expiration of the period during which they are to lease the same, and that the proceeds are to be divided according to the distribution directed in the eighteenth clause. Appellees, on the other hand, insist that the fee of said real estate was not disposed of by the will, but descended to the heirs of John Thomas, deceased, as intestate property, subject to the right of the executors to lease it for the period mentioned, and that the widow of the testator having died, and 10 years having elapsed since the death of the testator, the executors have no further authority or control over said real estate. The circuit court adopted the construction contended for by appellees, and in our judgment that construction is the correct one for the following reasons:

First. The eighteenth clause expressly excepts the real estate described in the nineteenth clause when it confers upon the executors power to sell such property as is not specifically bequeathed or devised by the will and such property as might revert to the estate by the happening of some contingency mentioned in the will. Appellants' contention that the exception refers merely to the time when such property shall be sold, and does not exclude it from the general power given to the executors to sell, is not sus-

tained by the phraseology adopted by the testator in the eighteenth clause.

Second. No language is found in the nineteenth clause which can be considered as authorizing the executors to sell the property therein described, or as authorizing them to divide any proceeds of the sale among the persons mentioned in the eighteenth clause. Appellants regard the words "net proceeds," as used in the nineteenth clause, as referring to the net proceeds of a sale of the property. Obviously those words, as used in that clause, refer to the net proceeds derived from the rents. The executors are directed to lease the property and to first pay taxes, assessments, repairs, insurance, and the costs and charges connected with leasing the property and collecting the rents, and to then divide the "net proceeds" according to the distribution directed in clause 18. The items directed to be first paid are mostly annual charges against the real estate. The intention of the testator therefore undoubtedly was that the rents derived from the property should each year be first applied to the payment of the items of expense enumerated, and the balance, being the net proceeds of the rents, should be distributed annually among the persons and in the proportions as specified in the eighteenth clause.

Third. The testator, in the sixteenth clause of the will, used language which in express terms directed the executors, after the death or remarriage of the widow, to dispose of the property therein described in accordance with the provisions of the eighteenth clause. Had he intended that the property described in the nineteenth clause should be disposed of in the same manner he certainly would have used language equally clear in expressing such intention.

Fourth. The distribution contemplated by the eighteenth clause was evidently one which might be made during the widowhood of Magdalena Thomas, since she was to receive one-fourth of all sums distributed under that clause, and it clearly appears to have been the intention of the testator that the interest of his widow in his estate should be reduced in case of her remarriage. The property described in the nineteenth clause was to be leased by the executors until the death or remarriage of the widow. Had the testator not excepted that property from the power of sale and distribution provided by the eighteenth clause, when the time arrived for such sale and distribution of this property the widow would have been either dead or remarried, and the proceeds, in the event of her death, could not have been paid to her, and in the event of her marriage her interest in the testator's estate would have been thereby increased, instead of diminished. In our judgment the testator had this in mind when he inserted the exception in the eighteenth clause, and specifically and intentionally excepted this property from the general power of sale in the eighteenth clause in or-

der that it might, after the death or remarriage of the widow, pass to his children and their descendants in accordance with the statute of descent of this state. A contrary construction would give to the descendants of his widow, Magdalena Thomas, resulting from her marriage to Holdner (which was her first marriage), who are strangers to the blood of the testator, an interest in his estate. There is nothing in the will to show any intention on the part of the testator to give any of his property to such descendants of his widow.

We are not unmindful of the rule that in determining the intention of the testator the presumption of law is that he intended by his will to dispose of all his property and to leave none as intestate estate, yet, as said in *Wilxon v. Watson*, 214 Ill. 158, 73 N. E. 306: "This is only a presumption, and cannot be permitted to overcome the expressed language of the will."

The decree of the circuit court will be affirmed.

Decree affirmed.

(229 Ill. 29)

**SUPERIOR COAL & MINING CO. v.
KAISER.**

(Supreme Court of Illinois. Oct. 23, 1907.)

**1. MASTER AND SERVANT—INJURY TO SERVANT
—MINES—NOTICE OF DEFECTS—ASSUMPTION
OF RISK.**

A miner, while bound to take notice of patent defects in the face of his entry where he was working, was not required to make an examination for hidden defects, but might properly assume that defendant had used reasonable care not to endanger his position by other workings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547, 557.]

2. SAME.

The rule that a servant assumes the ordinary risks incident to the work in which he is engaged presupposes that the master has performed the duties of care, caution, and vigilance which the law places on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547-549.]

3. SAME—EXAMINATION OF MINE.

Where plaintiff was injured by a fall of coal from the face of the entry in which he was working, and within two or three hours before the accident the ribs and face of plaintiff's entry had been examined by two experienced miners and found to be safe, the jury were authorized to find that plaintiff did not assume the risk of the same becoming unsafe because of the defendant's operations in a cross-cut near such entry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547, 557.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

Such facts were sufficient to sustain a finding that plaintiff exercised due care for his own safety.

5. SAME—NEGLIGENCE—INSPECTION.

Defendant, in the operation of a coal mine, had driven several entries, and at the time of the accident was driving a cross-cut between the fifth and the sixth entry. The cross-cut was so driven that a portion thereof passed through the south rib of the sixth entry, where plaintiff

was employed, and he alleged that the cut was developed in advance of and so close to the rib and face of the sixth entry as to loosen, crack, and weaken the rib and face of that entry at the point where he was at work. The last cutting in the cross-cut was done two days before plaintiff was injured by a fall of coal from the face of his entry, which, on examination, appeared to be safe on the morning of the accident. Defendant's mine manager testified that he was in the cross-cut on that morning, but that he did not sound the face of the coal there, merely assuming its safety from its appearance. *Held*, that the manager's failure to thoroughly examine the face of the cross-cut constituted negligence for which defendant was responsible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 465.]

6. SAME—SAFE PLACE—CHANGING CONDITIONS.

Where the dangerous condition of a mine entry in which plaintiff was engaged was developed from workings in an adjoining cross-cut, and plaintiff had no part in producing the condition which led to his injury, he was not barred from recovery by the rule that a master is not liable for dangerous and more or less hazardous conditions of the place in which the servant is employed when such conditions are temporary and result from the necessary prosecution of the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 179-205.]

7. SAME—FELLOW SERVANTS—QUESTION FOR JURY.

Where plaintiff was injured by alleged negligent mining operations by other servants in an adjoining cross-cut, whether plaintiff and the servants engaged in the cross-cut were fellow servants was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1062.]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Action by Frank Kaiser against the Superior Coal & Mining Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals. Affirmed.

Appellee was employed as a coal miner by appellant, the Superior Coal & Mining Company, which operates a coal mine southwest of Belleville. Two parallel entries were being run in the mine toward the west, and were known as the fifth west entry and the sixth west entry. The fifth west entry extended further to the west than the sixth. A cross-cut was being run from the fifth west entry to intercept the sixth west, extending from the fifth toward the north, and being of the width of about 19 feet. The entries were about 24 feet wide. In driving the cross-cut through to the sixth west entry the intersection occurred in such way that a portion of the cross-cut went through the south rib of the sixth west entry, leaving a hole or opening from the cross-cut into the entry. Appellee, in his declaration, states that appellant "carelessly and negligently directed, allowed, and permitted said cross-cut to be developed in advance of and so close to the rib and face of the said sixth west entry as to loosen, crack, and weaken the rib and face of the said sixth west entry at a point where the plaintiff was at work."

It is further averred that in consequence thereof appellee was injured, and that appellant had notice of this condition, or by the exercise of due care and caution might have known it; also, that appellee was exercising due care for his own safety, and did not know of the dangerous condition. Appellant contends that the development of the said cross-cut did not extend beyond the line coinciding with the south rib of the sixth west entry; in other words, that the face of the coal in the cross-cut, when finished, was straight in line with the south rib of the sixth west entry. The method of mining used in the sixth west entry and in the cross-cut was by cutting under with a machine and shooting down with powder. The last cutting by the machine in both the entry and the cross-cut was done on November 2, 1905, and the last shooting done in both the entry and the cross-cut prior to the injury was on the afternoon of the same day. On the morning of November 4, 1905, appellee went to his place of work at the sixth west entry, and according to the testimony of himself and his "buddy" he examined the coal in the face of the entry, inspected it, and sounded it with his pick. He concluded it was safe and went to work loading coal. About 10 o'clock of the same day, while he was engaged in loading coal, his right foot was injured by a fall of coal from the face of the sixth west entry. Appellant's mine manager testified that he was in the cross-cut and the sixth west entry on the morning of the injury, prior to appellee's arrival; that he examined the coal in the face of the sixth west entry, and it looked solid to him; that it was shot, but it was safe. He also testified that the coal in the face of the cross-cut was perfectly solid, and he states that he did not examine it. Appellee did not examine the coal in the face of the cross-cut, and testifies that he did not know that the cross-cut extended in advance of the face of the west entry. The case was tried by a jury in the circuit court and a judgment rendered in favor of appellee, and against appellant, for \$1,000. Motions to set aside the verdict and for a new trial were overruled, and appellant prosecuted an appeal to the Appellate Court for the Fourth District, where the judgment was affirmed. By its further appeal appellant brings the record to this court for review.

Schaefer, Farmer & Kruger, for appellant. Webb & Webb, for appellee.

VICKERS, J. (after stating the facts as above). It is admitted that appellee was injured by a fall of coal at the time and place alleged in the declaration. He bases his right of recovery upon the theory that his injuries are directly attributable to the carelessness and negligence of appellant in failing to exercise reasonable care and caution to provide him with a reasonably safe place

in which to work, by allowing the cross-cut to be developed in advance of and so close to the rib and face of the sixth west entry as to loosen, crack, and weaken the rib and face of the entry at the point where he was at work. At the close of appellee's evidence, and again at the close of all the evidence, appellant asked the court to instruct the jury to return a verdict of not guilty. This the court refused to do, and it is contended that such refusal was error, because the evidence, with all the legitimate and natural inferences which may be drawn therefrom, was insufficient to sustain the verdict for appellee.

It is first insisted that "the appellee assumed the risk of the injury from the negligence charged in the declaration." The evidence shows that appellee, on the day of the injury, examined the coal in the face of the sixth west entry before beginning work, and that it appeared to be solid and safe. The appellant's mine manager says that he examined the face of the sixth west entry on the same morning, before appellee arrived, and that it was safe. If, upon examination by two experienced miners, the ribs and face of the entry where appellee worked presented the appearance of safety, the jury were justified in finding that appellee did not assume the risk, and that he had exercised due care and caution for his own safety. When he examined the coal in the face of the entry where he was to work and found it apparently safe, he had the right to assume that appellant had discharged its duty toward him in reference to any dangers that might arise from the proximity of the cross-cut to his entry. Appellant's mine manager had been in the cross-cut on the morning of the injury, but he admits that he did not sound the face of the coal in the cross-cut, and determined from its appearance alone that it was solid. If he had made a thorough examination of the face, the danger might have been discovered by him, and the injury averted. The failure to do so was a failure to discharge the duty which rested upon appellant to use reasonable care and diligence to ascertain that appellee was being provided with a safe place in which to work. While appellee was bound to take notice of defects which were patent, he was not required to make an examination for hidden defects, and he might properly act upon the presumption that appellant had used reasonable care in developing the cross-cut, and that it had examined it for danger before permitting him to go to work. *Hines Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38; *Leonard v. Kinmare*, 174 Ill. 532, 51 N. E. 688; *City of La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72; *Himrod Coal Co. v. Clark*, 197 Ill. 514, 64 N. E. 282. The rule that the servant assumes

the ordinary risks incident to the work or business in which he is engaged presupposes that the master has performed the duties of care, caution, and vigilance which the law places upon him. *Western Stone Co. v. Muscial*, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325.

It is insisted that the rule which requires the master to furnish a safe place to work does not apply in the case at bar, for the reason that this rule cannot be invoked in that class of cases in which the servant is employed in constantly producing changes and temporary conditions for the time being more or less hazardous. To this we cannot assent. This rule does not apply here, for the reason that appellee had no part in producing the condition which led to his injury. He watched the condition of the face of the entry where he was employed. The dangerous condition was developed in another locality by the development of the cross-cut. He had not worked upon the face of the entry between the time he examined it in the morning and the occurrence of the injury. He had produced no change in that regard. He was occupied in loading coal that had been cut out by the machine.

Appellant urges that the negligence charged in the declaration in this case is not shown by the proof to have been the proximate cause of appellee's injury. The substance of the charge referred to in the declaration is that the condition which led to the injury was produced by the development of the cross-cut in advance of the sixth west entry and by the shooting of coal at that point, whereby the face of the entry was weakened so that it fell and produced the injury. We have examined the evidence in the record with reference to this point, and we are unable to agree with appellant that there was no evidence which fairly tends to support the declaration.

Appellant contends that appellee and the machine runners and shooters working in the sixth west entry and the cross-cut were fellow servants. This statement is not in accord with the facts. The evidence is that appellee did not work in the cross-cut at any time. The only theory on which appellant can invoke the fellow servant rule is that appellee, working in the sixth west entry, and the machine runners and shooters, working in the cross-cut, were fellow servants. Under the evidence in this case the question of fellow servants is one of fact to be determined by the jury. Therefore the judgment of the trial court, and its affirmance by the Appellate Court, are conclusive upon us on this point.

We find no error in the record, and the judgment of the Appellate Court is affirmed. Judgment affirmed.

(229 Ill. 68)

CALKINS et al. v. CALKINS et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. EQUITY—MULTIFARIOUSNESS.

The jurisdiction of courts of equity to entertain bills to contest wills, being statutory, may only be exercised in the mode prescribed by statute; and on such a bill defendants may not have the purported will declared a declaration in trust and an equitable assignment, since that relief invokes general equity jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 341-367.]

2. COURTS—JURISDICTION.

A court of general jurisdiction may have special statutory jurisdiction conferred upon it, not exercised according to the common law, and which does not belong to it as a court of general jurisdiction, and in such cases its decisions are treated as those of courts of special jurisdiction.

Appeal from Circuit Court, Kane County; L. C. Ruth, Judge.

Bill by Gilbert Calkins and others against Charles Calkins and another to contest a purported will. From a decree refusing probate, defendants appeal. Affirmed.

Gilbert Calkins and 22 other heirs of Cyrus Calkins filed a bill in chancery in the circuit court of Kane county to contest the will of Cyrus Calkins on the ground that the witnesses had signed the will in another room and out of the range of vision of the testator. An issue at law was made up and submitted to a jury for trial, and a verdict was rendered in favor of the validity of the will. A decree was entered on the verdict of the jury sustaining the validity of the will, to reverse which a writ of error was sued out of this court. Upon a hearing in this court it was decided that the evidence showed that the attesting witnesses had signed the will out of the presence of the testator, and a judgment was entered in this court reversing the decree and remanding the cause. See *Calkins v. Calkins*, 216 Ill. 458, 75 N. E. 182, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233. Upon the reinstatement of the case in the circuit court, appellants, who were the principal beneficiaries under the will, filed an amended answer, admitting that the will was not properly executed as a will, and alleged the following facts, which were not before the court on the former hearing: That the deceased, Cyrus Calkins, was a bachelor, who for more than 40 years prior to his death had resided upon his farm in Sugar Grove township, Kane county, adjoining that of appellants; that for 15 years prior to the death of the deceased the appellants had rendered services to the deceased in the conduct of his farm, transaction of his business affairs, caring for him and nursing him in sickness, who, on account of his old age and physical infirmities, was in need of assistance; that the only relatives that the deceased had for many years prior to his death were the nieces, grandnieces, and grandnephews as named in the bill of complaint, and nearly all of whom lived in other states and had never visited or had any communication with

the deceased, and by reason of such conditions were not the natural objects of the deceased's bounty; and that there existed very close family relations between the appellants and the deceased. The answer further alleged that Cora Needham, the daughter of appellants, had for many years prior to the death of Cyrus Calkins rendered services to the deceased by writing his letters, nursing him in his sickness, preparing his meals, and mending his clothes, and that on account of these close family relations the deceased had on many occasions expressed the desire to give to appellants the greater portion of his property as compensation for the services, care, and attention rendered by appellants. The answer further alleged that prior to the signing of the instrument in question the deceased, Cyrus Calkins, was advised by his physician, F. M. McNair, that the injury which he had theretofore sustained would be liable to produce death on account of his advanced age; that accordingly the deceased requested McNair to procure for him some one to prepare the necessary papers for executing a will; that McNair, in response to the request of the deceased, procured the services of Edward M. Harris, who accompanied McNair to the home of the deceased on the 16th of June, 1903, where, after a conference and consultation with the deceased, Harris proceeded to draw up the instrument in question for the purpose of a last will and testament for Cyrus Calkins to execute; that after the instrument in question had been prepared the deceased told McNair that before he would execute the paper devising to appellants nine-tenths of all his property he desired McNair to visit appellants and obtain from them their promise and agreement that they would give to their daughter, Cora Needham, the sum of \$500, and that in consideration of such promise and agreement on the part of appellants, he, the said Cyrus Calkins, would then execute his last will and testament devising and conveying to appellants nine-tenths of all the property which Cyrus Calkins might own or possess at his death; that the said McNair, in accordance with the request of Cyrus Calkins, did visit appellants and obtain from them their promise and agreement to give to their daughter, Cora Needham, the sum of \$500; that McNair conveyed such promise, on the part of appellants, to the deceased, who, when told that appellants had promised in accordance with his request, then said that he would sign and execute the instrument that had been theretofore prepared by Harris; and that said Cyrus Calkins did, in pursuance of such agreement, sign and execute the instrument in question under the belief on his part that he was executing a last will and testament which was valid in law to convey and transfer to the appellants nine-tenths of all his property which he might own at the time of his death. The answer further alleged

that after the execution of the instrument in question the same was delivered to McNair for safe-keeping, and that the deceased never thereafter in any manner attempted to revoke, annul, or in any way change the attempted disposition of his property as set forth in the instrument in question; that afterwards the deceased, Cyrus Calkins, on June 23, 1903, died in the belief that he had fully complied with his promise and agreement to give to appellants nine-tenths of all his property. The answer further alleged that Cora Needham, a few years prior to the death of Cyrus Calkins, had married her husband against the wishes and desires of appellants, and that on account thereof there was an estrangement between appellants and Cora Needham, which condition of affairs was known to Cyrus Calkins, and the deceased, being desirous of bringing about a reconciliation between Cora Needham and appellants, stated to McNair that he believed, if he could obtain a promise on the part of appellants to give their daughter the aforesaid sum of \$500, this act on the part of appellants would tend to bring about a reconciliation and family settlement. The answer further alleged that the appellants had paid to Cora Needham the sum of \$500 in accordance with their promise and agreement, and asked that although the said instrument might not be sustained as a last will and testament by reason of the same not being attested as required by law, yet that said instrument constitute a declaration in trust and an equitable assignment by the deceased, Cyrus Calkins, sufficient in law to give to appellants a right to have a conveyance from all the heirs of nine-tenths of all the real and personal estate which Cyrus Calkins owned at the time of his death, and prayed that nine-tenths of the property of Cyrus Calkins, deceased, should be decreed by the court to be held in trust by the heirs of Cyrus Calkins, deceased, for the benefit of appellants.

At the time of filing the answer the appellants also filed their cross-bill, alleging the same facts as above set out in the amended answer. The cross-bill prayed that the instrument in writing purporting on its face to be a will might be decreed to constitute a declaration in trust by Cyrus Calkins and an equitable assignment by him to appellants of nine-tenths of all property owned by the deceased at the time of his death, and prayed for an accounting as to the amount of property owned by the deceased, and that nine-tenths of it might be decreed by the court to be held by the heirs of Cyrus Calkins in trust for appellants. Exceptions were filed by appellees to the amended answer, and a general demurrer to the cross-bill was filed, alleging as cause for demurrer that the matters and things set forth in the cross-bill were not germane to the subject-matter of the original bill and not triable in this proceeding. The exceptions to the amended answer and the demurrer to the cross-bill were

sustained by the court below, and, appellants electing to stand by their cross-bill, it was dismissed by the court. Upon a hearing the court entered a final decree on the original bill refusing to admit the instrument in writing to probate as the will of Cyrus Calkins. From that decree appellants have appealed, and assign error upon the ruling of the court in sustaining the demurrer to their cross-bill and dismissing the same.

Raymond & Newhall (Robert S. Egan, of counsel), for appellants. Aldrich & Worcester and Lee Mighell, for appellees.

VICKERS, J. (after stating the facts as above). Conceding that the instrument probated as the will of Cyrus Calkins is invalid as a will for the reasons pointed out by this court when this case was here before, appellants now claim the same interest in the estate on the ground that the invalid will should be held to operate as an equitable assignment. In the view we take of the case as now presented, it will not be necessary to decide whether the facts stated in the cross-bill are sufficient to entitle appellants to the relief sought, since whatever equities appellants may have, if any, cannot be adjudicated in the proceeding to contest the will. The jurisdiction of courts of equity to entertain bills to contest wills is exclusively derived from statute, and can only be exercised in the mode and within the limitations prescribed by the statute. *Luther v. Luther*, 122 Ill. 558, 18 N. E. 166; *Jelev. Lemberger*, 163 Ill. 338, 45 N. E. 279. Cases are to be found in some of our sister states which hold that the power of courts of chancery to entertain bills of this character is embraced in the general equity jurisdiction of these courts; but this rule has never been recognized in this state, and it is opposed by the great weight of authority both in England and America. *Broderick's Will*, 21 Wall. (U. S.) 503, 22 L. Ed. 599; *Gould v. Gould*, 3 Story (U. S.) 516, Fed. Cas. No. 5,637; *Tarver v. Tarver*, 9 Pet. (U. S.) 174, 9 L. Ed. 91; *Archer v. Meadows*, 33 Wis. 166; 2 *Pomeroy's Eq.* § 913; *Kendrick v. Braushy*, 3 Bro. P. C. 358; *Webb v. Cleverden*, 2 Atk. 424; *Gainey v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524; *Luther v. Luther*, supra.

This court has decided that a bill to set aside a will under section 7 of our wills statute, and for partition, is multifarious, and that the court will, sua sponte, enforce the objection. *Hollenbeck v. Cook*, 180 Ill. 65, 54 N. E. 154. In disposing of that question in the *Hollenbeck* Case this court, on page 71 of 180 Ill., page 157 of 54 N. E., said: "It is now claimed by appellant that the court erred in refusing to retain the bill after overruling a motion for a new trial, for the purpose of dividing the lots owned by the parties as tenants in common. We do not concur in that view. We do not think that the partition of lands is a proper

matter to be incorporated in a bill in chancery, brought under section 7 of our statute of wills, to contest the validity of a will. Where a bill is brought to contest a will, the statute requires an issue of law to be made up whether the writing produced be the will of the testator or not, which shall be tried by a jury. Whether the instrument produced is the will of the testator or not is the question, and the only question, properly involved in a bill brought under the statute to contest a will. On a bill in chancery or petition for partition of lands the question presented is usually one of title to lands—a question to be determined by the court from the evidence introduced by the respective parties. The latter proceeding is one in no manner connected with a bill brought under the statute to contest a will."

When a bill is filed to contest a will under the statute, the jurisdiction invoked is not the general equity powers of the court, but the special statutory jurisdiction, and so far as the scope or extent of the jurisdiction extends it is to be determined by the same rules that would apply if the jurisdiction was conferred upon some particular tribunal created to exercise this special jurisdiction and no other. A court of general jurisdiction may have a special statutory jurisdiction conferred upon it, not exercised according to the course of the common law, and which does not belong to it as a court of general jurisdiction. In such cases its decisions are treated like those of courts of special jurisdiction. Brown on Jurisdiction, § 13; Haywood v. Collins, 60 Ill. 328; Johnson v. Von Kettler, 84 Ill. 315; Watts v. Dull, 184 Ill. 88, 56 N. E. 303, 75 Am. St. Rep. 141. Appellants' cross-bill brought forward matters which could only be adjudicated by the exercise of the general equity powers of the court, and were therefore not germane to the original bill.

The demurrer was therefore properly sustained, and the decree will be affirmed.

Decree affirmed.

(229 Ill. 75)

SAMPELL v. RYBCZYNSKI et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. STREET RAILROADS—COLLISION WITH VEHICLES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether decedent was guilty of contributory negligence in taking the chances of a collision between a street car and his wagon, held, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 253-257.]

2. SAME—INSTRUCTIONS.

In an action to recover for death resulting from a collision between a street car and wagon, an instruction that, if the sole cause of the injury was the negligent manner in which the team and wagon were managed, the jury should find defendant not guilty, is equivalent to, and warrants the refusal of, an instruction that, if the sole cause of the accident was the manner in which the team and wagon were managed, plain-

tiffs cannot recover, since, if the cause of the accident was the manner in which the deceased managed his team, it was necessarily negligent.

3. TRIAL—INSTRUCTIONS—DUTY OF JUDGE IN GENERAL.

Each party to a lawsuit has a right to have the court give instructions stating the law applicable to the evidence presented by such party, so that, if the jury find the facts in accordance with such evidence, they may correctly apply the law thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 480.]

4. STREET RAILROADS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In an action to recover for death resulting from a collision between a street car and wagon, where defendant's theory is that both parties thought the wagon far enough away so that the car might pass it in safety, defendant is not entitled to an instruction that, if the presence of the deceased served to impede the passage of the cars, and he failed to leave the track with his team and allow the cars to pass, plaintiffs cannot recover, because street cars have the right of way on their track, and public interest demands that they be run without delay.

5. SAME.

In an action to recover for death resulting from a collision between a street car and wagon, an instruction that if the horses started to move while the car was passing, and the starting of the horses was the sole cause of the accident, plaintiffs cannot recover, is equivalent to, and warrants the refusal of, an instruction that if the jury believe that the team and wagon were standing in the street a sufficient distance from the track to allow the car to pass in safety, and after the first part of the team was passed in safety the horses turned so as to cause a collision with the car, plaintiffs cannot recover.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Action by John A. Rybczynski and others, administrators, against Marshall E. Sampsell, receiver of the Chicago Union Traction Company. From a judgment of the Appellate Court affirming a judgment for plaintiffs, defendant appeals. Affirmed.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant. C. C. H. Zillman and Joseph B. David, for appellees.

CARTWRIGHT, J. Peter Ficht was employed in hauling asphalt with his team for the R. F. Conway Company, a corporation, which was laying an asphalt pavement in Garfield avenue, in the city of Chicago, in the block next east of Halsted street. It was necessary for him to drive with his load to the place where the material was to be deposited. He drove up with a load and was directed by the man who dumped the wagon to unload it just south of the car track of the Chicago Union Traction Company, at a point from 60 to 75 feet east of Halsted street. He drove to the place designated, and the team stood near the track, facing toward the west, and the front of the wagon was nearer the track than the rear. The wagon had a sheet-iron box, which could be tipped up in front to an angle of 45 degrees to permit the asphalt to run out at the

rear end, and after most of it had run out the dumper would scrape out the remainder from behind. The box was tipped up as usual, and the asphalt ran out on the pavement. While this was being done, a closed street car came up from the east and passed the wagon in safety. Shortly afterward an open car approached while the dumper was scraping out the remaining asphalt from the box. The car had a footboard on the side next the wagon which was folded up against the side of the car, and the car was stopped from five to seven feet from the end of the wagon. The motorman thought there was not room enough to pass the wagon, but the conductor looked at the situation and rang the bell to go ahead. The car started up, and Ficht went to the head of the team on the south side, with the heads of the horses between him and the car track, and held the horses by the reins, between the hames and the bits. The front part of the car passed the front wheel without striking it, but an iron strap near the middle of the footboard struck the hub of the front wheel in the rear, throwing the end of the tongue around to the side where Ficht stood, and he was struck in the stomach either by the end of the tongue or the end of the neck yoke, and died shortly afterward. Appellees, as administrators of his estate, brought this suit in the superior court of Cook county against the receivers of the traction company and recovered a judgment. An appeal was taken to the Appellate Court for the First District, and the cause was assigned to the branch of that court, where the death of one of the receivers was suggested, and the judgment was affirmed against appellant, the surviving receiver, who prosecuted a further appeal to this court.

The trial court refused to direct a verdict of not guilty at the request of defendants, and the refusal is assigned as error. To sustain that assignment, counsel contend that Ficht, with full knowledge of the situation, deliberately took the chances of the collision between the street car and his wagon which caused his death, and therefore was guilty of contributory negligence as a matter of law. They insist that he was guilty of a neglect of the duty imposed upon him by the law to remove his wagon from proximity to the track; that he gave an invitation to the motorman to come ahead; and that, knowing the situation fully, he elected to remain where he was and took upon himself the risk of being injured in the position where he saw fit to stand. If these facts had been proved and not controverted, the inevitable conclusion would be that Ficht was guilty of negligence equally with the motorman and conductor. When the car stopped, and the motorman was of the opinion that he could not get by with safety, if Ficht told the motorman and conductor to go ahead, that other cars had passed, and there was lots of room, and it was on his assurance and invitation that the attempt

to pass was made, his administrators could not say that he was free from negligence in giving the assurance and invitation, but the motorman and conductor were guilty of negligence in complying therewith. But that is not the state of the record. The questions whether Ficht understood the situation and the probability of a collision, and whether he gave any assurance or invitation, were both controverted, and issues of fact were raised as to both. The evidence for the plaintiffs was that some of the persons there called to the motorman that they did not think he could pass, and the motorman said to the conductor he did not think he could make it, but the conductor told him to go ahead and try his hand, or something to that effect, and rang the bell to go ahead. The dumper who was scraping out the wagon testified that he told the motorman he did not think he could get by, but the conductor looked out and said to the motorman that he thought he could make it. The evidence for plaintiffs tended to show that Ficht did not tell the motorman to come ahead, or anything of the kind; that he said nothing and gave no assurance that there was room to pass; that he said nothing except to hold up his hands and say: "Take it easy." He was standing on the south side, with the team between him and the car. That he stood south of the heads of the horses is proven beyond controversy by the fact that he was struck in the stomach by the end of the tongue or the end of the neck yoke when the tongue was thrown south by the car striking the wheel. It would be impossible for a man standing where he was to see what was going on opposite the team, or to be looking along the line between the car and wagon so as to know that a collision was about to occur. There was evidence for the defendants that the team was moved nearer the track just before the collision, but that was contradicted. On the motion to direct a verdict, the evidence for the plaintiffs was to be taken as true, and the court did not err in refusing to give the direction.

It is assigned for error that the court erred in refusing to give the third, fourth, and fifth instructions as requested by the defendants, and the remainder of the argument is devoted to that subject. The third instruction stated that, if the sole cause of the accident was the manner in which the team and wagon were managed, plaintiffs could not recover. The court gave an instruction, numbered 16, which informed the jury that, if the sole cause of the injury to the plaintiffs' intestate was the negligent manner in which the team and wagon was managed, they should find the defendants not guilty. If the cause of the accident was the manner in which Ficht managed his team, it was necessarily negligent, and the two instructions covered the same ground. It was not error to refuse to repeat the same rule of law.

The fourth instruction which was refused commenced with the statement of a correct rule of law to this effect: That by reason of its convenience to the public as a carrier of passengers, and because of the inability of its cars to turn out, a street railway company is invested with a right of way over other vehicles over the portion of the street occupied by its tracks, and it is the duty of the person in charge of a team and wagon standing near said track to turn out or move said team and wagon away from said track and allow the street cars to pass, and to exercise ordinary care not to obstruct or delay such street cars. Cars cannot turn to the right or left, but must move along the rails laid down in the street, and the public interest demands that they should be run without delay. It is therefore the duty of persons with teams to leave the track or move away from it and allow the street cars to pass, whenever their presence serves to impede the passage of the cars. *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78; *Chicago Union Traction Co. v. Jacobson*, 217 Ill. 404, 75 N. E. 508. The instruction then proceeded to apply that rule of law to this case, and advised the jury that if the plaintiffs' intestate neglected the duty so stated, and failed thereby to exercise ordinary care for his own safety, and he was thereby injured, they should find the defendants not guilty. Each party to a lawsuit has a right to have the court give instructions stating the law applicable to the evidence presented by such party, so that if the jury find the facts in accordance with such evidence they may correctly apply the law thereto. But in this case it was not the theory of the defendants that Ficht was obstructing the track or delaying the street cars. The motorman was of the opinion that he could not get by, and if that opinion had been adhered to Ficht would have been requested to get out of the way, and it would have been his duty to do so; but in the opinion of the conductor the wagon was not obstructing or delaying the car, and he rang the bell to go ahead, not expecting any collision. The theory of the defendants was that both parties thought the wagon was far enough away to pass in safety. Their claim was that there was no difference of opinion on that subject at all, and the question whether a person knowingly obstructing the passage of a car could recover for an injury was in no way involved. Neither was the question whether it is the duty of a person on or in close proximity to a track to get out of the way without being warned or ordered to do so.

The fifth instruction which was refused stated that if the jury believed, from the evidence, that the team and wagon were standing in the street a sufficient distance from the track to allow the car to pass in safety, and after the first part of the team was passed in safety the horses turned or were turn-

ed so as to come in collision with the car, plaintiffs could not recover. The court gave the seventeenth instruction, which stated that if the horses attached to the wagon started to move while the car was passing, and the starting or moving of the horses was the sole cause of the accident, then the plaintiffs could not recover. If the car would have passed in safety in case the horses had not moved, and they turned or were turned so as to come in collision with the car, the moving was the sole cause of the accident, and the refused instruction covered the same ground as the one which was given.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(229 Ill. 91)

ILLINOIS CENT. R. CO. v. WARRINER.

(Supreme Court of Illinois. Oct. 23, 1909.)

1. EVIDENCE—CITY ORDINANCES—PAMPHLETS—IDENTIFICATION.

Where a village ordinance was printed with other ordinances in pamphlet form, the pamphlet was admissible to prove the ordinance without further identification, because the ordinance purported to be published in the pamphlet by the authority of the president and board of trustees of the village, and not by virtue of the printed copy of a certificate at the end thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1234.]

2. SAME.

Where a village ordinance was contained in a pamphlet which purported to be published by authority of the president and board of trustees of the village, the pamphlet was admissible to prove the ordinance, though a certificate published at the end of the pamphlet did not show where the publication was made, and recited that the ordinances contained in the pamphlet were passed and approved on August 19, 1890, while a memorandum at the foot of the ordinance in question recited that it was passed on August 19, 1890, and approved on the succeeding day.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1234.]

3. NEGLIGENCE—DEATH OF CHILD—CONTRIBUTORY NEGLIGENCE OF PARENTS.

Contributory negligence of parents is a complete defense to an action for the alleged wrongful death of a child brought for the parents' benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 154.]

4. SAME—QUESTION FOR JURY.

Whether the negligence of parents contributed to the alleged wrongful death of a child held for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 352.]

5. APPEAL—PREJUDICE.

Where a child for whose death plaintiff sued was one year and eight months old, defendant was not prejudiced by an instruction with reference to the care required by the child's parents which mistakenly gave the child's age as two years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219, 4224.]

6. TRIAL—INSTRUCTIONS—FORM—REFERENCE TO TIME.

Where the time mentioned in an instruction was the date of the accident, it covered the

whole time, and was not objectionable as limiting the care required of the parents of a child alleged to have been wrongfully killed to the point of time when the child was near or at defendant's railroad track.

7. SAME—PREPONDERANCE OF EVIDENCE.

Where an instruction directed that, if the jury found from the evidence the facts therein stated, they should find defendant guilty, and the facts stated were all the facts necessary to constitute a cause of action and require such verdict, the instruction was not objectionable for failure to require that the finding of the facts must be from a preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 549, 550.]

8. SAME—FORM OF INSTRUCTIONS.

An instruction directing that, if the jury find certain facts from the evidence, it is their duty to find defendant guilty, is erroneous, unless it embraces all the facts essential to sustain the verdict directed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 534-538.]

9. SAME—RIGHT TO INSTRUCTIONS.

A party has a right to an instruction that one on whom the burden of proof legally rests must establish the facts by a preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 502.]

10. SAME—CREDIBILITY OF WITNESSES.

None of the methods by which the credibility of witnesses and the preponderance of the evidence are to be determined are essential to an instruction stating what facts will create a liability or constitute a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 490-494.]

11. SAME—KNOWLEDGE OF JURORS.

An instruction that, in considering the damages, the jury might consider the facts proved in connection with their own knowledge and experience, was not objectionable as not limiting the jury to such knowledge as men ordinarily possess, where such knowledge related to the value of the services, the expense of clothing, education, and support of a child alleged to have been wrongfully killed by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 624.]

12. DEATH—CHILDREN—PECUNIARY BENEFIT.

An instruction in an action for wrongful death of a child was not erroneous in permitting the jury to consider any pecuniary benefit that might result to the next of kin at any age of the child if he had lived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 112.]

13. PLEADING—DECLARATION—DEFECTS—AID BY VERDICT.

Where a declaration alleged that plaintiff's child was killed by and through the negligence and improper conduct of defendant, and the great and unlawful speed of defendant's train by which the child was struck and injured, it was inferable that the accident was not due to the negligence or want of care of the parents, so that failure of the declaration to charge that the parents were in the exercise of reasonable care for the child's safety was cured by the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1451-1477.]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Kankakee County; Frank L. Hooper, Judge.

Action by Lew H. Warriner, as administrator of the estate of Stewart Cornell Warri-

ner, deceased, against the Illinois Central Railroad Company. From a judgment for plaintiff affirmed by the Appellate Court, defendant appeals. Affirmed.

W. R. Hunter (John G. Drennan, of counsel), for appellant. H. K. & H. H. Wheeler, for appellee.

CARTWRIGHT, J. On November 3, 1904, Stewart Cornell Warriner, a child aged one year and eight months, was struck by the pilot beam of defendant's engine on the crossing of Wilson street, in the village of Peotone, and received injuries from which he died. This suit was brought by his administrator in the circuit court of Kankakee county to recover damages to his next of kin resulting from his death. There was a trial, and the case was submitted to the jury on the second and fifth counts of the declaration, which alleged that there was an ordinance of the village of Peotone prohibiting a greater rate of speed than 10 miles an hour, and charged that the defendant's train was running at a greater rate of speed, causing the death of said child. The jury found the defendant guilty and assessed damages, and judgment was entered upon the verdict. On appeal to the Appellate Court for the Second District the judgment was affirmed, and the case is brought here by a further appeal.

It is first contended that the court erred in admitting the ordinance in evidence. It was Ordinance No. 12, contained in a printed pamphlet, the cover of which was partly torn off so as to show only the first half of the title. The cover did not show what the pamphlet contained, but the first page was entitled, "The Revised Ordinances of the Village of Peotone," and on the last page there was what purported to be a printed copy of a certificate of the president of the board of trustees and the clerk of the village certifying to the ordinances as true copies of the revised ordinances of said village, and it was therein stated that they were printed and published by the authority of the president and board of trustees of the said village. The ordinance was objected to because the memorandum at the foot of the ordinance showed that it was passed on August 19, 1890, and approved August 20, 1890, while the copy of the certificate stated that the ordinances contained in the pamphlet were passed and approved on August 19, 1890. The ordinance was printed, with other ordinances, in pamphlet form, and was admissible in evidence under the statute, not by virtue of the printed copy of a certificate, but on the ground that the ordinance purported to be published in that pamphlet by authority of the president and board of trustees. All that was necessary to authorize the admission of the pamphlet in evidence was the fact that it purported to be published by such authority, and the statute made it evidence of the passage and legal publication of the ordinances contained

in it as of the dates mentioned in the pamphlet. *Bagan v. Connelly*, 107 Ill. 458; *McCrahey v. Glos*, 222 Ill. 628, 78 N. E. 921; *Chicago & Alton Railroad Co. v. Wilson*, 225 Ill. 50, 80 N. E. 56. The printed copy of the certificate had no legal effect as a certificate, and did not affect the ordinance. The further objection was made that the certificate did not show where the publication was made. If it had any effect at all, it showed that the publication was made in that pamphlet, and neither objection had any force. The court did not err in admitting the ordinance in evidence.

The train was running at a rate of speed prohibited by the ordinance, the speed being estimated by plaintiff's witnesses at from 20 to 40 miles an hour and by the defendant's witnesses at from 9 to 12 miles an hour, and the evidence tended to prove that the unlawful rate of speed was the cause of the accident. It is urged, however, that the evidence does not show that the parents of the child exercised any care or caution for its safety, but, on the contrary, showed an affirmative act of negligence on their part by placing the child in an open lot near the railroad track, and paying no further attention to him. On that ground, it is argued that the court ought to have directed a verdict for the defendant. Where an action for damages on account of the death of a child is brought for the benefit of those who were chargeable with its care, their contributory negligence will bar the action. *Chicago City Railway Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; *Chicago & Alton Railroad Co. v. Logue*, 158 Ill. 621, 42 N. E. 926. The home of this child was east of the railroad tracks, and faced north on Wilson street. The only adults at the house at the time were the mother of the child and two sisters, who were twins, 22 years old. They did the housework, and at the time of the accident were engaged in doing the family washing. The mother put on the child's coat, and saw him going down the back steps to the back or side yard to play, about 15 or 20 minutes before the accident. One of his sisters had been out in the back yard with a basket of clothes, hanging them on the line, and saw the child near the back porch about 10 minutes before the accident. She went into the house for more clothes, and heard an automatic signal bell at the crossing, which began to ring when the engine was more than 100 rods north of the crossing. The mother and both sisters commenced to make search for the child, and made every effort to find him. He had gone across the tracks to the west, and was coming east toward the tracks as the south-bound passenger train that struck him went through the village. The father, who had gone downtown and was returning, and the mother and sisters, were all running toward the train when the child was struck. The court did not err in submitting to the jury the issue of fact whether those who had

charge of the child exercised the degree of care demanded of them.

The first instruction given at the request of the plaintiff is complained of on various grounds. It was inaccurate as giving the age of the child as two years, when, in fact, he was one year and eight months old, and it is said that the instruction was hurtful to the defendant because the parents were required to exercise greater care and diligence to see that the child did not wander away if he was one year and eight months old than if he was two years old. We think there would be no substantial difference in the degree of care required on account of a difference of four months in age, for the reason that a child of either age would be incapable of exercising any care whatever for its own safety. The fact that the child was born February 25, 1903, was before the jury and not contradicted, so that there was no misunderstanding about his age. Another objection is that the instruction limited the care required of the parents to the point of time that the child was at or near the track, but, while the instruction refers to the child as being at or near the track, the time mentioned is the date of the accident, which covered the whole time. The objection most insisted upon is that the instruction, which was mandatory in form and required the jury to find the defendant guilty if they found the facts stated in it, did not require the finding to be from a preponderance of the evidence. By the instruction the court directed the jury that if they should find, from the evidence, the facts therein stated, they should find the defendant guilty, and the facts stated were all the facts necessary to constitute a cause of action and require such a verdict. It is necessary that such an instruction should embrace all the facts and conditions essential to sustain the verdict directed. *Illinois Iron & Metal Co. v. Weber*, 196 Ill. 526, 63 N. E. 1008. The instruction under consideration required the necessary facts to be found by the jury from the evidence, which required a consideration of all the evidence in the case as a basis for the finding. It is the law that one upon whom the burden of proof as to a fact legally rests must establish such fact by a preponderance of the evidence, and a party has a right to an instruction advising the jury of that rule. It is also true that various directions may be given by the court as to the methods by which the credibility of the witnesses and the preponderance of evidence are to be determined, but none of those things are essential to a statement of what facts will create a liability or constitute a cause of action. It would be unreasonable to say that the court must correctly set forth in such an instruction all the rules of law by which the facts are to be deduced from the evidence.

The second instruction, given at the instance of plaintiff, authorized the jury, in considering the amount of damages, to take

into consideration the facts proved, in connection with their knowledge and experience, and the objection is that the instruction did not limit the jury to such knowledge as men ordinarily possess. The knowledge and experience which the jury were authorized to bring to their aid in determining the amount of damages related to the value of services and the expense of clothing, education, and support, which are all common, everyday affairs, and the instruction is not subject to the objection made.

The third instruction was not erroneous in permitting the jury to consider any pecuniary benefit that might result to the next of kin at any age of the child if he had lived.

It is urged that neither of the counts submitted to the jury stated a cause of action, for the reason that they did not allege that the parents of the child were in the exercise of reasonable care for his safety. They alleged that it was by and through the negligence and improper conduct of the defendant and the great and unlawful speed of the train that the deceased was struck and injured. It is fairly inferable from the allegations of those counts that the accident was not due to negligence or want of care of the parents of the child, and the issue joined under the plea of not guilty was such as necessarily required proof of the omitted fact. The defect was cured by verdict. *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(229 Ill. 111)

DIMMITT v. FLINN.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. EXECUTION — SALE — VACATION — SALE EN MASSE.

Where land susceptible of division and worth \$3,000 was sold at execution en masse for \$75. the sale will be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 703-707.]

2. SAME—BONA FIDE PURCHASER.

Land was sold on an execution to the creditor's attorney, who agreed, after the time for redemption had expired, to convey the land on payment of the amount justly due on the claims which he held, but having previously agreed to give defendant, who was the debtor's sister, the first chance to purchase the land on those terms, declared that the debtor must first see her, and executed a deed to her on her payment of the amount due on such claims, with interest. *Held*, that defendant, having knowledge of such arrangement, as well as the position and claim of the attorney, was not an innocent purchaser for value as against the debtor, on his bill to set aside the execution sale or to redeem.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 827, 828.]

3. SAME—SALE—REDEMPTION—LACHES.

Where an attorney, who purchased complainant's interest in certain land at an execution sale which was voidable, agreed to permit the debtor to redeem before such attorney con-

veyed the interest so purchased to defendant, the defense of the redemptioner's laches was waived.

Error to Circuit Court, Pike County; Harry Higbee, Judge.

Suit by L. H. Flinn against Esle Dimmitt to set aside the execution sale and sheriff's deed of complainant's interest in certain lands, or, in the alternative, to determine the amount due defendant and permit complainant to redeem. From a judgment awarding such relief, defendant brings error. Affirmed.

W. L. Coley, for plaintiff in error. Williams & Williams, for defendant in error.

CARTWRIGHT, J. On February 1, 1901, L. H. Flinn, the defendant in error, lived in Adams county, and on that day a judgment was rendered against him by a justice of the peace in favor of H. A. Lusk for \$142.77 and costs. On the same day an execution was issued on the judgment, and the record of the justice does not show a compliance with the statute, which prohibits a justice of the peace from issuing an execution in any civil action until after the expiration of 20 days from the date of the judgment on which such execution is to be issued unless the party applying for the same, or his agent or attorney, shall make oath that he believes that the debt will be lost unless execution be issued forthwith. A demand was made by the constable holding the execution upon L. H. Flinn, and it was returned, the same day it was issued, "No property found." On the following day a transcript of the judgment was filed in the office of the clerk of the circuit court of Adams county. L. H. Flinn, the defendant in the execution, was the owner of an undivided one-third of a farm of 284.53 acres in Pike county, subject to a life estate of his mother, Sarah Flinn, who was to receive her support from the income of the farm, and any surplus of such income was to be applied to the satisfaction of the debts of B. W. Flinn, deceased, father of L. H. Flinn, under the provisions of his will. An execution was immediately issued on the transcript of the judgment, directed to the sheriff of Pike county, who on February 7, 1901, levied the same upon the interest of L. H. Flinn in said farm. The sheriff advertised said interest and sold it en masse on April 27, 1901, to W. L. Coley, attorney for Lusk, for \$75. The interest so sold was worth \$3,000, and is now worth \$4,000. The farm was situated in different quarter sections, and embraced 10 different tracts and subdivisions, which were susceptible of division and sale in separate parcels. In November, 1901, Sarah Flinn, the mother of L. H. Flinn, loaned some money to him and took a conveyance of his one-third interest in the estate, which she was to hold as security for repayment of the money loaned and for his use and benefit. At the end of the statutory period for redemption a deed was made to Coley. Sarah Flinn was in posses-

sion of the farm, which was operated by her son James B. Flinn, administrator with the will annexed of the estate of B. W. Flinn, deceased; and neither she nor L. H. Flinn had any knowledge of the execution, sale, or deed for several years afterward. The sale was for a grossly inadequate price, which is alleged to have resulted from the fact that a large claim on a note of B. W. Flinn, made in 1869, and held by a daughter of James B. Flinn, had been filed against the estate. It is apparent that that claim could not have been established, and that it never seriously alarmed any one who would have purchased at the sale. James B. Flinn operated the farm for five years without accounting for the rents and profits, and paid off debts of the estate; but the administration dragged along until early in the year 1906, when there were negotiations for a settlement between the widow and James B. Flinn and the other parties interested. About that time Sarah Flinn and L. H. Flinn learned of the sale and deed to Coley. There was another judgment before a justice of the peace in favor of C. H. Doss against L. H. Flinn, and Coley also held that claim as attorney. Coley, being applied to for the purpose of settling his claims, stated that he never felt that he wanted anything more out of the transaction than the amount of the claims which he held against L. H. Flinn, and that he would take the amount of the two judgments which he controlled for a quitclaim deed and cancellation of the Doss judgment. He stated, however, that he had given to the plaintiff in error, Esle Dimmitt, a sister of L. H. Flinn, and owner of an undivided one-third of the farm, subject to the same life estate and charges as the interest of L. H. Flinn, the first chance for a settlement and conveyance on those terms, and that the parties would have to see her. The settlement with James B. Flinn was completed, and the understanding was that Coley was to make a deed conveying his interest on payment of the amount due on the Lusk and Doss judgments. Esle Dimmitt was fully informed of the arrangement and settlement, and knew that Coley claimed nothing under his deed except payment of the two judgments, which Sarah Flinn and L. H. Flinn were willing to pay. On July 20, 1906, Coley made a quitclaim deed to Esle Dimmitt of the interest in the B. W. Flinn estate vested in him by the sheriff's deed dated August 7, 1902. On July 21, 1906, Sarah Flinn executed a quitclaim deed to L. H. Flinn of all her interest in the farm. L. H. Flinn then filed his bill in equity against Esle Dimmitt, praying the court to cancel and set aside the execution, sale, and sheriff's deed, or to determine the amount due Esle Dimmitt, to enable him to redeem, and that upon payment thereof she be directed to convey to him the interest derived from Coley, and upon her failure or refusal the court should cancel the deed to her. Esle Dimmitt answered the bill, and upon a hearing the

court found the sum due on the Lusk and Doss judgments to be \$397.15, that the said judgments were a lien on the interest of L. H. Flinn in the farm, and that upon payment of the same he was entitled to redeem. The court decreed payment of that amount, with interest at 5 per cent. from July 20, 1906, within 40 days from the date of the decree, and ordered that upon payment being made Esle Dimmitt release and quitclaim her right in the premises, or on her default that the master in chancery execute such deed. A writ of error was sued out from this court, and the record has been brought here for review.

At the sheriff's sale, property worth at that time as much as \$3,000 was sold for \$75, which was a grossly inadequate price, and there were irregularities connected with the sale sufficient to set it aside. Where property susceptible of division is sold en masse without first offering it in separate parcels, and for an inadequate price, the sale will be set aside. *Lurton v. Rodgers*, 139 Ill. 554, 29 N. E. 866, 32 Am. St. Rep. 214. It is not necessary to go further, and consider the effect of the want of any showing on the justice's record that any oath was administered which authorized the issuing of the execution. Inadequacy of price and the manner in which the sale was conducted were clearly sufficient to authorize the court to set aside the sale and deed. The sale was to the attorney for the plaintiff in the execution, and he conceded the right of redemption from the sale upon condition that the amount justly due upon the claims which he held should be paid. Whether there was any laches on the part of Sarah Flinn or L. H. Flinn is not a question in the case, since that question was waived by the agreement to permit a redemption and to make the quitclaim deed. Esle Dimmitt knew all about the arrangement, as well as the position and claim of Coley, and she took a deed of the interest of her brother in the property, which was worth \$4,000 at the time, in consideration of payment of the amount due on the two judgments against him. She does not occupy the position of an innocent purchaser for value, and there is no equity whatever in her claim. The decree of the court against her was clearly right.

The decree of the circuit court is affirmed.
Decree affirmed.

(229 Ill. 134)

DONK BROS. COAL & COKE CO. v. STROETTER.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WITNESSES — COMPETENCY — MARRIED WOMEN.

Under a statute making a wife competent to testify for or against her husband in business transactions conducted by the wife as his agent, it must appear, to permit her to testify, that she was authorized by her husband to conduct some business transaction for him which she did conduct, so that mere evidence that she was sent by her husband to the office of defendant's

president merely to hold a conversation with him with reference to the securing of options for coal lands by the husband for defendant was insufficient to entitle her to testify.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 153, 156.]

2. WORK AND LABOR—VALUE OF SERVICES—EVIDENCE.

Where plaintiff sued on a quantum meruit for services in obtaining options to purchase coal lands for defendant, evidence as to the value of the lands was admissible as bearing on the value of plaintiff's services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 52.]

3. APPEAL—WAIVER OF ERROR.

Where defendant requested an instruction submitting plaintiff's right to recover on a quantum meruit, it could not object on appeal that there was no quantum meruit count in the declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591, 3596.]

4. SAME—VARIANCE.

Where both parties have induced the court to charge as to the law on the facts disclosed by the evidence, and to direct that a verdict be returned in accordance with their respective rights, on such state of facts, neither can complain that the facts proved were not within the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3602, 3604.]

5. SAME—PREJUDICE.

Defendant could not object on appeal to an instruction in favor of plaintiff on an issue as to which the verdict was in defendant's favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4032.]

6. SAME—EFFECT OF VERDICT.

Where a verdict for plaintiff stated the items on which the jury found for plaintiff, and it did not appear that defendant made any objection to the verdict when it was received, defendant was not prejudiced by the jury's failure to specify in the verdict the counts on which the verdict was based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4231.]

Appeal from Appellate Court, Fourth District, on Appeal from the Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Action by Edward H. Stroetter against the Donk Bro. Coal & Coke Company. From a judgment for plaintiff, affirmed by the Appellate Court, defendant appeals. Reversed and remanded.

Appellee recovered a judgment against appellant in the circuit court of St. Clair county in an action of assumpsit on the common counts, which has been affirmed by the Appellate Court, and the defendant prosecutes a further appeal to this court.

The appellant was engaged in mining coal, and the suit was for services in securing for appellant options for the purchase of coal lands, and other services and expenses. A bill of particulars was filed consisting of 11 items; the first for commissions for buying 2,219.40 acres of coal at Collinsville and Maryville, \$11,079, and the third for commissions on 2,319.80 acres at Edwardsville, which was turned over to appellant under promise of \$5 per acre, \$11,599, and the ninth for 10 days' time in examining coal lands around

the Nigger Hollow mines, \$100. The other eight items, amounting to \$883.05, need not be further noticed, since the jury found for the defendant as to all of them. The ninth item (\$100) was admitted by appellant to be correct. Appellant claimed that the first item, for commissions on the Collinsville and Maryville tracts, had been settled, and the jury sustained this view by including nothing for this item in their verdict. The only question of fact which was contested as to which the finding was not in favor of appellant was in regard to the amount of the commission on the 2,319.80 acres in the Edwardsville tract. As to all other items the finding was in favor of the appellant. Appellant claimed the commission was to be 50 cents per acre, while appellee claimed \$5 per acre. The jury allowed \$1.50. The appellant admitted an indebtedness of \$1,314.16, and asked that the jury be instructed to return a verdict for the plaintiff for that amount, which was refused. The verdict was as follows: "We, the jury, find the issues for the plaintiff and assess his damages at \$1.50 per acre for 2,319.80 acres. We, the jury, find for the plaintiff for 10 days' work for examining coal fields, amounting to \$100, in and about Nigger Hollow mine, making a total of \$3,579.70. And we further find for the defendant on the other counts." Deducting from the verdict the additional dollar per acre which the appellant contests reduces the amount to \$1,259.80—a sum slightly less than the amount appellant admits to be due. The inquiry is therefore limited to the question whether there was error in the proceedings affecting the finding of the jury in regard to the rate of commission for the 2,319.80 acres.

Theodore Rassieur, Whitnell & Forman, and L. D. Turner, for appellant. Dill & Pfingsten and Schaefer, Farmer & Kruger, for appellee.

DUNN, J. (after stating the facts as above). The appellee gave testimony tending to show a contract to secure the options for the 2,319.80 acres at a price for his services to be fixed by appellee. He also testified to another conversation with the president of appellant tending to show an agreement to pay him \$5 per acre. The appellant's evidence tended to show an agreement for 50 cents per acre. These conversations were between appellee and E. C. Donk, the president of appellant. Their accounts of the conversations differed very materially, and anything affecting the credibility of either was important, for the jury were compelled to base their verdict chiefly on the testimony of these two witnesses. The court permitted appellee's wife to testify, over appellant's objection, to a conversation with Mr. Donk tending to show a promise to pay the appellee \$5 per acre for securing these options. The statute makes the wife competent to testify for or against her husband "in all matters of busi-

ness transactions where the transaction was had and conducted by such married woman as the agent of her husband." But in this case no transaction was had and conducted by Mrs. Stroetter. She testified that her husband sent her to Mr. Donk's office, and she had this conversation with Mr. Donk as the agent of her husband. But she conducted no business. To make a wife a competent witness under this clause it should appear that she was authorized by her husband to conduct some business transaction for him which she did conduct, and then she may testify. It was error to overrule the defendant's objection to her testimony. It is true the jury did not find in favor of the plaintiff for the \$5 per acre he claimed, but neither did they find in favor of the 50 cents per acre which the defendant claimed. Their finding was necessarily dependent largely on the credit of these two witnesses. If Mr. Donk's credit had not been attacked by Mrs. Stroetter's testimony to an inconsistent statement out of court, we cannot know that the jury would not have accepted his version of the conversations with Mr. Stroetter and found the commission was to be only 50 cents, instead of fixing it at \$1.50 per acre. Where a clear error appears which may have influenced the verdict, an appellate court must reverse the judgment.

The evidence as to the value of the coal lands was competent as bearing upon the value of appellee's services. If appellee's compensation was to be fixed by himself, then evidence of the reasonable value of his services was competent.

The objection of a variance is not available to appellant. In its fifth instruction it submitted to the jury the right of the appellee to recover on a quantum meruit, and cannot therefore now be allowed to object that there was no count upon a quantum meruit in the declaration. When both parties have procured the court to instruct the jury as to the law on the state of facts disclosed by the evidence and to direct a verdict to be returned in accordance with their respective rights on such state of facts, neither can complain that the facts proved were not within the allegations of the pleadings. *Illinois Steel Co. v. Novak*, 184 Ill. 501, 56 N. E. 966; *Illinois Central Railroad Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162.

For the same reason the objections taken to the first and second instructions given for the appellee are not valid, and the fourteenth and fifteenth instructions were properly refused. There was evidence tending to show that no fixed rate of compensation was agreed on. Appellee's third instruction related only to the 2,219.40 acres, as to which the verdict was in favor of appellant, and therefore could not have been injurious to it. The appellant's sixteenth instruction was properly refused, because there was evidence tending to sustain other counts than those mentioned in it. The refusal of appel-

lant's eighteenth instruction to find for the defendant on the count for goods sold did it no harm, nor did the failure of the jury to specify the counts upon which they found their verdict. They stated the items on which they found for the plaintiff, and it does not appear that the appellant made any objection to the verdict when it was received. The designation of the counts found for or against it could have been of no benefit to the appellant under the pleadings in this case. The objection that the hypothesis of appellee's fourth instruction has no foundation in the evidence is not sustained by the record.

For the error in admitting the testimony of appellee's wife, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

(229 Ill. 144)

BRUSH v. CITY OF CARBONDALE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. APPEAL—QUESTIONS OF FACT—REVIEW.

Prac. Act, § 87 (Hurd's Rev. St. 1905, c. 110, § 88), provides, on any final determination by the Appellate Court from a finding of facts different from that of the court below, the Appellate Court shall recite the facts as found, which finding shall be conclusive. *Held*, that a finding by the Appellate Court that a contract sued on was against public policy was not a finding of fact within such section, but was a conclusion of law, as to which the Supreme Court was not bound.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4278, 4345.]

2. CHAMPERTY AND MAINTENANCE—PUBLIC POLICY—DETERMINATION.

The public policy of the state is to be determined by the courts from the Constitution, legislation, judicial decisions, and practice of the executive department.

3. SAME—WHAT CONSTITUTES.

Cr. Code, div. 1, §§ 26, 27, provide for the punishment of barratry, and that, if any person shall officiously intermeddle in any suit that in no wise concerns him, by maintaining or assisting either party with money or otherwise to prosecute or defend such suit or to promote litigation, he shall be guilty of maintenance. Plaintiff, who was a citizen and resident of a state, agreed to pay the costs and expenses of prosecuting a test case for the alleged illegal sale of intoxicating liquors within the city to a decision by the Supreme Court, whereupon the city agreed to authorize an appeal to such court. *Held*, the contract was not void as a violation of such sections.

4. SAME.

There being no agreement that the city should divide with plaintiff any of the proceeds of such litigation that it might ultimately recover, the agreement was not champertous.

5. SAME—CHAMPERTOUS AGREEMENT—SERVICES OF ATTORNEY.

Though a contract between attorney and client is champertous, the attorney may recover from the client the reasonable value of the services rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Champerty and Maintenance, § 5.]

6. SAME—CONTRACT—VALIDITY.

Where a city agreed that plaintiff might prosecute a suit for the alleged illegal sale of intoxicating liquors to a final determination in the Supreme Court, in consideration of his agreement to pay all the expenses of such prosecution, that part of the agreement by which the

city agreed to surrender its right to settle the controversy and discontinue the suit was unsustainable.

7. CONTRACTS—BREACH—DAMAGES.

Where plaintiff contracted to pay all the expenses of an appeal to the Supreme Court in a test case by a city for the alleged illegal sale of intoxicating liquors, and after plaintiff had advanced large sums for attorney's fees, costs, etc., the city settled the controversy and dismissed the suit without decision by the Supreme Court, the city was responsible to plaintiff, as for a breach of the contract, for the amount of plaintiff's expenditures.

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Jackson County; W. W. Duncan, Judge.

Action by Samuel T. Brush against the city of Carbondale. From a judgment for plaintiff, reversed by the Appellate Court, plaintiff appeals. Reversed, and judgment of circuit court affirmed.

O. A. Harker (W. P. Lightfoot and George M. Harker, of counsel), for appellant. T. B. F. Smith, City Atty., and F. M. Youngblood, for appellee.

CARTWRIGHT, J. In January, 1902, several suits were begun by the city of Carbondale in justice's court against James W. Wade, a saloon keeper, and others engaged in the same occupation, charging them with selling intoxicating liquors within said city without a license. There had been a city election held on September 24, 1901, at which the question of licensing the sale of liquor was in issue, and those who were opposed to the traffic prevailed. An ordinance was passed forbidding the sale of liquor, which took effect December 24, 1901, and the prosecutions were for violations of that ordinance. The defendants contended that the sales were legal under licenses previously granted, and the city claimed that the licenses had been revoked by the passage of the ordinance. Several cases were tried, but no convictions were had, and finally the city attorney and the attorney for the defendants agreed to make the case of *City of Carbondale v. Wade* a test case for the purpose of settling the question. In pursuance of that agreement a judgment was entered in the justice's court against the city in favor of Wade, and an appeal was taken to the circuit court of Jackson county. The case was tried in the circuit court, and resulted in a judgment against the city. The appellant, Samuel T. Brush, who was a resident and business man of the city and had resided there 53 years, had been interested in the prosecution as a citizen and had employed counsel to assist the city attorney before the justice and in the circuit court. He urged the city council to take an appeal to the Appellate Court, and agreed that, if the city would take the appeal, he would pay all the expenses that might be incurred on behalf of the city in the appeal, no matter how the case might be decided. The city council accepted the proposition,

and an appeal was taken to the Appellate Court for the Fourth District, where the judgment of the circuit court was affirmed. Appellant again appeared before the city council, and urged that a further appeal should be taken to this court. Roy Spiller, the city attorney, was then claiming an attorney's fee of \$500 against the city for services rendered in the prosecution, which the city council was disinclined to pay, and they were not disposed to go further with the case. Appellant offered to pay the \$500 to Spiller, and all the costs and expenses from the beginning of the prosecution, and that the city should not be at any expense at all, if the city would appeal and he should be permitted to carry the suit to a final hearing in this court. The city council thereupon passed a resolution authorizing the city attorney to appeal from the judgment of the Appellate Court to this court, provided the city should be at no expense whatever, including all the costs from the beginning of the suit in the justice's court to a final determination of the case. The agreement was that the appellant should be allowed to prosecute the suit to a final determination in this court, which would settle the legal question involved concerning the validity of the licenses, and was to pay all the expenses. The appeal was perfected. Appellant paid the fee of \$500 to Spiller, and also employed additional counsel to whom he paid a fee of \$500, and he paid for printing abstracts and briefs and other expenses, which, with attorneys' fees, amounted in the aggregate to \$1,121.35. Abstracts and briefs were filed, but before the case was reached for hearing the city council passed a resolution directing the city attorney to dismiss the appeal, contrary to the agreement. The appeal was dismissed, and the case came to an end without any final decision by this court. The contract having been abandoned and brought to an end by the action of appellee without the consent of appellant, he brought this suit in assumpsit to recover from appellee the amount of his expenditures in pursuance of the agreement. A jury having been waived, the cause was tried by the court, and there was a judgment for appellant for the amount of his expenditures. Appellee appealed to the Appellate Court for the Fourth District, and that court reversed the judgment, without remanding the cause, and incorporated in the judgment of reversal what the court termed a finding of facts, as follows: "We find as a fact that the contract alleged in the declaration was contrary to public policy and void, and that there was no valid, binding agreement, expressed or implied, as alleged in the declaration." The appellant has brought the record here by appeal from the Appellate Court.

Section 87 of the practice act (Hurd's Rev. St. 1905, c. 110, § 88) provides that if any final determination of any cause shall be made by the Appellate Court as a result,

wholly or in part, of the finding of the facts concerning the matter in controversy different from the finding of the court from which such cause was brought by appeal or writ of error, it shall be the duty of such Appellate Court to recite in its final order, judgment, or decree the facts as found, and the judgment of the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such cause. The view of the Appellate Court seems to have been that the question whether the contract alleged in the declaration was contrary to public policy and void was one of fact. But that is not so. The facts from which the question whether the contract was contrary to public policy must be decided were conceded and not in dispute, and the question was one of law, to be determined by the court. The public policy of the state is not to be determined by juries as a fact, but is to be determined by the courts from the Constitution, legislation, judicial decisions, the practice of the executive department, and the opinion of the court whether the contract under consideration is of a nature injurious to the public welfare. *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; 9 Cyc. 483; 15 Am. & Eng. Ency. of Law (2d Ed.) 934. The facts being conceded, the finding incorporated in the judgment that the contract was contrary to public policy and void, and that therefore there was no valid, binding agreement, expressed or implied, was nothing else but a conclusion of law. The judgment of the Appellate Court cannot be sustained upon the ground that there was a finding as to any question of fact binding upon this court which would justify the reversal.

If the judgment of the Appellate Court can be sustained at all, it must be upon the ground that the action was not maintainable as a matter of law, and it appears from the opinion of the Appellate Court, as well as the supposed finding of facts, that such was the conclusion of that court. That is also the position of counsel for appellee, who do not contend that the facts were controverted, or that the trial court erred in its conclusion as to any matter of fact, but insist that appellee had no cause of action for several reasons. One of the reasons advanced is that the contract sued upon is void under both sections 26 and 27 of division 1 of the Criminal Code (*Hurd's Rev. St. 1905*, c. 38, §§ 26, 27), relating to barratry and maintenance. Section 26 provides that if any person shall wickedly and willfully excite or stir up suits or quarrels between the people of this state, either at law or otherwise, with a view to promote strife and contention, he shall be deemed guilty of common barratry and shall be punished as therein provided. The common-law offense of maintenance has been abolished by our statute (*Newkirk v. Cone*, 18

Ill. 499), and section 27 defines that offense by providing that if any person shall officiously intermeddle in any suit at common law or chancery that in no wise belongs to or concerns such person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend such suit with a view to promote litigation, he shall be deemed guilty of maintenance, and upon conviction thereof shall be fined and punished as in cases of common barratry. In this case there is no semblance of a violation of either of those sections. Appellant was not engaged in exciting or stirring up any suit or quarrel between the people of this state with a view to promote strife or contention. Neither did he officiously intermeddle in any suit that in no wise belonged to or concerned him, by maintaining or assisting any person, with money or otherwise, to prosecute or defend such suit with a view to promote litigation. The subject of the litigation was one that was of interest to all the citizens of the city of Carbondale, and the fact that appellant was willing to contribute of his money to have the case presented to this court, which, alone, had authority to finally decide the legal question involved, was neither a violation of the law nor in any way to his discredit. It may be that the Appellate Court, in considering the propriety of his action, was influenced to some extent by a mistake of fact, since it is stated in the opinion of that court that appellant was not even a resident of Carbondale, and therefore could not be, personally or individually, affected by the city ordinance, and had no right or voice, except as a moralist, in the making or enforcement of the city ordinances. Appellant testified that he was a resident of Carbondale, and had lived there about 53 years, and was engaged in business there. There was no contradiction of that testimony, nor is there any claim by counsel for appellee that appellant did not have any immediate interest in the subject of the litigation as a citizen. If Wade and others were selling liquor in the city of Carbondale without legal licenses, they were guilty of a criminal offense, and there is nothing in the record to justify any inference, except that appellant's object was to restrain the selling of liquor within legal limits. It would be just as reasonable to say that the employment of counsel to assist a state's attorney in a criminal prosecution, with no other intent than to see that the law is enforced and vindicated, would render a person guilty of officiously intermeddling with a suit that did not concern him, or with stirring up suits or quarrels between the people of the state with a view to promote strife and contention, as to make that charge against appellant.

Counsel next say that appellant was guilty of champerty, and at the same time concede that one essential element of every champertous agreement was wholly wanting. They say that if appellee had not dismissed its appeal, and this court had reversed the judg-

ments of the appellate and circuit courts the contract was champertous, although there was no agreement on the part of the city to divide the proceeds of the prosecution with appellant. They correctly state the rule that there are two essential elements in every champertous agreement: First, there must be an undertaking by one person to defray the expenses, in whole or in part, of another's suit; second, an agreement or promise on the part of the latter to divide with the former the proceeds of the litigation in the event the prosecution was successful. That is the law (*Torrence v. Shedd*, 112 Ill. 466), and there was no agreement for any division of any sum which the city might recover in its prosecution against Wade. Even if the contract had been champertous and void, it does not necessarily follow that no rights could grow up in the litigation which it concerned. If a contract is champertous and void, an attorney may recover from his client for services rendered in connection with the action in the same manner as if the champertous agreement had never existed. 6 Cyc. 890; 5 Am. & Eng. Ency. of Law (2d Ed.) 828. The other party cannot take the benefit of services rendered in his behalf, and escape liability for what they are reasonably worth on the ground that his agreement was illegal. In *Stearns v. Felker*, 28 Wis. 594, the court said: "There is almost or quite an unbroken line of authorities which hold that, although attorney and client may have entered into an agreement in respect to the compensation for the services of the former which was void for champerty, yet the attorney does not thereby forfeit his right to full compensation for his services, nor the client his right to the fruits of the litigation after paying for such services what the same are reasonably worth. Such is undoubtedly the law, and it harmonizes with the plainest principles of justice." It would be absurd to say that the agreement in this case was one the tendency of which was to corrupt and mislead or improperly influence the judgment of a public official in the performance of his duties, or that the payment of the money by the appellant or the prosecution of the appeal for the purpose of enforcing the law as he believed it to exist was contrary to public policy.

Again, counsel urge that the action could not be maintained because the contract was that the appellant was to prosecute the appeal at his own expense; that, whatever the judgment of this court might be, the city was to be liable for no costs or expenses, and there was no agreement on the part of the city to reimburse the appellant. They state one side of the agreement; but the other side was that the appeal was to be taken and was to be prosecuted in this court to a final determination, so that the legal question involved should be finally and conclusively determined. Appellee did not perform its part of the agreement, but prevented the final de-

termination, which was the consideration for appellant's agreement, by dismissing its appeal. The moneys were paid out by appellant in good faith, in pursuance of a contract with appellee by which there should be a decision of a legal question in which appellant had an immediate interest as a citizen of the city of Carbondale. Appellant lost all that he contracted for, and for which he paid his money, by the act of appellee; and ordinarily, if one party to a contract pays out money or performs services in pursuance of it, and the contract is abandoned or ended by the other party, he may recover what he has paid out or the value of the services which he has performed. It cannot be said that appellant has attempted to make himself a creditor of appellee by his own voluntary act. He was not to be reimbursed if the contract was carried out; but to say that appellee could put an end to the contract, and thereby deprive appellant, not only of what he bargained for, but also of the money which he paid out in good faith, would be against common justice.

There was a part of the contract which could not be enforced. That part was the agreement of appellee that appellant might prosecute the suit to a final determination, and that could not be enforced because the law favors settlements, and such agreements prevent a party from settling his controversy and discontinuing his suit. *North Chicago Street Railroad Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177. While a contract of that character may be spoken of as void, it is not so in the sense that no rights can grow up under it; but it is void in the sense that the party agreeing not to discontinue his suit is not bound by such agreement and it cannot be enforced. This contract, if executed on both sides, would confer actual rights to the same extent as any legal contract, and if the appeal had been prosecuted to a final determination the appellant could not have relieved himself from the obligation to pay the costs and expenses by saying the agreement was void. Appellant is not seeking to enforce the contract or to recover damages for a violation of it. That appellee had a right to withdraw from the agreement and dismiss its appeal is not disputed; but appellee entered into the engagement, and appellant paid out his money in good faith in its behalf, and the question is whether he had a right to recover the moneys so paid upon the abandonment by appellee of the contract. The contract was not enforceable so far as it limited the right of appellee to control the appeal; but it neither had for its object a violation of the law nor any act prohibited by statute, and to sustain the defense attempted would in our opinion neither advance public policy nor accomplish justice.

The judgment of the Appellate Court is reversed, and the judgment of the circuit court is affirmed.

Judgment reversed.

(229 Ill. 163.)

INGRAHAM v. HARMON.

(Supreme Court of Illinois. Oct. 23, 1907.)

APPEAL—RIGHT TO REVIEW WHEN NO QUESTIONS OF LAW ARE PRESENTED.

An appeal to the Supreme Court from the Appellate Court was taken on the ground of the insufficiency of evidence, but there was no question arising on the pleadings or admission of evidence and no demurrer to the evidence. No proposition of law was presented to the trial court, and there was no motion to find for defendant nor for a new trial nor in arrest of judgment. *Held*, that no question of law was presented for consideration, and the appeal should be dismissed.

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Randolph County; B. R. Burroughs, Judge.

Action by Nellie Harmon against William S. Ingraham. From a judgment for plaintiff, defendant appeals. Affirmed, with damages.

At the March term, 1906, of the circuit court of Randolph county, Nellie Harmon, the appellee, and Grace Harmon and Lola Harmon, by their next friend, brought suit against William S. Ingraham, appellant, to recover damages occasioned by the death of Felix Harmon, the husband of appellee and the father of Grace and Lola Harmon, while he was engaged as a coal miner in appellant's coal mine. The suit was afterward dismissed by the next friend of Grace and Lola Harmon as to them. A trial was had without a jury, and judgment was rendered by the court in favor of plaintiff for the sum of \$1,999. From that judgment appellant prayed an appeal to the Appellate Court for the Fourth District, and from the judgment of that court affirming the judgment of the circuit court this appeal is prosecuted. The declaration, consisting of two counts, charges willful violations of sections 8 and 18 of the mines and miners' act (Hurd's Rev. St. 1903, c. 93), and that the death of Felix Harmon was thereby occasioned. To the declaration defendant filed the general issue. It is urged by appellant that there is in this record no evidence tending to prove that his failure to comply with the requirements of the said sections of said act, as charged in the declaration, was the proximate cause of the death of Felix Harmon, wherefore there should be a reversal.

H. Clay Horner and Goddard & Goddard (Buckingham & Troup, of counsel), for appellant. A. E. Crisler (George A. Harker, of counsel), for appellee.

SCOTT, J. (after stating the facts as above). No question arises upon the pleadings. No complaint is made of the action of the trial court in passing on the admissibility of evidence. No propositions of law were submitted to the trial court. There was no demurrer to the evidence. There was no motion to find for the defendant. There was no motion for a new trial. There was no motion in arrest of judgment. Under

these circumstances no question of law is preserved for our consideration. *Myers v. Union Nat. Bank*, 128 Ill. 478, 21 N. E. 580; *Bolton v. Johnston*, 163 Ill. 234, 45 N. E. 203; *Fareon v. Hutchins*, 163 Ill. 445, 45 N. E. 297; *Mann v. Learned*, 193 Ill. 502, 63 N. E. 178. This situation was pointed out by the opinion of the Appellate Court. In the brief and argument filed by appellant in this court nothing is said on the subject. The point is made here by the brief of appellee. No brief in reply has been filed.

We are of the opinion that this appeal was prosecuted for delay. The judgment of the Appellate Court will be affirmed, and the clerk of this court is hereby directed to enter a judgment in this court in favor of the appellee, and against the appellant, for \$199.90, and execution may issue therefor.

Judgment affirmed, with damages.

(229 Ill. 238.)

BERRYMAN v. MEGGINSON.

(Supreme Court of Illinois. Oct. 23, 1907.)

ELECTIONS — INDORESEMENT OF BALLOTS — GROUNDS OF CONTESTS.

Under the statute providing that the initials of one of the judges of election shall be indorsed on the ballots, it was proper, on a recount, to reject ballots which had the names of the election judges merely stamped on them with rubber stamps, which were not even fac similes of the initials and signatures of the judges, since the rejection of ballots so stamped no more subjects voters to lose their votes by the acts of election officers than does the holding that a ballot containing no indorsement whatever shall not be counted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 149.]

Appeal from Morgan County Court; Francis E. Baldwin, Judge.

Action by Carlin Berryman to contest the election of P. D. Megginson to the office of county commissioner of Morgan county. From a judgment for defendant, plaintiff appeals. Affirmed.

William N. Hairgrove, for appellant. Worthington & Reeve, for appellee.

FARMER, J. This was a proceeding instituted in the county court of Morgan county by the appellant to contest the election of the appellee to the office of county commissioner of Morgan county. Appellant and appellee were both candidates for the office of county commissioner of said county at the regular election held November 6, 1906. Upon a canvass of the returns of said election it appeared that appellant had received 3,784 votes and appellee 3,789 votes for said office. From the returns, therefore, appellee was elected, whereupon appellant filed his petition in the county court to contest said election. At the hearing the ballots cast at said election for appellant and appellee were recounted, except the ballots cast in Prentice and Markham precincts. Those ballots were rejected by the county court for the reason that upon the ballots cast in Prentice precinct

the initials of E. D. Sage, one of the judges of election in said precinct, were stamped with a rubber stamp, and that in Markham precinct the full name of Jewsberry, one of the judges of election in said precinct, was stamped on the ballots. These rubber stamps were not fac similes of the initials and signature. No other indorsement of an election judge appeared on any of the ballots. Rejecting these ballots gave appellant 3,621 votes and appellee 3,639 votes. The county court thereupon found appellee was duly elected to the office of county commissioner, and dismissed the petition, from which judgment appellant has appealed to this court.

Appellant's counsel says the ruling of the county court in rejecting and refusing to count the votes cast in Prentice and Markham precincts is the only question he desires to present to this court for its consideration. Counsel recognizes that this precise question was passed upon by this court in *Cholsser v. York*, 211 Ill. 58, 71 N. E. 940, but insists that the ruling in that case was wrong, and, if adhered to, will have the effect of placing it in the power of election judges to disfranchise voters without any fault or wrong on the part of the voter. We held, in *Kelley v. Adams*, 183 Ill. 193, 55 N. E. 837, and *Caldwell v. McElvain*, 184 Ill. 552, 56 N. E. 1012, that ballots not having the initials of the judges indorsed thereon were not entitled to be counted, and the correctness of the rulings in those cases is not questioned. The voter is presumed to know the law, and the statute requires that the initials of one of the judges of election shall be indorsed on the ballots "in such manner that they may be seen when the ballot is properly folded." If a judge of election should fail to indorse his initials on a ballot for any reason, and a voter should accept and vote such ballot, he would not be entitled to have it counted. The voter should exercise some care to see that his ballot is properly indorsed. To hold that a ballot indorsed with a stamp, as were those thrown out by the county court in this case, should not be counted, no more subjects the voter to lose his vote by the acts or conduct of the election officers than does the holding that a ballot containing no indorsement whatever should not be counted. We are disposed to adhere to our former decisions, and do not deem a further discussion of the question necessary.

The judgment of the county court is affirmed.

Judgment affirmed.

(229 Ill. 248)

HOTCHKISS et al. v. NORWOOD PARK BUILDING, LOAN & HOMESTEAD ASS'N.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. BUILDING AND LOAN ASSOCIATIONS—LOANS—USURY—CONSTRUCTION OF BOND.

Under the homestead loan association act the loan of \$1,000 to one owning 10 shares in

such an association, on each of which he was required to pay 50 cents dues monthly till the stock reached par value, whether or not he was a borrower, was not usurious because of the provision in the bond that he should pay the principal sum of \$1,000 in monthly installments of \$5. "till the said principal sum shall have been fully paid or till the shares * * * shall have attained the value of \$100 each," and in addition should pay 7 per cent. interest on the \$1,000 till such time; such monthly payments of \$5 being payments of stock dues, notwithstanding the language of the bond.

2. SAME—PREMIUMS—DETERMINATION BY COMPETITIVE BIDDING—EVIDENCE.

That the minutes of the meeting of directors of a building and loan association do not state that the preference for a loan was offered to open competition, as required by Hurd's Rev. St. 1905, p. 521, c. 32, § 8, is not conclusive that such was not the case, nor does it prevent its being shown by oral testimony.

3. SAME.

The statement of the minutes of the meeting of directors of a building and loan association that a member applied for a loan at a premium of 35 per cent. is not inconsistent with, and therefore does not prevent, testimony of the secretary that such member authorized him to bid that much for the loan or preference in order to secure it.

4. SAME.

That the secretary of a building and loan association, authorized by a member to bid 35 per cent. premium to secure preference for a loan, bid such amount on his first bid, and no one else bid, did not make the transaction fraudulent and the loan usurious; it being enough if the statute was complied with by the preference being offered in open meeting to the highest bidder.

5. SAME.

Evidence in a suit to foreclose a mortgage securing a loan by a building and loan association held sufficient to sustain a finding that preference for the loan was offered in open meeting to the highest bidder, as required by the statute.

Appeal from Appellate Court, First District; on Appeal from Circuit Court, Cook County; J. W. Mack, Judge.

Suit by the Norwood Park Building, Loan & Homestead Association against Katherine B. Hotchkiss and others. From a judgment of the Appellate Court, affirming a decree for complainant, defendants appeal. Affirmed.

Appellee filed its bill in the circuit court of Cook county to foreclose two mortgages. The bill alleged that Freeland E. Hotchkiss, at the date of the execution of the first mortgage, was a member of the appellee and the owner of 50 shares of stock in appellee association; that said Hotchkiss borrowed \$5,000 from appellee and executed to it a bond in the sum of \$10,000, conditioned that he, his heirs, executors, administrators, and assigns, would pay to appellee "the said sum of \$5,000 in monthly installments of \$25 each, on the 15th day of each and every month from October 1, 1892 (the date of said series), with interest thereon at the rate of 7 per cent. per annum, payable in monthly installments of \$20.17 each, on the 15th day of each and every month after date until the said principal sum shall have been fully paid, or until the shares of said series shall have attained

ed the value of \$100 each, and shall pay the sum of \$1,531.25 (being unpaid premium) in monthly installments of \$18.23 each, on the 15th day of each and every month, beginning with the 15th day of October, 1893, and continuing until said unpaid premium is fully paid," and all fines on stock, taxes, and assessments levied against the property mortgaged to secure payment of the sum named. To secure the payments mentioned in the bond, Hotchkiss and his wife executed to appellee a mortgage on the northerly half of lot 774, in block 5, in the Third division of Riverside, Cook county, Ill. It was provided in the mortgage that in case of default for six months in the payment of any of the sums of money payable by the terms of the bond appellee might foreclose the mortgage. The bill further alleges that on May 17, 1893, Hotchkiss owned 10 other shares of stock in appellee association, and on that date borrowed an additional \$1,000 from it, and gave a bond in the sum of \$2,000, which was conditioned the same as the \$10,000 bond above mentioned, except that the amounts and dates of payment were different. Said \$2,000 bond bound the obligor to pay monthly installments of \$5 on stock or principal on the 15th day of each month from April 1, 1893, and monthly interest installments on the 15th day of each month of \$5.84 each, which was at the rate of 7 per cent. per annum, until the shares of stock in the twenty-fifth series should attain the value of \$100 each, and also pay \$306.25 (unpaid premium) in monthly installments of \$3.65 each, on the 15th day of each month, beginning with May 15, 1894. Said \$2,000 bond was secured by second mortgage on the same property described, executed by Hotchkiss and his wife under date of May 7, 1893, acknowledged June 17, 1893, and filed for record June 21 of the same year.

Freeland E. Hotchkiss died before the commencement of the suit, and his widow, individually and as administratrix, also his children and heirs, and others claiming to be interested in the property, were made defendants to the bill. The bill alleged that default had been made in the conditions of the bonds and mortgages in making the payments therein provided, and prayed for foreclosure. The defense set up by the answers of the widow and heirs of Freeland E. Hotchkiss was usury. The cause was referred to the master in chancery to take testimony and report his conclusions. The master found and reported that appellee was entitled to a decree of foreclosure of both mortgages, as prayed in its bill. Appellants filed objections to the master's report, which, by order of the court, stood as exceptions on the hearing before the chancellor. Said exceptions were sustained by the chancellor as to the first mortgage, and a decree was rendered that it was given to secure a usurious transaction, and directing that all sums paid as interest, premium, or on stock, incident to that loan, be credited on the principal sum borrowed. The grounds upon which

the defense of usury was sustained as to the first mortgage were that the preference for the loan was granted at a special meeting of the board of directors, instead of at a regular meeting upon competitive bids, as required by law. Appellants' exceptions were overruled as to the second mortgage, which the chancellor held was not usurious, and a decree was entered for its foreclosure, as prayed in the bill. From that part of the decree holding that the \$1,000 loan was not usurious, and directing a foreclosure for the amount claimed to be due by appellee, appellants appealed to the Appellate Court for the First District. No cross-errors were assigned by appellee, and the only question raised by the appeal was as to the correctness of the decree of the circuit court in holding that the \$1,000 loan was not a usurious transaction. The Appellate Court affirmed the decree of the circuit court, and appellants have prosecuted a further appeal to this court.

Appellants' counsel say the defense of usury is based upon the two following grounds: First. Because the principal sum of \$1,000 was payable, by the express terms of the bond and mortgage, in monthly installments of \$5 each, with interest on said principal sum at the rate of \$5.84 per month until said principal sum was fully paid; that the sum of \$5 of alleged stock payments was a payment on the principal sum mentioned in said money bond; that said sum of \$5.84 per month as interest was a greater rate of interest than 8 per cent. per annum provided in the by-laws of the association, and a greater rate of interest than was allowed by law for the use of money. It is further stated that no stock had been issued at the time of making said bond, and was only ostensibly issued thereafter as a part of the fraudulent scheme to collect usurious interest. Second. That said alleged premium of \$350 was not determined by free, open competition, as provided by the by-laws of the association and the statute of the state of Illinois, but was determined by private contract pursuant to a general fraudulent scheme of said association, whereby it had, for a long time prior and subsequent to the making of said loan, exacted a pretended premium imposed by the association; that the issuing of the stock was a part of the general fraudulent scheme to collect usurious interest from members and nonmembers of said association.

Frederick Mains and Frank F. Reed, for appellants. William T. Underwood and Roscoe L. Roberts, for appellee.

FARMER, J. (after stating the facts as above). It is contended that the provision of the bond for the payment of the \$1,000 in monthly installments of \$5 each, and the payment of 7 per cent. interest on the principal sum of \$1,000 in monthly installments of \$5.84 each, made the transaction usurious, for the reason that every monthly payment of

\$5 dues on stock should be credited upon the principal of the loan, thereby reducing it to that extent every month, and the continuation of the interest payments at the rate of \$5.84 per month was in excess of the rate allowed by law. It is contended, even if a loan made in accordance with the homestead loan association act is not usurious, this loan was not made in accordance with the requirements of that act, in that the stock dues of \$5 per month are to be applied upon the principal of the loan, and not upon stock, and the contract is therefore usurious. This court held, in *Holmes v. Smythe*, 100 Ill. 413, that a loan made in accordance with the provisions of the homestead loan association act was, in effect, an advancement to the stockholder until his stock reached par value, and that requiring the borrowing stockholder to pay his stock dues and interest in monthly installments until the stock reached par, at which time he had the right to have his note canceled and returned and his mortgage released, was not usurious. This case has been approved in subsequent cases of this court, so that it is not open to question in this state whether a loan made in accordance with the law is usurious. It is true, here the bond recited that the principal sum of \$1,000 should be paid in monthly installments of \$5 each, "until the said principal sum shall have been fully paid or until the shares of said series shall have attained the value of \$100 each." The law authorizes a subscriber to stock in a homestead loan association to pay it up in installments, in the manner required by the association. Appellee's charter and by-laws required subscribers to its capital stock to pay it up in installments at the rate of 50 cents per month for each share, and the monthly payments of \$5 mentioned in Hotchkiss' bond were payments upon his stock dues on his 10 shares of stock, notwithstanding the language used in the bond. The bond required these payments to be made until the loan was paid, "or until the shares of said series shall have attained the value of \$100 each." Hotchkiss then became bound to pay appellee \$5 dues each month on said 10 shares of stock until it reached par value, and this he was obligated to do, whether he was a borrower or not. When he obtained a loan or advance on his stock, until such time as the payments made thereon would mature the stock, he secured the payment of his stock installments by the bond and mortgage.

In 1897 the Legislature passed section 6b of chapter 32 (Hurd's Rev. St. 1905, p. 519), which provided for the withdrawal by a member of a homestead loan association of his shares of stock, whether they had been pledged as security for an advance or not. In 1899 section 6c was passed. That section, in part, reads as follows: "Any member who shall have obtained a loan or advance on his shares, and who shall have given real estate as security may, at any time, upon giving

thirty days' previous notice in writing, re-pay the same. On settlement such member shall be charged with the full amount of such loan or advance, together with any and all arrearages due thereon, or on the shares pledged or appertaining to the security given, and shall thereupon be allowed as a credit the withdrawal value of the shares pledged as security, together with such other credits as may be returnable on account thereof, and the balance shall be received by the association in full settlement and discharge of such loan or advance." Before the passage of these acts there was no law requiring associations of the character of appellee to allow a stockholder to withdraw his stock before its maturity, or a stockholder to whom an advance had been made to repay the advance before the maturity of his stock. These sections did not impair the rights of parties under contracts made before they went into effect; but they provided a remedy under contracts existing before their adoption, as well as contracts made afterwards. *Williams v. Waldo*, 3 Scam. (Ill.) 264; *Templeton v. Horne*, 82 Ill. 491; *Dobbins v. Bank*, 112 Ill. 553; *Wade on Retroactive Law*, §§ 221, 222. No additional sum beyond what was authorized by law was required to be paid by Hotchkiss, and the meaning and intent of his contract was that he would pay the dues monthly on his stock and the interest in monthly installments on the advance made him until such time as his stock became worth \$100 per share, and he was not entitled to have the stock dues paid by him credited on the principal of the loan or advance made to him, thereby reducing his indebtedness to the extent of each monthly payment. Section 6c, above referred to, gave him the right to pay the advance made him before the maturity of his stock, if he so desired, by complying with the provisions of that section.

Appellee had no by-laws dispensing with offering its money for bids in open meeting and fixing a rate of interest and premium at which it would loan its money, in accordance with section 8 of chapter 32 (Hurd's Rev. St. 1905, p. 521); and it is contended by appellants that the premium agreed to be paid by Hotchkiss was not determined by offering the money in free and open competition, but was determined by private agreement, in pursuance of a general fraudulent scheme of appellee. The first witness offered by appellants to sustain this proposition was F. D. Stevers, secretary of appellee. His minutes of the meeting of May 16, 1893, relating to the Hotchkiss loan, read as follows: "F. E. Hotchkiss applied for additional loan of \$1,000 on lot 774, block 5, Third division of Riverside, at a premium of 35 per cent. Motion to accept application carried. Adjourned. F. D. Stevers, Secretary." The minutes of the meeting of the board of directors held June 27, 1893, contained the following relating to the Hotchkiss loan:

"The committee on loan of F. E. Hotchkiss of \$1,000 reported making loan. Motion to accept report and grant the loan carried. Adjourned. F. D. Stevers, Secretary." The minutes of the meeting of May 16, 1893, show that Allen B. Smith applied for an additional loan of \$600, and that a motion to accept the application and grant the loan was carried. Henry Snyder, Sr., made application for an additional loan of \$600, and the motion that it be accepted on condition that an unpaid balance due on his abstract, also the cost of continuing the abstract, be deducted from the loan, was carried. Also James H. Boyle made application for a loan of \$1,800 at a premium of 35 per cent., and offered certain lots in Edison Park as security therefor. A motion to accept the application was carried, and a committee selected to approve the security. The minutes do not show whether Smith and Snyder bid any premiums for their loans or not. The minutes of June 27, 1893, show that the committee on the loans to Boyle and Snyder reported on them, and motions to grant the loans were made and carried. Stevers testified the minutes did not contain everything that transpired; that he recorded only such things as he thought necessary to make matters of record. He testified Smith appeared at the meeting and bid 35 per cent. premium, and that the matter was gone over thoroughly between him and the directors. He further testified Hotchkiss was not present at either of the meetings at which he bid for the preference of a loan, but that he authorized him (Stevens) to bid for him. He was not sure whether his authority to bid for a loan at the meeting May 16, 1893, was in writing or not. He testified Hotchkiss authorized him to bid 35 per cent. for an additional loan for him of \$1,000, upon the same security given for the first loan; that he did make the bid at that meeting for Hotchkiss, and the preference was awarded him, and the matter referred to a committee. The witness testified he did not think he offered 35 per cent. premium on his first bid; that his recollection was that his first bid was less than that. Stevers testified that appellee's method of making loans was as follows: When the premium a prospective borrower would give for a preference was announced at a meeting, the chairman of the meeting would then ask if there were any others who wished to bid; that this was asked in the presence of everybody present; and that the bid for Hotchkiss for the preference for the \$1,000 loan was put before the meeting and handled in the same manner as was done in all other cases. Charles Snyder, a son of the Snyder who applied for an additional loan of \$600 at the meeting held May 16, 1893, testified he was present at that meeting, and that his father, Mr. Smith, and Mr. Boyle were also present. He testified the president of the board asked the secretary if there were any applica-

tions for loans; that the secretary read applications of Smith, Boyle, witness' father, and Hotchkiss; and that they were acted upon in the order read, one at a time. On direct examination he does not testify that any bids were made by or for any one for the preference of a loan. On cross-examination he stated he did not know whether any one bid a premium for Mr. Hotchkiss or not. Boyle testified he was present at the meeting May 16, 1893, and that there was no competitive bidding by himself or any one else. But we think it more than probable that Mr. Boyle was mistaken as to the date of the meeting at which he was present, and that he was present at the meeting in June, instead of in May. Three other witnesses testified they had secured loans through the secretary or some director, and that the premiums were fixed without competitive bidding. It was further proven by the records of appellee that at 14 meetings, from July, 1891, to May, 1893, certainly 13, and possibly 15, loans were made at 35 per cent. premium, 4, or possibly 6, no rate of premium mentioned, 2 at 30 per cent., and 4 at 25 per cent.; and from the fact that the majority of these loans were made at 35 per cent. premium it is argued this tends to show that it was the practice of appellee to consider a request for a preference or loan as a bid of 35 per cent. premium.

It is apparent that a bid for a preference and an application for a loan or advance were not the same thing. The application signed by Hotchkiss bears the heading, "Application for Advance," and reads: "To the Board of Directors of the Norwood Park Building, Loan and Homestead Association of Norwood Park, Ill.—Gentlemen: At a regular meeting of your board held May 17, 1893, having obtained the preference for an advance on ten shares of the twenty-fifth series of the stock of your corporation at a premium of thirty-five per cent., I now offer you as security therefor the following property," etc. While it bore no date, it is evident from the way the application reads that it was executed after the preference for the advance had been obtained. Stevers testified this was the regular method of doing business, and that applications for a preference, or to bid for a preference, were seldom or never in writing. He testified he had no application in writing for persons who secured preferences for advances at the meeting of May 16, 1893, and it would seem from all the evidence that, if he read anything at that meeting, it was not applications for loans, as testified to by Boyle and Snyder. It is furthermore to be borne in mind that 11 years had elapsed between the meeting in May, 1893, and the time the witnesses testified. Snyder and Boyle were not present at that meeting to represent Hotchkiss, nor for the purpose of observing what was done with reference to his loan. It is a matter proper

to be considered whether their memories would be as good concerning all that occurred there as the memory of the secretary of the association. The fact that the minutes of the meeting made by the secretary of appellee do not state that the preference was offered to open competition is not conclusive that such preference was not procured by competitive bidding. Omissions in minutes of this character may be supplied by oral testimony, where the oral testimony does not contradict the minutes. *Endlich on Building & Loan Associations*, par. 185; *Lurton v. Jacksonville Loan & Building Ass'n*, 87 Ill. App. 395. That case was affirmed by this court in 187 Ill. 141, 58 N. E. 218, though that point is not mentioned in the opinion.

The minutes of May 16, 1893, state that Hotchkiss applied for an additional loan of \$1,000 at a premium of 35 per cent. This is not inconsistent with Stevers' testimony that Hotchkiss authorized him to bid that much for the loan or preference in order to secure it. Neither does it necessarily follow that, if Stevers bid that rate of premium at his first bid, it proved a fraudulent purpose or practice of the association to loan only at 35 per cent. premium. This loan was made during the year of the World's Fair at Chicago, and Stevers testified the premium rate for money was high on all transactions of that kind, and that it was almost impossible for suburban property owners to get loans. As we have before stated, he testified his best recollection was that he did not name 35 per cent. as his first bid; but if he did bid 35 per cent. at the first bid made by him, and no one else bid against him, this of itself would not render the transaction fraudulent, unlawful, and usurious. If the preference was offered in open meeting to the highest bidder, and opportunity given to all persons desiring to do so to bid, this was a compliance with the law; and the fact that only one person made a bid would not render the transaction usurious, as having been made contrary to law. *Home Building & Loan Ass'n v. McKay*, 217 Ill. 551, 75 N. E. 569, 108 Am. St. Rep. 263. If it be conceded that some stockholders did procure advances at meetings where competitive bidding was not permitted, this would not affect the Hotchkiss loan, if it was made in the manner required by law. It was incumbent upon appellants to establish their defense of usury by a preponderance of the evidence. *Mosier v. Norton*, 83 Ill. 519; *Boylston v. Bain*, 90 Ill. 283. The trial and Appellate Courts having found that this defense was not proven, we cannot say such finding was so palpably contrary to the weight of the evidence that the decree was erroneous and that the Appellate Court erred in affirming it.

The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

(229 Ill. 263.)

LORY v. PEOPLE

(Supreme Court of Illinois. Oct. 23, 1907.)

1. FALSE PRETENSES — INDICTMENT — VARIANCE.

There is a fatal variance between an indictment charging the unlawful obtaining of money from a person and evidence that a check was obtained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 53.]

2. SAME—REPRESENTATIONS—OPINIONS.

Defendant was not guilty of obtaining money by means of the confidence game, where he merely sold stock in a gold mining company having an undeveloped mine, making no false representations of fact in regard to the mine, but merely stating that it would pay a certain amount the first year and a greater amount thereafter, and guaranteeing it, whereas the operation proved a failure.

Error to Circuit Court, Vermillion County; E. R. E. Kimbrough, Judge.

Frank C. Lory was convicted of crime, and brings error. Reversed.

J. B. Mann and W. C. Lindley (A. H. Taylor and J. W. Jamison, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., and J. W. Keeslar, State's Atty. (W. T. Gunn, of counsel), for the People.

DUNN, J. The plaintiff in error was indicted and convicted for obtaining \$400 from Henry Lloyd by means of the confidence game, and has sued out a writ of error to reverse the judgment.

The indictment alleges that the plaintiff in error "did unlawfully and feloniously obtain from one Henry Lloyd \$400 of good and lawful money of the United States." The proof shows that what he obtained was a check for \$300. This is a fatal variance. In the case of *Goodhue v. People*, 94 Ill. 37, the defendant was indicted for the embezzlement of money belonging to the county, but the proof showed that the embezzlement consisted in the taking of county orders, and on page 48 we said: "The indictment charged the embezzlement of money and did not charge the embezzlement of county orders. If this disposition of the county orders was made criminal, it constituted either the larceny or the embezzlement of county orders, and not of money. * * * It is plain that if crime was committed by the accused in this transaction in relation to what are called the 'jail orders,' as presented by the proofs, it was not the embezzlement of the proceeds of the orders, but the embezzlement or larceny of the orders themselves. If a man steal a horse and sell him to a stranger, he may be convicted of stealing the horse, but not of stealing the money received as the price of the stolen horse." In *Weimer v. People*, 186 Ill. 503, 507, 58 N. E. 378, 380, it was said: "If it was true that Weimer received for and received from the town collector, as money, the amount mentioned in town orders, it could not be charged up to him in this case, and he could not be legally

convicted of embezzling or converting to his own use their face value as money. There was no evidence that he embezzled the town orders, and, if there had been, he could not have been convicted of it under the charge of embezzling money." So, in an indictment for larceny or receiving stolen property, where there is a specific charge that the money stolen was of a certain kind and denomination, it is essential that the proof should sustain this allegation of the indictment. *Williams v. People*, 101 Ill. 382; *Vale v. People*, 161 Ill. 309, 43 N. E. 1091. Whether or not it was essential to allege in the indictment that the property obtained was good and lawful money of the United States, yet if it was so particularly alleged, that allegation would not be sustained by proof that the accused obtained a check for the money.

But the evidence is not sufficient to sustain a conviction for obtaining either money or check by means of the confidence game. The plaintiff in error in November, 1900, sold to the prosecuting witness 100 shares of the stock of the Dominion Gold Mining Company, which was organized in that same month in Vermillion county, Ill., with a capital stock of \$750,000. Lory was the treasurer of the company, and Mr. Lloyd testified that Lory told him that the mine was very rich; that they had bored holes down to the gravel, and it paid \$3.85 to the pan and would make a man some money. It would pay 10 per cent. the first year, 30 per cent. the next, and in three years would be at par. Lory would guarantee it, and, if Lloyd was dissatisfied, would take the stock back any time and pay him 10 per cent. on it. Lory said the mine was already working. They had a flume and iron pipes, so as to wash the gold out of the gravel. They had a road there, and a good deal of timber to make necessary improvements, and several houses. Lloyd testified that he had faith in the representations made, relied upon the guaranty, and bought 100 shares at \$30 per share. In the summer of 1902 Lindley, Gundy, and Miller, who were citizens of Vermillion county and stockholders in the corporation, visited the mine for the purpose of inspecting it, in order to ascertain its value. They were witnesses for the state, and testified that the corporation owned about 320 acres of land in a valley; the bottom lying between the hill and the Dominion river. They found a bunkhouse, cookhouse, toolshop, dam, and flume. There were four or five men working about the flume and ditches and getting the muck off of the gravel. A ditch had been constructed along the hill and the water had been brought down to where they were washing off the muck, then into a flume and through smaller troughs to different points. The flume was about one-half a mile long, and they had cleared a space about 40x100 feet down to the gravel. They had not washed any in the sluice boxes at that time. The gold was principally on

the bed rock at the bottom of the gravel, but there were signs of gold through the gravel. Above the gravel was an accumulation of frozen moss and dirt, called "muck," from 9 to 18 feet deep, and this was washed off by the stream of water through the flume.

This is substantially all the evidence offered in support of the conviction. At the time of the sale of the stock to Lloyd the mine was merely being developed. The next two seasons were spent in prospecting, building houses, and constructing the flume and ditches. The gold was supposed to be below the muck, very little of which had been removed. All the representations of fact in regard to the mine made by Lory were true. The corporation had the land, houses, and flumes, the mine was being prepared to be worked, and gold was evidently there. After the sale of the stock to Lloyd, and after the visit of Lindley, Gundy, and Miller, the corporation continued to develop the mine and attempted to get out gold. A steam shovel to be used in removing the muck from off the gravel was purchased at an expense of \$9,000 and shipped to the mine. Considerable gold was taken out of a mine immediately adjoining. The stock bought by Lloyd was stock in an undeveloped mine. He was not misinformed as to the property. Lory may have had an exaggerated notion of its possibilities; but there is nothing to show that his optimistic estimate was not honestly entertained, or that it was unreasonable. The question of the amount of gold which would subsequently be taken out of the mine was necessarily a matter of opinion, as was that of the future value of the stock. Lloyd relied upon Lory's guaranty, and he was not deceived by any course of conduct of the latter into reposing confidence in him, or misled by any device, scheme, or swindling operation in which advantage was taken of his confidence. The fact that, contrary to their expectations, the operation of the mine by the company proved a failure, does not convert the sale of the stock into a confidence game.

The judgment will be reversed.

Judgment reversed.

(229 Ill. 286)

FOGLIA et al. v. PEOPLE.

(Supreme Court of Illinois. Oct. 23. 1907.)

1. CRIMINAL LAW — TRIAL — INSTRUCTIONS — PROVINCE OF COURT AND JURY.

Where, on a trial for murder, all the testimony agreed that at the time the fatal shot was fired one of the defendants was lying on his back on the ground with decedent on him, holding him down, and the testimony of defendants was that decedent was at the time striking such defendant with a knife or other implement, and the other testimony was in harmony with their statements, except that the knife found was closed, an instruction that, before an acquittal of a defendant charged with assault with a deadly weapon was justified on the ground of self-defense, it must appear that at the time the blows constituting the assault were struck it in

good faith appeared to defendant that he was in danger of losing his life or receiving great bodily harm, and that the person assaulted by defendant was the assailant, or that defendant endeavored to decline any further struggle, was erroneous, as implying that the court believed that at the time the fatal shot was fired defendants had an opportunity of declining further struggle, and that the court thought that defendants were the assailants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1731.]

2. HOMICIDE—TRIAL—INSTRUCTIONS MISLEADING.

Such instruction was misleading in referring to blows on the part of defendants; there being no evidence to show that they struck any blows.

3. SAME—APPLICABILITY TO EVIDENCE.

An instruction that the law of self-defense does not imply the right of attack in the first instance or permit of action done in retaliation or for revenge was improperly given where there was no evidence that defendants were the attacking parties, or that they were acting in retaliation or for revenge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 614-617.]

4. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

Where a requested instruction on reasonable doubt was one such as had been approved by the Supreme Court, and the instruction given on reasonable doubt in no way covered the idea as to reasonable doubt thereby conveyed, it was error to refuse such requested instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1904-1922.]

5. HOMICIDE—INSTRUCTIONS—GRADE OR DEGREE OF OFFENSE.

An instruction, as to the form of verdict, on a trial of two defendants for murder, that one defendant might be found guilty of murder and the other of manslaughter, was not subject to the objection that it placed two separate and distinct crimes before the jury.

Error to Criminal Court, Cook County; Marcus Kavanagh, Judge.

Vito Foglia was convicted of murder and Tony Foglia of manslaughter, and they bring error. Reversed and remanded.

A. J. Hanlon (Francis Borelli, of counsel), for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (F. L. Barnett, of counsel), for the People.

CARTER, J. Plaintiffs in error were tried by a jury in September, 1906, in the criminal court of Cook county, and the father, Vito Foglia, was found guilty of the murder of one Giovanni Toscano and sentenced to 14 years in the penitentiary. Tony Foglia, the son, then aged about 14 years, was found guilty of manslaughter, and sentenced to the reformatory.

A stenographic report of the testimony was not kept, and the record as to the statements of witnesses has been compiled and agreed upon by counsel from their best recollection of what was said at the trial. The homicide in question took place between 8 and 9 o'clock on the evening of October 15, 1905, on La Salle street, Chicago, near the fire plug in front of a row of buildings known as "405-409." When the witnesses for the state first appeared upon the scene, attracted by the shots,

plaintiff in error Vito Foglia was lying on the sidewalk, face up, and Toscano, the man who was killed, was lying on top of him, face down. According to the testimony of the state, plaintiff in error Tony Foglia, at the time he was first seen, was standing in the street near the two prostrate men, shooting with a revolver. He then came over to where the two men were, and pulled Toscano off of Foglia and turned him over, face upward, on the sidewalk. Toscano was then dead. When Vito Foglia got up from the ground, his face and head were wounded with several cuts, and covered with blood. He had a revolver in his hand, which the policeman who arrested him stated was a 38-caliber, with four shells empty and one loaded. This policeman stated that he did not find any revolver or knife on the person of deceased, but found a rusty four-bladed knife lying under deceased's body when he took him up; that the knife was closed, but was broken in such a way as to have a sharp edge; that one blade was missing entirely. The state's witnesses substantially agree on the facts of the shooting as above given. No disinterested witness testified as to the cause or beginning of the trouble. Apparently no person outside of the deceased and the plaintiffs in error was present when the difficulty began.

Plaintiff in error Vito Foglia lived with his family a little distance north of where the shooting occurred. His story is that on the Sunday night of the trouble, about 8:30 o'clock, he left his house and went out on the sidewalk to call his son Tony, who was playing in the street with other boys, and when he got to the sidewalk the deceased (Toscano) assaulted him (Vito), stating that he was going to kill him, and immediately struck and knocked him to the sidewalk and jumped upon him; that he (Vito) having a revolver, fired three or four shots in the air and called out, "Help me, my sons! He is killing me!" or words to that effect; that deceased was striking him and cutting him on the head with a knife; and that thereupon his son Tony shot at the deceased. The witness testified that he had known the deceased for some time intimately, but had never had any trouble of any kind or character with him; that he was arrested and taken to the emergency hospital, where the wounds on his head and face were sewed up.

Plaintiff in error Tony Foglia stated that he was playing on a wagon on the opposite side of La Salle street with some other boys whose names he did not remember. As he was playing, he heard some shots and his father cry out, "Help me, my sons! They are killing me!" or words to that effect. As he ran towards his father, he saw him on the ground with another man on top, striking him with something in his hand; that some person unknown to the witness placed a 32-caliber revolver in his hands, and told him to protect his father; that he went near to

where his father was lying while the other man was on top, striking him, and fired two or three shots; that after firing the shots, on seeing the man on top not moving, he pulled the deceased off of his father.

The manager of the emergency hospital where Vito Foglia was taken to have his wounds dressed testified that the records of the institution showed that there were five wounds in the patient's head and face, necessitating the insertion of 20 stitches.

The coroner's physician who made the post-mortem examination testified that he found four gunshot wounds in the body of the deceased; that two of them were neck wounds made by two 38-caliber shots from before backwards, the balls escaping without penetrating any vital organs; also a wound in the back, caused by a 32-caliber bullet entering between the ribs, passing through the lung to the heart, the ball being found in the right pleural cavity; also a wound in the side from a 32-caliber bullet, which passed between the ribs, through the stomach and upper border of the kidneys and lodged in the muscles of the back. In his opinion death was due to shock and hemorrhage from the gunshot wound of the 32-caliber bullet which pierced the right lung and heart, causing instant death.

Pedro Foglia, another son of Vito, testified that he was on the second floor of a house in the vicinity, playing cards, when he heard the shooting and ran out on the sidewalk; that he had no revolver or anything in his hand, and did not fire any shots. The witnesses for the state did not contradict this testimony of Pedro, or claim that he took any active part in the shooting, with the exception of one witness, who testified that about the time Tony Foglia pulled deceased off of Vito and laid him on the sidewalk, face up, Pedro came up and fired three or four shots at the body of the deceased as it lay on the sidewalk, face up.

Tony Foglia and Pedro Foglia ran away from the scene of the killing and went to Philadelphia, where they lived for some time under assumed names, but they testified that they afterwards came back on the advice of their counsel, and surrendered themselves to the police. Pedro was put on trial with his father and brother, but at the close of the state's evidence the presiding judge ordered him discharged, and the state thereupon entered a nolle pros. as to him.

It is stated at the close of the bill of exceptions that "the theory that the state advanced was that the Foglias laid in wait to assassinate the deceased, and accomplished that purpose. The position taken by the defendants was that the deceased mistook Vito Foglia for some one else, and assaulted him without provocation, and that the shooting was done in necessary self-defense." We find nothing in this record that conclusively upholds the theory of either the state or defense. There is no positive evidence as to

the beginning of the trouble other than that given by plaintiffs in error. In this state of the record the case called for care and accuracy in instructing the jury as to the law.

Several instructions were given that were prejudicial to plaintiffs in error. All the testimony agrees that at the time the fatal shot was fired—and, indeed, when all the shots were fired—plaintiff in error Vito Foglia was lying on his back on the ground, with the deceased on him, holding him down; and the testimony of the plaintiffs in error is to the effect that the deceased was at the time striking Vito on the face and head with a knife or some other implement. The other testimony in the record is in harmony with their statements in this regard, except that it shows that the knife found under the body was closed. The wounds on Vito Foglia's face tend strongly to show that the deceased struck him with something. Instruction 66 given for the state is as follows: "The court instructs the jury that, before the acquittal of a defendant charged with assault with a deadly weapon is justified on the ground of self-defense, it must appear from the evidence, considered all together, that at the precise time the blow or blows constituting the assault charged were struck, it in good faith appeared to the defendant that he was in danger of losing his life or of receiving serious or great bodily harm and that the assault was committed under such belief, and it must also appear that the person assaulted by the defendant was the assailant, or that the defendant had really and in good faith endeavored to decline any further struggle before the assault charged was made by him." This, in some respects, was the same instruction condemned by this court in *Filippo v. People*, 224 Ill. 212, 79 N. E. 609, and referred to in that case on page 216 of 224 Ill., on page 610 of 79 N. E., where we said: "The instruction clearly implied that the court thought defendant was an assailant." The instruction here says: "At the precise time the blow or blows * * * were struck." The instruction is misleading in referring to blows on the part of plaintiffs in error, as there is no evidence to show that they struck any blows. But, taking it in its most favorable light for the state, the jury would naturally have inferred that the court believed that at the precise time the fatal shots were fired both plaintiffs in error still had an opportunity of declining further struggle. How could Vito Foglia, on the facts presented, have shown that he had declined further struggle? The jury might easily have inferred from this instruction that the court thought that the defendants were the assailants, and this belief might well have been strengthened by the fact that the court gave for the state five other instructions as to the doctrine of self-defense, and the majority of them might readily have been construed by the jury in the same way. If the

evidence is conflicting as to whether the accused or the other party was the assailant, an instruction for the people which assumes that the accused was the assailant is improper. *Hammond v. People*, 199 Ill. 173, 64 N. E. 980.

Instruction 71, given for the people, stated to the jury that the law of self-defense does not imply the right of attack in the first instance or permit of action done in retaliation or for revenge. While this instruction as an abstract proposition of law is doubtless correct, there is nothing in the evidence to justify its being given in this case. It is apparently the same instruction that was condemned by this court in *Filippo v. People*, supra, referred to on page 217 of 224 Ill. and page 609 of 79 N. E. There is not the slightest positive evidence in this record that plaintiffs in error were in the first instance the attacking party, or that they, or either of them, were acting in retaliation or for revenge. The state appears to have tried the case on the theory that they were so acting, but the evidence did not justify the giving of this instruction in support of that view.

Complaint is also made by plaintiffs in error that the court refused to give their instruction numbered 1, as to the law of reasonable doubt. This instruction defines reasonable doubt in substantially the same language as was used by Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush. (Mass.) 320, 52 Am. Dec. 711, and has been approved by this court in *Little v. People*, 157 Ill. 153, 42 N. E. 389. There was only one instruction given by the court as to the meaning of the term "reasonable doubt." This was instruction 15 for the state, and informs the jury, properly enough, that a doubt produced by undue sensibility is not a reasonable doubt, and that a juror should not create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures, and that the jurors are not at liberty to disbelieve as jurors if from the evidence they believe as men. But this instruction did not cover in any way the idea as to reasonable doubt conveyed by the refused instruction for plaintiffs in error. The instruction was entirely proper and should have been given in this case. *Wacaser v. People*, 134 Ill. 438, 25 N. E. 564, 23 Am. St. Rep. 683. In view of our holdings on the instructions already discussed, it would be unnecessary to consider the other points raised by the briefs if it were not that they may arise on the next trial, and counsel appear to be entitled to the court's views on those questions.

Complaint is made that instructions 2, 3, and 7, offered by plaintiffs in error on the "presumption of innocence," were not given. We think this question was fairly covered by other instructions given. The same may be said as to instructions 4 and 5, offered by plaintiffs in error, on the doctrine of the

greater weight or preponderance of the evidence. We think the court correctly refused the sixth instruction offered by plaintiffs in error. It was not in entire harmony with the evidence.

The court, in instructing the jury as to the form of their verdict, among other forms gave the following: "They may find one defendant guilty of murder and the other defendant guilty of manslaughter." The jury followed this form of instruction, and found the father, Vito Foglia, guilty of murder, and the son, Tony Foglia, guilty of manslaughter. Counsel for plaintiffs in error contend that this form of verdict placed two separate and distinct crimes before the jury. With this we do not agree. It is said in *Wharton's Criminal Pleading and Practice* (8th Ed.) § 246: "Generally speaking, where an accusation * * * includes an offense of an inferior degree, the jury may discharge the defendant of the high crime and convict him of the less atrocious." To the same effect is 1 *Chitty's Criminal Law*, p. 638. This court held in *Carpenter v. People*, 4 Scam. 197, that on an indictment for murder the defendant might be acquitted of murder and found guilty of manslaughter. See, also, *Yoe v. People*, 49 Ill. 410; *Herman v. People*, 131 Ill. 594, 22 N. E. 471, 9 L. R. A. 182. In *Ruth v. People*, 99 Ill. 185, this court held that on the trial of one under an indictment for burglary and larceny it was error to refuse an instruction to the effect that the jury might find the defendant guilty of both or either of said offenses, as the evidence warranted. A state of facts might easily be conceived under which two persons might be indicted as principals on the charge of murder (*Usselson v. People*, 149 Ill. 612, 36 N. E. 952), and yet one of them be properly convicted of murder and the other of manslaughter. While such an instruction as the one here given as to the form of the verdict might not be proper in all cases, as the evidence might not justify its giving (*Lynn v. People*, 170 Ill. 527, 48 N. E. 964; *Bleich v. People*, 227 Ill. 80, 81 N. E. 36; *Koser v. People*, 224 Ill. 201, 79 N. E. 615), yet we do not think the giving of this instruction in this case was error. It certainly did not injure Tony Foglia in any way, and we cannot see how it worked to the disadvantage of Vito Foglia.

In support of their motion for a new trial plaintiffs in error introduced evidence tending to show that they were misled by one whom they employed as an attorney, but who they afterward found was not licensed to practice; that, therefore, the case was not properly prepared for trial. The newly discovered evidence they claim they could have had at the trial if the case had been properly prepared was cumulative, and we do not think it would justify a reversal. Its character need not be discussed, as the case must be reversed for other reasons.

For the errors indicated in giving instruc-

tions not applicable to the facts in this case, the judgment must be reversed, and the cause remanded for such further proceedings as law and justice shall require.

Reversed and remanded.

(223 Ill. 323)

BECKERLE et al. v. BRANDON et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. INTOXICATING LIQUORS—SALES TO MINORS—EXEMPLARY DAMAGES—PERSONS LIABLE—OWNERS OF PREMISES.

Where a minor, who helped to support his parents, was killed through his intoxication from liquors sold him by a saloon keeper, and the saloon keeper rented the premises from one who knowingly permitted the sale of liquors therein, exemplary damages may be assessed against both the saloon keeper and his landlord under Hurd's Rev. St. 1905, c. 43, § 9, which provides that the landlord, in specified contingencies, "shall be liable, severally or jointly, with the persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 438.]

2. SAME—ADMISSIBILITY OF EVIDENCE.

Where a father and mother are claiming vindictive damages under Hurd's Rev. St. 1905, c. 43, § 9, providing for exemplary damages against a liquor seller and his landlord for the sale of intoxicants to a minor to his injury, evidence that the father and the injured son drank together at the other saloons at other times is competent, since the jury had a right to consider that fact in fixing the amount of vindictive damages, even though the mother sued jointly with the father.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 447.]

3. APPEAL—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where a father and mother are claiming vindictive damages under Hurd's Rev. St. 1905, c. 43, § 9, providing for exemplary damages against a liquor seller and his landlord for the sale of intoxicants to a minor to his injury, the exclusion of evidence that the father and the injured son drank together at other saloons at other times is harmless, where it is shown that on earlier occasions at defendant's saloon the son had bought and drunk intoxicants with the father's consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Jackson County; W. N. Butler, Judge.

Action on the case by John Brandon and another against George Beckerle and D. P. Willis. From the judgment of the Appellate Court affirming the judgment of the circuit court for plaintiffs, defendants appeal. Affirmed.

This is an action on the case brought by John Brandon and Sarah Brandon, appellees, in the circuit court of Jackson county, under section 9 of the dramshop act (Hurd's Rev. St. 1905, c. 43), against George Beckerle, appellant, and one D. P. Willis, for injury to their means of support occasioned by the death of their son, John Brandon, Jr. A plea of the general issue was filed by defendants, and the trial resulted in a verdict and

judgment for plaintiffs in the sum of \$3,000. Defendants prayed an appeal to the Appellate Court for the Fourth District, and from the judgment of that court affirming the judgment of the circuit court this appeal is prosecuted.

While the cause was pending in the Appellate Court, D. P. Willis died, and upon the suggestion of his death in that court John R. Kane and John G. Hardy, executors of his last will and testament, were made parties, and they, together with Beckerle, are appellants herein. The declaration, which contains but one count, charges: That Beckerle conducted a dramshop in Murphysboro, Jackson county, Ill., in a certain building leased from one D. P. Willis; that Willis knew for what purpose the building was leased; that on September 1, 1905, while conducting said business, said Beckerle sold and gave intoxicating liquors to plaintiffs' minor son, causing his intoxication, and while so intoxicated, and in consequence thereof, he was struck and killed by a certain railroad train; that during his lifetime their said son earned the sum of \$70 per month; that they were entitled to his wages; that he contributed the same to their maintenance and support; and that by reason of his death they have been injured in their means of support and deprived of the same. It appears from the record that on August 31, 1905, Beckerle kept a saloon in the city of Murphysboro in a building leased from D. P. Willis, who was the owner thereof. The deceased, who was a minor son of the plaintiffs, 17 years of age and residing with them, was employed as a mule driver in a coal mine, earning the sum of \$2.42 a day. It seems from the evidence that all of the money earned by the son was by him paid over to his parents and used by them in support of the family. In the early part of the evening of August 31, 1905, John Brandon, Jr., with several other boys, went to the saloon of defendant Beckerle, where they remained until midnight, drinking intoxicating liquors and playing cards. The saloon closed at midnight, and by that time Brandon was very much intoxicated. Liquor had been sold and served to him in the saloon on that evening by both Beckerle and his barkeeper. He was perfectly sober when he entered Beckerle's saloon and had obtained liquor from no other place during the night. As the saloon closed, one of Brandon's associates obtained a pint of whisky from the barkeeper, and, with this companion and another, Brandon started for Mt. Carbon, where all three resided, on the opposite side of the Big Muddy river from Murphysboro. To reach their homes they started to cross the stream on the Illinois Central Railroad bridge, which spans the river at that place. When about halfway across they stopped, and each took a drink of whisky. They then sat down on the bridge, and in a few minutes fell asleep. Between two and three hours afterward, deceased, while still asleep on the bridge, was struck by a passing train and re-

ceived injuries from which he died the following afternoon. It is urged by appellants as grounds for reversal: First, the court erred in passing on instructions; second, the court erred in passing on objections to evidence.

James H. Martin, for appellants. Herbert & Levy, for appellees.

SCOTT, J. (after stating the facts as above). There is evidence in the record which shows that the deceased was but 17 years of age; that on the night of his death Beckerle, by himself or his barkeeper, sold intoxicating liquor to the boy which caused his intoxication, and also sold him liquor of that nature after he was so intoxicated; that the appellees were injured in their means of support in consequence of such intoxication; and that Willis rented the premises to Beckerle and knowingly permitted the sale of intoxicating liquors therein.

The court gave plaintiffs' instruction No. 8, which advised the jury that if they found for the plaintiffs, and found certain alleged facts to be true, they might then return a verdict including exemplary damages. This is said to have been wrong so far as Willis, the owner of the property, is concerned, as the evidence did not show any intentional wrongdoing, or any reckless, malicious, wanton, or oppressive conduct on his part. Section 9 of chapter 43, Hurd's Rev. St. 1905, gives a right of action against the liquor seller under certain circumstances, and provides that the owner of the building, in specified contingencies, "shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages." The language just quoted received the consideration of this court in *Hackett v. Smelsley*, 77 Ill. 109, and the reasoning of that opinion warranted the circuit court in giving the instruction above referred to.

It is then urged that the court erred in not permitting the defendants to show that the father and son visited and drank together at other saloons at other times. Inasmuch as the plaintiffs were claiming vindictive damages, this evidence was competent. *Hackett v. Smelsley*, supra. The fact that the wife sued jointly with the husband did not warrant its exclusion. If the father had on other occasions consented to the sale of intoxicating liquor to his minor son, the jury had a right to take that fact into consideration in determining whether vindictive damages should be awarded, and in fixing the amount thereof in case they awarded damages of that kind, no matter who sued. We think, however, that this error does not warrant a reversal. It was shown by the testimony of the father and others that on earlier occasions at Beckerle's bar the son had bought intoxicants, the father consenting, and that the son had there, in the presence of the father, par-

taken of the same without objection from the latter. Under these circumstances the exclusion of the evidence in question was not harmful.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(229 Ill. 47)

VANATTA et al. v. CARR et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WILLS — CONSTRUCTION — INTENTION OF TESTATOR.

The intention of the testator should be ascertained and given effect, in the construction of a will, if not prohibited by law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 955-961.]

2. LIFE ESTATES—CHARGES.

Where testator left all of his property to his widow for life, charged with a legacy to a son, the amount of which was left to the discretion of the widow, and the widow paid certain amounts to the son, of which she kept no account, she could not charge the estimated amount of such payments against the estate at the expense of the remaindermen.

3. PARENT AND CHILD—EMANCIPATION—MARRIAGE.

The marriage of a son while under age constituted an emancipation, so as to entitle him to his subsequent earnings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 168.]

4. LIFE ESTATES—RIGHTS OF LIFE TENANT.

Where a widow, long prior to her husband's death, mingled \$300, which she had received from her father's estate, with funds belonging to her husband, who bequeathed to her a life estate in his property, subject to certain charges, and she made no effort in the county court to recover such money from the estate, she was barred by laches from claiming the same as against the remaindermen.

5. TRUSTS — MINGLING TRUST FUNDS — BURDEN OF PROOF.

Where a trustee mingled her own funds with trust funds in purchasing property for the beneficiaries, the burden was on her to clearly show the amount she had used out of her own funds, in order to obtain credit therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 483.]

6. LIFE ESTATES—INCREASED VALUE.

Where a trust fund is invested in land, which rises in value from its situation or use and necessary improvements made by the life tenant, such increased value becomes capital, and belongs to the remaindermen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Life Estates, §§ 34, 35.]

7. SAME — TRUSTEE — SECURITY FROM LIFE TENANT.

Where a will bequeathed all of testator's property to his widow for life, remainder in fee, and the widow used a large part of the estate with which to purchase certain land in her own name, she being entitled to the use and profits thereof for life, the remaindermen were only entitled to have the title placed in the life tenant for life, with remainder to them in fee, but could not obtain the appointment of a trustee, or require the life tenant to give security for their protection.

Appeal from Circuit Court, Jasper County; Truman E. Ames, Judge.

Bill by William Vanatta and others against

Sarah Carr and others. From a decree in favor of complainants for less than the relief demanded, they appeal, and cross-errors are assigned by the defendants. Reversed and remanded, with directions.

This case has been to this court before as *Vanatta v. Carr*, 223 Ill. 160, 79 N. E. 86. In the original case the trial court sustained a demurrer to the bill now before us, and dismissed the suit for want of equity. On appeal to this court the decree of the lower court was reversed, and the cause remanded. A copy of the will construed by the court in that case and all the facts as set out in the bill are found in the statement in the original case, and need not be here repeated. The remanding order in that case was filed in the circuit court of Jasper county, and the cause came on again for hearing at the April term of that court, at which the defendants all answered the original bill, denying most of the material allegations, and appellee Sarah Carr filed her cross-bill asking for special relief, which cross-bill was answered by the complainants in the original bill, who also replied to the answers to the original bill. The testator, William T. Cowger, died seised of 12 $\frac{3}{4}$ acres of ground which is not here in question. As shown by the final report of the administrator in the county court, his personal estate consisted of chattel property appraised at \$330.75; cash on hand, \$500; good notes belonging to the estate, \$2,200; total, \$3,050.75. This was disposed of as follows: Executor, for services, \$80.25; Sarah A. Cowger, bequest, \$2,220; Sarah A. Cowger, claim probated, \$73; Sarah A. Cowger, personal property taken on account of the award, \$330.75; Sarah A. Cowger, balance due on award, \$318.75. This makes \$3,022.75, and the balance, about \$28, was for court costs, attorney's fees, etc. After the settlement of the estate and the payment of the money shown above by the executor, the appellee Sarah Carr, who is shown in the executor's report as Sarah A. Cowger, bought the 36.98 acres of land now in question for \$2,375, taking the title in her own name. She claims in her answer and cross-bill that she used the \$2,220 turned over to her by the executor in paying for the land, but that \$300 of this was her own individual money that she had received from her father's estate; that she had also provided her son Alva B. Cowger with a team of horses and bed and bedding, as directed in the will, at a cost of \$350, and with food and raiment at a cost of \$700, so that of the \$2,220 turned over to her by the executor only \$870 then belonged to the estate; that the difference between the \$2,220 and \$2,375, or \$155, she paid from her own money. Appellants, in their answer to the cross-bill, allege that in addition to the \$2,220 of the purchase money for said property that went into the estate, all of which they allege belongs to the estate, the executor gave \$80.25 allowed him for services, as

shown in his final report, to appellee Sarah Carr to be used as a part of the estate, and that she used this money along with the \$2,220 to pay for this land. They deny that any part of the \$2,220 was the personal property of the appellee Sarah Carr from any moneys that she received from her father's estate, also allege that she is barred by her own laches from setting up any claims to the fund or any portion thereof, and deny that she had given to her son Alva B. Cowger his board and clothing, bed and bedding, and team of horses, as alleged in the cross-bill.

After the issues were settled the case was heard by the chancellor and a decree entered therein, the material parts of which, as affecting the questions here at issue, are substantially as follows: Finds that appellee Sarah Cowger (now Sarah Carr) had turned over to her by the executor \$2,220 cash and notes, all of which notes were subsequently paid to her in full, and all of which amount was paid by the executor to her as devisee for life, and not otherwise; that said Sarah Carr, as directed and provided for in said will, has furnished and delivered to said Alva B. Cowger an average team of horses, bed, and bedding, and has provided food and raiment for him, at an aggregate sum of \$1,007.50; that said appellee, since the death of testator, has purchased the 36.98 acres of land in question, taking the estate in her own name, where it still remains, for which she paid the sum of \$2,375, a portion of which sum was her own money and the remainder she received as devisee, as aforesaid, under the will of said testator; that said appellee, in furnishing and providing the said Alva B. Cowger with bed and bedding and a team of horses and food and clothing and purchasing said real estate, paid out the sum of \$1,162.50, which sum was composed of her own notes and income of the life estate devised to her by said will; that the remaindermen, under said will, are entitled to be protected and have secured to them the sum of \$2,220 after the termination of the life estate of the said Sarah Carr therein, subject to any decree which may hereafter be made by a court of competent jurisdiction for the purpose of providing for the support of the said Sarah Carr. Orders that said Sarah Carr be required to give bond in the penal sum of \$2,500, with sureties approved by the court, conditioned for the faithful management of said \$2,220; that said Sarah Carr shall control and manage said 36.98 acres of land, and shall be authorized, in her discretion, to sell and convey the same, and to use and control the proceeds arising from such sale, and to loan or reinvest the same in other real estate, at her pleasure, free from molestation or interference of the devisees or remaindermen under said will; that the costs of the proceedings shall be divided equally between appellees and appellants. From this decree the appellants have

appealed to this court. Cross-errors have been assigned by appellees.

Andrews & Vause, for appellants. Albert E. Isley and Gibson & Walker, for appellees.

CARTER, J. (after stating the facts as above). It is somewhat difficult to ascertain definitely from the record the sum expended by appellee Sarah Carr under the provisions of the will for her son Alva B. Cowger, which the chancellor placed at \$1,007.50; but that is not important, in view of our conclusions reached in this case. We assume, from the findings of the decree and the briefs of counsel, that the trial court did not take this amount into consideration in deciding what should be allowed to the remaindermen under the will. Manifestly the chancellor found that appellee Sarah Carr should be compelled to account for the \$2,220 that she had taken from the estate and invested in the land in question, the balance of the purchase price of \$2,375, or \$155, being made up from her own funds, and that, while she had paid the \$1,007.50 to Alva B. Cowger out of her own money, under the circumstances as shown on this record she could not recover it. Appellees, under their assignment of cross-errors, insist that the court should have allowed this amount of \$1,007.50 to be deducted from the amount due the remaindermen, for which the said appellee Sarah Carr was required to give bond. It is apparent that the widow never intended to charge the estate with this amount until after the trouble arose over the construction of the will. Soon after the testator's death, in the spring of 1899, the land in question was purchased, and appellee Sarah Carr (then Sarah Cowger) and her son Alva (who was then past 14 years of age) moved onto it. Only a small amount of farming was done that fall, but for several years thereafter Alva ran the farm, paying his mother two-thirds of the proceeds as rental. One year he ran it with Lee Vanatta. Shortly after he became 19 Alva married, and then continued to run the farm for two or three years more, when he had a sale and removed to town and bought a store. About the time of her son's marriage Sarah Cowger also married, and sold her son Alva the farm implements for \$40, and gave him a team of horses and his bed and bedding. In September, 1905, Sarah A. Carr and her husband conveyed the 36.98 acres to Alva B. Cowger, and these proceedings resulted. The mother did not claim any contract with her son Alva, or any one else, for compensation for his support during all those years, nor any claim for the horses or bed and bedding. Indeed, she testified herself that all she had and all her former husband (the testator, Cowger) had she called one, and expected, after doing these things for Alva, to have it all divided equally under the will until this lawsuit was commenced, and then she proposed to have all she was entitled to.

In construing a will, as has been frequently

said by this court, the intention of the testator should be ascertained and given effect if not prohibited by law. This is the primary rule in construing wills. *Bradsby v. Wallace*, 202 Ill. 239, 66 N. E. 1088; *Vanatta v. Carr*, supra. No definite amount was fixed in the will to be given to appellee Alva Cowger. It certainly was not the intention of the testator that he should be paid enough to give him food and raiment and keep him in idleness. The will shows that the testator expected to have a substantial amount left his other children. He certainly could not have planned that his son Alva should have over \$1,000 from the body of his estate, his wife a life estate, and appellee Lee his portion, and expect to have left an amount of a substantial size for the other children. It will be noted in this connection that Alva was also one of the three equal residuary legatees. The testimony in the record shows that at the time of his death the testator was planning to buy the very land in dispute. His wife purchased the property as soon as she could, and largely because he had so planned. She and her son Alva were supported by it. In *Vanatta v. Carr*, supra, we said, in discussing this question (page 187 of 223 Ill., page 88 of 79 N. E.), that the meaning of the provision of the will with reference to Alva and the mother's life estate was "that, except as to the charge made against his estate in favor of his son Alva, his widow should have a life estate in his property." The life estate was subject to the legacy of Alva. The amount that was to be paid him under this legacy must necessarily be left largely to the discretion of the person who was to pay it. 1 *Jarman on Wills* (6th Ed.) p. 398. The mother took it upon herself to act in this capacity. She says she kept no account as to the amount she paid out, and she only estimates what the value is. Having seen fit to pay this amount herself, she cannot now ask to have it charged to the estate. *White v. Cannon*, 125 Ill. 412, 17 N. E. 753. See, also, *Tyler v. Daniel*, 65 Ill. 316; *Ward v. Armstrong*, 84 Ill. 151. We think the court ruled correctly in not charging this amount to the share of the remaindermen. Appellee Sarah Carr is barred by her own laches from making any such claim. This conclusion as to the intention of the testator and the justice of such finding is strengthened by the fact that Sarah Carr received her widow's award, which, under the statute, is given partly for the purpose of assisting in the support of minor children, if there are such. The only minor child was Alva Cowger. He and his mother received support from this farm, which was purchased from money coming from testator's estate. This result, plainly, is all that testator intended as to Alva's support.

It might well be urged that while Alva B. Cowger lived with his mother on the farm and worked for her, and while she was entitled to his wages, she should support him.

His marriage emancipated him, even though he was not of age, and entitled him thereafter to his own earnings. 21 Am. & Eng. Ency. of Law (2d Ed.) p. 1060, and cases cited. What is said on this point on the question of laches covers fully any contention made by appellees as to the right of the widow to claim \$300 which she testifies she received from her father's estate. It is very clear from this record that this \$300 had been mingled with the funds of the testator for years previous to his death, no account being kept of it, and was returned to the county court as a part of his estate, and she herself testifies that she never expected to make any claim for it until this trouble arose. The chancellor was right in not allowing this claim.

One hundred and fifty-five dollars of the purchase money was found by the court to have been paid out of money belonging to appellee Sarah Carr. Appellants contend that \$80.25 of this amount was turned over to her by the executor, her son-in-law, Vanatta, to be a part of the general fund of the estate, and not to belong to her. He testified to this fact and the purpose for which it was to be used, and his testimony on this point is evidently in accordance with the facts. The appellants further contend that the balance (\$75) was never intended to be charged by her against the estate, and that under the authorities, when a trustee mingles her own funds with trust funds in purchasing property for the beneficiaries, the burden is upon the trustee to show clearly the amount she has used out of her own funds in order to have it credited to her. *Tyler v. Daniel*, supra; *Ward v. Armstrong*, supra. It appears from the testimony of the executor and one of the other appellants that there was some cash on hand at the death of the testator, which the widow (appellee herein) used without making it a part of the inventory. The executor testified that she used part of this money to pay funeral expenses, and that \$73 of these same funeral expenses was probated and paid to her from the estate. As we understand his testimony, he claims that she had this \$73 from the money that was not inventoried, and that she admitted to him that she had about \$100 of the estate's money, including this \$73, over and above that which she had put into the purchase of this land. Appellee Sarah Carr was not asked by any counsel as to this amount of \$100 or the \$73 double payment. Having put this \$155 in with the other trust funds in the purchase of this land, she cannot have it allowed to her, unless she shows, clearly and satisfactorily, that it came from her own individual funds. This she failed to do.

The main contention is as to the correctness of the court's ruling in allowing security only for the fund belonging to the remaindermen; appellants claiming that the chancellor should have entered a decree placing the title

to this land in appellee Sarah Carr for life, with remainder to those entitled to it under the will. In 2 Perry on Trusts (5th Ed.) §§ 545, 546, the rule is laid down that if the trust fund is invested in land, and the land rises in value, from its situation or from the use and necessary improvements made by the tenant for life, such increased value becomes capital and belongs to the remaindermen. The general rule seems to be that the enhanced value of the principal of a trust fund goes to the remaindermen; and this is true, whether the investment be made in real estate or in stocks and bonds. *Chaplin on Express Trusts*, §§ 417, 418; 16 Cyc. 621, and cases there cited; *In re Gerry*, 103 N. Y. 445, 9 N. E. 235. In *Dee v. Dee*, 212 Ill. 338, 355, 72 N. E. 429, 434, in discussing a similar question we said: "If the widow invested the proceeds of the personal property in real estate, the remaindermen not challenging her power or authority to make that investment, the title should be placed in her for life, or as long as she remains the widow of Patrick Dee, with remainder to the persons entitled to the remainder in the personality under his will"—citing in support of this holding *Burnett v. Lester*, 53 Ill. 325, *Welsch v. Belleville Savings Bank*, 94 Ill. 191, and *Buckingham v. Morrison*, 136 Ill. 437, 27 N. E. 65, which are cited and some of them relied on in support of the findings of the chancellor. We said in *Vanatta v. Carr*, supra, in discussing this point (page 171 of 223 Ill., page 90 of 79 N. E.): "If the averments of the bill are true that the land purchased by Mrs. Carr was purchased wholly with the personal property left by her husband, the title should be placed in her for life, with remainder in fee in those entitled to it under the provisions of the will. We see no good reason for the appointment of a trustee to manage and control the estate, or requiring Mrs. Carr to give security for the protection of the remaindermen, if the facts are as averred in the bill. She would be entitled to the use, rents, and profits of the land, and should be given its possession and management during her life." The facts as found on this hearing are not substantially different from what they were understood to be in the previous hearing before this court, and the rule laid down by us as above should govern in the final distribution. The decree should have directed, in accordance with the former decision, that the title to the land in question be placed in Sarah Carr for life, with remainder in fee to those entitled to it under the provisions of the will, and that she be entitled to the use, rents, and profits of the land, and be given its possession and management during her life, but that she be not required to give bond.

The decree of the circuit court will therefore be reversed, and the cause remanded to that court, with directions to enter a decree in harmony with the views herein expressed.

Reversed and remanded, with directions.

(229 Ill. 56)

PEOPLE ex rel. WILLIAMS v. ERRANT
et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MUNICIPAL CORPORATIONS—CIVIL SERVICE
—PROMOTIONS.

Under Chicago Civil Service Rule 2, § 4, providing that the grades shall be based upon compensation, and rule 7, § 1, providing that promotions shall be from grade to grade, except as otherwise provided, "in the same line or character of work," upon competitive examinations, promotions must be made upward from the grade next below in the same line of employment, rank for the purpose of promotions not being determined by salary only; and hence, though ward superintendents are in the fifth grade and the assistant superintendent of streets in charge of street and alley cleaning in the tenth, a higher grade, ward superintendents are eligible for such assistant superintendency, being next below in the same line of employment.

2. SAME—COMMISSIONER'S DECISION—CONCLUSIVENESS.

Under Chicago Civil Service Act (Laws 1895, p. 87) § 9, requiring the commission to provide for promotions on the basis of ascertained merit and seniority in service and examination, and to provide, where "practicable," that vacancies shall be filled by promotion, where there are at least 15 persons ready and willing to take a promotional examination for a higher position to which they are eligible, the commissioners may not determine before such examination that it is impracticable to fill the vacancy by promotion.

3. MANDAMUS—PARTIES—DEFENDANTS.

One who has been appointed to fill a vacancy in a civil service position after a general examination is not a necessary defendant in mandamus to compel the civil service commissioners to hold a promotional examination to fill the position.

4. SAME—TO COMPEL CIVIL SERVICE EXAMINATION.

Under Chicago Civil Service Act (Laws 1895, p. 87) § 9, providing that, where practicable, vacancies shall be filled by promotion, where there are at least 15 persons eligible for promotion to a vacancy, mandamus will lie to compel the commissioners to hold a promotional examination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 159.]

Appeal from Branch Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Petition for mandamus by the people, on the relation of Harris Williams, against Joseph W. Errant and others. From a judgment of the Branch Appellate Court, reversing a judgment for petitioner and remanding the cause, petitioner appeals. Reversed, and judgment of circuit court affirmed.

The following statement of facts, made by Mr. Justice Freeman, of the Branch Appellate Court of Cook county, is agreed to by both parties as an accurate statement. It also presents the facts as we understand them from the record:

"This is a petition for mandamus, filed by a citizen and taxpayer, it is said, for a writ of mandamus to compel the appellants, as civil service commissioners of the city of Chicago, to hold a promotional examination for the position of assistant superintendent of streets in charge of street and alley cleaning;

the taking of such examination to be limited to ward superintendents of the city of Chicago. The petition sets forth the rules of the civil service commission in force from January 23, 1905, down to the time of filing the petition, and states that November 3, 1898, an original public competitive examination was had, free to all persons in the classified service and others, for the office of assistant superintendent of streets in charge of street and alley cleaning, but that since that time no further examination for that position has been held; that July 17, 1905, the superintendent of streets made a requisition on the commissioners for the name of one eligible to appointment to said position; that the commission claimed there was no list of eligibles from which certification could be made, and the superintendent of streets thereupon made a temporary appointment, with the approval of the commissioners, which has been renewed from time to time, the appointee having never taken part in nor passed any examination under the civil service act. The petition states that there was held, April 30, 1898, an original examination for the position of ward superintendents, and that certain named persons passed successfully and were appointed ward superintendents; that said position is of the next lower rank to that of assistant superintendent of streets in charge of street and alley cleaning, and there is no intermediate office between them. It is charged to have been the duty of the civil service commissioners to provide by its rules that vacancies in the office or place of employment of said assistant superintendent shall be filled by promotion from the rank of ward superintendents in all cases where practicable, and that all examinations for promotion to the position of said assistant superintendent shall be competitive among members of the next lower rank, known as 'ward superintendents,' who desire to submit themselves to such examination. It is alleged that more than 15 of such ward superintendents are ready to participate in such examination and will register as candidates for said position; said persons being in all respects qualified for that office of assistant superintendent of streets in charge of street and alley cleaning.

"It appears that the superintendent of streets is the head of the bureau of streets, and his immediate superior is the commissioner of public works. Next in rank to the superintendent of streets are the assistant superintendent of streets and the assistant superintendent of streets in charge of street and alley cleaning. It is stipulated, among other facts, that 'the duties of assistant superintendent of streets, ever since the year 1897 and down to the filing of the petition, have always been the superintendence, subject to the orders of the superintendent of streets, of all matters pertaining to street, sidewalk, culvert, and crossing repairing, and all other work pertaining to the streets and

alleys of the city, excepting the work of street and alley cleaning and garbage removal.' It is also stipulated that neither of these assistant superintendents, the assistant superintendent of streets or the assistant superintendent of streets in charge of street and alley cleaning, has been or is subject to the orders of the other, but both alike are subject to the superintendent of streets, and there is no intermediate office between the latter and the two subordinates above mentioned. The duties of ward superintendents, it is stipulated, are the direction and superintendence of street, sidewalk, culvert, and crossing repairing, and all other work pertaining to the streets, including street and alley cleaning and garbage removal, in their respective wards; and, as to street and alley cleaning and garbage removal, their immediate superior has always been the assistant superintendent of streets in charge of street and alley cleaning. They also receive orders from his superior, the superintendent of streets; while as to duties pertaining to matters other than street and alley cleaning and garbage removal, the immediate superior of ward superintendents has always been the assistant superintendent of streets, and they receive orders in reference to such work also from his superior, the superintendent of streets. It is stipulated that, unless the respective ranks of assistant superintendent of streets in charge of street and alley cleaning and ward superintendents are to be determined by the single test of their respective salaries, the office of ward superintendent is of the next lower rank to that of assistant superintendent of streets in charge of street and alley cleaning.

"It appears from the record that the civil service commissioners held an examination January 3, 1906, public, competitive, and free, for the position of assistant superintendent of streets in charge of street and alley cleaning, at which 11 persons took the examination, five of whom passed. The highest on the list was Richard T. Cox, who was certified to the commissioner of public works and appointed to the position. The civil service commission had previously announced that in their judgment it was impracticable to fill said position by promotional examination, and that ward superintendents were not next in rank to the assistant superintendent of streets in charge of street and alley cleaning, and had refused to call a promotional examination. The appellants have placed ward superintendents in the fifth grade, the salaries being \$1,400, and the assistant superintendent of streets in charge of street and alley cleaning in the tenth grade, the compensation being above \$3,000.

"The judgment rendered grants relator a peremptory writ of mandamus, commanding respondents, the civil service commissioners, to hold a promotional examination, within 30 days from date, for the office of assistant superintendent of streets in charge of street

and alley cleaning, unless they shall be prevented from so doing by the fact that none, or not more than one, of said ward superintendents shall register for such promotional examination, and, in case said examination shall be successfully passed by one or more of said ward superintendents, to make an eligible list composed of such ward superintendents as shall have successfully passed said examination, and to certify therefrom."

Under these facts the Branch Appellate Court was of the opinion that ward superintendents were not next in rank or grade to assistant superintendent of streets in charge of street and alley cleaning under the classification made, and that it was, therefore, not practicable to hold a promotional examination. The judgment of the trial court was reversed, and the case remanded, with directions to dismiss the petition. The petitioner appeals to this court.

Hiram T. Gilbert, for appellant. Clyde L. Day and George W. Miller (Edward J. Brundage, Corp. Counsel, of counsel), for appellees.

VICKERS, J. (after stating the facts as above). The act to regulate the civil service of cities was passed in 1895. Laws 1895, p. 85. The whole scheme of civil service is a development of modern political thought. Hence the law may be regarded in its formative period. Most of the questions arising under it are new, and but little assistance can be found in the analogies of the law. In construing the law or rules made to carry out its provisions, certain considerations which led to its adoption must be kept in view. The first and most important object to be accomplished by a system of civil service is to increase the efficiency of the service. This is a worthy purpose, and one that appeals to the good sense and sober judgment of thoughtful men. To accomplish this great purpose the civil service law seeks to remove the service to which it applies from the domain of party politics, and readjust it on a common-sense, business basis, placing before the officer or employé every possible inducement to render faithful and conscientious service. Among the means devised to secure the highest degree of efficiency are the assurance that the employé is not in danger of being swept from his place by an unfavorable turn of the political wind, and that faithful, honest, and efficient service in one position will open up possibilities for future promotion to a better one. The success of the system, in the nature of things, rests primarily with the persons charged with its administration. So long as the administrative agents are making an honest effort to carry out the provisions of the law in its true spirit, they should be left free to exercise a reasonable discretion in all matters depending on information of details and local conditions. With these general observations in view, we will proceed to express our

conclusions on the questions presented by this record.

Strictly speaking, there is but one ultimate question to be decided, which is: Is it the duty of the civil service commissioners to hold a promotional examination for assistant superintendent of streets in charge of street and alley cleaning, limiting such examination to ward superintendents? And, if so, is the duty of that clear and undoubted legal character which is enforceable by mandamus? The solution of this question depends upon the decision of two subordinate propositions:

First. Is the rank or grade of ward superintendents next below that of assistant superintendent of streets in charge of street and alley cleaning? To this question the trial court gave an affirmative answer, and the Branch Appellate Court replied in the negative. By the stipulation of the parties this question is simplified. It is stipulated as follows: "Unless the respective ranks of assistant superintendent of streets in charge of street and alley cleaning and ward superintendents are to be determined by the single test of their respective salaries, the office of ward superintendent is of the next lower rank to that of assistant superintendent of streets in charge of street and alley cleaning." Rule 2 of the appellees relates to "divisions and grades." Section 4 of said rule provides as follows: "Sec. 4. The terms 'grade' and 'rank,' wherever used in the civil service act or rules, shall be treated as synonymous and convertible terms. The grades shall be uniform in all classes and divisions and based upon compensation, as follows: 'First grade, less than \$800 per annum; second grade, \$800 or more and less than \$1,000 per annum; third grade, \$1,000 or more and less than \$1,200 per annum; fourth grade, \$1,200 or more and less than \$1,400 per annum; fifth grade, \$1,400 or more and less than \$1,600 per annum; sixth grade, \$1,600 or more and less than \$1,800 per annum; seventh grade, \$1,800 or more and less than \$2,100 per annum; eighth grade, \$2,100 or more and less than \$2,500 per annum; ninth grade, \$2,500 or more and less than \$3,000 per annum; tenth grade, \$3,000 or more per annum.' Ward superintendents receive \$1,400 per year, and the assistant superintendent of streets in charge of street and alley cleaning receives \$3,840 per year. The former are, therefore, on a salary classification, in the fifth grade, while the latter is in the tenth grade. It must be remembered, to avoid confusion, that the civil service of Chicago is divided into 11 divisions, as follows: Division A, medical service; division B, civil engineering; division C, clerical service; division D, police service; division E, electrical service; division G, library service; division H, bridge service; division I, inspection service; division J, elevator service; division K, mechanical engineering; division L, miscellaneous service. There are also five groups or bureaus, as follows: (1) Bureau of

engineering; (2) bureau of water; (3) bureau of streets; (4) bureau of sewers; (5) all laborers not otherwise grouped.

The salary classification applies, not alone to the bureau of streets, but also to all the classified service of the city. In view of the complexity of the service, it would probably be next to impossible to devise a reasonable and practicable classification without taking into account the salary carried by the various offices or places. The promotion scheme that enters into the civil service system is based on the idea of a salary classification. No one would be much stimulated by the prospect of a promotion that did not offer an increase of salary, and the idea of a promotion from a place bearing one salary to another carrying less compensation would be a reversal of the natural incentives to efficiency and would defeat the purposes of the system. The classification on the salary basis in the city of Chicago seems to be based on a similar classification adopted in the state of New York, where civil service was introduced in 1883 and later (in 1894) was incorporated in the state Constitution. See *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809. While a salary basis seems to be an essential element in any system of classification, yet a little reflection will show that any hard and fast rule based exclusively on salary, leaving out of view every other consideration, would be impracticable, and defeat, in many cases, the purposes of the system. To illustrate: Suppose in the bureau of health there is a hospital for the insane under the charge of a superintendent, at a salary of \$3,000 per year, who must be a physician. Directly under the superintendent there are 10 ward physicians in charge of the various wards of the hospital, at salaries of \$1,800 per year. In the same institution there are bookkeepers, stewards, stenographers, purchasing agents, attendants, and various other employes, with salaries ranging from \$600 to \$2,500 per year. If a vacancy should occur in the office of superintendent, it would be illogical and unreasonable to say that the 10 ward physicians should be put aside and a class made up for promotion out of the stenographers, bookkeepers or purchasing agents, whose salaries happened to be next in grade below the superintendent. Common sense and the spirit of the civil service law would naturally suggest that the vacancy, in the case put, should be filled from a promotional examination open only to the 10 ward physicians. This illustration will serve to show the necessity of some flexibility in the so-called salary classification. This element is imparted to the classification by section 1 of rule 7 adopted by appellees, which is as follows: "Promotions in the classified service shall be based on ascertained merit and seniority of service, and shall be from rank to rank or grade to grade (except as otherwise provided in this rule) in the same line or character of

work to be determined by the commission, and shall be made upon voluntary competitive examination."

Under this rule, classification for promotion must be from rank to rank, except as otherwise provided, in the same line of service. The requirement that the promotion is to be in the same line of employment rests on the rational basis that careful and studious attention to the duties of one station or place has an educational tendency to prepare one for advancement to a higher position in the same line. In our opinion the proper construction of these rules is that promotion shall be made upward—that is, toward the higher salaried place from the grade next below in the same line of employment—and that the same line of employment means those positions in the various departments the duties of which are so related to the duties of the higher place that a thorough knowledge of them is in a degree preparatory for the duties of the higher position. In going down the line of positions from assistant superintendent of streets in charge of street and alley cleaning, the next is assistant superintendent of streets, with a salary of \$2,600 per annum. It is not claimed that the place of superintendent of streets in charge of street and alley cleaning should be filled from this grade. There is nothing in common between the duties of these positions. The next is clerk of street and alley cleaning. This is an office position, and, while it is under the bureau of streets, it is not at all in the same line of service with the assistant superintendent of streets in charge of street and alley cleaning. The next in order is ward superintendent. The duties of a ward superintendent are of the same general character as those of the assistant superintendent of streets in charge of street and alley cleaning. The difference is a ward superintendent has charge of the street and alley cleaning in a ward of the city, while the assistant superintendent of streets in charge of street and alley cleaning has general charge of all the wards. The ward superintendents are the captains in charge of their several companies of laborers, while the assistant superintendent of streets in charge of street and alley cleaning is the major in command of the whole force. By a comparison of the questions used in the examination of the two classes of officers there is a striking similarity. They relate to the same general subjects, and are designed to test the practical knowledge of the applicant in relation to street building, repairing, and cleaning. But, as above pointed out, it is admitted that the ward superintendents are the next grade below the assistant superintendent of streets in charge of street and alley cleaning, unless the salary test alone is to determine the grade. This, we have sought to show, is not the sole test, but that the salary only determines the grade among those in the same line of employment. There are 36 of the ward su-

perintendents in Chicago—one for each ward. They are subject to change from one ward to another, so that it is not improbable that some of the older men in this position may have substantially covered the whole city during their service, thus giving them a general knowledge of conditions in the different parts of the city, the different classes of paving, the extent and character of the use to which the streets are put in different localities, and the effect of such use on different street material—in short, affording these officers exceptionally good opportunities to qualify for the position next above them in their line of employment.

Our conclusion is that the ward superintendents, under the law and under the facts of this case, are next in order or grade to assistant superintendent of streets in charge of street and alley cleaning.

Second. The second question is whether the appellees' determination or announcement that it is not practicable to fill the position of assistant superintendent of streets in charge of street and alley cleaning is final and binding. We do not understand that the civil service commissioners are vested with any arbitrary discretion in this matter. Section 9 of the civil service act provides: "The commission shall by its rules provide for promotions in such classified service on the basis of ascertained merit and seniority in service and examination, and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion." The Standard Dictionary of the English language defines "practicable" as "that which can be put into practice; possible of execution or performance." This court has defined the word as "that which may be done, practiced, or accomplished; that which is performable, feasible, possible." *Streeter v. Streeter*, 43 Ill. 155. The phrase in section 9 above quoted, "in all cases where it is practicable," adds but little to the meaning of the section, and takes little or nothing from it. If this phrase was eliminated entirely from the statute, it would mean substantially the same as it does with it in. The meaning in both cases is that the vacancies are to be filled by promotion. If this is not possible, the office is not to remain vacant and the wheels of government stop; but the place is to be filled in another way and the functions of the government go on. In the case before us the determination of appellees that it was not practicable to fill the place by promotion should not precede, but come after, a promotional examination, where it is their duty to hold such examination. There are, it is admitted, at least 15 ward superintendents who are ready and willing to take the promotional examination for the position to be filled. If the examination is held, and two or more ward superintendents qualify, then it will be practicable to appoint the one making the highest grade. Until such examination is held, and these persons given a chance to pass, the appellees can-

not know whether it is practicable to fill the place from the ward superintendents. The only prayer of the petition is that appellees be required to hold such promotional examination. This, we think, it is their clear legal duty to do. Appellees have announced that it was not practicable to fill the position by promotion, and the result is that a person has been appointed to this position who never served in any subordinate position in this line of service. His appointment was made and remade from time to time, until finally a general examination was held, and it happened that the same man who had been holding under temporary appointments passed the examination by a slightly better grade than his competitors, and hence he was then appointed as a result of examination. It is suggested that this officer is interested in this proceeding and should be made a party. We fail to see how he is interested in the holding of the examination. None of the applicants may make the required grade on examination, and, should they all fail, the present incumbent could not be disturbed.

Our conclusion is that the facts present a case of a clear legal duty which is enforceable by mandamus, and that the Branch Appellate Court erred in reversing the judgment of the trial court.

The judgment of the Branch Appellate Court is reversed, and that of the circuit court is affirmed.

Judgment reversed.

(229 Ill. 115)

PALMER et al. v. OWEN et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WILLS—PROBATE—DENIAL—GROUNDS.

The possibility, where a will is written on separate sheets of paper loosely fastened together, that one or more sheets may be removed, and others substituted, is not sufficient to justify a refusal to probate the will.

2. SAME—EXECUTION—SUFFICIENCY.

It is not necessary to the validity of a will that it should be written on one sheet of paper, and all that is required is that the whole will shall be in the presence of the attesting witnesses when attested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 233.]

3. SAME.

Witnesses to a will need not examine it with such care as to be able, on application for its probate, to say that all the pages or clauses of the proposed will were the pages and clauses signed by testator and attested; it not being required that subscribing witnesses shall know that the instrument is a will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 310.]

4. SAME—PROBATE—EVIDENCE—SUFFICIENCY.

Where the attesting witnesses to a will testified that testator declared that the paper was his will, that he signed it in their presence, and that at his request and in his presence they each signed as witnesses, the requirements of the law were complied with, entitling the will to probate, in the absence of fraud, compulsion, or other improper conduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 711, 714.]

Appeal from Circuit Court, Will County; Dorrance Dibell, Judge.

Petition by James W. Owen for the probate of the will of William B. Owen, deceased, in which Marguerite Palmer and another, minors, by their guardian ad litem, David Palmer, appeared. From a decree of the circuit court admitting the will to probate rendered on appeal of the probate court admitting it to probate, the guardian ad litem appeals. Affirmed.

Ernest Severy and John H. Savage, for appellants. Knox & Akin, for appellees.

FARMER, J. William B. Owen died testate in Will county, Ill., in November, 1906. In December following, what purported to be his last will and testament disposing of his property, real and personal, was filed with the clerk of the probate court, and James W. Owen, one of the persons named in the will as executor, filed a petition in that court asking that the will be admitted to probate and for letters testamentary. Upon a hearing on the petition the will was admitted to probate, and from the order admitting it Marguerite and Antoinette Palmer, minor children of a deceased daughter of the testator, by their guardian ad litem, appealed to the circuit court of Will county. Upon a hearing in the circuit court an order and decree were entered admitting the will to probate and directing the clerk of that court to certify said order to the probate court, and the appellant has prosecuted a further appeal to this court.

The will appears to have been written on nine sheets of paper. The will proper, with the signature of testator, was written on the first eight sheets, and the ninth sheet contained the attestation clause, signed by the witnesses, William Cleveland and Amella M. Cleveland, his wife. The will is shown by the evidence to be in the handwriting of Miss Belle Owen, a daughter of the testator and one of the beneficiaries under his will. It is dated just above the signature of the testator, March 7, 1902. The attestation clause signed by the witnesses is not dated. William Cleveland testified he remembered signing the will as a witness in the year 1902, but thinks it was not on the day the will bears date. He further testified the testator signed the will in the presence of himself and his wife and requested them to sign it as witnesses; that he showed them the document and told them it would not be necessary for them to read the whole of it, but that they could read enough of it to know that it was his will. And the witness testified he did do that, and afterwards the testator signed it in the presence of the witness and his wife, whereupon, at the request of the testator and in his presence, witness and his wife subscribed their names to the will as witnesses. Witness testified that the sheets upon which the will was written were fastened together in some manner—just how

he could not remember—and that the testator turned the leaves back, one after the other. He did not examine all the sheets, but says he did examine the last two, and that those two sheets of the will as admitted to probate were the same sheets he examined when he signed the will. Mrs. Cleveland's testimony as to the circumstances of signing the will as a witness was substantially the same as that of her husband. Both testified the testator was of sound mind and memory, and Mrs. Cleveland says he turned the pages of the will over for them to see that it was his will; that the pages were fastened together, and she did not examine all of them, but did examine the first two and the last one sufficiently to be able to testify that they formed the same pages of the will as probated. She also testified she did not sign the will as a witness on the day it bore date, March 7, 1902, and was unable to give the exact date at which she did sign it.

Counsel for appellant say the sheets upon which the will was written were not all uniform in texture and finish, and from this circumstance, and the further fact that the witnesses to the bill were unable to identify every sheet of it as being the same paper the testator signed and they witnessed as his will, it is contended probate should have been denied, because they say the proof does not show that the instrument sought to be probated is the whole instrument acknowledged and executed by the testator as his will. It is true, as counsel contend, that it is possible, where a will is written on separate sheets of paper, loosely fastened together, that one or more sheets might be removed and others substituted but the possibility of this being done is not sufficient to justify denying the admission of a will to probate. It is not necessary to the validity of a will that it should be all written on one sheet of paper. All that is required is that the whole will shall be in the presence of the witnesses when attested by them. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113. Neither is it required that the witnesses to a will should read it or examine it with such care as to be able, upon an application to admit it to probate, to say that all the pages or clauses of the proposed will were the pages and clauses signed by the testator and attested by them. It is not required that the subscribing witnesses shall know that the instrument is a will. *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907. The proof shows the testator declared to the witnesses that the paper was his will; that he signed it in their presence, and at his request and in his presence they each attached their signatures to it as witnesses. This was a compliance with the requirements of the law and entitled the will to be admitted to probate, in the absence of proof of "fraud, compulsion or other improper conduct" in the execution of the will. No such proof was made in this case, and without adverting further to the testimony it is sufficient to say that we have read it all,

and there is no evidence in this record that would have justified the court in denying admission of the will to probate.

The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

(229 Ill. 139)

AHLFIELD et al. v. CURTIS et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WILLS—CONSTRUCTION—ESTATE DEVISED—BASE FEE.

Testatrix devised her real estate to her daughter, then to her "heirs," but, if the daughter should die leaving "no heirs of her own," then the land should be sold and the money divided into equal parts, to be paid to others. Another clause made the daughter executrix. *Held*, that the word "heirs" in the first clause was used in its legal technical sense to mean all persons who would succeed to the estate in case of intestacy, but that the fee which would have been conveyed by such clause was limited by the subsequent provision that, if the daughter should die leaving no "heirs of her own," the property should be sold, etc., and, the daughter having been named as executrix, the death contemplated was one occurring at any time, and not necessarily before the death of the testatrix, so that the daughter took a base fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Wills, §§ 1351-1359, 1514-1518.]

2. ESTATES—BASE FEE—DISTINCTION FROM LIFE ESTATE.

A base fee is distinguished from a life estate, in that such fee may last forever in case the first taker dies leaving a child or children entitled to take under the will, but is liable to be terminated by the death of such first taker without leaving a child or children, while a life estate terminates absolutely on the death of the life tenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estates, § 6.]

Error to Circuit Court, Edwards County; J. R. Creighton, Judge.

Bill by Frank Curtis and another against Samuel Ahlfield and others, for the sale of certain lands and the distribution of the proceeds. From a decree in favor of complainants, defendants bring error. Affirmed.

Hannah Ryan, a widow, was the owner of certain real estate situated in Edwards county, Ill. On October 4, 1904, she executed her last will and testament, which is as follows:

"In the name of God, Amen. I, Hannah Ryan, of Black, in the county of Edwards and State of Illinois, being of sound mind and memory and considering the uncertainty of this frail and transitory life, do therefore make, ordain and publish and declare this to be my last will and testament.

"First. I order and desire that my executor hereinafter named pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

"Second. After the payment of such funeral expenses and debts, I give, devise and bequeath to my daughter, Anna M. Ryan, all my real estate, then to her heirs, described: East half, south-east quarter of section (5) five, and the east half north-east quarter of section (5) five, all in township one (1) south,

range (10) east, containing 106⁴⁰/₁₀₀ acres, in Edwards county, Illinois, more or less. If my daughter should die leaving no heirs of her own, then I wish the real estate to be sold and the money divided into two equal parts, and one part to go to Minnie E. Ryan and Mary E. Ryan, daughters of my former husband, the other half to go to my brothers, Frank and John Curtis. Both sets of heirs shall have the right to buy the others out.

"Thirdly. It is my wish that my daughter shall give my mother a comfortable living during her natural life and that she shall have the use of one room in the house downstairs. The land shall not be sold during the lifetime of my mother, Mahala Curtis. The reason that I do not give to the other heirs on my side of the house is that they got their share by my father taking them to raise.

"Lastly, I make, constitute and appoint my daughter, Anna M. Ryan, to be executor of this my last will and testament, hereby revoking all former wills by me made.

"In witness whereof I have hereunto subscribed by name and affixed my seal the fourth day of October, in the year of our Lord one thousand nine hundred and four."

The will was properly executed and duly attested. The testatrix was the mother of one child, Anna M. Ryan, the devisee, then about 17 years of age, who was unmarried and lived with her mother. The testatrix died January 10, 1905, leaving Anna M. Ryan surviving her. The will was admitted to probate March 6, 1905, and Anna M. Ryan was appointed executrix. On April 5, 1905, Anna M. Ryan married Samuel Ahlfield, one of the plaintiffs in error, and she died intestate March 1, 1906, leaving surviving her no children or descendants of children. Mahala Curtis, one of the beneficiaries under the will, died October 15, 1906. John Curtis and Frank Curtis are brothers of the testatrix, and Minnie E. Ryan (now Drummet) and Mary E. Ryan (now Carminke) are the daughters of a former husband of the testatrix and are half sisters of Anna M. Ahlfield (née Ryan), deceased. Clarence Walter, one of the plaintiffs in error, is the son and only heir at law of a deceased sister of Anna M. Ahlfield (née Ryan). John Curtis and Frank Curtis, two of the parties named in the last will and testament of Hannah Ryan, filed a bill in chancery in the Edwards county circuit court, at the November term, 1906, praying that the lands described in the will be sold and the proceeds distributed among John Curtis, Frank Curtis, Minnie E. Drummet (née Ryan), and Mary Carminke (née Ryan). Samuel Ahlfield and Clarence Walter were made parties defendant to the bill. The bill alleges that plaintiffs in error claimed some interest in the land devised by the will, but that, as a matter of fact, they had no interest in or title to the land. At the April term, 1907, of the circuit court plaintiffs in error filed their special demurrer to the bill, alleging therein that by the terms of the will

of Hannah Ryan, John Curtis, and Frank Curtis derived no interest in the land devised. The demurrer was overruled by the court, and plaintiffs in error elected to stand by their demurrer. The bill was therefore taken pro confesso against them, and a decree entered directing a sale of the land devised and a division of the proceeds among the defendants in error. Plaintiffs in error excepted to the ruling of the court, and by writ of error have brought the record to this court for review.

I. W. Ibbotson and H. J. Strawn, for plaintiffs in error. Carroll C. Boggs and J. M. Campbell, for defendants in error.

VICKERS, J. (after stating the facts as above). The only question involved in this case that requires discussion relates to the construction to be given to the second clause of the testatrix's will. That clause, omitting formal and descriptive parts, reads as follows: "I give, devise and bequeath to my daughter, Anna M. Ryan, all my real estate, then to her heirs. * * * If my daughter should die leaving no heirs of her own, then I wish the real estate to be sold and the money divided in two equal parts, and one part to go to Minnie E. Ryan and Mary E. Ryan, daughters of my former husband, and the other half to go to my brothers, Frank and John Curtis. Both sets of heirs shall have the right to buy the others out." The word "heirs" in the sentence, "I give, devise and bequeath to my daughter, Anna M. Ryan, all my real estate, then to her heirs," is used in its legal, technical sense, and means all those persons who would succeed to the estate in case of intestacy. The effect of this clause is to vest a fee-simple title in the devisee, Anna M. Ryan. By the subsequent clause, "if my daughter should die leaving no heirs of her own," etc., the fee previously devised is made to depend on a condition which may or may not happen. If she dies leaving a child or children, which is the evident meaning of the words "heirs of her own," the fee devised to her passes to such child or children. If, however, she dies leaving no child or children, then the devise over of the remainder takes effect and the fee to the first devisee comes to an end and is determined. The estate of Anna M. Ryan was therefore a base or determinable fee. Such an estate is distinguishable from a life estate, in that it might last forever in case the first taker dies leaving a child or children, but it is liable to be terminated by her death without leaving such child or children. Anna M. Ryan having died without leaving a child or children, the devise over took effect, and appellants, who claim as her collateral heirs, have no interest in the estate in question.

Plaintiffs in error do not seriously contend that the word "heirs" in the second clause of this will should receive its technical meaning, but conceding, as they seem to do, that such is the proper construction of that word as

employed by the testatrix in the second clause of her will above set out, it is insisted that the clause, "if my daughter should die leaving no heirs of her own, then I wish the real estate to be sold," etc., refers to the death of the primary devisee prior to the death of the testatrix; hence the gift over was substitutionary and dependent upon the death of the primary devisee in the lifetime of the testatrix and was designed to prevent a lapse, and that, since Anna M. Ryan survived the testatrix, her estate became a fee simple and descended to her heirs. This court has had occasion to construe similar clauses in wills often, and the rule may be regarded as well established that when the death of the first taker is coupled with circumstances which may or may not take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and general meaning of the words, upon the death, under the circumstances indicated, at any time, whether before or after the death of the testator. *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1020; *Bradsby v. Wallace*, 202 Ill. 239, 66 N. E. 1088; *Fifer v. Allen*, 81 N. E. 1105. In the case at bar it is clear that the testatrix contemplated that her daughter would survive her. She is made executrix of the will, and certain duties are enjoined upon her in respect to furnishing the mother of the testatrix with a home, etc., clearly indicating that the death of the devisee meant a death after the death of the testatrix. Anna M. Ryan died after the death of the testatrix, leaving no children. Her estate in the lands devised thereby terminated and the devise over took effect. There was therefore no error in overruling the demurrer of Ahlfield and Walter to the bill of defendants in error.

The decree of the circuit court of Edwards county should be, and is accordingly, affirmed.

Decree affirmed.

(229 Ill. 155)

SMITH et al. v. CLAUSSEN PARK DRAINAGE AND LEVEE DIST.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. STATUTES—EFFECT OF PARTIAL INVALIDITY.

The main purpose of the levee and drainage act of 1879 being to provide for the construction, reparation, and protection of drains, ditches, and levees, and for the organization of drainage districts, a public purpose, the fact that the provisions of the act relating to the method of ascertaining damages for the taking of land are invalid does not invalidate the whole act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 58, 62.]

2. EMINENT DOMAIN—AUTHORITY TO EXERCISE—DRAINAGE DISTRICTS.

Though the levee and drainage act of 1879 does not authorize a district organized thereunder to exercise the power of eminent domain under the general law, it may do so; it being

organized to carry out "a public purpose," to do "a public work."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 31, 32.]

3. DRAINS—DRAINAGE DISTRICT—ORGANIZATION—COLLATERAL ATTACK.

The legality of the organization of a drainage district cannot be collaterally attacked in condemnation proceedings by it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Drains, § 54.]

4. SAME—ATTEMPT TO AGREE ON COMPENSATION—EVIDENCE.

Evidence in condemnation proceedings by a drainage district held sufficient to show a prior attempt by the district to agree with the landowners as to the compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 533.]

5. SAME—NECESSITY OF PROPERTY FOR PUBLIC USE.

Where the use for which land is sought to be condemned is one for which the statute gives the right to condemn, the court will inquire into the extent to which the property is necessary for such use only when it appears that the quantity of land taken is grossly in excess of the amount necessary therefor.

6. SAME—OBJECTIONS.

The question of the abuse of the power of eminent domain, by taking a quantity of property grossly in excess of that necessary for the public use, must be presented to the court as a preliminary question going to the right to condemn the property for such use.

7. SAME—DEFINITENESS OF PLANS AND SPECIFICATIONS.

Where the contention of the landowners in condemnation proceedings by a drainage district was merely that more definite plans and specifications were necessary to enable them to determine the damage to land not taken, the motion therefor was properly denied; the profiles and maps, with the evidence introduced on the preliminary, being sufficient to give information of the width, depth, and course of the ditch, and also as to the quantity of dirt to be removed, where it would be placed, and the height of embankments.

8. SAME—DESCRIPTION OF PROPERTY.

The description in the petition in condemnation proceedings of the land taken is sufficient, when, with it and the map made an exhibit to it, a surveyor could definitely locate it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 515, 516.]

9. SAME—DAMAGES — EVIDENCE — STIPULATIONS.

On the questions of damages for condemnation by a drainage district, a stipulation by it to construct and maintain a bridge over the ditch is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 542.]

Appeal from Kankakee County Court; A. W. Deselm, Judge.

Condemnation proceedings by the Claussen Park Drainage and Levee District against Thomas Smith and others. From the judgment, defendants appeal. Affirmed.

This is an appeal from a judgment of the county court of Kankakee county in a proceeding to condemn lands, instituted by the Claussen Park Drainage and Levee District, against Thomas Smith, Harriet Smith, Thomas Dally, and others. The proceeding was commenced by the drainage and levee district

against the landowners for the purpose of acquiring certain land for ditches and drains. The petition was filed on the 9th day of February, 1907, and avers that petitioner is a body politic, incorporated and organized under the act of the Legislature of the state of Illinois entitled "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others, for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts," and alleges that the district was duly incorporated and established on the 8th day of October, 1906; that the drains and ditches are upon and across the lands and premises described in the petition and exhibit; and that the said lands are necessary for the construction, maintenance, and the proper drainage of the lands within the boundaries of the said drainage district. The petition is in conformity with the requirements of the eminent domain law. Appellants each filed cross-petitions, claiming damages to lands not taken, and charged the necessity of bridges in order to enable the owners to use the land. Upon a preliminary hearing it was stipulated that the lands sought to be taken were owned by appellants. The final order and judgment of the county judge of October 8, 1906, decreeing the establishment of the appellee as a drainage district pursuant to the statute, was introduced. Appellants also introduced, as preliminary proof, exhibits and plats of the proposed ditches and drains, and the testimony of witnesses as to the character of the ditches, drains, etc., and the necessity therefor, and in explanation of the plats, specifications, and profiles; also, evidence as to the failure of appellee to agree with appellants as to the compensation. At the close of the evidence on the preliminary hearing the landowners filed a motion to dismiss the petition, alleging that no legal right to condemn had been shown; that the petitioner had not shown that it was legally incorporated, and alleging that it was not seeking to take the lands for the uses and purposes recognized by the eminent domain act. This motion was overruled by the court. A jury was impaneled to assess damages, and at the conclusion of the hearing returned a verdict assessing the damages of Thomas Smith at \$212.55 and Harriet M. Smith at \$106.60 for lands taken, and finding that as to each of these there were no damages to land not taken. The jury allowed to Thomas Dally \$413.25 for lands taken and \$138.40 damages to land not taken. The landowners filed a motion for new trial, which was overruled. The landowners excepted and bring this cause to this court by appeal, assigning as error that the trial court erred in overruling the motion to dismiss the petition, admitting improper evidence, in giving instructions, in finding that appellee had the right to condemn lands, in denying motion for new trial, and in rendering judgment on the verdict.

Small & Brock and Smith & Marcotte, for appellants. W. G. Brooks and Bert L. Cooper, for appellee.

VICKERS, J. (after stating the facts as above). First. The motion to dismiss attacks the jurisdiction of the court; appellants contending that certain provisions of the drainage and levee act which have heretofore been decided to be in violation of the Constitution, and therefore invalid, bear such relation to the other provisions of the act as to invalidate the whole of the act, and the contention being that if the whole act is void then the appellee has no legal existence, and hence no right to maintain this proceeding. It is an established rule that where a statute is passed to accomplish a single object, and some of its provisions are void, the whole act must fall unless sufficient remains to accomplish the object without the aid of the invalid portion; that is, if the part of a statute that is held to be unconstitutional is so mutually connected with the other parts of the statute that the object of the whole act fails if deprived of the invalid portion, then the whole act is invalid. *People v. Olsen*, 204 Ill. 494, 68 N. E. 376. This court held in *Wabash Railroad Co. v. Coon Run Drainage & Levee District*, 194 Ill. 310, 62 N. E. 679, that the provisions of section 16 of the levee act of 1879 (Laws 1879, p. 125), in so far as they authorized the court to impanel a jury in drainage proceedings without notice to or participation by the owners of the land condemned, were in violation of section 13 of article 2 and section 14 of article 11 of the Constitution, and also that the course of proceeding directed by section 17 of that act (page 126) in determining compensation is not the judicial ascertainment of such compensation, as contemplated by the constitutional provisions bearing on the subject, and that such sections, in that respect, were in violation of the Constitution, inoperative, and void. In *Juvinall v. Jamesburg Drainage District*, 204 Ill. 106, 68 N. E. 440, we held that the part of section 37 (page 131) of the drainage act of 1879, as amended in 1885 (Laws 1885, p. 124), which provides that "when the court so orders" the commissioners may assess damages and benefits in lieu of a jury, to be in violation of section 18 of article 2 of the Constitution, which requires compensation for private property taken or damaged for public use to be ascertained by a jury. And these decisions are followed by this court in *Michigan Central Railroad Co. v. Spring Creek Drainage District*, 215 Ill. 501, 74 N. E. 696, where it is said: "There are two methods provided under the drainage act for estimating benefits and damages. One is by a jury, as provided in sections 16, 17, 19, 20, and 21, and the other by commissioners, as provided in section 37. Both methods have been condemned by this court as unconstitutional and void. The only legal method by which a property owner can be deprived of his proper-

ty for public use is by having his damages assessed by a jury duly selected, impaneled, and sworn and acting under the direction of a court of competent jurisdiction." These cases hold that in so far as the levee and drainage act purports to provide a method of fixing compensation for land taken it is unconstitutional, because where it provides for a jury it does not require that the landowner shall be made a party to the proceeding or receive any notice; and the other provision is that such estimate shall be made by the commissioners, both, in effect, depriving the landowner of the right to have his damages estimated by a jury duly selected, impaneled, and sworn. These cases have the effect of invalidating this act only in so far as it purports to provide a method of fixing compensation or estimating the damages due to the owners of private property which may be taken for the public use of the district. As indicated by its title, the drainage and levee law is "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others, for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts." The invalid portions of this act are not so mutually connected with the other provisions that the object and purpose of the statute is defeated without the invalid provisions. The main purpose of the Legislature in enacting this statute was to provide for the construction, reparation, and protection of drains, ditches, and levees and for the organization of drainage districts. This is a public purpose, and the fact that the provisions of the act relating to the method of ascertaining damages may be invalid does not invalidate the whole of the statute. The provisions of the statute other than those referred to are complete and enforceable in connection with the eminent domain law without the invalid portions, and hence the position of the appellants that the whole of the act is unconstitutional cannot be sustained.

Second. It is contended, also, that there is nothing contained in the levee and drainage act of 1879 authorizing drainage districts organized thereunder to exercise the right of eminent domain under the general law. In *Hutchins v. Vandalla Levee District*, 217 Ill. 561, 75 N. E. 354, this court said that, after the Vandalla levee and drainage district had been organized, it had the power to proceed, under the eminent domain act, by an original proceeding to condemn the property, citing *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Polecat Drainage District*, 213 Ill. 83, 72 N. E. 684. It is clear that the statute embraces drainage districts; that such a district has the right to invoke the aid of the provisions of the act for the reason that it is organized to carry out "a public purpose," to do "a public work." The improvement and benefit to be derived therefrom are public in their character. There is no reason for denying the right of

eminent domain to such drainage and levee district, and this court, by the decisions cited supra, has decided that the right exists in the drainage district to invoke the aid of the eminent domain statute. These cases have been reaffirmed in *City of Joliet v. Drainage District*, 222 Ill. 441, 78 N. E. 836, and *People v. Munroe*, 227 Ill. 604, 81 N. E. 704.

Third. Appellants contend that the evidence does not show that appellee is entitled to exercise the right of eminent domain under the general statute. The final order of the county court decreeing the establishment of appellant as a drainage district is in evidence, and this final order of the court was in conformity with the requirements of the statute in this respect. The appellants filed a cross-petition here, asking for damages to lands not taken. The appellee was organized under the drainage and levee act and had complied with the provisions of the eminent domain act. The position of appellants seems to be that this drainage district was not legally organized. In *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Polecat Drainage District*, supra, this court said (page 86 of 213 Ill., page 685 of 72 N. E.): "The question whether the appellee drainage district had been legally organized did not and could not arise in the proceeding for the condemnation of a right of way for the ditch across the lands of the appellant company. A petition to the Coles county court for the entry of an order creating the district and a final decree or order of said county court establishing the district were produced in evidence. The statute invested the county court of that county with jurisdiction to entertain petitions for the formation of drainage and levee districts and to enter final orders establishing such districts. Jurisdiction and power were therefore vested in the county court to determine whether the petition bore the signatures of the requisite number of qualified petitioners and was in other respects in compliance with the statute. Whether it correctly exercised such power or jurisdiction could not be considered in this a collateral proceeding. * * * The legality of the organization of a drainage and levee district can be attacked and brought under judicial review only in a direct proceeding by quo warranto." This authority meets appellants' contention on this point, and further comment is unnecessary.

Fourth. It is urged that appellee failed to prove an attempt to agree with appellants before commencing this suit. This contention raises a question of fact. The record discloses that Robert Strandstra, one of the commissioners of the district, on November 22, 1906, called on the appellants Thomas Smith and Harriet M. Smith; that he spoke to Harriet M. Smith (who is the wife of Thomas Smith), and told her who he was, and stated that his business was to see her in regard to the land involved and wanted

to make a settlement; that she told him to see her husband; that thereupon, in the presence of Mrs. Smith, he spoke to Thomas Smith, her husband, and offered him \$65 per acre for the land; that Smith answered saying he wanted \$5,000. This witness states that he made each of the Smiths an offer of \$65 per acre, and it appears that such sum was not satisfactory to them; that the appellants were demanding \$5,000 for the land taken. On the same day this commissioner called on appellant Daily and offered Daily \$65 per acre, and it was refused. We are satisfied that appellants were well advised of the place and location of the land needed and substantially the amount of land to be taken; that an honest effort was made by appellee, through its commissioner, to settle or agree upon the compensation to be paid; and that appellee was unable to agree with appellants for the reason that the judgment of the commissioner and appellants differed as to the value of the land to be taken. There was a sharp contest as to the amount of damages. In *Lake Shore & Michigan Southern Railway Co. v. Baltimore & Ohio & Chicago Railroad Co.*, 149 Ill. 272, 37 N. E. 91, where the sufficiency of the proof upon this question was being considered, this court, on page 287 of 149 Ill., page 95 of 37 N. E., said: "Even where there is no direct testimony as to the truth of this allegation yet the fact that there is a vigorous contest, as there is here, between the petitioning corporation and the owner of the property sought to be condemned, both on the original and on the cross-petition, is evidence of an inability to agree." Substantially the same language is used in *Ward v. Minnesota & Northwestern Railroad Co.*, 119 Ill. 287, 10 N. E. 365. The allegation in the petition that the parties were unable to agree as to the compensation to be paid is fully sustained by the evidence.

Fifth. It is urged, also, that appellee did not show the necessity for the lands sought to be taken. The right of eminent domain, as granted by the statute, is in derogation of the common law. The provisions of the statute are most strictly construed against one who seeks to acquire property under it. In order to warrant the taking of private property it must appear that the land is required for a public use, within the meaning of the statute, and the proceeding must be in conformity with statutory requirements. When the use for which the land is required is one for which the statute gives the right to condemn, the question of the necessity for the land is largely left to the determination of the corporation, subject to the right of judicial review and revision for an abuse of the right. An abuse of the right of eminent domain will not be tolerated. The courts reserve the power to deny to corporations the right to invoke the aid of the statute of eminent domain to deprive private citizens of property which is not to be used for a public

purpose. This power in the courts will not be exercised in such way as to deny to those entitled to it the full benefit of the statute. If the court finds that the use for which the property is to be taken is a public one, then the court will not inquire into the extent to which the property is necessary for such use unless it appears that the quantity of property taken is grossly in excess of the amount necessary for the use. The question of such abuse, however, must be presented to the court as a preliminary question going to the right of petitioner to condemn such property for such use. *Chicago, Rock Island & Pacific Railroad Co. v. Town of Lake Creek*, 71 Ill. 333; *Tedens v. Sanitary District of Chicago*, 149 Ill. 87, 36 N. E. 1033.

Sixth. Appellants insist that the plans and specifications are insufficient. It is argued that the insufficiency of plans and specifications furnished worked injury to appellants, in that the jury were unable to determine the damage to land not taken. We have carefully considered the record on this question, and are of the opinion that the profiles and maps, in connection with the evidence introduced upon the preliminary, are sufficient to furnish information to appellants of the width, depth, and course of the ditch, and also as to the quantity of dirt to be removed, where it would be placed and the height of embankments. Appellants have no ground for complaint based on failure to furnish to them such information. In this case appellants did not claim that the amount of land sought to be taken was in excess of the amount needed for the use to which the land was to be subjected, and hence *Tedens v. Sanitary District of Chicago*, supra, is no authority on this point for the position urged. Here no question is made that all the land sought to be taken is not necessary for the use. The contention of appellants, as appears from the motion, was that more definite plans and specifications were necessary in order to determine the value of land taken and damage to land not taken. There was no error in the court's refusal to require appellee to produce additional plans and specifications. *Burke v. Sanitary District*, 152 Ill. 125, 38 N. E. 670.

Seventh. Appellants next insist that the description of the lands is insufficient. In determining this question it is necessary to refer to the petition and exhibit. By reference to these we find that the land of appellant Thomas Smith is described as being 75 feet off the south side of certain tracts described in the petition, and the land of appellant Harriet M. Smith is described as being a strip of land 75 feet wide, extending over and across a certain tract of land; the center line of the strip being the center of an old ditch which pursues a northwesterly direction from a certain highway, and from a bridge on the highway to the northwest corner of the tract described. In like manner the description of the land of appellant

Thomas Dally is set out in the petition, and the particular location is embraced and outlined in the map of the land taken, which is made an exhibit to the petition. We are of the opinion that any surveyor, with the description contained in this petition and exhibit before him, would be able to definitely locate this land, and where the land is described with such certainty as to enable this to be done it is all that the law requires. The acreage in each instance taken from each of these appellants is mentioned in the petition, and we see no uncertainty in the description.

Elighth. Appellant Dally insists that the court erred in admitting a stipulation by appellee to build and maintain a bridge across the ditch through his land. Our attention is called to the case of *McCaleb v. Coon Run Drainage & Levee District*, 190 Ill. 549, 60 N. E. 898, and it is urged that this authority supports the contention of appellants. In that case this court condemned an instruction telling the jury that it was the duty of the commissioners of the drainage district to construct such farm bridges as may be actually necessary for the proper use of the lands in said district, and that the cost of constructing such bridges should be paid out of the corporate funds of the district, and further telling the jury that they should take into consideration the benefit, if any, arising from the construction of such bridges in making estimate of the damages or benefits of any tract or tracts of land in said district. This instruction was held to be erroneous for the reason that the levee act of 1879, under which the district was organized, contained no provision requiring the district to construct farm bridges at its expense, and therefore it was error for the court to advise the jury that it should take into consideration the benefits accruing to any tract of land from the construction of such bridge. The holding there is that the statute does not make it incumbent on the district to construct and maintain farm bridges across the ditch for the use of the landowner. That case is not decisive of the question here presented. In the case of *Pinkstaff v. Allison Ditch District*, 213 Ill. 186, 72 N. E. 715, we held that the expense of constructing a necessary bridge across such ditch is a proper element of damage for consideration of the jury. The stipulation which was offered in evidence and incorporated in the final judgment of the court is as follows: "It is hereby stipulated and agreed by the said petitioner that it will build and erect across its ditch, as provided for by the plans and specifications herein, a good and sufficient wooden bridge at one point to be designated by the respective defendants, as hereinafter named, upon each of the lands of the following defendants hereto, to wit, A. J. Cheffre, Thomas Dally, Ludwig Whittams, Leoline Manny, and Leah Glasson, and will

maintain and keep in repair said bridges." In *Elgin, Joliet & Eastern Railroad Co. v. Fletcher*, 128 Ill. 619, 21 N. E. 577, on the trial of a condemnation suit, the petitioner stipulated in open court that it would build fences inclosing its right of way across the respondent's land by the 1st of May, 1888, which was an earlier date than the statute required such fences to be made, and that it would also construct, and thereafter maintain, suitable and proper underground crossings on the land of respondent. The sole object of such stipulation was to reduce the amount of damages. In disposing of the objection raised by the respondent to certain instructions referring to the stipulation, this court, speaking by Mr. Justice Scholfeld, on page 626 of 128 Ill., page 579 of 21 N. E., said: "We think it is competent, upon the trial of a condemnation case, for the party seeking condemnation to bind itself, by an offer in open court, to the performance of duties like those here offered to be performed, and to thereby, and to the extent that such performance will prevent damages that would otherwise occur, abridge the claim by the landowner for damages. *Chicago & Alton Railroad Co. v. Joliet, Lockport & Aurora Railway Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Hayes v. Ottawa, Oswego & Fox River Valley Railroad Co.*, 54 Ill. 373. The judgment in such case should vest the rights obtained by the condemnation, subject to the performance of such duties, so as to insure it, and that was sufficiently done here." In our opinion the drainage district had power, as an incident to the power to condemn, to make the stipulation in question, and that a legal and binding obligation was thereby created, for a violation of which an action would lie. The stipulation is recited at large in the final judgment of the court, and appellants' rights are thereby fully protected. There was no error in admitting the stipulation in evidence. No objection is made to the form of the judgment.

Errors are assigned upon the giving of instructions for appellee and the refusal of certain instructions asked by appellants. The instructions are not numbered or otherwise designated in the printed abstract, so that we can certainly know what particular instructions appellants refer to. We have, however, examined the instructions, and our conclusion is that those given are not open to the objections made, and that appellants' given instructions covered all the questions in the case and presented the law as favorably to appellants as they were entitled to have it presented.

We find no reversible error in this record, and the judgment of the county court of Kankakee county is affirmed.

Judgment affirmed.

(223 Ill. 180)

EAST ST. LOUIS & S. RY. CO. v. ZINK.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CARRIERS—STREET RAILROADS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Defendant street railway maintained a small building for the storing of materials, and also permitted passengers to remain there while waiting for cars. Plaintiff, a passenger, was directed to leave a car in which he was riding, and wait at this building for another car. He sat on the floor of the building with his feet outside, and several cars passed him safely on a track some few feet away from where he sat. A defective car was run on the track, left the rails and crashed into the building, and injured plaintiff. *Held*, that plaintiff was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1364, 1402.]

2. SAME—EVIDENCE—CUSTOM.

Plaintiff, a passenger on one of defendant's cars, was by its conductor directed to leave the car and wait for an employes' car, which would take him to his destination. While waiting for such car, another car ran off the track and into plaintiff, injuring him. Defendant contended that plaintiff could not be regarded as a passenger at the time, since passengers were not permitted to ride on the employes' car. *Held*, that evidence that for a long period of time defendant's conductors had carried passengers on the employes' car, on payment of the ordinary fare, was admissible to show that defendant had notice of the custom and acquiesced therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1296.]

3. SAME.

Where plaintiff, while waiting for a street car at defendant's street railway station, was run into and injured by a defective car which left the track, evidence that it had left the track on several occasions while being carefully operated, and where the track was in good condition, was proper to show that defendant had knowledge of the defective condition of the car.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1301, 1302½.]

4. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.

Where, in an action against a street railway for injuries through negligence, defendant was not found guilty on certain counts, the admission of evidence not of a character to prejudice the jury against defendant in the trial of the issues presented by the plea to such counts was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4171-4177.]

5. TRIAL—INSTRUCTIONS—CURING ERRORS.

In an action against a street railway for injuries through negligence, the jury were advised that "if they believed from the evidence in the case," etc. *Held* that, if the instruction was erroneous as omitting any reference to the preponderance of evidence, the error was cured by instructions on request of defendant that no recovery could be had unless the plaintiff's cause was established by a preponderance of the proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 718.]

6. CARRIERS—INJURY TO PASSENGERS—INSTRUCTIONS.

In an action for injuries to an alleged passenger, an instruction setting out facts which, if established, would authorize a verdict for plaintiff, is not erroneous because not in terms requiring a finding that he was a "passenger," where it requires finding of facts which would establish the relation of passenger and carrier.

7. TRIAL—INSTRUCTIONS—CURING ERRORS.

In an action against a street railway for injuries, the jury were instructed that, if plaintiff sustained damages as charged in his declaration, it would be the duty of the jury, etc. *Held* that, if the instruction was erroneous as disregarding the questions of defendant's negligence and plaintiff's contributory negligence, it was cured by a subsequent instruction that the jury should look solely to the evidence for the facts, and to the instructions for the law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 718.]

8. SAME.

Where a party asks more than one instruction stating in varying language the same proposition, he cannot complain of a refusal of the court to give the instruction which he deems most favorable to his cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Action by Louis F. Zink against the East St. Louis & Suburban Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an appeal from a judgment of the Appellate Court for the Fourth District affirming a judgment of the circuit court of St. Clair county for \$6,000, recovered by appellee in an action on the case against appellant for personal injuries.

Suit was brought by appellee at the April term, 1904, against appellant and the East St. Louis Railway Company upon a declaration containing nine counts, which was afterward, on August 23, 1905, amended. The general issue was filed, and upon the trial, after all of the evidence had been introduced, each of the defendants moved the court for a peremptory instruction. The motion of appellant was sustained as to the second, third, fourth, fifth, and sixth counts of the declaration, and overruled as to the remaining counts. The appellee thereupon dismissed the suit as to the East St. Louis Railway Company, and obtained leave to amend the remaining counts of the amended declaration and to proceed against the appellant. To the amended declaration as again amended the general issue theretofore filed was extended. Appellant then moved the court to instruct the jury to find it not guilty as to the declaration as lastly amended, which motion was denied. The jury returned a verdict finding the appellant guilty on the eighth and ninth counts of the declaration, and, after the court had overruled the defendant's motion for a new trial, judgment was entered on the verdict. The eighth count, as finally amended, charges that defendant, on September 7, 1906, possessed and operated a certain electric railroad, etc., and that it carelessly and negligently operated and ran a certain car the gauge of which was too narrow for the tracks, rendering the car liable to leave the tracks, of which defendant had notice or should have had notice; that plaintiff boarded a certain car of de-

fendant to be carried to Belleville and was received as a passenger in said car; that while riding on said car near the city limits of East St. Louis the conductor of said car informed him that he must change cars, and ordered and directed him to go and wait at a certain station of defendant, used by the public in waiting for cars, for the coming and leaving of a certain other car going to the city of Belleville, and while so waiting in said station, without notice of the said defect in the first-mentioned car, and while he was in the exercise of due care, etc., said car, by reason of said defect, ran off the track at said station and injured him. The ninth count, as submitted to the jury, alleges that plaintiff, while in the city of East St. Louis, was received as a passenger upon defendant's car to be carried to Belleville, and while being so carried the conductor informed him that he must change cars, and directed him to wait at a certain station or waiting room near the tracks of defendant for the leaving of another car for the city of Belleville; that while waiting at said station in pursuance of said order, without notice of any danger, in the exercise of due care and caution for his own safety, the defendant, through its agents and servants, carelessly and negligently drove and operated a certain car, and by reason thereof it ran off the track up to and against said waiting room and the plaintiff, and injured the plaintiff, etc.

At the time of the injuries alleged, appellant was engaged in operating a street railway line in the city of East St. Louis and also a line from that city to the city of Belleville, Ill. The cars running from Belleville enter the city of East St. Louis on State street, which runs in an easterly and westerly direction. On the south side of State street, at a distance of about a mile from the east limits of East St. Louis, are located the car shed, power house, and machine shops of appellant. The car shed is about 300 feet south of the south line of State street, and in this building there is a restaurant and reading room, supplied with chairs designed for the convenience of employes, in which passengers could wait for cars. On the east side of the yards in front of the car shed there was a single track, called a "shed track," connecting with a number of tracks extending into the shed. The north end of this track had a Y connection with the State street tracks, so that cars could be taken into the yards and shed from either the east or west, on State street. A few feet south of the point of connection of the two tracks constituting the Y, and about 75 feet south from State street, at a distance of 4 feet and 9 inches from the west rail of the track and on the west side thereof, there was a small shed, known as the "oil shed." This shed was 10 or 12 feet in length from north to south, and about 8 feet in width, and contained a board floor 1 foot from the ground.

This shed was open on the front, which faced the track, and was also open a short distance back from the front on each end, and was used as a storehouse for detachable headlights, oil, sand, buckets, wire, and other materials needed in the operation of the road and also as a waiting room or station for the convenience of passengers waiting to take the employes' car hereinafter referred to. The last passenger car for Belleville left East St. Louis at midnight, and no regular passenger cars were operated between those points from that time until 5 o'clock in the morning. All cars were turned into the sheds over the shed track at about 1 or 1:15 o'clock in the morning, and then an employes' or work car was run from East St. Louis to Belleville for the purpose of carrying conductors and motormen who had turned in their cars, and who lived at Belleville, to their homes. Whether the employes who had charge of this car had authority to carry passengers thereon was one of the contested questions in the case. Passengers were very frequently carried on that car. On the morning of September 7, 1903, at about a quarter past 12 o'clock, appellee boarded one of the suburban cars in the business portion of East St. Louis for his home in Belleville. He testifies that the conductor told him that the car did not go to Belleville, but stopped at the sheds, and that he could ride from there on the work car. When the car turned into the yards and stopped in front of the oil shed, appellee testifies that the conductor told him to get off and wait there for the car which would take the employes to Belleville, and that he obeyed. At this time there were six or eight other persons at the shed or standing a short distance away, also intending to take the employes' car for Belleville or intermediate points. Appellee seated himself on the edge of the floor at the northeast corner of the shed, facing the shed track, with his feet on the ground outside the shed, and while he sat there several cars were turned in and passed him on the way to the car sheds. During the earlier part of that night one of the cars of the city line was several times derailed. The conductor of that car testifies that this resulted from a "sprung axle," which narrowed the gauge of the car. When this car arrived at the yards appellee was still seated on the floor of the oil shed, as above described. The car was driven to the east on State street until it had passed both branches of the Y. The trolley pole was then turned, and the motorman took his position on the westerly end of the car, and it was driven on the easterly track of the Y to connect with the track leading to the sheds. When the car, which was being run at a very slow rate, was 10 or 15 feet from appellee, it was stopped, and just before it started the motorman rang the gong. He testifies that appellee motioned with his arm to come ahead, and that he (the motorman) thereupon told him that he had better

get up, but that he did not move. Appellee denies that he heard this advice. The car proceeded to the south, and when the rear truck was about opposite the point where appellee was seated it left the track, swung over toward appellee, and ran against him and the floor of the shed, crushing his right leg so badly that it was necessary to have it amputated.

Appellant urges as grounds for reversal: (1) The court erred in denying defendant's motion for a peremptory instruction at the close of all the evidence; (2) the court erred in passing on objections to evidence; (3) the court erred in passing on instructions.

Schaefer, Farmer & Kruger, for appellant.
Webb & Webb, for appellee.

SCOTT, J. (after stating the facts as above). The evidence in this case not only tends to show, but clearly establishes, that appellee was a passenger of appellant, and that he was waiting at the oil shed, by direction of the conductor of the car upon which he had been riding, for the purpose of taking another car upon which passengers were carried, with the authority or sanction of the appellant, from East St. Louis to Belleville, and that the oil shed in question, with like sanction and authority, was used as a passenger station, and that appellant was guilty of the negligence charged in the eighth count.

The only question arising upon the motion for a directed verdict which is entitled to serious consideration is that of contributory negligence. The shed in question was on the west side of the track upon which the car that injured appellee was traveling. The shed was open on the east side toward the track, and there was an open space at each end, extending west a little way from the east side of the shed. There was a floor in this shed a foot above the ground, and that floor is commonly referred to as the platform, although it did not extend beyond the roof of the structure. From the edge of the floor to the track was a distance of four feet and nine inches. That space was not occupied by any platform, and there was no station platform there within the ordinary meaning of that term; that is, there was no platform between the structure itself and the tracks upon which passengers could easily and conveniently pass to the steps of cars stopping at that station without stepping upon the ground. Appellee was sitting on the northeast corner of the floor of the station. The car which injured him, when on the rails, projected to the outer side of the rail about one foot. While he was sitting in this position, three cars of like character passed him without injuring him or touching him. As he sat there he was entirely beyond the reach of any part of such car, and was not where he was apt to come in contact with persons stepping off the car or with articles carried from the car by passengers. The car which injured

him, according to the statement of appellant in its brief and argument in this court, "was being moved very slowly and carefully and at a rate of about two miles an hour."

It may be conceded that the individual who sits down on the edge of the ordinary railroad station platform on the side thereof next the rail, with his legs projecting over the edge, where cars are frequently passing, and who is injured by a passing car, is not in the exercise of due care for his personal safety. It is also equally certain that, if the same individual sits on the edge of a platform belonging to a railroad company at a distance of 25 feet from the tracks, he is not, by reason of taking that position, guilty of any negligence that would contribute to an injury received from a passing car. And it is equally clear that, if the individual is so located at some one of certain points between these two extremes more or less remote from the tracks, the question whether or not he is guilty of contributory negligence where he sustains injury from a passing car becomes a question of fact to be determined by the jury. This man, in his position on the floor of the station, was entirely safe so long as the cars of the appellant were properly managed and remained upon the track, and so long as appellant itself was guilty of no negligence. He could not, with reason, contemplate or expect any combination of circumstances that would bring the car of appellant which injured him in contact with his person at the place where he sat. We think, under these circumstances, it cannot be said, as a matter of law, that he was guilty of contributory negligence, and for this reason the peremptory instruction was properly refused.

It was contended by appellant upon the trial that its conductors were without authority to permit passengers to ride upon the employes' car, which appellee was awaiting, and that for this reason he could not be regarded as a passenger at the time he received his injury. The court permitted the appellee to show that many conductors, at various times in the past, had directed passengers to leave the car upon which they were then riding and take this employes' car for Belleville, and that such passengers followed such directions and were carried on that car to Belleville without objection, upon the payment of the ordinary fare. It is urged that this testimony was improperly admitted. This proof covered a lengthy period of time, and we think it was proper for the purpose of showing that the company had notice, or should have had notice, of the custom, and if it permitted the practice to continue after a time when it had, or should have had, notice thereof, it could not successfully contend that passengers were improperly permitted to ride upon the employes' car in question.

Complaint is also made of the action of the court in permitting appellee to prove that the car which injured him had during the same night, at different places on the lines of ap-

pellant, left the track. This evidence was offered in support of the eighth count of the declaration, that being one of the counts upon which the issues were found for appellee, and is said to have been improper for the reason that no evidence was offered showing the condition of the track at the various places where the car left the track nor showing the manner in which the car was operated on the earlier occasions. We think this contention ignores certain testimony that appears in the record. Hart, the motorman on the car in question, testified: "Downtown we got off on Summit avenue. The condition of the track and street on Summit avenue where we got off was good. I operated the car at about five miles an hour. The track there was straight and the street paved. During that run and during that night the car left the track five or six times;" and that on each occasion when the car left the track it "was running slow." The testimony was proper for the purpose of showing that the company had knowledge of the alleged defective condition of the car.

It is also contended that certain evidence offered in support of counts of the declaration other than the eighth and ninth was improperly admitted. As the appellant was not found guilty upon such other counts, and as the evidence was not of a character to prejudice the jury against the appellant in the trial of the issues presented by the plea to the eighth and ninth counts, its admission, even if it was not competent, was harmless.

Two instructions were given on behalf of the appellee. In the first the jury were advised "that if you believe, from the evidence in this case," etc., and it is said that it was erroneous in omitting any reference to the preponderance of the evidence. If this point be well taken, the error was cured by instructions given on behalf of appellant, from which the jury would understand that no recovery could be had unless the plaintiff's cause was established by a preponderance of the proof. This instruction purported to set out facts which, if established, would authorize a verdict in favor of appellee, and is said to be erroneous because it does not require the jury, before returning a verdict for appellee, to find that he was a passenger at the time of the injury. The instruction does not, in terms, require a finding that he was a "passenger," but it does require the finding of facts which establish the relation of passenger and carrier.

The next instruction is the ordinary one in reference to the measure of damages, and advises the jury that, if appellee "was injured and sustained damages as charged in his declaration, then it will be the duty of the jury," etc. It is said that this instruction disregards the question whether appellant was guilty of the negligence charged, and whether appellee was in the exercise of due care. He was not injured as charged in the declaration unless the appellant was guilty

of the negligence therein averred, and unless appellee, at the time of receiving the injury, was in the exercise of due care. This instruction did not specifically require the jury to consider the instructions of the court in determining the question of appellant's guilt. It dealt only, however, with the situation that would arise in case the jury determined to find in favor of appellee. This instruction contained no direction to the jury as to the course to be pursued by them in determining the guilt or innocence of the appellant. As stated in *Chicago & Alton Railroad Co. v. McDonald*, 194 Ill. 82, 62 N. E. 308, in considering a like defect in an instruction on this subject, "the fault of the instruction has no relevancy to the measurement of the amount of damages; therefore we think it safe to assume that no prejudice resulted to appellant by reason of the error." In the case at bar the jury were advised by the eighth instruction given at the request of appellant that they "should look solely to the evidence for the facts and to the instructions of the court for the law of the case, and find your verdict accordingly," which, we think, cured the defect now under consideration, if it could, in any event, be regarded as material.

Appellant, among others, asked three instructions, numbered, respectively, 3, 21, and 22, each of which, in substance, advised the jury that if appellee, at the time he received the injury, was not a passenger of the appellant, but was a trespasser upon its property, he could not recover. The court gave the instruction numbered 3, and refused those numbered 21 and 22. Appellant complains of the refusal of the two last mentioned, and says that the third stated the proposition abstractly, while the other two applied it to the facts of this case, and that, if the court did not desire to give all, the third should have been refused and the twenty-first and twenty-second given. Where a party asks more than one instruction, stating, in varying language, the same proposition, his complaint that the court refused the one which the party deems most favorable to his cause and gave the other does not deserve extended notice. Appellant could have avoided this difficulty by presenting to the court only that one of these three instructions which was to it most satisfactory. *Indiana, Illinois & Iowa Railroad Co. v. Otstot*, 212 Ill. 429, 72 N. E. 387.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(229 Ill. 303)

CITY OF CHICAGO v. ILLINOIS STEEL CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MUNICIPAL CORPORATIONS — STREETS — ABANDONMENT — ESTOPPEL.

Where, from the filing of plats of a city addition in 1852 and 1856, nothing further was

done toward building up the addition, and thereafter steel mills were erected encroaching on the streets, and the mill company and its successors had exclusive, open, and uninterrupted possession of the streets in controversy from 1859 to the commencement of the suit in 1903, and the city stood by in silence and knowingly permitted defendant to invest large sums of money on the belief that the street had been abandoned, the city was equitably estopped from thereafter insisting that defendant's structures constituted an obstruction to the streets.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1429.]

2. ESTOPPEL—MUNICIPAL CORPORATIONS.

Where a party acting in good faith under affirmative acts of a city has made such extensive and permanent improvements that it would be inequitable and unjust to establish the rights claimed by the city, the doctrine of equitable estoppel would be applied against the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 151-153, 264-275.]

3. ESTOPPEL—LIMITATION OF ACTIONS—MUNICIPAL CORPORATIONS.

Though municipal corporations are not within statutes of limitation, except as to private rights, equity will prevent the operation of the rule by enforcing an equitable estoppel.

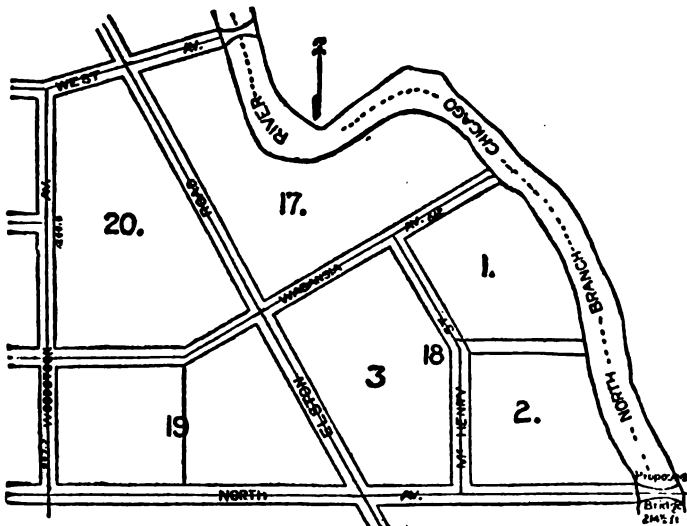
[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 151-153.]

Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Action by the city of Chicago against the Illinois Steel Company. From a judgment for defendant, plaintiff appeals. Affirmed.

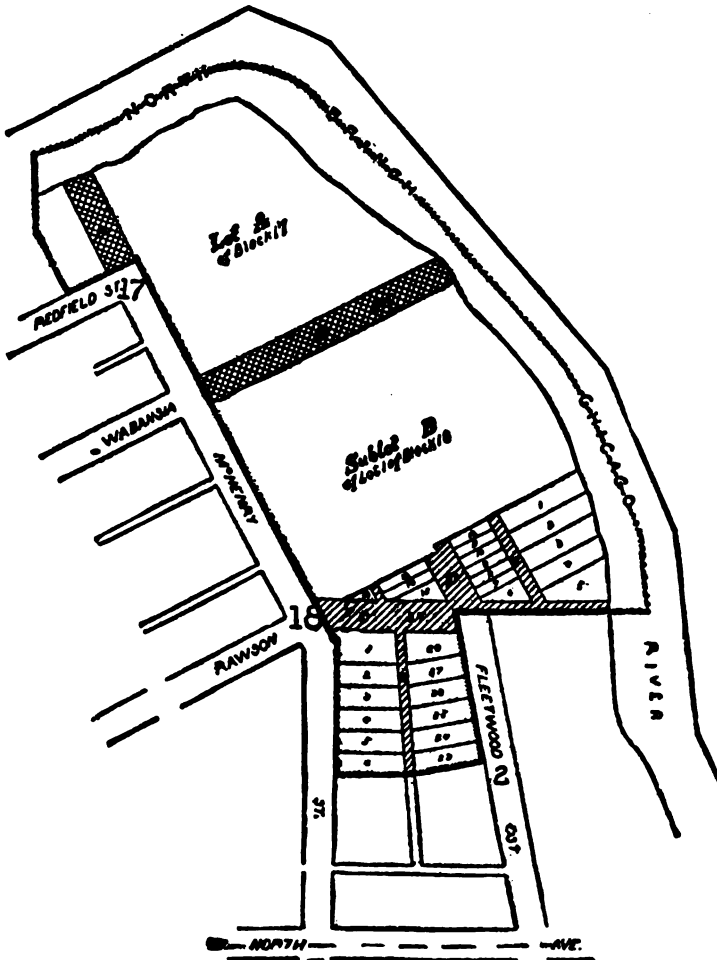
On October 13, 1853, Joseph E. Sheffield was the owner of the southwest quarter of section 32, township 40 north, range 14 east of the third principal meridian, and on that date he recorded in the recorder's office in Cook county a plat of a subdivision, which he called "Sheffield's addition to Chicago." A better understanding of the location of the streets may be ascertained by referring to the following copy of this plat:

Blocks 17 and 18 were indicated, among others, on this plat. Block 17 was situated north of block 18, and between blocks 17 and 18 was a strip of land marked "Wabansla avenue," which extended in a northeasterly direction from a point west of Elston road to the westerly bank of the north branch of the Chicago river. Block 18 was divided into three lots, which were numbered. Lot 1 was north of lot 2, and lot 3 was west of the two other lots. Between lots 3 and 1 and 2, as shown on this plat, was a strip of ground marked "McHenry street," which extended in a southerly direction from Wabansla avenue to North avenue. On October 22, 1856, the Chicago Land Company, which seems to have become the owner of blocks 17 and 18, made a subdivision of blocks 17, 18, 20, and others in Sheffield's addition to Chicago, a plat of which was recorded in the recorder's office of Cook county. On this plat McHenry street was shown as extending northerly from Wabansla avenue to the river, and there was also indicated a strip of land marked "Rawson street," running east from McHenry street to another strip indicated upon the plat, which ran northerly and southerly, and which was denominated "Fleetwood street." On January 28, 1876, Frederick Siebold, who had become the owner of lot 1 in block 18 in Sheffield's addition to Chicago, filed a plat in the recorder's office, which was entitled "Koerner's subdivision of sublots 14, 32, 33, 34, and 35, also so much of subplot 13 as lies south of the north line of lot 14 extended to Rawson street." This property all lay in lot 1 of block 18 of Sheffield's addition. This plat also indicated Rawson street, which was shown as extending easterly to the western bank of the north branch of the Chicago river. There were also indicated on this plat three strips of land extending in a norther-



ly direction from Rawson street, two of which were denominated "alley" and one "Fleetwood street." On December 1, 1876, the North Chicago Rolling Mill Company, having become the owner of all that part of block 17 which lay on the east side of McHenry street and all of lot 1 of block 18, except such part of said block as was embraced in Koerner's subdivision, filed in the recorder's office of Cook county a deed purporting to vacate such part of lot 17 and such part of lot 1 in block 18 as it owned. On December 4, 1876, the North Chicago Rolling Mill Company filed in the recorder's office what is known as the "North Chicago Rolling Mill Company's Resubdivision of Parts of Blocks 17 and 18 in Sheffield's Addition to Chicago." A correct understanding of the changes made may be ascertained by an examination of the following plat:

lying south of Wabansia avenue and between McHenry street and the river was denominated "sublot B of lot 1 of block 18." This resubdivision made no change in Koerner's subdivision. Subsequent to this time appellee became the owner of the property lying on both sides of McHenry street from its intersection with Redfield street to the south bank of the north branch of the Chicago river, and also of lot A in block 17 and sublot B of lot 1 of block 18, according to the North Chicago Rolling Mill Company's resubdivision, which was all the property situated on both sides of Wabansia avenue as it extended from McHenry street to the west bank of the north branch of the Chicago river. It also became the owner of all the lots in Koerner's subdivision, being the property on both sides of the alleys and of Fleetwood street, as shown in Koerner's sub-



In that plat Wabansia avenue is shown extending from McHenry street to the north branch of the Chicago river. That portion lying north of Wabansia avenue and between McHenry street and the river was denominated "lot A of block 17," and that portion

division, and also on both sides of Rawson street as it extended from McHenry street to Fleetwood street. On September 17, 1898, appellee filed a deed of vacation in the recorder's office of Cook county, which purported to vacate so much of each and every

of the aforementioned plats as lay within its property. This vacation was intended to include that portion of McHenry street which extended from Redfield street to the Chicago river; that portion of Wabansia avenue extending from McHenry street to the Chicago river; that portion of Rawson street which extended from McHenry street to the Chicago river; and that portion of Fleetwood street which extended in a northerly direction from Rawson street and the two alleys, as shown in Koerner's subdivision. On November 30, 1900, appellee filed in the recorder's office a plat of its property, which was entitled "Illinois Steel Company's North Works Addition to Chicago, being a part of section 32 of township 40, north, range 14, east of the third principal meridian," upon which all of its property was indicated as block 1.

A small shed stood east of McHenry street, about the center of Wabansia avenue, on the strip which extends from McHenry street to the river, and on July 8, 1903, appellant, through its agents, entered upon the land and commenced to tear the shed down. On July 13, 1903, appellee filed a bill of complaint in the superior court of Cook county, praying that appellant, its agents, officers, and servants, might be perpetually enjoined from removing materials, buildings, and structures from the strips of land in controversy here, or from in any way obstructing, interfering with, or harassing appellee in its use of said lands. Appellant filed its answer, and the cause was referred to John J. Healy, master in chancery. On November 14, 1904, the court entered an order transferring the case from Master Healy to Master George W. Miller, and on January 9, 1906, it was ordered transferred from Master Miller to John F. Holland, master in chancery, who on May 18, 1906, filed his report, with a conclusion that the essential allegations of the bill of complaint had not been proven, and that appellee was not entitled to the relief prayed for in regard to Wabansia avenue, McHenry street, and that part of Rawson street west of Fleetwood street; that it was entitled to the relief prayed for as to that part of Rawson street east of the west line of what was formerly Fleetwood street, and he recommended a decree accordingly. Exceptions were filed to the master's report, and on July 24, 1906, a decree was entered sustaining the exceptions to the master's report and finding that the essential allegations of the bill were proven, and that appellee was entitled to the relief prayed for, except as to that strip of land marked "Rawson street," extending from McHenry street to Fleetwood street. It was ordered, adjudged, and decreed that appellant, its agents, officers, and servants, be perpetually enjoined from removing any material, buildings, or structures situated on the several strips of land marked "McHenry street" ex-

tending from Redfield street northerly to the Chicago river, and marked "Wabansia avenue," extending from McHenry street easterly to the Chicago river, and also several strips marked "streets" and "alleys" on the plat known as "Koerner's subdivision." Appellant was further perpetually enjoined from in any way interfering with material, buildings, and structures upon these strips of land, or from in any way obstructing, interfering with, or harassing appellee in its use of these strips of land. Appellant thereupon perfected an appeal, and brings the record to this court for review.

James Hamilton Lewis (A. L. Gettys and D. R. Levy, of counsel), for appellant. Knapp, Haynle & Campbell, for appellee.

VICKERS, J. (after stating the facts as above). The city of Chicago claims to be the owner in fee of the locus in quo by virtue of a dedication of the land for streets by the plats set out in the foregoing statement. It is admitted that the plats in question were properly executed under the statute and constituted a valid offer to dedicate the premises designated as streets on said plats. Sheffield's plat was made in 1853, and the Chicago Land Company's subdivision in 1856. There is no proof in the record of a formal acceptance of the offer to dedicate under either of these plats. Whether there was an implied acceptance by the city is a question upon which both parties have offered much testimony and have argued that issue elaborately in their briefs. The validity and effect of the vacation deed of appellee on September 17, 1898, is also a question which is the subject of extended argument by both parties in this court. In the view that we take of this case, it will not be necessary to consider any of the foregoing questions.

In 1857 these additions were not inside the corporate limits of the city of Chicago. The territory was open, unimproved prairie, and there were no houses or other improvements in that vicinity. Up to this time the execution and filing of the two plats of 1853 and 1856 was all that had been done looking toward building up the addition. In 1857 O. W. Porter, representing E. D. Ward, of Detroit, commenced the construction of a rolling mill on the west side of the Chicago river on the property designated as lot A of block 17 or subplot B of lot 1 of block 18. The exact location of this building is not clearly pointed out by the evidence. For the convenience of the millowners in getting material to construct the mill a dock was constructed at the end of Wabansia avenue. The building material was brought to the dock on scows. When the mill was completed, it became necessary to construct the dwelling houses for the mill employes. The houses, and also a boarding house for the

convenience of the mill employes, were erected along the extension of Wabansia avenue between McHenry street and the mill, and a sidewalk was built in front of these houses. These buildings were constructed by the mill company for its own benefit, and neither the city nor the public appears to have had anything to do with them. Later, when the lots occupied by the houses were required for extensions of the mill property, they were torn down and moved away by the company, and the plant was extended west to McHenry street. After the extension of the plant to McHenry street the mill premises were inclosed by a fence, and a sign was erected at the west end of tract B warning all persons other than employes to keep out, and the mill company kept a watchman stationed there to enforce this warning. The evidence shows that the mill company and its successors have had exclusive, open, and uninterrupted possession of all of the premises lying east of McHenry street to the Chicago river and north of the south line of lot 1 in block 18 to the river. After the removal of the cottages and extension of the plant to McHenry street, the strips of land representing the extension of Wabansia avenue east of the river and the extension of McHenry street north to the river, designated "B" and "A," respectively, have been occupied and used by the company under a claim of right in the same manner and to the same extent that it used other portions of its mill site. Railroad tracks have been laid wherever the convenience of the mill company required them, regardless of whether they were in or out of the supposed streets. There appear to be some 18 or 20 railroad tracks and spurs that traverse some portion of Wabansia avenue east of McHenry street. The south end of the north rail mill extends practically to the center of Wabansia avenue, and the south mill, another extensive building of the mill company, is immediately south of the north rail mill, but not upon any portion of the street. The evidence shows that the blast furnaces, the rail mill, the Bessemer steel mill, and other parts of the plant were located in close proximity to each other, some upon one side and some upon the other of the alleged street, and that the location of the different mills is such that, if Wabansia avenue were opened up and used as a public highway, the plant would be rendered inoperative. The space in Wabansia avenue between the rail mill and the south mill is occupied by railroad tracks, weighing offices, rail-loading docks, turn-table, and other things pertaining to the finishing and delivery end of the rail mill. The rail mill and the south mill were both operated from the same steam supply. The conditions are such that it would be utterly impossible to operate the plant without reconstructing it if Wabansia avenue should be opened up as a street to the river. We

have no means of knowing the amount invested in these various buildings and appurtenances in connection with this plant, or how much it would cost to reconstruct the same if the street in question were opened up. It is stated by counsel for appellee that the plant represents an investment of millions of dollars. It is apparent that appellee's plant represents a very large amount of money, and it is not pretended by appellant that the opening up of the proposed street will not entail upon appellee a very heavy loss. During all of these years, from about 1859 to the beginning of this suit, the municipality of Chicago has stood by and by its silence acquiesced in the occupation by the appellee and its predecessors of the street in question, knowing that appellee was investing large sums of money on the faith and belief that there was no street there, or that, if there ever had been one, it had been abandoned by the city. Under these facts, appellant is equitably estopped from insisting that appellee's buildings and other structures constitute an obstruction to the highway. The case of *Reichert Milling Co. v. Village of Freeburg*, 217 Ill. 384, 75 N. E. 544, is a case very much like the case at bar, and announces the principle that must control here. The same principle has been applied in many other cases in this court. *Village of Winnetka v. Prouty*, 107 Ill. 218; *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212; *Village of Vermont v. Miller*, 161 Ill. 210, 43 N. E. 975; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191; *City of Carlinville v. Castle*, 177 Ill. 105, 52 N. E. 383, 69 Am. St. Rep. 202; *People v. City of Rock Island*, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179. In the case last above cited this court, on page 495 of 215 Ill., page 44 of 74 N. E. (106 Am. St. Rep. 179), said: "It has frequently been decided that the doctrine of estoppel in pais is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to encourage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such extensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine. In the exercise of proper diligence the public authorities may prevent encroachments upon public right, and, if they do not, any citizen may take the necessary steps to do so, and if there is not only a failure to act by either, but affirmative action by the public authorities with the apparent approval of every one

ted, under which the situation is changed, permanent improvements are made, principles of equity require that the public be estopped."

Principal corporations are not within statutory limitation except as to private rights, rights of equity will prevent the operation of this rule by enforcing an equitable estoppel where to permit the assertion of a claim on a street after long acquiescence in the situation of money in the erection of buildings would work a gross injustice to rights of private persons. The facts in this case within this rule, and there is no error in granting a perpetual injunction the court below.

Decree affirmed.
 Decree affirmed.

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KENNEDY v. AFDAL et al.

Supreme Court of Illinois. Oct. 23, 1907.)

JUDICIAL SALES—VACATION—FRAUD.

Any fraud by the purchaser at a judicial sale which competition is prevented and any neglect of duty by the officer producing such result sufficient to justify an order setting aside sale.

Note.—For cases in point, see Cent. Dig. 1, Judicial Sales, § 75.]

FACTS—EVIDENCE.

Before a sale of certain land descended to plaintiff and minor children had been ordered, and his partner contracted to sell the land for \$80 an acre and accepted part of the same price. K. thereafter met a prospective purchaser, who had come to bid on the land to the hour of sale, and told him that the land was sold, and that whoever bought it at sale would buy a lawsuit. K. procured a claim deed to the widow's interest on the day of the sale and used this to deter bidding. When the sale was ready to begin, he stated to the present in intimidating language that he bought the widow's interest, and threatened the purchaser with a lawsuit. Eighty-eight dollars an acre was bid, the bidder offering a check for \$1,000 earnest money, which the bank on which it was drawn informed the guardian of minors would be paid, but notwithstanding the land was sold to K. for \$81.50 per acre, the previous bidder had been called away from the sale by someone in the interest of K. L., that such facts constituted fraud, authorizing a resale.

Note.—For cases in point, see Cent. Dig. 31, Judicial Sales, §§ 73, 75.]

APPEARANCE—JURISDICTION.

Where, in a proceeding to set aside a judicial sale and order a resale, the purchaser appeared and was made a party on his own motion and appealed from an order directing a resale, he could not object that the court had no jurisdiction of his person.

Note.—For cases in point, see Cent. Dig. 3, Appearance, §§ 79-90.]

ESTOPPEL—JUDICIAL SALES—ASSENT OF WIDOW—REPUDIATION.

Where a widow having a life estate in certain property freely assented to a judicial sale thereof, without fraud or misrepresentation, and thereupon a decree was obtained ordering a sale of the premises, including the widow's life estate, she was estopped from thereafter recalling her assent to a sale including her interest.

Note.—For cases in point, see Cent. Dig. 19, Estoppel, §§ 257-259.]

5. LIS PENDENS—SUBSEQUENT PURCHASER—NOTICE.

Where, after a widow had voluntarily consented to a sale of certain property free of her life estate therein, a decree ordering such sale was obtained, a subsequent purchaser of the widow's interest was estopped under the doctrine of lis pendens to object to the sale of the widow's interest.

6. SAME—CONVEYANCE—POWER OF GUARDIAN.

Where, after a widow holding a life estate in certain property had consented to a sale of the same free of her interest, by the guardian of certain minors interested therein, a decree of sale was obtained, whereupon the widow conveyed her interest to another, such conveyance did not affect the power of the court to direct the guardian to execute a deed to the purchaser at the sale conveying the fee to the entire premises unincumbered by the life estate.

7. CANCELLATION OF INSTRUMENTS—PARTIES ENTITLED TO CANCELLATION.

Where, after a widow had consented to a judicial sale of land in which she had a life estate by the guardian of certain minor remaindermen also interested, she conveyed her interest to K. before the sale, which was fraudulently conducted, the remaindermen, though entitled to a decree vacating the sale, were not entitled to set aside the widow's deed.

8. JUDICIAL SALES—VACATION—FRAUD—COSTS.

Where a judicial sale of the land of minors was set aside because of the purchaser's fraud, the costs of the sale and of the proceedings to vacate it were properly charged to him.

9. SAME—EARNEST MONEY—RETURN.

Where a judicial sale of land on which the purchaser had paid \$1,000 earnest money was set aside because of the purchaser's fraud, he was entitled to a return of the earnest money, less the costs adjudged against him.

Appeal from Boone County Court; L. M. Reckhow, Judge.

Application by Bertha Afdal and another, by Martha Afdal, their mother and next friend, to recall and cancel a guardian's deed of certain land sold under order of court, in which Peter R. Kennedy, the purchaser, appeared, and, from an order setting aside the sale and the quitclaim deed executed to him by Martha Afdal, he appeals. Reversed in part.

Knute Afdal died leaving a widow, Martha Afdal, and two minor children, Bertha and Oscar B. Afdal. At the time of his death he was the owner of and resided upon, with his family, a farm in Boone county, consisting of 117 acres. Elisha A. Cook was appointed guardian for the two minor children. There was an incumbrance on this homestead of about \$4,000. On December 3, 1906, the guardian presented a petition to the county court praying for an order of sale of the lands belonging to his wards. The widow filed her written assent to the sale of her dower and homestead, and on the 9th of January, 1907, an order of sale was entered by the court. The sale was duly advertised to occur on February 4th. Before the petition was filed, the guardian had consulted the county judge, and had been advised that it would be advisable to find a purchaser who would pay a fair price for the land before taking steps to have it sold. Acting on

this suggestion of the county judge, the guardian had some conversation with Peter R. Kennedy, a real estate agent in Belvidere, in relation to finding a purchaser for the farm. Kennedy and his partner, Parker, took the matter up with a man by the name of Carlstedt, and made an agreement to procure the farm for Carlstedt at \$80 per acre and received \$500 purchase money. On January 7th Kennedy made a contract with the widow by which it was agreed that her interest in the premises should be settled for on the basis of \$90 per acre; she agreeing to execute a quitclaim deed to Kennedy. On the day of the sale Kennedy met Lane, a prospective bidder for the land, and told him that the land was already sold; that he had bought the widow's interest. He also informed Lane that if anybody bought the farm they would have trouble. Just before the hour set for the sale Kennedy procured the execution of a quitclaim deed from the widow to himself. He then went to the place where the sale was to occur and addressed the assembled bidders as follows: "What are you fellows down here for? To raise a stink? I own Mrs. Afdal's interest in that property. The man that buys this farm will bid on a lawsuit. I will sue him for partition that will cost him \$400 or \$500 before he gets done with it." He also said that a purchaser who bought that land could not get a clear title. These statements, or similar ones, were repeated a number of times in the presence of the assembled bidders. A number of bids were made, the last one by John Seaver, which was \$88 per acre. Kennedy asked Seaver if he had the \$1,000 to make the initial payment. Seaver said that he had a check all filled out except signing, and that the check would be honored by the Capron Bank, and that they could telephone to the bank and find out whether the check would be honored. The premises were struck off to Seaver at \$88 per acre. Some one was sent to telephone to the bank about the check, and came back and reported that the check was all right and would be duly honored. Thereupon Wood, attorney for the guardian, and who was acting as auctioneer, declared that by general consent all bids were declared off, and proceeded to reoffer the land. Upon the second offer the land was started at \$75 per acre. Then Kennedy bid \$80 per acre. Seaver bid \$81 per acre. Immediately after Seaver's bid of \$81 per acre, a man who says that he was a friend of Kennedy's and desired to see him get the land invited Seaver to step aside. While Seaver and this party were engaged in a conversation about 30 feet away from where the sale was taking place, Kennedy bid \$81.50 and the auctioneer immediately knocked off the land to him. The auctioneer says that he called the bid three times before declaring the land sold to Kennedy. Seaver says that he did not hear it. Some of the witnesses say that Cook gave Wood a signal to "drop

it." The sale was immediately reported to the court, approved, and a deed executed, and Kennedy gave his check for \$1,000 to the guardian.

On the 18th of February the minors, by their mother and next friend, filed a motion to set aside the sale of February 4th and to recall and cancel the guardian's deed, and by amendment, afterwards made, a prayer for the cancellation of the quitclaim deed made by the widow to Kennedy was included. While this action was invoked by a motion, it was, in fact, a petition, and was so treated by the parties and by the court. The grounds alleged as reasons for setting aside the sale embody all of the facts above recited respecting the conduct of Kennedy and other parties connected with the sale. The guardian filed an answer to the petition, and the court heard it upon affidavits and parol evidence given in open court. The court sustained the petition, set aside the sale, vacated the guardian's deed, canceled the quitclaim deed of the widow, ordered a resale, and adjudged that Kennedy pay the costs of the sale set aside and of this proceeding. Before the final termination of the proceedings to vacate the sale Kennedy came in and on his own motion was made a party, and was present in person and represented by counsel on the final hearing. Seaver obligated himself, in open court, to bid \$88 per acre for the premises upon a resale, and executed a bond in the sum of \$3,000, with approved security, to secure the performance of his obligation. Cook, the guardian, and Kennedy excepted to the action of the court, but Cook does not join in this appeal. Kennedy alone brings the case to this court for review, and assigns error upon the action of the court in setting aside the sale and the quitclaim deed and in adjudging the costs against him.

P. H. O'Donnell and William Blester, for appellant. H. B. Stevenson and J. B. Lyon, for appellees.

VICKERS, J. (after stating the facts as above). Appellant insists that the court erred in setting aside the sale, in vacating the order approving the sale, and in setting aside the guardian's deed to him. To this we cannot assent. Good faith is required in all judicial sales, both by the purchaser and the officer making the same. Everything done by the parties calculated to prevent competition renders such sale void. Any fraud by the purchaser by which competition is prevented, any neglect of duty by the officer producing that result, is regarded as sufficient ground upon which to order a resale. *Longwith v. Butler*, 3 Gilm. 32; *Coffey v. Coffey*, 16 Ill. 141; *Meeker v. Evans*, 25 Ill. 283; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580. In the case at bar the court saw the witnesses and heard the testimony, and the findings in the decree will not be disturbed unless palpably against the weight of the evidence. The evidence as disclosed

the record abundantly sustains the decree. The conduct of appellant, who was a purchaser at the sale, was characterized by fraud throughout the entire transaction. It is evident that he determined to secure this land at \$80 per acre, regardless of its value. Before the sale was ordered by the court, he and his partner, Parker, entered into an agreement with Carlstedt to sell him this land for \$80 per acre, and the firm of Kennedy & Parker accepted from Carlstedt \$500 as the purchase price almost two months before the day of the sale. He met Lane, who had come to bid on the land, prior to the hour of sale and told him that the farm was sold, and that whoever bought the farm that afternoon would buy a lawsuit. He executed a quitclaim deed to the interest of the widow on the day of the sale and used it to deter others from bidding. When the widow was ready to begin, he addressed the people present in intimidating language, and informed them that he had bought the widow's interest and threatened the purchaser at the sale with a lawsuit. John Seaver bid \$88 per acre, and the land was struck off to him at that price. Kennedy was still active in the proceedings to the extent of inquiring of Seaver if he had \$1,000 to pay down, according to the terms of the sale. Seaver offered his check on the Capron Bank for \$1,000, and at the instance of the guardian the bank was consulted by telephone, whereupon the bank authorities stated that the check would be honored. The guardian ordered the land resold. The evidence of fraud in the part of appellant is so complete and convincing that the court could not in good conscience do otherwise than protect the interests of appellees by ordering a resale. Appellant's irregular, unfair, and fraudulent conduct disclosed by the evidence in order to sell the land at a price less than it was worth is aided and abetted by others whose fiduciary relations to the minors ought to have required them to use their best efforts to protect the interests committed to their charge. Appellant insists that the court did not have jurisdiction of his person. There is no foundation for this contention. Appellant came in and on his own motion was made a party and participated in the proceedings and took this appeal. There is no merit in this contention.

It is next insisted that the court erred in setting aside the quitclaim deed made by the widow, Martha Afdal, on the day of the sale. The evidence shows that Martha Afdal entered into the following agreement with Peter R. Kennedy and H. H. Parker on January 1, 1907: "Belvidere, Ill., January 7, 1907. This agreement made and entered into this day between Martha Afdell, of the town of Boone, county of Boone, and state of Illinois, the party of the first part, and Peter R. Kennedy and Hiram H. Parker, of the county of Belvidere, county of Boone and state of Illinois, parties of the second part. Said

Martha Afdell agrees to take her proportionate part of cash, which shall be set aside to her as her interest in the Afdell farm, containing one hundred and seventeen acres, and give a quitclaim to the same at the rate of \$80 per acre. Said Peter R. Kennedy and Hiram H. Parker agree to pay said Martha Afdell at the rate of \$80 per acre for her interest in said farm. If said farm does not bring \$80 per acre at public sale said Peter R. Kennedy and Hiram H. Parker agree to bid \$80 per acre for said farm, the terms to comply with the requirements of the court. Said quitclaim deed to be given to P. R. Kennedy and H. H. Parker. Peter R. Kennedy, H. H. Parker, per P. R. K. Martha Afdal." This agreement obligated Kennedy and Parker to bid at least \$80 per acre for the farm, and it obligated Martha Afdal to settle on the basis of \$80 per acre for her life estate, and she also agreed to make a quitclaim deed to Kennedy and Parker. This contract is not set aside by the decree of court, nor is there any charge made that this contract was not fairly entered into. The execution of the quitclaim deed on the day of the sale was apparently in execution of this contract. Martha Afdal had executed her assent to the sale of her life estate, and the decree of the court was for the sale of the entire premises free from the life estate of the widow, and the sale had been so advertised. After a decree ordering the sale of the premises free and clear of the life estate, based on the widow's assent freely and voluntarily given, without fraud or misrepresentation, such assent to such sale could not be recalled by the widow. She would be estopped by her own conduct from repudiating her assent after the expense of securing a decree had been incurred ordering the sale of the premises, including the life estate. Kennedy, as grantee in the quitclaim deed, occupied no better position with respect to the sale than the widow, even if the deed were valid for any purpose, which we do not decide. This grantee had actual notice of the decree, and, even if he did not, he would be bound under the doctrine of *lis pendens*. If he took anything under such deed and contract it would only be the excess of the widow's interest, if any, figured on the basis of the selling price of the land over the amount of her interest computed on the basis of \$80 per acre. If the quitclaim deed is upheld, it is manifest that no one will be injuriously affected except Martha Afdal. She is not complaining. The motion to set aside the sale and this quitclaim deed is made by the minors only. It is not necessary for the protection of the interests of the minors that this quitclaim deed should be set aside. It will have no effect whatever upon their interests, nor do we see how such deed can depress the price on a resale of the premises. The purchaser, upon a resale, will obtain a title free and clear of the life estate of the widow, and it can make no difference

to the purchaser whether the value of the life estate is all paid to the widow, or a part paid to her and a part to Kennedy under his contract with the widow.

It is suggested that Martha Afdal could not make a quitclaim deed to the purchaser, having conveyed to appellant. This is not necessary. The widow having filed her written assent to the sale of her life estate, the court is authorized to direct the guardian to execute a deed conveying the fee-simple title to the whole premises, unincumbered by the life estate.

It is said by appellees that a fraud was practiced upon the widow in securing the execution of this quitclaim deed. Upon this question we express no opinion. We do not regard that matter properly before us. The order of the court in setting aside the sale on the motion of the minors was properly entered, but the decree setting aside the quitclaim deed by the widow to appellant was improperly made at the instance of the minors.

Appellant complains of the order of the court taxing certain costs against him. The order complained of required Kennedy to pay the costs of the proceedings to vacate the sale and also the costs of the sale which was set aside. There was no abuse of discretion in this order. All the costs of the sale which had to be set aside on account of the misconduct of appellant were properly charged to him, and the costs of the proceedings to set aside the sale should be paid by appellant for the reason that the irregular conduct of appellant made the proceeding necessary in order to protect the rights of the minors. We see no reason for disturbing the order of the court as to the disposition of the costs.

Appellant raises the point that the court should have ordered the guardian to return the \$1,000 paid on the purchase. Of course, appellant will be entitled to this money, less the costs adjudged against him; but the court was not required by any pleading in the case to pass on that question, and did not, in fact, make any order in regard to it. That question was not raised or passed on. Hence there is no ruling on which error can be assigned.

The order of the court in so far as it sets aside the quitclaim deed is reversed. In all other respects the decree of the county court is affirmed. Appellant will pay all costs.

Decree reversed in part.

(229 Ill. 313)

CITY OF CHICAGO v. OPENHEIM et al.
SAME v. SIEGEL. SAME v. MILLER.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. APPEAL—DECISIONS REVIEWABLE—VALIDITY OF ORDINANCES.

The Supreme Court has jurisdiction of the question as to whether a city ordinance attempts to interfere with a constitutional right, but not of a controversy as to the power of a city, under the statutes, to pass the ordinance, or to ques-

tion whether the ordinance is invalid as an unreasonable and oppressive exercise of that power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 111.]

2. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—STREET RAILROADS—MUNICIPAL REGULATIONS.

Municipal Code City of Chicago, § 1974, requires street railway companies to issue transfer tickets. Rev. Municipal Code City of Chicago, § 1500A, prohibits any person from selling or giving away any street railway transfer ticket or from receiving and using any transfer so sold or given away and provides penalties for its violation. Held, that the latter ordinance is not in violation of the constitutional provision that no person shall be deprived of property without due process of law; it being merely a regulation of the use of property.

3. CARRIERS—STREET RAILROADS—TRANSFERS—SELLING OR GIVING AWAY.

Rev. Municipal Code City of Chicago, § 1500A, prohibiting any person from selling or giving away a street car transfer, is not open to the objection that it may subject innocent parties to punishment, as it forbids the disposal of a transfer at any time or place, since under Municipal Code, § 1974, the life of a transfer is limited to a certain time, after the expiration of which it ceases to be a transfer; and, the ordinance being penal, it will be made applicable by the courts only to the case of persons or the kind of acts clearly contemplated within its scope.

4. APPEAL—REVIEW—RECORD.

A city ordinance not introduced in evidence and not contained in the abstract or record cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2897.]

Error to Municipal Court of Chicago; McKenzie Cleland, Judge.

Joe Openheim and others were charged with the violation of an ordinance of the city of Chicago, and from a judgment for the accused the city brings error. Reversed and remanded.

Edwin H. Cassels and Symmes & Kirkland (Edward J. Brundage, Corp. Counsel, and John A. Rose, of counsel), for plaintiff in error. Joseph Epstein and Wharton Plummer, for defendants in error.

FARMER, J. Defendants in error, Joe Openheim, Julius Siegel, and Nick Miller, were arrested and brought before the municipal court of the city of Chicago charged with violating section 1500A of the Revised Municipal Code of said city. Said section of the municipal code prohibits any person from selling a street railway transfer ticket issued by a street railway company within the city, given to the passenger for the purpose of authorizing him to transfer from one car or line to another without the payment of additional fare. It also prohibits any person from giving away such transfer ticket for the purpose of enabling the person to whom given to use or offer it for passage upon any street railway car or cars. It further prohibits any person from receiving any transfer ticket in the manner prohibited by the ordinance, and from using, attempting to use, or offering the same for passage upon any street railway car or cars. Penalties

provided for the violation of the provisions of the ordinance, and it was to enforce the penalty that these suits were instituted. The facts are not disputed. Defendant in error Openheim was, and had been for some time prior to his arrest, engaged in selling newspapers at the corner of Fifth and Halsted streets. On the day of arrest he was seen by a police officer to come from a number of transfer tickets held in his hands and give it to defendant in error Siegel, who handed Openheim five cents. Openheim gave three cents back to Siegel. Siegel boarded a car, and while in the act of offering the transfer to the conductor for his fare was arrested. Defendant in error Miller was seen by a police officer to come from the wife of defendant in error Openheim a transfer ticket and pay her two cents therefor, whereupon he was immediately arrested. Defendant in error Openheim was charged with selling a transfer ticket in violation of the ordinance. Defendant in error Siegel was charged with purchasing a transfer ticket and attempting to use the same for passage upon a street railway car. Defendant in error Miller was charged with using a transfer ticket for the purpose of using or attempting to use it for passage upon a street railway car. Upon a trial in the municipal court without a jury the parties were discharged, and the City of Chicago has brought the cases here for review by writs of error sued out of court.

There is no controversy about the facts, the questions of law being the same in all three of the cases, by agreement of the parties the cases were consolidated in this court, and the briefs and abstracts filed in these cases are considered as the briefs and abstracts in all three of them. As there were no written pleadings in the cases except the complaint, we can only know from the contents of counsel in their briefs what issues were made by defendants in error in the trial court. Counsel for plaintiff in error says it was contended for defendants in error that

"First, that the city of Chicago had no power to pass section 1500A of the Revised Municipal Code of the City of Chicago; second, that if the city did have the power to pass said ordinance, the ordinance in violation of section (section 1500A) is unreasonable and oppressive, and that it is unconstitutional because it operates to take property without due process of law." It is further said in the brief of counsel that the trial court held that the city had power to pass and enforce an ordinance governing the use of street cars, but that the court held the ordinance in question could not be sustained as an exercise of such power "because it is unreasonable, oppressive, and in violation of the Constitution." It is said the trial court held a transfer ticket in the hands of the passenger to whom it was issued was property, and to deprive him of the

right to sell it amounts to taking his property without due process of law. If the controversy related only to the power of the city, under the statute, to pass the ordinance, or to the question whether the ordinance is invalid as being an unreasonable and oppressive exercise of that power, this court would have no jurisdiction to entertain these writs of error. Where, however, an ordinance attempts to interfere with a constitutional right, and that is the question determined by the trial court, an appeal direct to or a writ of error from this court will lie for the purpose of reviewing said judgment. *Wood v. City of Chicago*, 205 Ill. 70, 68 N. E. 712. The question then presented for our consideration by this record is whether the ordinance is in conflict with the constitutional provision that no person shall be deprived of property without due process of law.

This court held, in *Chicago Union Traction Co. v. City of Chicago*, 199 Ill. 494, 65 N. E. 451, 59 L. R. A. 631, that the city had the power to fix, by ordinance, the maximum rate of fare at five cents and to provide for the issue of transfer tickets. It was contended in that case by the Chicago Union Traction Company that the charters of its constituent companies constituted contracts as to the rate of fare it might charge, and the ordinance fixing the maximum fare at five cents and requiring the issue of transfer tickets impaired these contracts and was therefore in violation of the Constitution of the United States and the Constitution of the state of Illinois; but the court held to the contrary. In 1875 the Legislature of this state passed an act making it unlawful for any one not authorized by the owner or owners of any railroad or railroads or steamboat to sell or transfer, for a consideration, the whole or any part of a ticket for transportation over any railroad or steamboat. The act provided that the railroad or steamboat company should redeem tickets from purchasers who for any reason did not desire to use them, but a sale of the ticket by the purchaser to any other person than the company issuing it, by presenting it for redemption, was made punishable by a fine and imprisonment. The constitutionality of this statute was passed upon in *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329. One of the grounds upon which the legality of the act was challenged was that a railroad or steamboat ticket was property in the hands of the purchaser, and that the effect of the statute was to deprive him of his property without due process of law, in violation of section 2 of article 2 of the Constitution of the state of Illinois. The court said (page 606 of 149 Ill., page 950 of 36 N. E. [24 L. R. A. 152, 41 Am. St. Rep. 329]): "The lawmaking power may provide means for remedying such evils as, in its opinion, may exist in the management of these public agencies of transportation, and in doing so it may some-

times impose restrictions, which are deemed to be necessary, upon the use and enjoyment of property. A man is not deprived of his property unless it is taken away from him, so that he is divested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner, when the property, whose use and enjoyment are so limited, is invested in a business affected with a public use or is used as an accessory in carrying on such business." Similar statutes upon the same subject have been enacted by many other states and have been sustained by their courts of last resort as a proper exercise of the power of the state. We quote from the opinion of the Supreme Court of Minnesota in *State v. Corbett*, 59 N. W. 319, 57 Minn. 345, 24 L. R. A. 498, the following language, which is substantially similar to the reasoning adopted by other courts in passing upon the same question: "The fact that the purchaser of a ticket is prohibited from selling it to whom he pleases does not deprive him of his property without due process of law. The disposition of property may always be limited or regulated where public interests so require. The ticket is not destroyed or taken from the holder, nor is his right to ride on it at all limited. The only limitation is upon his right to transfer it. If he wishes to ride on it, which is the purpose for which a ticket is presumably bought, he can do so; but, if he does not use it, his only course is to require the carrier who issued it to redeem it. As already suggested, a man has no constitutional right to insist that these contracts for transportation shall be transferable, and if the Legislature had seen fit to declare that they should not be, and that they could only be used by the party to whom they were originally issued, they might have done so, even without making any provision at all for their redemption by the carrier if not used." Our attention is called to but one state where such an enactment has not been sustained. In *People ex rel. v. Warden of City Prison*, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am. St. Rep. 763, by a divided court of four to three, the New York Court of Appeals held a statute upon this subject invalid.

It is true, the above were acts of the Legislature, and not city ordinances; but if they did not amount to taking property without due process of law we are unable to see how the ordinance in question, adopted by a city council having the power to require the issue of transfers and to regulate their use, can be held to be a violation of the Constitution. Section 1974 of the Municipal Code of the City of Chicago requires street railway companies to issue transfer tickets without further charge to persons who have paid their fare. Such transfer ticket entitles the passenger to be carried "on any other line adjoining, connecting, crossing and intersecting, as aforesaid, and owned, leased or op-

erated by such person or corporation, for a continuous trip of any distance within the city if used within one hour after the same is issued at the point or place for which such transfer ticket was issued." This ordinance was enacted for the benefit of passengers wishing to make a trip which necessitated the use of more than one line of the street railway company. It was not within the contemplation of the city council, in adopting the ordinance, that a person wishing to make a trip to a point reached by the initial line of passage should have the right to demand a transfer ticket for the purpose of selling it to some one else, to be used in making a trip over a connecting line of the street railway company. When a passenger pays his fare on the street railway, he is entitled to a transfer ticket if in making his trip he desires to transfer from one line to another upon which transfers are issued, and such transfer is good upon the line over which it is issued if used at the place and within the time required. Limiting it to the use of the person to whom issued, as was said in *Burdick v. People*, supra, is not taking it away from him so that he is divested of his title and possession, and does not therefore deprive him of his property.

Ex parte Lorenzen, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55, 79 Am. St. Rep. 47, is a case much in point. There the petitioner, Lorenzen, was convicted of having given away and disposed of a street railway transfer ticket in violation of section 3 of an ordinance of the city of San Francisco. Said section 3 is as follows: "No person, except a duly authorized conductor or agent of a person, firm or corporation operating a line of street railroad within the city and county of San Francisco, shall, within said city and county, issue, deliver, give or sell, or offer to issue, deliver, give or sell, to any other person whatsoever, any transfer, transfer check or ticket issued or purporting to be issued by such person, firm or corporation so operating such line of street railroad, for passage on any street railroad car or line." Lorenzen sued out a writ of habeas corpus from the Supreme Court of California, alleging in his petition that the ordinance under which he was convicted was void. The case is directly in point, and, as we agree with the reasoning and conclusion of the court, we take the liberty of quoting extensively from the opinion. One of the grounds urged against the validity of the ordinance was that it was an unconstitutional interference with the right of private property. The city council of the city of San Francisco had by an ordinance required street railway companies to issue to passengers who had paid their full fare transfer tickets, to be used by the persons to whom issued, within the time limited, upon connecting lines of such street railway company, without the further payment of fare. The court held that it was a part of the pas-

senger's contract with the street railway company that he might transfer to and ride upon the connecting road without the payment of further fare, and that it was also a part of the contract that the passenger should use the transfer ticket, if used at all, upon the line and within the time specified, and that he would not transfer or assign it to any one else. In the opinion of the court it is said: "Street car companies are public utilities, which are almost necessities to our present mode of life. While in one aspect their ownership is private, and they are operated for private gain, in another they are servants of the people, and the law-making powers reserve and freely exercise the right to regulate and control them in their operations. It is upon the theory, and only upon the theory, that they may be operated for the public good, that a franchise permitting their existence may be given; and the power to pass reasonable regulations for their operation and management is expressly granted by section 503 of our Civil Code. It is strictly within the power of the municipal authorities of the city, and properly within the exercise of their duties, to pass any reasonable regulations affecting street car lines, to remedy a threatened or actual interference with the comfort, convenience, and general welfare of the traveling public. * * * It is here first insisted by petitioner that the transfer issued to him by the company is his property, and that an essential and inalienable right to the enjoyment of property is the right to sell, give it away, or otherwise dispose of it. This, however, is but partially true. A man may not be deprived of his property or of his property rights for any private consideration whatever, nor for considerations of public good, without compensation first made; but the Legislature has the unquestioned right, and every day exercises it, of restricting the use to which private property may be put." After quoting from *Burdick v. People*, supra, the opinion proceeds: "But aside from this, in the case of this ordinance it cannot be perceived that its terms limit or circumscribe any of the just and legal rights which a passenger receiving a transfer theretofore enjoyed. In receiving it he took it under the conditions above set forth. It was a part of his contract that, if used, he alone would use it, and if he sold it or assigned it, or gave it to another, to the end that that other might use it, he clearly violated his contract and put a fraud upon the company. A court will not hear with much patience one insisting upon his right to violate his contract and consummate a fraud. The ordinance in question, therefore, so far as the passenger is concerned, leaves him all the rights which theretofore he enjoyed under his contract, and interferes in no way with any legal or legitimate use which at any time he could have made of the transfer. At the most, so far as he is concerned, it has but made penal what

before was illegal and against good morals."

It is further insisted by defendants in error that the ordinance in question prohibits the selling or giving away of street railway transfer tickets without any limitation or restriction and without any regard to the place where issued or the time when issued, and it is said that if a person to whom a transfer had been issued should sell or give it away at any time after the right to use it had expired, or at any place, however distant, from the place where it was authorized to be used, such person would be subject to the penalties provided by the ordinance for its violation. A similar objection was urged to the ordinance in the *Lorenzen Case*, and upon this point the court used the following language, which expresses our views upon this subject: "To some of the objections thus presented answer may be made that the life of the transfer ends with the passage of the time indicated upon its face. It ceases then to be a transfer—to have any value at all, other than that which may attach to it as a bit of paper. But for the more substantial objection that the ordinance, by its terms, would oppress and lead to the conviction of persons guilty of no fraudulent act, it is to be remembered that the letter of a penal statute is not of controlling force, and that the courts, in construing such statutes, from very ancient times have sought for the essence and spirit of the law and decided in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope."

It is urged that there is another ordinance of the city of Chicago providing for the refunding of fares to passengers or issuing to them a coupon or ticket in cases of breakdown or delays, entitling such passengers to continue their trip on other cars of the street railway company, and that the ordinance in question purports to deprive the passenger to whom a ticket is given in such cases of the right to sell it or give it away, and that this is taking property without due process of law. If there is any such ordinance as that referred to it does not appear to have been offered in evidence, as we are unable to find it in either the abstract or record, and that question is not before us.

We are of opinion section 1500A of the Municipal Code of the City of Chicago is a valid ordinance, and that the municipal court erred in holding otherwise and discharging defendants in error.

The judgment of the municipal court in each of the cases is reversed, and the causes remanded to that court for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

(229 Ill. 474)

HERTEL v. BOISMENUE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. SCHOOLS AND SCHOOL DISTRICTS—TOWNSHIP TREASURER—REMOVAL.

The power of the trustees of schools to remove the township treasurer under the express provisions of 3 Starr & C. Ann. St. 1896, c. 122, § 23, p. 3657, and section 34, p. 3660, requires no formal charge, no notice to the incumbent, no form of procedure or trial, and is not subject to review.

2. MANDAMUS—NECESSARY PARTIES.

In mandamus to compel the county superintendent of schools to approve a township treasurer's bond, the former treasurer is not a necessary party, since his right to the office is not involved.

3. SAME—COUNTY SCHOOL SUPERINTENDENT—REFUSAL TO APPROVE BOND.

Where the penalty of a township treasurer's bond, when presented to the county superintendent of schools, is twice the amount of bonds, notes, etc., then in his hands, as expressly required by 3 Starr & C. Ann. St. 1896, c. 122, § 1, p. 3671, and is approved by the trustees of schools, the duty of the superintendent to indorse his approval thereon, have it recorded, and give the statement of approval to the treasurer, are ministerial acts coercible by mandamus.

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Mandamus by Louis Boismenue to compel Charles Hertel, as county superintendent of schools, to approve his bond as township treasurer. From a judgment of the Appellate Court for the Fourth District affirming a judgment for petitioner, respondent appeals. Affirmed.

The appellee filed in the circuit court of St. Clair county his petition for a writ of mandamus commanding the appellant, who was county superintendent of schools, to approve petitioner's bond as township treasurer, and to deliver to petitioner a written statement of such approval, and that petitioner is entitled to the care and custody, on demand, of all moneys, bonds, mortgages, notes, and securities, and all books, papers, and property, of every description, belonging to the township. The appellant filed an answer in the form of five pleas; the first denying appellee's appointment, the second denying that there was a vacancy in the office at the time of the alleged appointment, the third averring that the bond was not in proper form and the penalty thereof, which was \$500,000, was insufficient, and the fourth averring that one Daniel Sullivan had been appointed treasurer of said township for the term of two years, which had not expired, that he had not been removed, and there was no vacancy in said office, and the said Daniel Sullivan was then treasurer of said township. The fifth plea alleged Sullivan's appointment and qualification as treasurer, and that the trustees of the township attempted to make an order removing him, but that said order was without authority and without cause, because his term had not expired, and

he had in all respects efficiently executed all orders and requisitions legally made and entered of record by said board of trustees and had not been guilty of any improper conduct in the discharge of his duties as treasurer, and there existed no good cause for his removal in pursuance of the statute; that he was competent and able to and did efficiently perform the duties of said office. A demurrer was sustained to this plea, and a trial had upon the other four. The issues were found for the petitioner, and a judgment rendered awarding a peremptory writ of mandamus, which has been affirmed by the Appellate Court. The respondent has appealed from the judgment of affirmance to this court.

F. J. Tecklenburg, State's Atty., L. D. Turner, and Forman & Whitnel, for appellant. Keefe & Sullivan, for appellee.

DUNN, J. (after stating the facts as above). The statute provides for the appointment of a township treasurer by the trustees of schools for a term of two years and authorizes his removal by the board for good and sufficient cause. 3 Starr & C. Ann. St. 1896, c. 122, §§ 22, 23, p. 3657, and section 34, p. 3660. The power of removal there given requires no formal charge, no notice to the incumbent, no form of procedure or trial, and is not subject to review. *People v. Higgins*, 15 Ill. 110; *Wilcox v. People*, 90 Ill. 186; *People v. Mays*, 117 Ill. 257, 7 N. E. 660. In the case first cited it is said (page 114 of 15 Ill.): "Here the trustees were charged with the general management of the institution and were authorized to appoint a superintendent possessed of certain qualifications, and for the want of certain of those qualifications they might remove him. They are not bound down by any legal rule of evidence when determining as to the existence of those qualifications for the purpose of making the appointment; nor, on the other hand, are they thus restricted when determining upon the absence or want of certain qualifications when acting upon the question of removal. They may determine that question upon their own observation and exercising their own best judgment. * * * They may act upon their own judgment and their own observation, and whenever they are prepared to take the responsibility of saying that the incumbent does not possess the necessary qualifications for the office. They have the right, and it is their duty, to remove him for such cause." There was therefore no error in sustaining the demurrer to that part of the answer called the fifth plea.

The third plea avers that the bond was not sufficient in penalty or in proper form. No objection to the form is pointed out. The statute requires the penalty of the bond to be twice the amount of all bonds, notes, mortgages, moneys, and effects. 3 Starr & C. Ann. St. 1896, c. 122, § 1, p. 3671. The penalty of the bond presented was \$500,000, and

the former treasurer testified that there were in his hands \$243,917.13. The penalty of the bond was more than twice this amount. The appellant offered to prove that other moneys came to the hands of the treasurer after the bond was executed, making the total amount handled by him since that date over \$400,000. No offer was made to show when or from what source the additional sum was received. The trial occurred in December, nearly eight months after the bond was presented for approval. If the penalty of the bond was sufficient when presented to the appellant, he cannot excuse his refusal to approve it by showing that at some time within the next eight months the funds increased so as to require an increase in the penalty of the bond. The same section of the statute which provides for the penalty of the bond provides for such increase of the penalty as the increase of the amount of notes, bonds, mortgages, and effects may require.

It is insisted that Daniel Sullivan, the former treasurer, is a necessary party to this proceeding, because, it is said, his right to the office will be directly affected by the judgment. In this case his right to the office is in no way involved, and the judgment cannot affect that question. In the case of *People v. Matteson*, 17 Ill. 167, an application was made for a peremptory mandamus against the Governor and Secretary of State to compel them to issue commissions to the relators, as police magistrates of the city of Chicago. At the election the relators had received the greater number of votes, but owing to the fact that the ballots cast for them were for "police justices," and not for "police magistrates" (the term used in the act under which the election was held), it was contended that they were illegal and should not be counted. Accordingly, commissions had been issued to the opposing candidates, who had received a smaller number of votes, but for "police magistrates," and they had qualified and entered upon the duties of the said offices. The court awarded the writ, and said: "It was suggested at the bar, on behalf of those who received the commissions under this election, that mandamus will not lie to admit the relators to an office which is already filled. We recognize the rule as unquestioned that, ordinarily at least, the court will not by mandamus turn out one officer and admit another in his place. This we do not propose to do. We have nothing to do with those parties who are not now before us. This decision does not affect their rights to their offices, one way or the other. If they were holding their offices rightfully before they will do so still, and if they had no legal right to the offices before, but were merely holding by color of office, this decision makes them no less officers de jure. Their right to the offices can be determined directly by quo warranto." And to the same effect are *People v. Rives*, 27 Ill. 242, and *Peo-*

ple v. Hilliard, 29 Ill. 413. In the case of *Powell v. People*, 214 Ill. 475, 73 N. E. 795, 105 Am. St. Rep. 117, cited by the appellant, the writ commanded the respondents to strike from the civil service list of eligibles for chief sanitary inspector the name of the incumbent then holding the office, cancel and withdraw their certification of him for said office, and certify the petitioner for appointment to said office. The effect of the judgment was to remove him at once from office in a proceeding to which he was not a party. In this case it was not proposed to turn any one out of office. All the court was asked to do was to compel the county superintendent to perform his plain duty under the statute, leaving the parties to the remedies existing under the law. *People v. Matteson*, supra; *People v. Rives*, supra. The law gave the power of appointment and removal of the treasurer to the trustees alone, and with it the county superintendent had nothing to do. His only duty was with the treasurer's bond—on its delivery to him, after being approved by the trustees, to indorse his approval thereon, have it recorded, and give the statement required by the statute to the appointee. These are ministerial acts, the performance of which may be coerced by mandamus.

The judgment was right and will be affirmed.

Judgment affirmed.

(229 Ill. 330)

GEORGE B. SWIFT CO. v. GAYLORD.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. LIMITATION OF ACTIONS — PLEADING — AMENDMENT.

Where a suit is brought in apt time, and a declaration filed imperfectly stating the cause of action, subsequent amendments, though filed after limitations against a new action have run, will not be barred, if they amount to not more than a restatement in a different form of the cause of action originally declared on; but, if they set up an entirely new and distinct cause of action, limitation will be successfully pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-547.]

2. SAME—CONSTRUCTION.

A declaration charged that an employer negligently failed to properly secure the arm of a derrick, whereby it fell and killed an employé. An amendment alleged negligence, in that defendant failed to properly secure the derrick, and to sufficiently brace and secure the beam of the hoisting apparatus, and to properly brace and bolt the beam of the derrick, etc. *Held*, that the omission charged both by the original and amended declarations was the failure to construct the derrick so as to make it reasonably suitable, in that defendant failed to have the derrick arm securely fastened, and the amendment was properly allowed, though limitations had run against a new action when the amendment was filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, §§ 543-547.]

3. MASTER AND SERVANT—DEATH OF SERVANT — CAUSE OF ACTION.

A cause of action for death of a servant is the act or thing done or omitted to be done by the master which confers the right upon the

servant's representative to sue, or the act which causes a grievance for which the law affords a remedy.

4. SAME—NEGLIGENCE—DEFECTIVE APPARATUS.

Where a servant was killed by the fall of a derrick, and the evidence showed that the derrick was not braced to withstand the strain incident to the purpose for which it was used, and that it gave way and killed deceased while he was in the exercise of ordinary care, the court properly refused to direct a verdict for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1000-1009.]

5. SAME—INSTRUCTIONS.

The court charged that if the derrick by which intestate was killed was negligently constructed and fastened by defendant, and intestate had no knowledge thereof, and could not by ordinary care have acquired such knowledge, and while in the exercise of ordinary care was killed by the fall of the derrick by reason of its negligent construction, and his death caused pecuniary injury to his next of kin, the jury should find for plaintiff, though the immediate cause of the falling of the derrick was the combined result of defendant's negligent construction and the carelessness of defendant's employees engaged in operating the derrick. *Held*, that the instruction was not misleading, as failing to negative the fact that deceased was one of such employees, and in charging that a recovery might be had, though deceased's own negligence contributed to his injury.

6. DEATH—LOSS OF PECUNIARY AID—EXPECTATION OF LIFE.

Where there was actual loss of pecuniary aid by decedent's alleged wrongful death, the jury, in determining the amount, could consider the reasonable expectation of life of the deceased and of his next of kin so injured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 84, 90; vol. 15, Damages, § 489; vol. 20, Evidence, § 1520.]

7. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—INSTRUCTIONS.

In an action for death of a servant, the burden is on plaintiff to show, not only that an appliance was defective and that the master had notice thereof, or should have had notice, but also that the servant did not know of the defect, and had not equal means of knowing with the master.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 877-908.]

8. SAME—KNOWLEDGE OF SERVANT.

To charge a servant with negligence, he must not only know, or have means of knowledge by the exercise of ordinary care, of the defect in the appliance by which he was injured, but must also know that the defect rendered the appliance unsafe to use; he not being bound, however, to make an inspection for latent defects.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-709.]

9. SAME—PROOF.

Where a servant's want of knowledge of the defectiveness of an appliance is not susceptible of direct proof, it may be inferred from circumstances; plaintiff being aided by the presumption that a person does not voluntarily incur danger and risk of death.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Rock Island County; El. C. Graves, Judge.

Action by Lucian E. Gaylord against the George B. Swift Company and others. Judgment in favor of plaintiff against the named

defendant was affirmed by the Appellate Court, and said defendant appeals. Reversed and remanded.

The circuit court of Rock Island county rendered a judgment for \$5,000 in favor of appellee against appellant for negligently causing the death of plaintiff's intestate, and that judgment has been affirmed by the Appellate Court. The action was brought to the January term, 1904, of said circuit court against this appellant, the Chicago, Rock Island & Pacific Railway Company, and the Rock Island Improvement Company. The original declaration consisted of a single count, which alleged that the death occurred on September 22, 1903. After the expiration of one year from that date the plaintiff filed an amended declaration of seven counts, to which the defendants filed a plea of not guilty and also a special plea to each count setting up the one-year statute of limitations. The plaintiff demurred to each of the special pleas. This demurrer having been overruled, he then filed a second amended declaration, consisting of four counts, to which the defendants again pleaded the general issue and special pleas of the statute of limitations. The plaintiff again demurred to each of the special pleas. This demurrer was sustained, and a jury was impaneled for the trial of the cause. During the progress of the trial plaintiff, by leave of the court, dismissed his suit against the other defendants, and filed another amended declaration of four counts against appellant alone, to which appellant filed a plea of the general issue and special pleas of the statute of limitations. Plaintiff demurred to the special pleas, his demurrer was sustained, and the trial proceeded, with the result above stated.

Jackson, Hurst & Stafford, for appellant. J. B. & J. L. Oakleaf and J. T. & S. R. Kenworthy, for appellee.

DUNN, J. (after stating the facts as above). It is contended that the court erred in sustaining the demurrer to the pleas of the statute of limitations filed to the amended declaration. The statute provides that every action to recover damages for the death of a person caused by another's wrongful act shall be commenced within one year after such death, and, the amended declaration in this case having been filed more than one year after the death of plaintiff's intestate, the action was barred, unless the cause of action set forth in the amended declaration was the same as that declared upon in the original declaration. Counsel for appellant earnestly insist that the causes of action set up in the several counts of the amended declaration are entirely new and distinct from that declared upon in the one count of the first declaration. It is well settled that if a suit is brought in apt time, and a declaration duly filed stating the cause of action, though imperfectly, subsequent

amendments, though filed after the statute of limitations has run, will not be barred thereby, if they amount to no more than a restatement, in a different form, of the cause of action originally declared upon. *North Chicago Rolling Mill Co. v. Monka*, 107 Ill. 340. But if the amended counts set up an entirely new and distinct cause of action the statute of limitations may be successfully pleaded thereto. *Phelps v. Illinois Central Railroad Co.*, 94 Ill. 548; *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, 46 N. E. 266.

The first declaration in this case alleged that the defendants were engaged in the business of erecting a building, and the deceased was in their employ, and the defendants were in the act of hoisting lumber from the ground to the top of said building, using a derrick for that purpose, it being the duty of the deceased to receive the lumber on the top of the building, and while he was in the act of performing such duty, exercising due care, the derrick gave way and broke, by means whereof plaintiff's intestate was then and there instantly killed. The declaration then proceeded: "And the plaintiff further avers that said defendants, a short time prior to the killing of plaintiff's intestate as aforesaid, had erected and constructed said derrick or hoist for the purpose of hoisting lumber as aforesaid, and in the erection of said derrick or hoist, and the placing of the same, had negligently omitted to properly place, fasten, and secure the same, in this: They had neglected and omitted to properly and securely place the arm of said derrick or hoist which held the pulley over which the rope attached to said derrick or hoist ran, so that, when applying the power to hoist the said lumber as aforesaid, and while said lumber was about up to the top of said building, ready for the plaintiff's intestate to take when so hoisted, the said derrick or hoist gave way, and the said lumber and derrick fell upon the plaintiff's intestate," etc. The amended declaration, upon which the trial was had, as already stated, contained four counts. The first alleged that the defendant carelessly and negligently built said derrick, and omitted to properly place, fasten, and secure the same, so that, when the weight of the lumber to be hoisted thereby was placed upon the arm of the derrick, it broke and gave way, and the defendant had neglected and omitted to properly secure the arm of said derrick, so that, when the power was applied to hoist the lumber, it gave way. The second averred that the negligence of the defendant consisted in not sufficiently bracing, securing, nailing, bolting, and fastening the beam of said hoisting apparatus, so as to prevent the same from falling when a load to be hoisted was heavy, or might be caught, as it was liable to do, upon or against the said iron cross-beams when being hoisted as aforesaid. The third sets up that the defendant

was negligent and careless in fastening and constructing the beam of said derrick, and that the same was not safely and properly braced, nailed, bolted, and fastened to sustain the weight of the hoisting of said timbers and lumber in the manner and form the same were being hoisted as aforesaid, and was not sufficient to sustain the weight that would come upon the same in the event said timbers and lumber should be caught on said iron cross-beams while being so hoisted in the manner and form aforesaid. And the fourth alleged that the defendant caused and permitted said derrick or hoisting apparatus to be negligently and carelessly built and constructed, in this: That said derrick beam, and its supports and braces, were not sufficiently and properly braced, bolted, placed, nailed, built, adjusted, and fastened, so as to prevent the same from falling when in use in the hoisting of said lumber as aforesaid. It will be seen that each of these counts rests upon the alleged failure of the defendant to properly nail, brace, and fasten the arm of said derrick. In cases of this kind the cause of action is the act or thing done or omitted to be done by one which confers the right upon another to sue; in other words, the act or wrong of the defendant towards the plaintiff which causes a grievance for which the law gives a remedy. *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979. Here the omission of duty charged against the defendant, both by the original and amended declarations, was the failure to so construct the derrick in use upon the building as to make it reasonably suitable and safe for the use for which it was intended, and the particular negligence was the failure to have the arm so securely fastened that it would not give way to the pressure upon it.

Special attention is called by appellant's counsel to the use of the word "place," in the first declaration, in connection with the arm of the derrick, as limiting the issue to the single point of negligence in placing the arm of the derrick. The words used are, "neglected and omitted to properly and securely place," and they mean that the defendant neglected to properly put the derrick in position in a safe manner, secure against the strain to which it might be subjected. Under this allegation any evidence would have been admissible which was admissible under the amended declaration or which was admitted on the trial. Evidence that the snatch block on the ground, instead of being directly under the derrick, was on one side, and that the side which was not braced, was admissible, not as evidence of an independent act of negligence, but as showing the additional strain to which the arm would thereby be subjected and the necessity that it should be "securely placed." The counts in the amended declaration did not set up any new cause of action, but merely am-

plified the statement of that alleged in the first declaration and changed the form of its expression.

It is next urged that the jury should have been instructed to find a verdict for the defendant. The walls of the building on which the deceased was working had been completed, and workmen were engaged in laying the roof, at a height of from 40 to 50 feet from the ground, when the accident occurred. A derrick set on the roof was used to hoist lumber from the ground. Deceased was engaged in carrying lumber from the derrick to the carpenters laying the roof. The arm of the derrick, extending from north to south, was a timber 4 inches by 6 and about 22 feet long; the lower end being lashed to a joist in the roof, and the upper end passing over a post about 7 feet high, set at the edge of the opening in the roof through which the lumber was to pass as it came up, and the upper end of the arm extending out over the opening. Near the top of the arm was fastened a pulley, through which a hoist rope passed down to a snatch block on the ground, and thence along the ground, turning corners at several points, several hundred feet, to a hoist engine. This engine was located out of sight of the men engaged in raising the lumber, and signals given by employes stationed at different points were necessary to communicate with the engineer. Several pieces of lumber were fastened together at the bottom of the hoist and the signal given to raise them to the roof. A guide rope was fastened to this lumber for the purpose of guiding it through the opening in the roof and to prevent it from being caught under the girders. At the time of the accident, however, it either caught beneath the roof, upon the girders which formed the sides of the opening, or passed through the opening and caught upon the pulley block, and, the engine failing to stop, the continued application of the power caused the braces to give way and the derrick fell to the east, on which side there was no brace, striking the deceased upon the head, killing him instantly. The engineer could not see the timbers being hoisted or the men engaged in the work, or know whether the timbers went through the opening in the roof. He had to depend upon signals, repeated by two other employes of appellant, as to when he should hoist and when stop. The timber might be expected to catch on the edge of the opening in the roof, or, if the power was not stopped in time, to be carried to the top of the derrick. In either case there would be a severe additional strain upon the arm of the derrick, which it should be secured to withstand. There was evidence tending to show that the derrick was not braced to withstand the strain incident to the purpose for which it was used, and that in consequence it gave way, and the deceased, while in the exercise of ordinary care for his own safety, was

killed. The instruction to find for the defendant was properly refused.

The first instruction given on behalf of the plaintiff informed the jury that if they "believed, from the evidence, that the derrick or hoist mentioned in the declaration was negligently constructed and fastened by the defendant; as stated in the declaration, and that plaintiff's intestate had no knowledge of said negligent construction, and that he could not, by the exercise of ordinary care for his own safety, have acquired such knowledge, and was an employe of the defendant, and while in the exercise of due care was killed by the derrick falling on him by reason of its negligent construction, as stated in the declaration, and that by his death his next of kin sustained pecuniary injury, then the jury should find their verdict for the plaintiff, although they may believe, from the evidence, that the immediate cause of the falling of the derrick was the combined result of the negligent construction of the derrick and the carelessness of those employes of the defendant engaged in hoisting the lumber." It is objected to this instruction that it is misleading, in not negating the fact that the deceased was one of the employes engaged in hoisting the lumber, and that it tells the jury a recovery may be had although the deceased's own negligence, as an employe engaged in hoisting the lumber, contributed to his injury. The instruction is not subjected to this construction. It required by its terms that the deceased should have been himself in the exercise of due care.

The third instruction informed the jury that they might take into consideration the reasonable expectation of life of the deceased and of his next of kin in estimating their pecuniary loss by his death, and it is objected that the mere expectation of life was not proper to be considered in this case, where there was no legal claim for pecuniary aid; the deceased being an adult and the next of kin his father and mother. If there was an actual loss of pecuniary aid, one element in determining its amount was the length of time such aid might be expected to continue, and, while it might be terminated by many contingencies other than the death of the giver or the receiver, yet the probable length of their respective lives was proper to be taken into consideration in estimating the amount.

The fifth instruction was as follows: "The court further instructs the jury, as a matter of law, that a servant may, in the absence of notice and when he is in the exercise of reasonable care for his own safety, rely upon the presumption that the master has done his duty in furnishing all reasonably safe appliances and surroundings to his servant to enable him to perform the service engaged to be performed, and that the burden of proving that Gaylord had actual notice of the

defective construction of the derrick or hoist, if it was so, is upon the defendant, and if the evidence fails to establish such notice to the said Gaylord, then the presumption is Gaylord relied upon the performance of the said legal duty of the master and had no such notice, if the jury believe, from the evidence, that the relation of master and servant existed between Gaylord and the George B. Swift Company." This court in the case of *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95, assumed the rule of law in respect to the burden of proof in an action by a servant against the master for an injury resulting from defective appliances to be as stated in *Wood on Master and Servant*, § 414: "The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions: First, that the appliance was defective; second, that the master had notice thereof, or knowledge, or ought to have had; third, that the servant did not know of the defect, and had not equal means of knowing with the master." The same rule was recognized in the cases of *Karr Supply Co. v. Kroenig*, 167 Ill. 560, 47 N. E. 1051, *Chicago & Alton Railroad Co. v. Scanlan*, 170 Ill. 106, 48 N. E. 826, *Hines Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38, and *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724. In the latter case the rule was stated to be the well-settled law of the state. In *Lake Erie & Western Railroad Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573, two instructions given at the instance of the plaintiff directed a verdict for her. The judgment in her favor was reversed, and the giving of the instructions held to be error, because neither instruction embraced the proposition that the plaintiff was bound to prove that the deceased did not know of the defect causing the injury and had not equal means of knowing with the master. And in *Armour v. Brazeau*, 191 Ill. 117, 60 N. E. 904, the judgment was reversed, and it was held error to refuse an instruction imposing upon the plaintiff the burden of proving the existence of the defect and that it caused the injury, defendant's knowledge, plaintiff's lack of knowledge and of means of knowledge equal to the defendant's, and that plaintiff was in the exercise of ordinary care. The same rule is announced or recognized in other cases. *Chicago & Eastern Illinois Railroad Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Momence Stone Co. v. Turrell*, 205 Ill. 515, 68 N. E. 1078; *Sargent Co. v. Baublis*, 215 Ill. 428, 74 N. E. 455; *Montgomery Coal Co. v. Barringer*, 218 Ill. 327, 75 N. E. 900; *McCormick Harvesting Machine Co. v. Zakzewski*, 220 Ill. 522, 77 N. E. 147, 4 L. R. A. (N. S.) 848.

The case of *Chicago & Eastern Illinois Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515, has been referred to as sustaining this instruction, but the subject-matter there under consideration was the sufficiency of the declaration to support the

judgment after a demurrer had been overruled and trial had. What the court held was that the allegation of due care in the deceased negated negligence, and, by implication, that he had knowledge of the defects by reason of which he was injured, and that it was, therefore, sufficient on error. And in the case of *City of La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72, it was held that the allegation of the declaration that the plaintiff was using due and ordinary care for his own safety was a sufficient allegation that he did not know, and had no opportunity of knowing, the defective conditions to justify an instruction that, if he had made out his case as laid in the declaration by a preponderance of the evidence, he should have a verdict. In the first case it is said that it is matter of defense that the deceased had knowledge of the defects through which his injuries were received, and this is quoted in the second case. But it was merely argument in either case. If the allegation of due care negated knowledge of the defect, then, in order to sustain the allegation, the plaintiff would be required to prove want of knowledge. There is some conflict of authority concerning the burden of proof in such cases. In some of the states the rule is different from that which prevails in this state. In actions for personal injuries it has always been held in this state that the plaintiff must allege and prove that he was free from negligence contributing to the injury. It is said in *Thompson on Negligence* (volume 1, § 368) that in those jurisdictions where the burden rests on the plaintiff to prove his freedom, or the freedom of the person killed or injured, from contributory negligence, the rule by analogy is that the burden will rest upon the employé of proving that he did not accept the risk of the employment, and the want of knowledge of the danger must be averred and proved; and such has been the rule in this state. It is true that, to charge the servant with negligence, he must not only know, or have the means of knowing by the exercise of ordinary care, of the defect, but must also know that the defect renders the appliance unsafe to use, and he is not bound to make an inspection for latent defects. Where want of knowledge is not susceptible of direct proof, it may be inferred from circumstances, and the plaintiff may be aided by the presumption that a person does not voluntarily incur danger or the risk of death. Knowledge or want of knowledge of a defect may be inferred from the circumstances; but, by whatever evidence the fact must be shown, the burden of proof in that regard rests upon the plaintiff. By the fifth instruction the jury were told that this burden was on the defendant. The second instruction is also subject to criticism for omitting the element of the deceased's knowledge or means of knowledge of the alleged defect.

For the error of the circuit court in giving

the second and fifth instructions, its judgment, and that of the Appellate Court, will be reversed, and the cause remanded to the circuit court for a new trial.

Reversed and remanded.

FARMER and VICKERS, JJ., took no part in the decision of this case.

(229 Ill. 367)

GLOS et al. v. SWANSON.

(Supreme Court of Illinois. Oct. 23, 1907.)

WRIT OF ERROR—DISMISSAL OF WRIT—VACATION OF JUDGMENT BY TAKING NEW TRIAL.

The payment of costs within a year and taking a new trial under the statute in an ejectment case vacates the judgment on the first trial, so that the writ of error to review it theretofore sued out should be dismissed.

Error to Circuit Court, Cook County; R. W. Clifford, Judge.

Action by Huldar Armia Ellinor Swanson against Jacob Glos and others. Plaintiff had judgment, and defendants brought error. Writ dismissed.

See 81 N. E. 386.

Jacob Glos (John R. O'Connor, of counsel), for plaintiff in error Glos. William Gibson, for defendant in error.

VICKERS, J. This is a writ of error brought by Jacob Glos and Emma J. Glos to reverse a judgment of the circuit court of Cook county in favor of Huldar A. E. Swanson for the recovery of lots 12 and 13, in Knickerbocker's subdivision of the south 4.15 acres of block 20, in the canal trustee's subdivision of the east half of section 31, township 39, range 14, in Cook county. The case was tried in June, 1905, and at the conclusion of the evidence the court directed a verdict for plaintiff below. It appears that an appeal was prayed to this court and an appeal bond filed, but that, instead of perfecting the appeal, a writ of error was sued out from this court, and the record brought up on such writ. Afterwards, and within a year, plaintiffs in error paid the costs in the circuit court, and took a new trial under the statute. The case was retried in the circuit court, and a verdict was again rendered against plaintiffs in error by direction of the court and judgment entered in January, 1907. From this last judgment plaintiffs in error prayed an appeal to this court, which was perfected and submitted for decision at the February term, 1907. At the succeeding April term of this court an opinion was filed in said cause, and at the following June term a petition for rehearing was denied, and our opinion in that case is found as Glos v. Swanson, 227 Ill. 179, 81 N. E. 386.

The payment of the costs within a year and taking a new trial under the statute vacated the first judgment and this writ of error should have been dismissed, but by failure of counsel to call this court's attention

to the state of the record no formal order of dismissal has been entered. Our opinion in the case above cited fully disposes of the merits of this case, and the writ of error will therefore be dismissed.

Writ dismissed.

(229 Ill. 387)

GLOS et al. v. GRANT BUILDING, LOAN & HOMESTEAD ASS'N.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. RECORDS—PROCEEDINGS TO REGISTER TITLE—EVIDENCE.

In a proceeding to register land title, deeds describing the lands as certain lots in certain subdivisions are insufficient to locate the lots, where no plat of any subdivision is offered, and there is no evidence that any such plat or subdivision was ever made, or that the lots or subdivision have any legal existence.

2. SAME—ABSTRACTS OF TITLE.

An examiner of titles for registration improperly considers abstracts of title in making up his report, where they are not returned by him as part of the evidence.

Writ of Error to Circuit Court, Cook County; R. S. Tuthill, Judge.

The Grant Building, Loan & Homestead Association applied under the Torrens law to register title to land. From a decree ordering registration of title in fee simple in applicant, Jacob Glos and another bring error. Reversed and remanded.

Jacob Glos (John R. O'Connor, of counsel), for plaintiffs in error.

CARTER, J. On May 20, 1903, defendant in error filed its application under the Torrens law in the circuit court of Cook county to register its title to lot 32, in block 2, in Schlesinger's subdivision of the S. W. ¼ of the S. E. ¼ of the S. E. ¼ of section 6, township 38 N., range 14 E. of the third principal meridian; also to lot 42, in block 2, in Huling & Johnson's subdivision of block 13, in Stone & Whitney's subdivision, in sections 6 and 7, township 38 N., range 14 E. of the third principal meridian, in Cook county, Ill. Applicant alleged that the land was occupied by its tenants, that there were no liens thereon, and that no persons were interested, except Jacob Glos and A. A. Timke. Glos answered, claiming title to said real estate, but neither admitting nor denying the other allegations. Timke filed a demurrer, which was overruled, and he elected to stand by it. Reference was had to the examiner of titles, who took evidence, which was later certified to the court with his report. Objections to this report filed by Timke and Glos were overruled, and, being allowed to stand as exceptions, were again overruled, and decree entered ordering the registrar of titles to forthwith register title in fee simple in applicant to the premises described in the application. No brief has been filed by defendant in error.

As we understand the record, the evidence before the examiner consisted of testimony

that defendant in error had been in possession of said lot 32 since 1898, when it obtained title through foreclosure, and was still in possession by its tenants, one Lesko and another person; that said lot 42 was then in the possession of one Horak as a tenant of defendant in error, and that one Joseph Strika owned and occupied it from 1893 to 1898, when the defendant in error acquired title to it by foreclosure proceedings. A master's deed to said lot 32, dated December 29, 1899, was offered in evidence, also a master's deed to said lot 42, dated April 11, 1900, and certified copies of decrees upon which these two master's deeds were based. There was no evidence of payment of taxes by or for defendant in error, and no other evidence of title introduced. No plat of any subdivision was offered as to either of the two lots in question, and there was no evidence that any such plat or subdivision was ever made. It was not shown that said lots or subdivisions mentioned in said master's deeds had any legal existence. The deeds alone furnish no means of locating these lots, and the proof, therefore, was insufficient. *Glos v. Ehrhardt*, 224 Ill. 532, 79 N. E. 605.

The report of the examiner of titles recited that he had been furnished by the applicant with certain abstracts of title. These abstracts were not returned by him as a part of the evidence, nor were they offered in evidence upon the hearing, and they do not appear in this record. We held in *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80, that it was not within the province of the examiner to make *ex parte* examinations of title not introduced in evidence before him, and that the applicant for initial registration of title should introduce his evidence before the examiner of titles, upon notice to the defendants, in such form that the latter may preserve their rights for review by objection to the evidence. Under the authority of this decision, and the cases therein cited, the examiner improperly considered the abstracts of title in making up his report. See, also, *Messenger v. Messenger*, 223 Ill. 282, 79 N. E. 27.

For the reasons suggested, the decree of the circuit court will be reversed, and the cause remanded.

Reversed and remanded.

(230 Ill. 61)

PEOPLE ex rel. BROWNING, County Collector, v. **ST. LOUIS, A. & T. H. R. CO.** et al. (Supreme Court of Illinois. Oct. 23, 1907.)

1. TAXATION—ASSESSMENT—INCREASE IN INTERMEDIATE YEARS.

It was improper for the board of review in 1905 to increase an assessment of land made in 1903 on account of supposed increase in value of underlying coal and mineral through the location of a mine on other land in the vicinity.

2. SAME—OBJECTIONS—SUFFICIENCY OF SHOWING.

An objection that a road and bridge tax exceeded the rate allowed by law was properly

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overruled, where it was impossible to tell from the record what rate was extended; the *prima facie* case made by the collector's delinquent list being not overcome.

3. SAME.

Where a delinquent tax list shows an unpaid general city tax, against the regularity of the levy of which nothing appears, but no tax to pay bonds and interest, an objection that a tax for bonds and interest was improperly extended should have been overruled.

4. MUNICIPAL CORPORATIONS—TAXATION—VALIDITY OF LEVY.

There being no appropriation ordinance in force when a tax levy ordinance is passed, the tax levy ordinance is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2069.]

5. SCHOOLS AND SCHOOL DISTRICTS—PUBLIC—TAXATION.

It is no objection to a school district tax for \$340 for building purposes that only one bond, amounting to \$212, was outstanding, it not appearing there was no other indebtedness for building purposes, since, though the school directors could not build a schoolhouse without a vote of the district, they need not submit to the voters the cost of the building to be erected, and, if the amount of the bonds issued did not equal the cost of the building, a levy for building purposes to make up the difference is valid.

Appeal from Franklin County Court; W. F. Slater, Judge.

Application by the people, on the relation of William R. Browning, county collector, for judgment and order of sale against the lands of the St. Louis, Alton & Terre Haute Railroad Company and others for delinquent taxes. Judgment being denied, relator appeals. Reversed in part, and remanded.

William P. Geeber, State's Atty. (O. H. Layman and T. J. Layman, of counsel), for appellant. W. S. Cantrell (W. W. Barr, of counsel), for appellee St. Louis, A. & T. H. R. Co. Hart & Williams, for other appellees.

DUNN, J. At the June term, 1906, of the county court of Franklin county, the county collector made application for judgment and order of sale, against the lands of the several appellees herein for delinquent taxes assessed for the year 1905. Numerous objections were filed, which were heard together and sustained, and judgment denied in each case, from which judgment an appeal has been prosecuted to this court by the people.

One objection is common to all the appellees except the railroad company, and, since it is vital, it alone, aside from those peculiar to the railroad company, will be considered. The lands of these appellees were assessed in 1903. In 1905 the board of review increased the assessment of appellees' lands on account of the supposed increase in value of the coal and mineral underlying them by reason of a mine having been located on other land in the vicinity. In the case of *Crozer v. People*, 206 Ill. 464, 69 N. E. 489, it was held that the board of review is without authority, in the years intervening the years of the general assessment, to increase the assessed value of real estate, except in instances where new or added buildings,

structures, or other improvements of some kind shall have been placed upon the real estate after April 1st of the year of the general assessment. That case is conclusive of the question here, and there was, therefore, no error in sustaining this objection.

The St. Louis, Alton & Terre Haute Railroad Company objected to the road and bridge tax of the town of Benton because it is said to be 5 cents on the \$100 in excess of the rate allowed by law. If such is the case, the evidence of the fact has not been preserved. The value of objector's right of way is not shown, and the county clerk testified that the amount of road and bridge tax levied by the commissioners was 45 cents. He did not testify what amount or what rate was extended. The commissioners' certificate of levy does not appear in the record. It does not appear whether the town was under the cash system or under the labor system. If under the former, a levy of 60 cents on the \$100 was authorized; if under the latter, a levy of 80 cents might be made under certain conditions, the existence or nonexistence of which is not shown. It is impossible to tell from this record what rate was extended, and the prima facie case made by the collector's delinquent list was not overcome.

The railroad company also objected to the city tax of the city of Benton for the purpose of paying bonds and interest. The county clerk testified that he extended the tax for the purpose of paying bonds and interest of the city of Benton by authority of an ordinance passed January 4, 1893, providing for the purchase by the city of an electric light plant for \$5,000 and the issuance of bonds for the payment therefor, and purporting to levy, for the payment of such bonds and the interest thereon, a tax in each year for 15 years; the amount for the fiscal year beginning June 1, 1905, being \$590. The delinquent list shows no city tax "for the purpose of paying bonds and interest," but only "city tax of Benton, \$100.95." Counsel for the railroad company say in their argument that the county clerk extended \$2 on each \$100 valuation to raise the amount levied by the annual appropriation bill, and \$1.50 on each \$100 to pay bonds. It does not so appear in the record. The delinquent list shows an unpaid city tax, against the regularity of the levy of which nothing is shown. No judgment is asked for any tax to pay bonds or interest. The objection to this tax should, therefore, have been overruled.

Objection is made to the village tax of the village of Thompsonville, \$63.97, for the reason that the original, and not a certified copy, of the levy ordinance was filed with the county clerk, and that there was no appropriation ordinance in force when the levy ordinance was passed. The appropriation ordinance was passed and approved August 7, 1905, but was not published until August 11. The levy ordinance was passed August 11, 1905. There was, therefore, no appropriation

ordinance in force when the tax levy ordinance was passed, and in consequence the latter was void. *People v. Florville*, 207 Ill. 79, 69 N. E. 623. The objection to the village tax of Thompsonville was properly sustained.

The directors of school district No. 70 certified that they required \$340 for building purposes, and it is objected to this tax that only one bond, amounting, with interest, to \$212, was outstanding, and for the excess above that amount the levy was without authority of law. Counsel says in his brief this tax was levied for paying this one bond; but this statement cannot be accepted as evidence. While this was the only bond outstanding, the record contains no evidence that there was no other indebtedness incurred for building purposes. The directors had no authority to build a schoolhouse without a vote of the district; but they were not required to submit to the voters the cost of the building to be erected, and, if the amount of the bonds issued did not equal the cost of the building, a levy for building purposes to make up the difference is valid. *People v. Chicago & Northwestern Railway Co.*, 186 Ill. 139, 57 N. E. 838; *People v. Peoria & Eastern Railway Co.*, 216 Ill. 221, 74 N. E. 734. This objection should have been overruled.

The judgment of the county court is affirmed in all things, except as to the road and bridge tax of the town of Benton, the city tax of the city of Benton, and the school tax of district No. 70, as to which the judgment is reversed, and the cause remanded.

Reversed in part, and remanded.

(229 Ill. 369)

LININGER v. HELPENSTELL.

(Supreme Court of Illinois. Oct. 23, 1907.)

HOMESTEAD—CONVEYANCE—JOINT TENANTS—HUSBAND AND WIFE—JOINDER.

Homestead Act, § 4, prohibiting the conveyance of a homestead without the joinder of the wife of the grantor, is applicable to a homestead held by a husband and wife as joint tenants, so that deeds executed by them separately attempting to convey the property were invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 207.]

Appeal from Rock Island County Court; E. E. Parmenter, Judge.

Petition by E. F. Helpenstell, as administrator of the estate of Jacob Dels, deceased, against Conrad H. Lininger. From a judgment for complainant, defendant appeals. Affirmed.

Searle & Marshall, for appellant. S. R. Kenworthy, for appellee.

SCOTT, J. Appellee, as administrator of the estate of Jacob Dels, deceased, filed his petition in the county court of Rock Island county, praying for an order directing him, as such administrator, to sell certain real estate alleged to have been owned by said

deceased, to pay the debts of said estate. Incidentally it was also sought to have certain deeds of record in that county delivered up and canceled of record as clouds upon the title to said real estate. The only defense interposed to the petition was that Jacob Deis was not, at the time of his death, the owner of said real estate. Upon the hearing appellee introduced in evidence a deed from Moses Heidelberg and wife, dated August, 1872, conveying the premises described in the petition to Jacob Deis and Caroline Deis, his wife, as joint tenants, and not as tenants in common. It was stipulated by the parties that said premises were used and occupied by Jacob Deis and Caroline Deis, his wife, as a residence, continuously from the date of that deed up to the death of Jacob Deis; that Caroline Deis departed this life intestate on February 21, 1904; that Jacob Deis departed this life intestate on March 10, 1904; and that said premises have not, at any time since August, 1872, been worth more than \$1,000. Appellant, to maintain his defense, offered in evidence a warranty deed from Jacob Deis to Caroline Deis dated April 22, 1899, and executed by Jacob Deis alone, which purported to convey said premises to the grantee therein named; also a warranty deed from Caroline Deis to Dorothea Singleman, dated February 27, 1903, and executed by Caroline Deis alone, which purported to convey said premises to Dorothea Singleman; and a warranty deed from Dorothea Singleman to Conrad H. Lininger, the appellant, dated September 25, 1905, which purported to convey to him the premises in controversy. Caroline Deis left, her surviving, Jacob Deis, her husband, William Kelpp, her son by a former marriage, and Dorothea Singleman, the child of a deceased daughter by the former marriage, as her only heirs at law; and Jacob Deis left, him surviving, Mary Studer, a daughter, and George Deis, a son, both by a former marriage, as his only heirs at law. The heirs of Jacob Deis and the heirs of Caroline Deis, together with Conrad H. Lininger, were made defendants to the petition. The county court found that the deed from Jacob Deis to Caroline Deis, the deed from Caroline Deis to Dorothea Singleman, and the deed from Dorothea Singleman to Conrad H. Lininger, were clouds upon the title descended from Jacob Deis, deceased, and ordered that they be set aside and declared null and void, and that the petitioner proceed to sell said real estate to pay the debts of the estate of said deceased and the costs of administration. Conrad H. Lininger has prosecuted an appeal to this court.

The deed from Jacob Deis to Caroline Deis was declared void by the county court on the ground that it attempted to convey the homestead of the grantor and was not signed and acknowledged by his wife, as required by section 4 of the homestead act (Hurd's Rev. St. 1905, c. 52). In *Brokaw v.*

Ogle, 170 Ill. 115, 48 N. E. 394, and *Wike Bros. v. Garner*, 179 Ill. 257, 53 N. E. 613, 70 Am. St. Rep. 102, this court held that a homestead may exist in lands held in co-tenancy in favor of the occupying tenant as against creditors of that tenant. Appellant contends, however, that if a homestead can be asserted in lands, held in co-tenancy, by one co-tenant as against the creditors of that co-tenant, it cannot be asserted as against or to the prejudice of the other co-tenants. Appellant does not, however, indicate in what manner that proposition is of controlling effect in the case at bar. The statute creates the estate of homestead for the benefit of the householder and his or her family, and requires any release, waiver, or conveyance of such estate to be in writing, subscribed by the householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, unless possession is abandoned or given pursuant to the conveyance. The statute gives the wife of the householder the power to prevent a sale of the homestead in case she desires so to do, and by its terms it is equally applicable whether the husband is the owner of the realty in fee simple absolute or is merely one of several joint tenants owning the land.

It is said, however, that "where the joint tenants are husband and wife, if one may assert a homestead in the joint estate which can be conveyed only in the manner prescribed by the statute, then the other joint tenant is powerless to destroy or sever the joint tenancy, and thus defeat the right of survivorship, except with the consent of the other joint tenant, who by dissenting has the possibility of profiting thereby," and it is urged that this affords a reason for holding that no homestead attaches in such cases as that at bar, as between the husband and wife. This reasoning, if carried to its logical conclusion, would defeat the homestead exemption in all cases. If the wife can prevent the husband conveying any interest in the homestead when he is the owner of all the title therein, it would not seem a good objection to the assertion of the homestead right to say that if it be held to exist it would prevent the husband conveying his interest in the realty covered thereby when his interest was merely that of a joint tenant. In either event the wife may profit by his inability to convey. The condition of the husband in this regard is the same whether he owns the entire title to the property or is merely a joint tenant with his wife. The wife, here, could assert a right of homestead as against her co-tenant, not alone because she occupied the premises as a homestead, but because, in addition to that fact, the co-tenant was her husband. Had the person owning the property jointly with her been some person other than her husband, the question whether she could assert a

homestead to the prejudice of that joint owner would be determined upon different considerations entirely.

The respective interests which a husband and wife have in property owned by them in common and occupied by them as a residence are discussed in *Capek v. Kropik*, 129 Ill. 509, 21 N. E. 836. There the husband and wife had been tenants in common of the property. The wife died, leaving, her surviving, her husband, and also leaving minor children by a former marriage. The surviving husband sought to have his homestead set off in the whole of said premises. In considering the relative rights of the husband and wife in the property, and the rights of her children therein after her death, this court said (page 518 of 129 Ill., page 838 of 21 N. E.): "Appellant and his wife were seised as tenants in common of the lot in question, and, each occupying the same as a residence for themselves and family, were jointly seised of an estate of homestead in such lot. Upon the death of the wife the fee to the moiety owned by her descended to and vested in her heirs at law, subject to the homestead interest of the surviving husband and her minor children, and the dower right of the husband in the residue of the premises after the allotment of the homestead estate. Upon her death, as before, the husband, by virtue of the statute, was entitled to homestead in one-half of said lot in his own right, as owner of the fee, and the homestead interest in the moiety of which the wife died seised was by the statute continued for his benefit and for the benefit of the minor children of the wife until the youngest attained the age of 21 years; each moiety of the fee contributing to the homestead estate. * * * It is apparent that the right of occupancy is not divisible, and although the minor stepchildren could only have homestead in the moiety of which their mother died seised, yet the right of occupancy, so long as the homestead continues, must necessarily continue for their benefit in the whole of the land constituting the homestead; that is, no allotment of the homestead could be made except by setting off by metes and bounds, or otherwise, the dwelling house, etc., of the value of \$1,000. And it necessarily follows that any allotment of homestead made to appellant must require that each moiety of the fee contribute its share thereto. It was not therefore error for the court, upon the prayer of complainant that his homestead be set off to find and declare the homestead to exist in the whole of said premises." In the case last cited the husband and wife were tenants in common of the property, while in the case at bar they were joint tenants. That difference, however, is not material in considering the nature of the estate held by the husband and wife during the lifetime of both. If they are "jointly seised of an estate of homestead" in the property held by them as

tenants in common, it necessarily follows that they are jointly seised of an estate of homestead in property held by them as joint tenants.

The deed from Jacob Deis to Caroline Deis, his wife, was inoperative and void because it attempted to convey the homestead of the grantor and was not signed and acknowledged by his wife, as required by section 4 of the homestead act. *Klitterlin v. Milwaukee Mechanics' Mutual Ins. Co.*, 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220; *Barrows v. Barrows*, 138 Ill. 649, 28 N. E. 983. The deed from Caroline Deis to Dorothea Singleman was likewise void because it attempted to convey the homestead of Caroline Deis and was not signed and acknowledged by the husband of the grantor. The deed from Dorothea Singleman to the appellant depended upon the validity of the deed from Caroline Deis. That deed being void, the deed from Dorothea Singleman to the appellant passed no title. Upon the death of Caroline Deis, her husband, Jacob Deis, became seised of the entire title to the premises in controversy by the right of survivorship. So far as this record shows, he died seised in fee of those premises, and they descended to his heirs, subject, however, to the right of his administrator to resort to them for the payment of the debts of the estate.

The decree of the county court was therefore the proper one in this case, and it will accordingly be affirmed.

Decree affirmed.

(229 Ill. 412)

ABERNATHIE et al. v. RICH et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CANCELLATION OF INSTRUMENTS—PROCEEDINGS AND RELIEF—PARTIES.

Where a bill by children and a grandchild of a decedent to cancel deeds of premises owned by decedent and for an accounting as to rents and profits failed to join as parties the children of a deceased daughter of decedent, or any person who had succeeded to her interest, if any, in the premises, there was a fatal defect of parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 55-65.]

2. SAME.

Where a bill to cancel conveyances of land, and to have it decreed that the title purported to be conveyed thereby was in complainants, failed to join as parties grantors in those of the conveyances which were warranty deeds, there was a fatal defect of parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, §§ 55-64.]

3. SAME—EFFECT OF NONJOINDER.

Where a final decree in a suit to cancel deeds cannot be made without materially affecting the interests of persons not made parties, neither the court of original jurisdiction nor of review should proceed further until the omission be corrected, though no objection is made by any party litigant.

4. SAME.

Where one of the complainants in a bill to cancel deeds was of unsound mind, and had been adjudged insane prior to the filing of the bill, laches cannot be imputed to her, nor can

she be charged with fault in the omission of necessary parties.

Error to Circuit Court, Union County; W. N. Butler, Judge.

Bill by William L. B. Abernathie and others against William C. Rich, Sr., and others. Decree for defendants, and complainants bring error. Reversed and remanded, with directions.

Plaintiffs in error filed their bill against defendants in error, in the circuit court of Union county, to set aside certain deeds executed by James M. Abernathie, now deceased, to lands now in possession of certain of the defendants in error, and for other relief.

From the record it appears that James M. Abernathie died intestate on January 12, 1877, leaving surviving him a widow and children. On September 20, 1876, the deceased was the owner of two farms in Union county, the titles to which are here in dispute. One of the farms contained 248.32 acres, and was worth from \$10 to \$15 an acre, and the deceased, with his family, resided thereon. The other contained 160 acres, and was worth from \$15 to \$20 an acre. Of this tract 120 acres was mortgaged by deceased and his wife to one Hugh M. Andrews, prior to the last-mentioned date, to secure the payment of \$371.63. This mortgage was afterward foreclosed and the property sold for the debt, interest, and costs, and on February 6, 1882, a master's deed was executed, conveying to William S. Hanners, one of the defendants herein, the property conveyed by said mortgage. On September 20, 1876, James M. Abernathie and his wife executed a deed to all of the above described land, except 40 acres of the larger tract, to James R. Abernathie, a son of James M., and at the same time the father executed a bill of sale of all his personal property to his said son. There seems to have been no consideration for either conveyance. On the same day the instruments were filed for record in the recorder's office of Union county, and afterward, when recorded, were returned to James M. Abernathie, and were found among his papers after his death. Shortly after the father's decease James R. Abernathie, as he says, learned from Hanners for the first time of the execution of the deed and bill of sale, and, upon Hanners' advice, went to the house in which his father had resided and obtained possession of the papers. Upon the death of James M. Abernathie, the father, James R. Abernathie, the son, took out letters of administration upon his estate. In the inventory filed by him he scheduled all the personal property which had been transferred to him under the said bill of sale and had the same appraised; the appraisal amounting to \$1,120.32. The inventory also contained the following entry: "Real estate was deeded to James R. Abernathie during the lifetime of James M. Abernathie, now deceased." The widow's

award was fixed at \$1,277, and on June 27, 1877, she receipted the administrator for all of the personal property. Claims amounting to several hundred dollars were allowed against the estate.

The bill herein was filed by three of the children and one grandchild of the deceased; the grandchild being a child of his daughter, Louisa J. Carter, whose death followed that of her father. The bill sets out, in substance, the foregoing statements of fact, and alleges that, immediately upon the filing of the receipt of the widow for the personal property, the said Hanners, who was then county clerk of Union county, procured the removal of James R. Abernathie as administrator, and went to the home of the widow and represented to her that, because of the execution of the deed and bill of sale above mentioned, she had no right to either the real estate or personal property; that he was administrator since the removal of James R. Abernathie, and that the personal property must be turned over to him to pay the debts of the estate; that he took possession of and sold the same for \$900, and afterwards, on June 1, 1878, used said money with which to purchase the land at said foreclosure sale, alleges that on the day of said sale the said Hanners and one Jesse Ware, who was the solicitor for the complainant in the foreclosure proceeding, procured the intoxication of said James R. Abernathie, and while he was so intoxicated they secured his signature to a quitclaim deed to said Hanners for the said 160-acre tract; that on June 5, 1878, said Andrews, Ware, and Hanners went to a harvest field where James R. Abernathie was at work, and by false representations Hanners and Andrews induced him to sign a paper which afterward proved to be a deed to N. B. Collins, Samuel Springs, and Charles Crowell to 208.32 acres of the homestead tract; that said parties then by false representations induced the wife of James R. Abernathie to sign said paper, and that the deed was without consideration; that between the date of the execution of said deed and January 22, 1879, said Hanners, while he was the duly appointed and qualified administrator of said estate, procured separate deeds from each of the last mentioned grantees to himself for all of said lands; that said Hanners was appointed administrator de bonis non of said estate on July 29, 1878, and as such, on July 7, 1879, filed a petition asking an order to sell the remaining 40 acres of said homestead tract to pay debts; that a decree of sale was entered without in any manner disposing of the dower of the widow or the homestead of the widow and minor children, and that said Ware acted as guardian ad litem for said minors; that in his petition for sale said Hanners swore that said 40-acre tract was worth \$200, and that on May 15, 1880, he sold the same to his deputy, Joseph H. Sampson, for \$45, and on

March 14, 1881, said Sampson conveyed said tract of land to Hanners for \$45; that on the same day Hanners conveyed all of said 248.32 acres to T. J. Murphy for \$850, and on December 9, 1882, Hanners conveyed the same tract to Ware; that on June 1, 1883, T. J. and G. W. Murphy conveyed said tract to Ware, and on June 4, 1883, Ware conveyed an undivided one-half interest in the same to David W. Karraker, and on April 14, 1883, Karraker and wife and Ware conveyed all of said tract to William C. Rich, Sr.; that on January 17, 1883, Hanners conveyed the 160-acre tract to one Elijah Hartline, who afterward, on February 20, 1883, conveyed it to Jacob Rendleman; that Rendleman afterward died testate, appointing John Rendleman executor of his last will, with power to sell and dispose of his real estate; that John Rendleman, as such executor, conveyed said land to Robert Rendleman, who at the time of said conveyance to him knew that the heirs of James M. Abernathie had been defrauded of said lands. The bill further alleges that all of the defendants knew, at the time they purchased said lands, that the title thereto acquired by Hanners had been obtained by fraud and circumvention; that as administrator, to cover up and conceal his acts, Hanners never made a report to the county court and has never obtained his discharge; alleges that the complainants did not learn that the deed from James M. Abernathie was not intended to convey the title to said lands, and that the same was not delivered until within five years next before the commencement of this suit, and that James R. Abernathie, through fear of criminal prosecution if he revealed how he obtained the deed made by his father and how the other deeds were obtained from him, kept such transactions secret from the complainants; that William C. Rich, Sr., and Robert Rendleman, defendants herein, have been in possession of said lands since they were conveyed to them and have received the rents and profits therefrom. The bill prays that the deed from James M. Abernathie to James R. Abernathie, and all the conveyances of said premises from that time down to and including the conveyances to Rich and Rendleman, be canceled and declared null and void as to the complainants, and that an accounting be taken of the rents and profits between the complainants and defendants Rich and Rendleman. Rich, Ware, Hanners, Karraker, Robert Rendleman, and James R. Abernathie were the only defendants to the bill.

Pleas were interposed to the bill by Ware, Karraker, Rich, and Rendleman setting up the statute of limitations of 20 years, 7 years' payment of taxes with color of title and possession, and 7 years' payment of taxes with color of title to vacant land. Hanners filed an answer, which was a general denial of the allegations of the bill.

Rich, Ware, Karraker, and Rendleman also answered, admitting the execution of the various deeds at the times stated in the bill; alleging that the deed and bill of sale executed by James M. Abernathie and wife were made for the express purpose of transferring the title to the property therein conveyed to James R. Abernathie, that James M. Abernathie was indebted to Springs, Collins, and Crowell in the sum of \$1,200, and in consideration of that debt the conveyance of the said 208.32 acres was made to them by James R. Abernathie and wife, and alleging that the grantors knew for what purpose the deed was executed; admitting that Rich and Rendleman have been in possession of the land since its conveyance to them; alleging that the two latter have paid the taxes thereon and claim to own the same; averring that, if complainants ever had any cause of action, the same has been barred by the statute of limitations and laches; and denying the other material allegations of the bill. In addition the answer of Rendleman alleges that said land conveyed to him was sold for taxes on June 11, 1877, to William C. Rich, Sr., who received a deed therefor on September 1, 1879, and that the title so obtained by Rich is now vested in Rendleman. James R. Abernathie defaulted.

Replications were filed and the cause was referred to a special master to take and report the proofs. Upon the coming in of his report a hearing was had, and on July 7, 1906, the court entered a decree dismissing the bill for want of equity. Complainants bring the record here by writ of error. It is urged by them that the court erred in dismissing the bill.

Taylor Dodd and Richard Peery, for plaintiffs in error. M. C. Crawford, H. F. Bussey, and D. W. Karraker, for defendants in error.

SCOTT, J. (after stating the facts as above). In this case there was a fatal lack of parties. James M. Abernathie left, among other heirs, Mary Nickens, a daughter. After his death and prior to the beginning of this suit she departed this life. Whether testate or intestate does not appear, but it is shown by the proof that she left two children, who still survive and who reside in Union county. These children of Mary Nickens were not made parties, and no person was made a party who had succeeded to her interest, if any, in the subject-matter of this suit. The bill prayed for an accounting as to rents and profits. If the bill were proven, those who succeed to the rights of Mary Nickens would be entitled to a portion of such rents and profits. It has been frequently held in partition suits that all persons having an interest in the land must be made parties. *Kester v. Stark*, 19 Ill. 328; *Daniel v. Green*, 42 Ill. 471. It is apparent that the reason of that holding requires that those who suc-

ceed to the rights of Mary Nickens, and who on the theory of the bill own an interest in the lands and are entitled to share in such rents and profits, should in some way have been made parties to this proceeding.

The record title to the real estate appeared, by the instruments offered, to have passed by various mesne conveyances from James M. Abernathie to William C. Rich, Sr., and Robert Rendleman. Certain of these mesne conveyances were warranty deeds, which the bill prays may be canceled and by decree declared null and void, and the bill also asks that the title which such deeds seemed to convey should be decreed to be in the complainants. The grantors in certain of the warranty deeds which complainants sought to have canceled and held null and void were not made parties to the suit. If a decree should be entered in accordance with the prayer of the bill, these grantors would be exposed to litigation by reason of the breach of their covenants of warranty. Those warranty deeds should not be set aside in this suit as to the grantees therein, except by a decree binding upon the grantors therein. We are of the opinion that the rights of these grantors and the rights of those who succeed Mary Nickens are so intimately connected with the subject-matter of the controversy that a final decree could not be made in this cause without materially affecting their interests. Where this appears, neither the court of original jurisdiction nor a court of review should proceed further in the matter until the omission be corrected, even though, as here, no objection is made by any party litigant. *Herrington v. Hubbard*, 1 Scam. 569, 33 Am. Dec. 426; *Spear v. Campbell*, 4 Scam. 424; *Prentiss v. Kimball*, 19 Ill. 320; *Knopf v. Chicago Real Estate Board*, 173 Ill. 196, 50 N. E. 658.

In this case the defect of parties resulted, in the first instance, from the fact that complainants below, plaintiffs in error here, did not make the necessary parties to the bill. If plaintiffs in error were all free from legal disability, we would not reverse the decree against them for the reason alone that there was a lack of necessary parties, but one of the complainants below, Sarah A. Abernathie, a daughter of James M. Abernathie, deceased, has been of unsound mind since the time of her father's decease, and had been adjudged insane prior to the filing of the bill. Laches could not be imputed to her, nor can it be said that she is chargeable with fault on account of the omission of necessary parties. It is our province to protect her in this regard, and we will not proceed further in the matter until the defect in parties is cured.

The decree of the circuit court will be reversed and the cause will be remanded, with directions to that court to grant leave to the complainants to amend their bill in such manner as to make the necessary parties

thereto, if such leave shall be sought. Each party will pay one-half the costs of this court.

Reversed and remanded, with directions.

(229 Ill. 538)

ANDERSON v. ANDERSON.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. PROCESS—PUBLICATION—AFFIDAVIT.

1 Starr & C. Ann. St. c. 22, § 12, p. 568, authorizes publication of notice on an affidavit showing that defendant resides or hath gone out of the state, or on due inquiry cannot be found, or is concealed within the state so that process cannot be served on him, and stating the place of residence of defendant if known, or that on diligent inquiry his place of residence cannot be ascertained. *Held*, that an affidavit stating that defendant formerly resided at 5559 State street, Chicago, Ill., that he had moved therefrom to parts unknown to the affiant, and although affiant had made diligent search and inquiry among defendant's neighbors and acquaintances he was unable to ascertain defendant's "present whereabouts," and did not know his "whereabouts," was fatally defective for failure to show inability to discover his "residence."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 118.]

2. SAME—MAILING NOTICE.

4 Starr & C. Ann. St. c. 100, par. 5, p. 905, provides that on service by publication the clerk, within 10 days after the first publication, shall mail to the defendant a copy of the notice directed to his last known residence, as stated in the affidavit. *Held*, that where the affidavit stated defendant's last known residence as 5559 State street, Chicago, a notice mailed to 5857 State street was insufficient to confer jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 124, 135.]

Error to Circuit Court, Cook County; E. F. Dunne, Judge.

Action by Hans Anderson against Andrew P. Anderson. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

Stedman & Soelke, for plaintiff in error.

DUNN, J. This writ of error is prosecuted to reverse a decree of the circuit court of Cook county setting aside a deed from the complainant to the defendant on the ground that it was obtained by duress. There was no personal service and no appearance by the defendant. The decree must be reversed because the court did not have jurisdiction of his person.

The affidavit for publication of notice was as follows: "Hans Anderson, being first duly sworn, on oath states that he is the complainant in the above cause; that the defendant formerly resided at the premises located at and known as 5559 State street, Chicago, Illinois; that he has removed from said premises to parts unknown to the complainant, and, although affiant has made diligent search and inquiry among the neighbors and acquaintances of said defendant, he is unable to ascertain his present where-

abouts, and affiant does not know his whereabouts." The statute authorizing publication of notice requires, as the basis of such publication, an affidavit showing that the defendant "resides or hath gone out of this state, or on due inquiry cannot be found, or is concealed within this state, so that process cannot be served upon him, and stating the place of residence of such defendant if known, or that upon diligent inquiry his place of residence cannot be ascertained." 1 Starr & C. Ann. St. c. 22, § 12, p. 568. None of the requirements of the statute are met by the affidavit filed. It does not appear that upon due inquiry the defendant could not be found, or that his place of residence cannot be found upon diligent inquiry. It appears that the defendant removed from his former place of residence to parts unknown to the complainant, and that upon diligent inquiry among his neighbors and acquaintances complainant is unable to ascertain and does not know his present whereabouts. But though his whereabouts on May 8, 1902, when this affidavit was made, may have been unknown, it might be a matter of no difficulty to ascertain his residence. The affidavit is required as to his residence, and not as to his personal presence. Although he had moved to parts unknown to complainant, and complainant was unable to ascertain his present whereabouts when he made the affidavit, it might well be, consistently with the truth of this affidavit, that the defendant could be readily found and served with process. The statute required the clerk, within 10 days of the first publication of notice, to mail a copy to the defendant at his last known residence, as stated in the affidavit. 4 Starr & C. Ann. St. c. 100, par. 5, p. 905. The place stated in the affidavit was 5559 State street, Chicago, while the notice mailed by the clerk was sent to 5857 State street. This was not sufficient to confer jurisdiction.

The decree will be reversed, and the cause remanded.

Reversed and remanded.

(22) Ill. 420)

SHULTS v. SHULTS.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. EXCEPTIONS, BILL OF—APPEAL—BILL OF EXCEPTIONS—TIME FOR PRESENTATION.

A bill of exceptions or certificate of evidence must be presented within the time allowed by the order granting the appeal, or within such further time as may be allowed before the expiration of the time fixed in the original order.

2. SAME—EXTENSION OF TIME.

The court has power during the term of court at which an order is made for presenting a bill of exceptions or certificate of evidence to extend the time for so doing.

3. WILLS—TESTAMENTARY CAPACITY—SUFFICIENCY OF EVIDENCE.

In an action to set aside a will, evidence held to support a finding that testator had testamentary capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 137-161.]

4. TRIAL—INSTRUCTIONS ASSUMING ADMITTED FACT.

It is not error to assume in an instruction a fact that is admitted or about which there is no controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 432-434.]

5. SAME—OBJECTIONS—SILENCE OF COURT—CONSTRUCTION.

The fact that objections are not passed on by the court is not necessarily equivalent to overruling them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 312.]

Error to Circuit Court, Kane County; H. B. Willis, Judge.

Bill by Carlton Andrew Shults against Fannie Shults. Decree for defendant, and complainant brings error. Affirmed.

This is a bill in chancery to set aside the will of Jeremiah Shults. The only ground that contestant sets up in the bill in support of which any evidence was offered on the hearing is the want of mental capacity in the testator. This question was decided by the jury against contestant, who has appealed to this court, and urges a reversal because the finding is contrary to the evidence, and the court gave improper instructions for proponent, and because of alleged misconduct of counsel.

The testator had been afflicted with a cancerous growth on his neck for about two years before his death. About 10 weeks before his death the testator and his wife went to Plano, Ill., to reside with Mrs. Algler, the mother of his wife. Dr. Taylor, of Plano, treated the testator during the time he was in Plano, but did not succeed in arresting the progress of the disease. On the morning of November 15, 1904, the testator went to the office of Dr. Taylor for treatment, in accordance with his usual custom. In a conversation with Dr. Taylor at his office on that occasion the doctor advised him that his trouble was very serious, and that, if he desired to make a will or attend to any other matters in regard to the distribution of his property, he had better attend to the same. On this occasion Dr. Taylor sent the testator home in a buggy, and shortly thereafter called in consultation Dr. Lord, and it was then determined that an operation should be had as quickly as possible. Dr. Lord visited the testator about 10 o'clock in the forenoon. Preparations were immediately begun to remove the testator to Aurora, 16 miles away, to a hospital, for the purpose of having the operation performed upon him. After the operation had been determined upon, the testator sent for E. L. Henning, a banker in Plano, and requested Henning to draw his will. Henning visited the testator about 11 o'clock in the forenoon, and made pencil notes of such facts as were necessary to enable him to write the will. The testator furnished all the information that Henning required. Henning took the notes and went to his bank, prepared the will, and returned to Mrs. Algler's residence about the hour of

12 o'clock of the same day. The will was read over by Henning to Shults, who then and there attached his name to it, and Henning and Olsen, who had accompanied Henning to the Aigler residence for that purpose, signed the will as witnesses in the presence of Dr. Taylor. Soon after the execution of the will the testator and his wife, accompanied by Dr. Taylor, took the train to Aurora, arriving there at 1:15 o'clock p. m. The parties drove directly to St. Charles Hospital. Soon after their arrival at the hospital Dr. Brennecke, who was expected to perform the operation on the testator, was called in consultation, and after examining the testator Dr. Brennecke advised against operating. In his opinion the condition of the testator could not be relieved by an operation. The testator died in the hospital about 3 o'clock the following morning.

The testator owned but a small estate, estimated at \$6,000 or \$7,000 above his liabilities. He had been married twice. Carlton Andrew Shults, complainant below and plaintiff in error here, is the only surviving child of the testator's first marriage. The mother of the plaintiff in error died when the plaintiff in error was an infant less than one month old. Plaintiff in error was taken to the home of his maternal grandparents, with whom he continued to reside until after the death of his father, the testator. The evidence shows that plaintiff in error never resided with his father, and that their association was limited to an occasional visit. By his will the testator left all of his property to his widow, Fannie Shults, who is the defendant in error herein.

J. F. Snyder (C. Stuart Beattie, of counsel), for plaintiff in error. Raymond & Newhall (R. S. Egan, of counsel), for defendant in error.

VICKERS, J. (after stating the facts as above). Plaintiff in error insists that the decree dismissing his bill should be reversed because the verdict of the jury is contrary to the preponderance of the evidence on the question of the mental capacity of Jeremiah Shults to execute the will. The theory of plaintiff in error is that the cancerous growth on the testator's neck had affected the testator's brain, producing fever and a state of delirium rendering him mentally incapable of transacting any business, and that the will executed under these circumstances should be set aside. It is not claimed that the testator was otherwise affected in his mind except as a result of the disease of which he died. At the time the will was executed two subscribing witnesses and the attending physician were present. Edgar L. Henning testifies that on the occasion of his first visit to the testator on that morning he had an interview with him regarding his will, and that there was no other person present at that time. He testifies that he went into the room

and sat down in front of Mr. Shults; that he had to lean over in order to hear what he said; that Mr. Shults could not speak above a whisper; that Mr. Shults told him that he wanted to leave his property to his wife, and stated who his heirs were; that Henning told him that he would have to mention the boy's name in the will and give him something; that the testator then told him to give the boy \$1 and to give the rest of his property to his wife. This witness further says that he went away and drew the will in accordance with the instructions he had received from Mr. Shults, and returned again with the will soon after 12 o'clock; that on this occasion there were present four persons in the room—Mr. Shults, Dr. Taylor, Mr. Olsen, and the witness—that the witness then read the will to Shults, who signed it, and Olsen and Henning signed it as witnesses. Henning says that in his opinion Shults was capable of doing business and of making a will at the time he signed this instrument. Olsen, the other subscribing witness, corroborates Henning as to the circumstances attending the execution of the will, and says that he thought Mr. Shults was all right as to his mental condition. Dr. Allen R. Taylor testifies to his being present at the execution of the will and of seeing Mr. Shults at the office early in the morning, and again at 10 o'clock in company with Dr. Lord, and of going with the deceased to Aurora in the afternoon and remaining with him constantly until 6 o'clock that evening. In answer to the question, "What, in your judgment, was his mental condition on that day?" he says, "He was of sound mind." In addition to these three witnesses, who were the only persons present at the time the will was executed, except the testator, proponent introduced about 20 other witnesses who were the neighbors and associates of the testator, who gave testimony that leaves no doubt that the testator had always been considered a man of sound mind and memory, and fully competent to transact any ordinary business. Dr. Herman Brennecke, who had never seen the testator until about 2 o'clock on the day that the will was executed, testifies to the physical condition of the testator at the time when he saw him, and from the condition he found the patient in at 2 o'clock he did not consider that he was then in a condition to transact any business or to make a will, and that he did not consider that he was competent to do so at 12 o'clock on that day. In his opinion, from the nature of the disease and the stage it had reached at 2 o'clock, the testator could not have been in a condition at 12 o'clock to transact business or to execute a will. Dr. Lord, who is called as a witness for contestant, and who, it is stated, saw Shults at 10 o'clock in the morning, was not asked in regard to his mental condition and gave no evidence on that point. No other witness testifies to any fact or circumstance bearing upon the mental condition of the testator on the

day the will was executed. From the foregoing summary of the evidence bearing upon this issue, it is apparent that there is a clear preponderance of the evidence supporting the verdict of the jury. There is not only a greater number of witnesses testifying to the capacity of the testator, but their opportunities for knowing the condition of Shults at the time the will was executed were much better than those of Dr. Brennecke, who did not see him for two hours after the will was executed and after he had undergone the fatigue of a trip from Plano to Aurora. In our opinion the verdict of the jury is in accordance with the weight of the evidence.

It is next insisted by the plaintiff in error that the court erred in giving certain instructions for defendant in error. Instructions Nos. 1 and 2 are as follows:

"(1) The court instructs the jury that an owner of property desiring to dispose of the same by will has the right to distribute it according to his or her own judgment, and may give nothing to children, or may divide it equally among them or other relatives, or leave the same to others not of kin to the deceased, at his or her pleasure, and of this right a property owner cannot be deprived, nor is a will made in execution of such purpose to be lightly set aside, and no will is to be deemed invalid because the jury are of the opinion that a different disposition ought to have been made, nor is the distribution made by a testator, if otherwise valid, subject to be overruled, or overridden by the jury. The question of the propriety of the will in this case has nothing whatever to do with its validity, with the single exception that the jury may consider, together with all the other evidence, as a circumstance bearing on the question, whether or not the testator had sufficient mental capacity to make a will. The test of the validity of the present will, to be determined from the evidence, is not whether, in the judgment of the jury, it is a just or proper will, but whether, at the time it was made, the testator was of sufficiently sound mind to make a will, as explained in other instructions.

"(2) The jury are instructed that every person is presumed to be sane and to have sufficient mental capacity to make a will. This presumption is to be taken into account by the jury in considering, from all the evidence, whether, at the time the will here in question was made, the testator had sufficient mental capacity to make the same, and this presumption is to be taken into account by the jury, with all the other evidence, in determining the validity of the present will. If the jury find, from all the evidence in this case, that at the time the will in question was made the testator had sufficient mental capacity to understand what he was about when he made it, and to remember and appreciate the property he had for disposal and his relations toward the objects of his bounty, so as to judge for himself what he wished to do in the dis-

posal of his property, this is sufficient mental capacity to enable him to make a valid will, whether, at the time, his general health was good or not."

The specific objection to these instructions is that they assume that the testator executed the will in question. That fact was not in issue. There was no dispute but that the testator executed the paper purporting to be his will. Counsel for plaintiff in error apparently intended to contest the execution of the will. In the opening statement of plaintiff in error's brief, we find a statement that there was evidence upon the face of the will itself that it was not executed by the testator and the witnesses at the same time, and calling attention to the appearance of the signatures, the color of the ink, etc., and it is said that at the proper time plaintiff in error would have the original will transmitted to this court for inspection. But, if plaintiff in error ever had the purpose to contest the execution of the instrument, he seems to have abandoned it in this court, since the will has not been certified up, nor is there any reference to this matter in the brief of plaintiff in error except in the statement of facts as above indicated. It is not error to assume in an instruction a fact that is admitted or about which there is no controversy. *Wallace v. De Young*, 98 Ill. 638, 38 Am. Rep. 108; *Chicago City Railway Co. v. Allen*, 169 Ill. 287, 48 N. E. 414; *Illinois Central Railroad Co. v. King*, 179 Ill. 91, 53 N. E. 552, 70 Am. St. Rep. 93; *Citizens' Ins. Co. v. Stoddard*, 197 Ill. 330, 64 N. E. 355.

Plaintiff in error also criticises the fifth instruction given for defendant in error. We have carefully considered the fifth instruction, and in our opinion it is not open to any of the objections made to it.

It is next urged as a ground for reversing this decree that defendant in error's counsel was guilty of improper conduct in the examination of witnesses and in his argument before the jury. An examination of the record discloses the fact that the court, in most instances, promptly sustained objections when interposed to the alleged improper remarks of counsel. There is no ruling of the court in this respect that is complained of as error. Some objections were made which were not passed on by the court, and the plaintiff in error insists that the silence of the court is equivalent to overruling the objections. This does not follow. The court may have been occupied with instructions, or otherwise, so that his attention was not directed to the objectionable matter. Error is ordinarily only assignable upon improper rulings of the court. If cases may arise where the conduct of counsel is so clearly prejudicial to the rights of parties that this court would be warranted in reversing a judgment for that reason without a ruling of the court on the question, this case is not one of that class.

We are satisfied that the verdict is in accordance with the clear preponderance of the

evidence and that substantial justice has been done, and that the decree ought to be, and is accordingly, affirmed.

Decree affirmed.

On Motion to Strike Certificate of Evidence.

VICKERS, J. (orally). This is a motion to strike the transcript of the certificate of evidence from the transcript of the record. This was a bill in the circuit court of Kane county to contest a will. The cause was tried at the November term, 1905, and the verdict of the jury was in favor of the validity of the will. Contestant made a motion for a new trial, which was not disposed of at that term, but continued until the February term, 1906. On the 6th day of February, 1906, the motion for a new trial was overruled, and contestant excepted and prayed an appeal to this court, which was allowed upon bond being filed within 30 days, to be approved by the clerk of the court, and 60 days allowed to file a certificate of evidence. The certificate of evidence was not filed within the 60 days allowed by the order granting the appeal. On the 7th day of May, 1906, the February term being still in session, contestant made a motion for an extension of time in which to file the certificate of evidence. This motion was overruled by the court at that time, but subsequently, on the 18th day of May, the motion, being renewed by the contestant, was allowed, and 60 days' additional time from the 18th day of May was allowed in which to file a certificate of evidence. The certificate of evidence, the transcript of which is now sought to be stricken, was filed on the 30th day of June in pursuance of the order and leave granted on the 18th day of May. The ground upon which this motion is based is that the certificate of evidence was not filed within the 60 days allowed originally by the court in which to file it, nor within any other time allowed by the court before the expiration of the 60 days.

This court has often held that a bill of exceptions or a certificate of evidence must be presented within the time allowed by the order granting the appeal, or within such further time as may be allowed before the expiration of the time fixed in the original order. From this line of cases contestant assumes that the rule is that the court has no power to grant an extension, even though it may be applied for at the same term of court at which the original time is fixed. This, we think, is a misapprehension of the rule on this subject. All orders of the court entered during the term are within the breast of the court until the final adjournment of the term. The order allowing an appeal and fixing the time of filing the bond or the bill of exceptions, like any other order, may be extended if the extension is applied for during the term of court at which the order is granted. The February term of the Kane county circuit court was still in session on the 18th day of May. The court had jurisdiction of

the cause, and the orders that had previously been entered were within the control of the court, and there was no impropriety in the court allowing an extension of time in which to present the bill of exceptions.

The motion to strike the certificate from the record will be overruled.

(229 Ill. 588)

NAGEL v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CRIMINAL LAW—FORMER JEOPARDY.

An acquittal under an indictment charging robbery, making no reference to the crime having been committed in a place which the statute names in defining burglary, and not accusing defendant of having wrongfully entered any such place, is not a bar to a prosecution for burglary with intent to murder, as defendant could not properly have been convicted under the first indictment of the offense charged in the second.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 896.]

2. SAME.

An acquittal under an indictment for robbery does not prevent proof by the state, on a prosecution for burglary with intent to murder, of facts connected with the latter crime, though much or all the evidence as to them had been introduced on the former trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 822-835.]

3. SAME—DISCHARGE FOR DELAY IN TRIAL—TRIAL FOR OTHER CRIMES.

That defendant was set at liberty under Cr. Code, § 18, div. 13 (Hurd's Rev. St. 1905, c. 38, § 438), on the indictment for murder, for want of a trial within the statutory time, does not bar his trial for other crimes, though growing out of the same transaction, of which he was not in peril of conviction under the indictment for murder.

4. SAME—APPEAL—PRESUMPTION—FILING ADDITIONAL TRANSCRIPT.

That the action of the trial court in permitting the filing of an additional transcript of the record was correct will be presumed, in the absence of a bill of exceptions relative thereto.

5. SAME—PERSONAL PRESENCE OF DEFENDANT.

The personal presence of defendant in proceedings connected with his case subsequent to his trial and sentence is not required, where such proceedings relate to the correction of the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1483; vol. 15, Criminal Law, § 2544.]

6. BURGLARY—INDICTMENT—DESCRIPTION OF STRUCTURE—VARIANCE.

An indictment properly describes the place of the crime as a houseboat, it having been built as such, and being in form one, though it was drawn up on the beach of an island in a river; there being nothing to indicate that it was placed there so as to remain permanently, but all the evidence tending to show the contrary.

7. CRIMINAL LAW—JUDGMENT—SENTENCE.

It is not necessary that the court formally adjudge defendant guilty before pronouncing sentence on the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2510.]

Error to Circuit Court, Henry County; E. C. Graves, Judge.

William Nagel was convicted of crime, and brings error. Affirmed.

H. A. Weld and Adair Pleasants, for plaintiff in error. W. H. Stead, Atty. Gen., John K. Scott, State's Atty., and Charles E. Sturtz, State's Atty., for the People.

CARTER, J. Plaintiff in error was taken into custody by the sheriff of Rock Island county August 5, 1905, upon a mittimus of the coroner of that county, on the charge of murder, and was afterwards, at the September term of the circuit court of that county, indicted for that crime. That court on January 10, 1906, ordered him set at liberty upon his application made under section 18 of division 13 of the Criminal Code (Hurd's Rev. St. 1905, p. 746, c. 38), for the reason that he was not tried at a term commencing within four months after the date of his commitment. A new indictment for murder was procured against him, and was returned into the circuit court the next day, by virtue of which he was kept in imprisonment. At the May term, 1906, of said court, four separate indictments were returned against him, charging, respectively, burglary with intent to murder, burglary with intent to rob, burglary and larceny (in one indictment); and robbery. On his motion a change of venue was taken to the circuit court of Henry county, and he was transferred to the custody of the sheriff of that county, who retained him by virtue of the second charge for murder, as well as the other indictments. Nagel thereafter petitioned this court for a writ of habeas corpus, and, this petition being granted, it was ordered that he be discharged from further imprisonment or detention by reason of the indictment for the crime of murder returned against him January 11, 1906; but it was stated that the judgment was not to affect or interfere with his detention by reason of the other indictments against him. *People ex rel. v. Helder*, 225 Ill. 347, 80 N. E. 291. Plaintiff in error was tried in the Henry county circuit court upon the indictment charging him with robbery, and acquitted. He was then tried in the same court upon the indictment charging him with burglary with intent to murder, and found guilty by the jury, and sentenced to the penitentiary. To reverse this sentence he now brings this writ of error.

The testimony disclosed that Carl Brady, a German, from 40 to 45 years of age and unmarried, was living in a houseboat on a wooded island in the Mississippi river on the Illinois side, and about five miles above Muscatine, Iowa. The houseboat appears to have been pulled up on the sand at the end of the island, and the deceased during the spring of 1905 was living there, engaged in raising chickens and garden stuff. On June 9, 1905, about the middle of the afternoon, plaintiff in error and Josephine Collett, a woman with whom he had been living for several years, but who testified she was not his wife and had never considered herself as such, were rowed over to the island on which Brady

lived by one Alonzo F. Brown. The latter testified that he wanted to get a boat which Brady had borrowed of him. On reaching the island they failed to find Brady in or about the houseboat. Brown testified that he walked into the timber about 75 or 100 yards, when he discovered that plaintiff in error was behind him, and noticed that he had a gun in his pocket, and that he thereupon decided to go home, and left plaintiff in error and the woman remaining on the island. The testimony as to what happened after Brown's departure and before Nagel was taken into custody rests largely upon the evidence of the woman, Josephine Collett, the only person present on the island at the time of the crime, save plaintiff in error and the victim. Her testimony is that after Brown left they remained by the houseboat; witness sitting on a pile of ties, and Nagel having a revolver in his hand, from which he fired two bullets into the ties. In a little while Brady came. He spoke to Nagel, and was introduced by the latter to the woman. On the request of Brady, Nagel helped him to carry some chicken coops into the chicken house, and the two men then went around the front of the cabin; but the witness did not know what they were talking about, as they talked in German. Towards evening it commenced to rain, with thunder and lightning, and the witness asked Nagel to go home; but he replied that he was not ready to go. She then started crying. Soon after, plaintiff in error and Brady began quarreling. Nagel asked Brady to lend him a flatboat to go across to a neighboring island, where the witness and plaintiff in error lived, and Brady refused to let them have the boat. Thereupon plaintiff in error asked him to let them stay all night, and he said he would let Nagel stay, but the woman could not. Nagel then said, if the woman could not stay, he would not stay. This conversation had apparently taken place in the houseboat; the woman remaining outside while it was going on. Plaintiff in error came outside, and Brady shut the door, and said he did not want them there at all. Nagel went back in, and began fussing with Brady, and there were three shots. When the shots were fired, the woman screamed, and plaintiff in error came out and swore at her, and called her names, and told her to keep still; that he did not want people to know what he was doing there. He pointed his revolver at her, and swore he would blow her brains out. He then returned inside the cabin, and in a little time came out and showed her some money (\$7.60) and a watch, all of which he stated to her he had taken off of Brady. He went back into the cabin of the boat, and four shots were heard by the witness, followed by groans and cries and moaning, then pounding, and then two shots were fired at the last. She claimed she heard six shots after plaintiff in error showed her the money and watch. She next saw plaintiff in error at

2 o'clock in the morning, when he came out of the houseboat cabin and said, "The old gazabo is dead." Immediately thereafter he put on an undershirt and drawers of Brady's. Plaintiff in error and the woman continued to occupy the houseboat until they were arrested, August 3, 1905, when a deputy sheriff of Rock Island county, with others, went to the island about 11 o'clock in the morning and found them in bed there. Nagel was afterwards taken back to the locality and pointed out several spots in which he said the body would be found; but, after digging, the information proved incorrect. Finally he designated a place directly behind the houseboat, and the body was found there, charred and badly decomposed, with the side of the skull crushed in, which Nagel claimed was caused by a post in trying to shove the body into a hole in the ground.

Plaintiff in error's first contention is, as stated in the briefs, that "any person committed for a criminal offense * * * and set at liberty by the court because not tried at a term of court beginning within four months of his commitment cannot afterward be indicted and tried for another offense carved out of the transaction constituting the crime for which he was first committed"; that this right to be set at liberty is not limited by the crime charged in the warrant of commitment. This question, while not identical, bears very close analogy to the question arising under that provision of the Bill of Rights which declares that "no person shall be * * * twice put in jeopardy for the same offense." What constitutes the "same offense" was discussed at length by this court in the early case of *Freeland v. People*, 16 Ill. 380. It was there stated that, "If the defendant upon the first indictment could not have been convicted of the offense described in the second, then an acquittal or conviction upon the former is no bar to the latter. * * * If defendant could not by any legal possibility have been convicted upon the former prosecution of the offense charged in the second, he can in no just sense be said to be in peril of a second conviction on the same offense"—citing in support of this doctrine 1 Chitty's Crim. Law, § 456, Archbold's Crim. Pl. § 82, 3 Greenleaf on Evidence, § 36, and other authorities. This same doctrine has been approved by this court in *Guedel v. People*, 43 Ill. 226, *Ferguson v. People*, 90 Ill. 510, *Campbell v. People*, 109 Ill. 565, 50 Am. Rep. 621, and *Spears v. People*, 220 Ill. 72, 77 N. E. 112, 4 L. R. A. (N. S.) 402. See, also, *Commonwealth v. Bakeman*, 105 Mass. 53; *State v. Ingalls*, 98 Iowa, 728, 68 N. W. 445; *State v. Warner*, 14 Ind. 572; *Wharton's Crim. Pl. & Pr.* (8th Ed.) § 471, and authorities there cited. Plainly, the plaintiff in error could not properly have been convicted, on the former trial for robbery, of the offense charged in the indictment in the present case—burglary with intent to murder.

No reference is made in the indictment for robbery of the crime having been committed in a building or boat, or any other place which the statute names in defining burglary; nor was plaintiff in error accused in that indictment of wrongfully entering any such place.

Counsel for plaintiff in error further insist that the trial court erred in permitting any evidence to be introduced which was heard on the trial charging robbery, as to the facts which they claim were conclusively settled by the verdict in that case. It is apparent from this record that all the crimes charged in all the indictments grew out of the same act or series of acts. This court in *Freeland v. People*, supra, stated (16 Ill. 383): "It is not enough that the act is the same; for by the same act the party may commit several offenses, in law. The crime of murder may embrace an assault with intent to commit rape or other felony, an assault with a deadly weapon with intent to inflict a bodily injury, an assault and battery, and, if two or more persons are present and engaged in the wrongful act, may embrace riot. In the same act of feloniously taking a quantity of goods the party may, in law, be guilty of as many crimes as there are separate owners of the goods stolen, and may be punished as for so many distinct larcenies. If a person steals a horse, saddle, and bridle, at the same time, by the same act, he may commit, in law, three several larcenies. * * * If a former conviction or acquittal upon a prosecution for the same act is always a bar to a subsequent prosecution for any crime consisting in the same act, it would follow that a conviction or acquittal upon a prosecution for assault and battery might bar a prosecution for an assault with intent to commit murder, or even for murder. With such a rule high crimes would often be inadequately punished, or not punished at all." Under the authorities cited it is evident that the former acquittal on the charge of robbery cannot be pleaded as a bar to this indictment. Nor was the state estopped by it from proving any of the facts connected with the crime charged in this indictment, although much or all of this evidence had been introduced in the former trial.

Counsel for plaintiff in error concede, and there can be no doubt, that the doctrine of former jeopardy cannot be invoked on this trial. This being true, we are of the opinion that the fact that plaintiff in error was set at liberty on the indictment for murder for want of a trial within the statutory time does not bar his further trial for those crimes, although growing out of the same transaction, of which he was not in peril of conviction under the indictment for murder. The evils that counsel contend would arise from this holding were considered by this court in *Freeland v. People*, supra, where it was said (16 Ill. 383): "In all such cases the attorney for the people may, and should, refuse to prose-

cute beyond the exigencies of public policy; the objects of punishment being example and reformation." This statement, the doctrine of which we here again approve, is a complete answer to the argument of counsel on that point.

Counsel also urge that the record on this case as originally filed in this court did not show the impaneling of the grand jury nor the return of the indictment in the Henry county circuit court, although they admitted in their briefs, when they first urged this point, that the indictment on which plaintiff in error was tried was in fact returned at the May term, 1906, of the Rock Island county circuit court, and that no objection was made on this point in the trial court. In *Per-teet v. People*, 70 Ill. 171, it was held that a prisoner, even in a capital case, might by express consent waive his rights. In *McKinney v. People*, 2 Gilman, 540, 557, 43 Am. Dec. 65, it was said that the law, by furnishing the prisoner with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglects in proper time to insist on his rights he waives them. We are inclined to the opinion that these statements in the brief of counsel for plaintiff in error waived the right to insist on this point. However that may be, the Attorney General, at the April term, 1907, of this court, suggested a diminution of the record and asked for leave to supply. This motion was allowed, and an additional record was filed, showing that on June 3, 1907, the circuit court of Henry county, after notice to counsel for the plaintiff in error, permitted the record of that county to be amended by filing certified copies of the proceedings in the circuit court of Rock Island county, to the effect that this indictment had been returned against plaintiff in error by the grand jury of Rock Island county at the May term of the Rock Island circuit court.

It is insisted that the Henry county circuit court was without jurisdiction to permit the filing of this additional transcript of the record, as the term at which the trial took place had long since expired, and no minutes of the judge or clerk existed upon which to base this amendment. No bill of exceptions relative to these facts having been filed, the presumption must be indulged that the action of the lower court was correct. *Wallahan v. People*, 40 Ill. 103; *Chicago, Milwaukee & St. Paul Railway Co. v. Walsh*, 150 Ill. 607, 37 N. E. 1001.

In this same connection it is also insisted that the law requires the personal presence of the plaintiff in error in proceedings connected with his case subsequent to his trial and sentence. The record shows that due notice was given to the plaintiff in error's counsel of the motion in question. When these subsequent proceedings relate, as they did in this instance, to the correction of the record, we do not think the presence of the plaintiff in error was required. This was the holding in *State*

v. Westfall, 49 Iowa, 328. See, also, 12 Cyc. 526, and authorities there cited. We held in *Sullivan v. People*, 156 Ill. 94, 40 N. E. 288, that errors assigned in a criminal case on the basis of an imperfect record are not available, where the true record has subsequently been brought up and they do not apply to it. In that case we referred to the authorities relied upon here by plaintiff in error as to this point, and held that they did not apply after the record had been corrected. In *Rainey v. People*, 3 Gilman, 71, where a very similar point was under consideration, it was stated that it was the duty of the Attorney General to see that the defects in the record were supplied, and, when necessary, to suggest a diminution of the record and sue out a certiorari to the court below. Whatever defect may have existed in the original record in this court has been cured by the additional transcript filed.

It is also urged as ground for reversal that the structure described in the indictment as a houseboat was in fact a dwelling house, and not a water craft. The claim is made that the houseboat, being drawn up on the beach, as it was at the time the crime was committed, could not properly be called a water craft, but should have been called a dwelling house or other building. It is undisputed that the structure where the crime is charged to have been committed had been built as a houseboat, and was in the form of one, but was at the time drawn up on the sand bar or sandy beach on an island in the Mississippi river. There is nothing in this record to indicate that it was placed there so as to remain permanently. On the contrary, all the evidence tends to show that it was only placed there temporarily, to remain during the spring and summer months, while the owner was looking after his chickens and his small garden. No blocks were placed under it to hold it there, and there was nothing permanent, so far as the evidence shows, attaching it to the ground. It is apparent that if the water of the Mississippi river had risen, as it frequently does, it would have caused the boat to float. Whether it was so drawn up with the intention of ever being put again to its original use as a water craft, or was only there temporarily, until the inclination of the owner or the rise of the water caused him to use it for transportation on the river, does not appear positively from the record. But, be this as it may, no term other than "houseboat" would so clearly have described the place where the crime is charged to have been committed. Variances are regarded as material in criminal cases when they mislead the defendant in making his defense and expose him to the danger of being again put in jeopardy for the same offense. *Clark v. People*, 224 Ill. 554, 79 N. E. 941. The office of the indictment was properly filled in this instance in apprising the plaintiff in error in plain terms where the crime was charged to have been committed. We fail to see how

he could possibly have misunderstood this term, or have understood another better. The place of the crime was properly described in the indictment as a houseboat.

It is further contended that before the court pronounced sentence it should have adjudged plaintiff in error guilty of the crime, and that the case should be reversed because this was not done. Substantially the same form of sentence as is found in this record was pronounced in *Hoch v. People*, 219 Ill. 265, 76 N. E. 356, 109 Am. St. Rep. 327. What was said in that case fully answers this objection. The sentence in this case was legal and binding.

Finding no reversible error in the record, the judgment of the circuit court is affirmed. Judgment affirmed.

(229 Ill. 519)

PEORIA HUMANE SOCIETY v. McMURTRIE et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WILLS—JOINT WILL—VALIDITY.

The wills of two persons may be united in a single instrument, if it can be given effect on the death of either as the will of that one, and at the death of one the instrument may be probated as his will, and be again probated at the death of the other as his will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 238.]

2. SAME—REVOCABILITY.

A joint, mutual, or reciprocal will, like any other, is ambulatory during the lives of the makers, and is revocable by either at any time before his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 449.]

3. SAME—REVOKED BY MARRIAGE.

The joint will of mother and son was revoked as to him by his subsequent marriage.

4. SAME.

Where the joint will of mother and son provided that if the makers should both die, or when both should be dead, if no individual will had been made, the property should be treated as one and be disposed of as thereafter provided, and the son subsequently married, made an individual will, and died, his property being distributed under the later will, the joint will was not effective, upon his mother's subsequent death, as to her property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 449.]

Appeal from Circuit Court, Peoria County; N. E. Worthington, Judge.

Petition by the Peoria Humane Society to probate Mary W. Rouse's will, adversely to Leonard C. McMurtrie and others. From a judgment of the circuit court denying probate on appeal from a like judgment of the probate court, petitioner appeals. Affirmed.

Jack, Irwin, Jack & Miles, for appellant. Winslow Evans and Barnes & Magoon, for appellees.

CARTWRIGHT, J. On January 13, 1890, Mary W. Rouse and Harry G. Rouse, her son, of the county of Peoria, in this state, were in San Francisco, Cal., about to take

a sea voyage to the Sandwich Islands, and executed their joint and mutual or reciprocal will and testament, the first two clauses of which are as follows:

"Being of sound and disposing mind, we, Mary W. Rouse and Harry G. Rouse, both of the county of Peoria, city of Peoria and state of Illinois, do make and declare this our last will and testament.

"The one of us surviving the other is to inherit all property, real, personal or mixed, of the other, to be used as the survivor may see fit; but should both die, or if when both shall be dead if no individual will has been made, then the property of both shall be treated as one and the same and disposed of as provided below. The one surviving is hereby appointed executor of the other without bond."

The will then provides for the payment of debts, funeral expenses, and the cost of making a suitable inscription upon a certain monument, and makes bequests and devises to various charities and individuals, and contains a residuary devise and directions to trustees and executors. Among the bequests to charities is one of \$7,500 to trustees for the appellant, Peoria Humane Society, to be expended in the erection of a public drinking fountain in the city of Peoria, inscribed as erected to the memory of George W. Rouse and dedicated to the city of Peoria, and to be so constructed as to be available, not only for mankind, but all animals, large and small, and horses, both checked and unchecked. The will provides for compensation to the trustees, and devises real estate, the income of which is to be used, in part for maintaining the fountain, and in part for other charities. Harry G. Rouse, one of the makers of the will, was married in 1890, and his marriage revoked the will so far as he was concerned. He died in 1898 or 1899, leaving his wife surviving him, and also leaving his individual last will and testament, executed after his marriage. His individual will was admitted to probate, and its provisions were duly executed, and his estate was settled. On March 21, 1904, Mary W. Rouse died at Long Beach, Cal., and on April 14, 1904, letters of administration were issued by the probate court of Peoria county to appellee Leonard C. McMurtrie. On December 12, 1904, the will made by Mary W. Rouse and Harry G. Rouse was presented to said probate court as the will of Mary W. Rouse, with a petition that it be admitted to probate and letters of administration with the will annexed be granted to the public administrator of the said county. Probate was denied by the probate court, and by the circuit court on appeal. The will devised real estate in the city of Peoria, and an appeal was allowed to this court.

There is no legal objection to uniting the wills of two persons in a single instrument, if such instrument can be given effect, on the

death of either, as the will of that one. *Gerbrich v. Freitag*, 213 Ill. 552, 73 N. E. 338, 104 Am. St. Rep. 234. A joint will contained in a single instrument is the will of each of the makers, and at the death of one may be probated as his will, and be again probated at the death of the other as the will of the latter. A joint, mutual, or reciprocal will, like any other, is ambulatory during the lives of the makers, and it may be revoked by either at any time before his death. The right of revocation cannot be doubted, at least as to either maker who has taken no benefit or advantage under the will; and that was the case here. So far as the instrument was the will of Harry G. Rouse, it was revoked by his subsequent marriage; and he also made an individual will, which could have operated as a revocation. The instrument ceased to be his will, and the question to be solved is whether it is now the will of the other maker.

The whole property and estate of that maker who should first die was given to the other, to be used as the survivor might see fit. That provision of the will was mutual or reciprocal, and, the will having been revoked by Harry G. Rouse, his estate did not pass, by virtue of it, to his mother, Mary W. Rouse. The remainder of the will was joint, and provided that if the makers should both die, or when both should be dead if no individual will had been made, the property of both should be treated as one, and be disposed of as thereafter provided. Some of the prop-

erty specifically disposed of was designated as the property of Harry G. Rouse; but the gifts were all expressed as the joint gifts of the two, and the will throughout shows an intention that it should be a joint will. That part of the will was to operate only upon certain contingencies. One of them was that both of the makers should be dead, and another that no individual will had been made. The first contingency upon which the will was to take effect happened, both of the makers being dead; but the further contingency upon which the will was to be operative did not occur, since an individual will was made by Harry G. Rouse. It is clear that the makers intended that the portion of the will in question should take effect as the will of both or neither, and it was to be operative as a will on condition that neither of the makers should otherwise dispose of his or her property by an individual will. The property of both makers of the will was to be treated as one and the same, and was to be disposed of as a single estate if no individual will had been made. The separate property of each was to be a joint fund, and devoted to the purposes specified in the will. Whether the will could have been executed, after the death of both the makers, if the conditions upon which it was to become operative had existed, is not here involved, and no opinion is expressed on that question.

The circuit court was right in rejecting the will, and the judgment is affirmed.
Judgment affirmed.

(229 Ill. 574)

REISCH et al. v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. APPEAL—REVIEW OF DECISIONS OF INTERMEDIATE COURT—QUESTIONS OF FACT.

The verdict of the jury and its approval by the Appellate Court settle all controverted questions of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4324.]

2. SAME.

In cases coming to the Supreme Court from the Appellate Court, alleged errors raised in the Supreme Court for the first time will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4281.]

3. TRIAL—INSTRUCTIONS.

An instruction in the words of the statute on which the action is based is not erroneous.

4. INTOXICATING LIQUORS—CIVIL DAMAGES—ACTIONS—INSTRUCTIONS—MODIFICATION.

In an action of debt on a retail liquor dealer's bond for the use of the widow of a person unlawfully killed in consequence of his assailant's intoxication, the court was requested to instruct that, even if the jury should believe that decedent's assailant was intoxicated at the time the wounds were inflicted, yet if they further believed that decedent assaulted his assailant, and that the wounds in question were inflicted in repelling the assault, they should find defendant not guilty. *Held* that, while the instruction might properly have been given as asked, it was not improper to modify it by inserting the words "first wrongfully" before the word "assaulted."

5. APPEAL—ESTOPPEL TO ALLEGE ERROR.

A party cannot avail himself of an error in permitting the cross-examination of a witness, where he had, prior thereto, induced the court to make a similar ruling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591-3610.]

6. WITNESSES—CONTRADICTIONARY STATEMENTS.

A party to an action cannot be deprived of the right to show that a witness had on a former trial given contradictory testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1252-1256.]

7. APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY OF RECORD.

Alleged improper remarks of counsel will not be considered on appeal, where there is no assignment of error, either in the Appellate Court or the Supreme Court, raising such question, and the same is not included in the ground set out in the motion for new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3086, 3087.]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, Shelby County; W. M. Farmer, Judge.

Action by the people against George Reisch and others. Judgment for plaintiff was affirmed by the Appellate Court, and certain defendants again appeal. Affirmed.

Alfred Adams, Rufus M. Potts, and Shutt, Graham & Graham, for appellants. Leslie J. Taylor and Arthur Yockey, for the People.

VICKERS, J. This is an action of debt on a retail liquor dealer's bond, for the use of Matilda Stringer, widow of Thomas Stringer, deceased. Appellants, George Reisch and Philip Standley, were sureties on the bond of Joseph and Louis Jurica, who were the

keepers of a dramshop in Moweaqua. A judgment for \$1,500 in the circuit court of Shelby county has been affirmed by the Appellate Court for the Third District, and the sureties on the bond prosecute a further appeal to this court.

The appellee's contention is that her husband, Thomas Stringer, was unlawfully killed by Sanford Wolfe in consequence of Wolfe's intoxication, caused by liquors obtained at Jurica's dramshop on the 6th of August, 1904. Whether Wolfe was intoxicated, and, if so, the extent of his intoxication, and whether the assault upon Stringer was in consequence of such intoxication, or from some other cause, are questions of fact, upon which the evidence is conflicting. The verdict of the jury, and its approval by the Appellate Court, settle all controverted questions of fact. We have examined the evidence sufficiently to satisfy us that the court did not err in refusing to direct a verdict for appellants.

Appellee, by leave of this court, has filed a certified copy of appellants' briefs in the Appellate Court, for the purpose of showing that some of the errors relied on in this court were not urged in the Appellate Court. In cases coming to this court from the Appellate Court, alleged errors which are raised for the first time here will not be considered. *Strodtmann v. County of Menard*, 158 Ill. 155, 41 N. E. 778; *Central Union Building Co. v. Kolander*, 212 Ill. 27, 72 N. E. 50.

Appellants insist that the court erred in giving the following instruction: "The court instructs the jury in this case that the section of the statutes of the state of Illinois upon which this suit is founded is as follows, to wit: 'No person shall be licensed to keep a dramshop or to sell intoxicating liquors, by any county board or by the authorities of any city, town or village, unless he shall first give bond in the penal sum of three thousand (\$3,000) dollars, payable to the people of the state of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property or means of support, by reason of the person so obtaining a license, selling or giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person or his legal representatives who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed or by his agent or servant.'" This instruction is in the language of section 5 of the dramshop act. Appellants urge that the giving of this instruction in the language

of the statute violates the rule which prohibits the reading of the law to the jury in civil cases. All proper instructions state the law, and if appellants' objection should be sustained it would put an end to the court instructing the jury as to the law in the trial of civil cases. The rule which prohibits the reading of authorities to jurors in civil cases is not intended to prevent the court from giving the jury the law of the case in instructions. In fact, under our practice, this is the only proper method of advising the jury what the law of a case is. The instruction under consideration is in the words of the statute upon which the appellee's case is based, and we are not aware that it has ever been held that it is error to lay down the law in the words of the law itself, but the reverse of this proposition has often been declared. *Town of Fox v. Town of Kendall*, 97 Ill. 72; *Petefish v. Becker*, 176 Ill. 448, 52 N. E. 71; *Mt. Olive Coal Co. v. Rademacher*, 190 Ill. 538, 60 N. E. 888; *Ward v. Meredith*, 220 Ill. 66, 77 N. E. 118. The instruction condemned by this court in *Baker & Reddick v. Summers*, 201 Ill. 52, 66 N. E. 302, was unlike the instruction here. There the instruction, after reciting the statute, told the jury that the defendants would be liable "for all the damages sustained, and in this case not exceeding the sum of \$5,000," and the instruction was held vicious because of the addition of the words quoted above, and not because it quoted the statute. There is nothing in that case that has application to the instruction before us in this case. There was no error in giving the instruction complained of.

It is next insisted that the court erred in modifying certain instructions offered by appellants. One of these as offered is as follows: "The court instructs you that, even if you should believe from the evidence that the said Sanford Wolfe was intoxicated at the time the said wounds were inflicted on Thomas Stringer, yet if you further so believe that said Stringer assaulted said Wolfe, and that wounds in question were inflicted in meeting or repelling said assault, then in such case it would be your duty to find the defendants not guilty." The court modified this instruction by inserting the words "first wrongfully" before the word "assaulted," and gave the instruction as modified. While the instruction might properly have been given as asked, its sense and legal import were not changed by the addition made by the court.

There are a large number of instructions printed in the abstract, none of which are numbered, either in the abstract or in the record; nor are they otherwise designated, so that the court can readily determine the particular instructions that appellants complain of. We have, however, by counting the instructions and reading them in connection with appellants' brief identified, as well as we could, the particular instructions which appellants regard as erroneous, and have ex-

amined the same; and our conclusion is that there is no error in the giving, modifying, or refusing of instructions which requires a reversal of this judgment. If any instruction has escaped our attention, it is because of the negligence of appellants in failing to designate the instructions by proper numbers or letters, so as to enable the court to find the instruction which the appellants complain of.

Appellants next insist that this judgment should be reversed because appellee's counsel asked the witness Wolfe certain questions relating to a criminal prosecution against Wolfe for the killing of Stringer. The court excluded all evidence of the fact that Wolfe had been convicted of the homicide, and the questions asked were apparently for the purpose of laying the foundation to impeach Wolfe, by showing that he had made contradictory statements on the trial of the criminal case from those made on this trial. By thus directing Wolfe's attention to his former testimony, appellee was able to get satisfactory answers, thus obviating the necessity of calling impeaching witnesses. There was nothing in any of the questions asked that disclosed anything respecting the criminal trial, except the fact that such trial had occurred. Whether Wolfe was convicted or acquitted does not appear from any of the questions asked him. The fact that the former trial had occurred, involving the death of Stringer, was first brought to the attention of the jury by appellants' counsel in the cross-examination of appellee's witness Hiatt, as the following questions and answers, taken from the record, will show: "Q. You were a witness on the trial involving the death of Mr. Stringer at Moweauqua? A. Yes, sir. Q. On that occasion did not you testify, in substance, as follows: 'I was riding with Stringer, and met Wolfe as he was returning home from Moweauqua?' (Objected to by plaintiff, for the reason that matters referring to the other case had been ruled out; the court remarking: "I suppose the purpose is to show different statements at another time than made here.") A. Yes; I think I did. Q. Didn't you also on that occasion testify, in substance, as follows: 'Wolfe's wife and four children were with him in the buggy at the time we met them?' The foregoing questions and answers advised the jury that another trial had occurred growing out of the death of Stringer. If there was error in the admission of the questions propounded to the witness Wolfe, because they called the jury's attention to the fact that another trial had occurred, a similar error was committed at the instance of appellants in the cross-examination of the witness Hiatt, and appellants cannot avail themselves of an error in this regard, when they had induced the court to make a similar ruling before the ruling against them was made. We are, however, of the opinion that the ruling of the court in both instances was proper. Neither party to this suit could be deprived of the right to

show, if such was the fact, that a witness had on a former trial given testimony contradictory to his statements in this case, for the reason that questions and answers thereto, intended as the foundation for impeaching testimony, unavoidably disclosed the occurrence of another trial growing out of this transaction.

We find nothing to support appellants' contention that appellee's counsel made improper remarks in the presence of the jury. But, even if such remarks were made, there is no assignment of error, either in the Appellate Court or in this court, raising such question; nor is it included in the grounds set out in the motion for a new trial. If appellants desired to save this point, they should have specified it among the causes alleged for the granting of a new trial, and assigned it as error in the Appellate Court and in this court. None of these things have appellants done. The point is, therefore, not saved.

The judgment of the Appellate Court for the Third District is affirmed.

Judgment affirmed.

FARMER, J., took no part in the consideration or decision of this case.

(229 Ill. 523)

SANDIFER et al. v. SANDIFER et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. EQUITY—PLEADING—INFORMATION AND BELIEF.

A bill alleging that complainants are not advised as to whether or not a deed was ever delivered to the grantee, but state that since her death they have been informed that it was never actually delivered to her in the lifetime of the grantor, is not sufficient to raise the question of delivery, since it does not allege complainants' belief in the truth of the information and charge the facts accordingly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 337.]

2. DEEDS—CONSTRUCTION—ESTATE CONVEYED—FEE SIMPLE.

The words, "it is hereby agreed by and between the parties, grantor and grantee, that upon the death of the parties hereto that the estate of the parties hereto, both real and personal, shall be divided in severalty among our legal heirs, equally," attached to a warranty deed from husband to wife, in accordance with 1 Starr & C. Ann. St. 1896, pp. 922, 925, c. 30, §§ 9, 13, which conveys an estate in fee simple, if a less estate be not limited by express words, do not affect the fee-simple estate conveyed, but merely constitute a covenant between the parties.

Appeal from Circuit Court, Franklin County; E. E. Newlin, Judge.

Action for partition by William Sandifer and others against Cleveland B. Sandifer and others. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

F. M. Youngblood and Benjamin W. Pope, for appellants. William H. Warder, William A. Schwartz, E. E. Denison, and William H. Hart, for appellees.

DUNN, J. The appellants filed their bill for partition in the circuit court of Franklin county against the appellees, in which they alleged that Robert Sandifer, during his lifetime, was the owner in fee simple of certain real estate therein described, and that being in feeble health, he and his wife, Martha, were desirous of arranging their affairs so that the survivor might have the use of the property of which either might die seised, during the life of the survivor, and for that purpose, on December 6, 1887, he made a deed to his wife, the material parts of which are as follows: "The grantor, Robert Sandifer, of Six Mile township, in the county of Franklin and state of Illinois, for and in consideration of natural love and affection and one dollar in hand paid, convey and warrant to Martha Sandifer, of Six Mile township, county of Franklin, and state of Illinois, the following described real estate, to wit: * * * It is hereby agreed by and between the parties, grantor and grantee, that upon the death of the parties hereto that the estate of the parties hereto, both real and personal, shall be divided in severalty among our legal heirs, equally." The bill alleged that this deed was acknowledged by the grantor on the day it bears date, but was not acknowledged by his wife until December 2, 1893; that complainants are not advised as to whether or not the deed was ever delivered to Martha Sandifer, but state that since her death they have been informed that it was never actually delivered to her in the lifetime of her husband, and therefore the complainants pray that the question of the delivery of said deed may be inquired into by the court; that, even if said deed was delivered during the lifetime of Robert Sandifer, it is clearly manifest from its face that the only purpose of the deed was to create a life estate in Martha Sandifer, to terminate at her death; that Robert and Martha Sandifer continued to live together as husband and wife until about December 2, 1893, when Robert Sandifer died intestate, leaving the complainants, his nephews and nieces, his only heirs at law; that at the time of his death he and his wife were occupying the premises as a homestead, and Martha Sandifer continued to occupy the same until her death, in the spring of 1905 or 1906; that as to whose possession said deed has been in after its acknowledgment by Martha Sandifer complainants are not fully advised, but aver that they are informed that said deed, during all this time and up to the death of Robert Sandifer, has remained among his papers, and has never been actually delivered to Martha Sandifer, and was found after the death of Robert Sandifer and placed on record, and that upon the death of Martha Sandifer her estate or interest in the real estate terminated. It is alleged that appellee Cleveland B. Sandifer claims to be an adopted child of Martha Sandifer, and as such to have an interest in the premises, and he and the other appellees, who are alleged

to claim an interest as grantees of Martha Sandifer or Cleveland B. Sandifer, are made defendants. A general demurrer to the bill was sustained, the bill dismissed for want of equity, and an appeal has been prosecuted to this court.

The allegations of the bill are insufficient to raise the question of the delivery of the deed. It nowhere states positively, or even upon information and belief, that the deed was not delivered. The strongest averment is that complainants have been informed that the deed was never actually delivered to Martha Sandifer. No material issue could be made on this averment. It should have gone further, and alleged complainants' belief in the truth of the information and charged the fact accordingly. *Primmer v. Patten & Co.*, 82 Ill. 523.

Appellants contended that the deed conveyed only a life estate to Martha Sandifer and made no disposition of the fee. It is in the statutory form of a warranty deed, and must be held to convey an estate in fee simple unless a less estate is limited by express words or appears to have been granted by construction or operation of law. 1 *Starr & C. Ann. St. 1896*, pp. 922, 925, c. 30, §§ 9, 18. The words used do not purport to limit the estate granted. They do not refer specifically to the lands conveyed by the deed, but generally to all property, real and personal, which the parties might own at death. They constitute a covenant between the parties, but do not affect the estate conveyed. This clause is properly considered in connection with the whole deed in determining the estate granted; but, when so considered, it does not appear to have been intended to limit the estate or reduce it to less than the fee simple.

The decree is affirmed.

Decree affirmed.

(229 Ill. 490.)

**STATE BOARD OF EQUALIZATION v.
PEOPLE ex rel. ALEXANDER
COUNTY et al.**

(Supreme Court of Illinois. Oct. 23, 1907.)

1. PUBLIC LANDS—GRANTS IN AID OF RAILROADS—CONSTRUCTION OF GRANT.

Grants made by Act Cong. Sept. 20, 1850, c. 61, § 9 Stat. 468, granting the right of way and making a donation of land to several states to aid in the construction of a railroad from Chicago to Mobile, were not upon condition that the same company should own the railroad throughout its entire length.

2. SAME.

Act. Feb. 10, 1851 (Priv. Laws 1851, p. 61), ceding to the Illinois Central Railroad Company lands granted by the United States government to the state in aid of a railroad from Chicago to Mobile, contemplated the use of some method for the transportation over the Ohio river of traffic destined to points south thereof.

3. TAXATION—EXEMPTIONS—COMMUTATION—RAILROAD PROPERTY.

An approach to the Ohio river bridge of the Illinois Central Railroad, consisting of the tracks leading to the bridge and the embankment and steel structure upon which they rest, used in connection with its charter lines to connect with the Mobile & Ohio Railroad is not a branch

or lateral line, but a switch or sidetrack which it is empowered to acquire by section 1 of its charter (Acts Feb. 10, 1851, § 1; Priv. Laws 1851, p. 61) as needful to carry into effect its purposes, and falls within sections 18, 22, imposing a tax on gross receipts and exempting its charter lines from other taxation.

4. SAME.

The fact that a railroad has not paid taxes on a bridge approach, as part of its lines exempt from ordinary taxation does not render the property subject to taxation under the general law.

5. RAILROADS—TRAFFIC CONTRACTS—CONTRACT FOR USE OF TRACKS.

Under Act Feb. 12, 1855 (Priv. Laws 1855, p. 304), authorizing a railroad to allow other roads to use its tracks, it has authority to permit such use of a bridge approach upon the payment of toll, which would not be a use for other than railroad purposes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 434.]

6. EMINENT DOMAIN—RAILROADS—EXTENT OF POWER.

The power of a railroad to acquire land by condemnation for side or switch tracks is not exhausted by an apparent completion of the road; but is a continuing power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 143-145.]

Appeal from Circuit Court, Sangamon County; O. P. Thompson, Judge.

Mandamus by the people, on the relation of the county of Alexander and others, to compel the state board of equalization to assess property for taxation. From a judgment for petitioners, defendants appeal. Reversed and remanded, with directions.

This is a petition filed by the people ex rel. the county of Alexander, the city of Cairo, and the board of education of the city of Cairo against the state board of equalization of the state of Illinois, in the circuit court of Sangamon county, for mandamus to compel the said board and its officers to value and assess for taxation the property known as the "Illinois Central bridge approach of the Chicago, St. Louis & New Orleans Railroad Company," which leads to the bridge across the Ohio river at Cairo, Ill.

The petition alleges, among other things, that the Illinois Central Railroad Company was incorporated under an act of the General Assembly of the state of Illinois, approved February 10, 1851 (Priv. Laws 1851, p. 61); that by the second section of said act the company was authorized and empowered to survey, locate, construct, complete, alter, maintain, and operate a railroad, with one or more tracks or lines, from the southern terminus of the Illinois and Michigan canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the state of Iowa; that by the third section of said act the said company was given the right of way upon and authorized to appropriate to its own use and control, for the purposes contemplated in said act, a strip of land not exceeding 200 feet in width through its entire length, and to enter

upon and take possession of and use all and singular any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road; that by the fifteenth section of said act the state of Illinois ceded and granted to said corporation, among other things, all the lands which might be selected along the lines of said road and branches within the state under the act of Congress of September 20, 1850, entitled "An act granting the right of way and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile" (9 Stat. 466, c. 61), but that said cession and grant were made by the state for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining, and operating said road and branches, as provided for in said act of incorporation; that by the third subdivision of said section 15 the main trunk or central line of said railroad was required to run from the city of Cairo to the southern terminus of the Illinois and Michigan canal.

The petition further alleges that soon after the passage of the said act of February 10, 1851, the Illinois Central Railroad Company entered upon the construction of its railroad and had the same completed and in operation before the expiration of the year 1855; that in the construction of its road at and near the city of Cairo it obtained, by purchase, a strip of land in the upper or northern part of the city, known as the "Illinois Central 500-foot strip," extending from the Ohio to the Mississippi river, and that the company's right of way of the width of 200 feet approached this strip from the north and entered the same about midway between the two rivers, and after entering said strip its tracks and right of way turned to the left and ran out to the Ohio river, and from that point its tracks were laid upon and extended southward on the Ohio river levee for a distance of about two miles to Second street, in the city of Cairo, and then on block 1, in said city, said company built its passenger station, and said place was then and there selected and established by said company as the southern terminus of said road and as such has been kept and maintained up to the present time—a period of 50 years—and that said company has at no time had or maintained any other point, place, or station in Illinois as the southern terminus of said road, and that it has continuously used and operated its road to and from said station as the southern terminus of its said railroad in Illinois, as provided for and authorized by said company's act of incorporation.

The petition further alleges that within a few years after the completion of said road

the Mobile & Ohio Railroad Company completed its railroad from the city of Mobile, Ala., to the city of Columbus, Ky., situated on the Mississippi river 20 miles below the city of Cairo, and that for a number of years connection was made between these two railroads by means of a steamboat, called "The Illinois"; that this arrangement was soon discontinued and the Illinois Central Railroad Company entered upon the work of making the city of New Orleans the extreme southern terminus of its road or system of roads and obtained possession and control of certain railroads in Louisiana, Mississippi, and Tennessee, and after the operation of them for a time in connection with a road built by it or other companies from Columbus to a point on the Ohio river opposite Cairo, Ill., it procured, about the year 1880, the consolidation of these roads and the formation of a new company, to which it gave the name of the Chicago, St. Louis & New Orleans railroad, under the acts of the Legislatures of Louisiana, Mississippi, Tennessee, and Kentucky, and that on June 13, 1882, it took from the Chicago, St. Louis & New Orleans Railroad Company a lease for a term of 400 years from July 1, 1882, upon its railroad extending from the city of New Orleans, through the states last mentioned, to said point opposite Cairo, Ill.; that the Mobile & Ohio Railroad Company on January 1, 1886, procured a lease upon the St. Louis & Cairo Railroad, extending from Cairo, Ill., to St. Louis, Mo., for a term of 45 years, and St. Louis has become the northern terminus of said Mobile & Ohio Company's road and New Orleans has become the southern terminus of the Illinois Central lines.

The petition further alleges that on March 29, 1886, the Illinois Central Railroad Company and the Chicago, St. Louis & New Orleans Railroad Company procured from the Legislature of the state of Kentucky an act authorizing them, or either of them, to build a railroad bridge across the Ohio river at or near the said city of Cairo, and that shortly thereafter the said companies began the construction of said bridge, and that the same was completed and opened for traffic in October, 1889; that said bridge was built 60 feet above high-water mark; that the bridge proper is about 1 mile in length, and each of the approaches to said bridge about $1\frac{1}{2}$ miles in length, and consist of steel viaducts and high earth embankments; that the steel viaduct part of the Illinois approach is 2,656 feet in length and the earth embankment is 5,307 feet in length; that the bridge was first a single track bridge throughout, but now the Illinois approach is double tracked; that the Illinois Central Railroad Company is said to have built the Illinois approach and the Chicago, St. Louis & New Orleans Railroad Company the Kentucky approach, and the bridge proper across the river to the Illinois shore, which is the boundary line between the two states.

The petition further alleges that the Illinois Central Railroad Company, in order to obtain sufficient land upon which to build its said approach, purchased from the trustees of Cairo trust property a strip of ground extending north along the west side of its right of way from the point where its right of way enters said 500-foot strip for the distance of about 1 mile, containing 17.60 acres, and on this strip and on its original right of way it built that part of its approach consisting of earth embankment; that a considerable portion of said embankment is entirely off of said original right of way and wholly on the said strip of 17.60 acres, and that said earth embankment at its junction with the said steel viaduct is of the height of about 50 feet and of the width of about 185 feet at its base, and that the same diminishes in height and width from that point to its junction with the main line of the company; that said steel viaduct, which turns to the east and connects with said bridge, crosses 50 or 60 feet above the surface tracks of said company, and the tracks of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the said approach nowhere touches any of the tracks of said company except at the point of the junction at the foot of the approach with the main line, a mile and a half from the river, alleges that said approach is no part of the company's right of way or railroad tracks as the same have been used and operated to its Second street station for 50 years, and that said approach is no part of said bridge, and is known and called by no other name than "the bridge approach"; that said approach is not a spur track or a turn-out track, but is a branch or lateral road of the company, which leaves its main line $3\frac{1}{2}$ miles from its terminus at Second street, in Cairo, and connects with another railroad or railroad bridge at the river bank; that the company's right of way is limited to 200 feet in width, but it has been widened, for the distance of a mile, from 200 feet to almost 600 feet to accommodate the approach; that the acquisition of this strip of land of 17.60 acres to widen its said right of way and the construction of the said approach constitute a new and independent enterprise, and are the location and construction of a new road, which can only be properly designated as a branch or lateral road of the said company.

The petition further alleges that said company uses said bridge for the transfer of its trains running from various points and that the same has been so used by the Mobile & Ohio Railroad for a number of years, and that petitioner is informed and believes that a contract exists between said companies, which is to run for 25 or more years, under which said Mobile & Ohio Railroad Company is to use said bridge, and that the amount now paid by it for such use to the Illinois

Central Company is not less than \$150,000 per annum; that, in addition to this income, from other and independent sources, the said Illinois Central Railroad Company now collects, and has for many years collected, from shippers an extra charge of 2 cents per 100 on account of the said bridge, which said rate is called the "Cairo Bridge toll"; that the said bridge, together with said approach, is a toll bridge, and the said toll of 2 cents per 100 is first taken out for said company before a division of freights is made between it and other companies; that after said company had acquired its southern lines, and up to the time of the completion of said bridge, it owned and used large transfer boats at Cairo to transfer its cars and trains across the Ohio river, and that it paid taxes, as levied from year to year, on all of such boats, and alleges that the Illinois Central Railroad Company has no power or right to own, have, or use any property whatever beyond what is reasonably necessary to enable it to maintain and operate its railroad extending from Cairo to the northwest and northeast corners of the state, and that said bridge approach is in no way either necessary or essential to the operation of said road as provided for by said act of incorporation, and it is but the northern terminus of said company's New Orleans railroad, extended into Illinois to connect with its Illinois railroad $3\frac{1}{2}$ miles north of the southern terminus of said road.

The petition further alleges that the relators herein applied by petition to the state board of equalization of this state, at its September term, 1905, and requested it to value and assess the said bridge approach for the purposes of taxation; that said petition was referred by said board to its committee on the assessment of railroad property, and that said committee on November 8, 1905, reported, in writing, to the board that said bridge approach was not, in their judgment, assessable by the board, and that said report was then and there adopted, and of such action the relators were officially notified by the secretary of said board on November 9, 1905; alleges that the Illinois Central Railroad Company had expended in the construction of said approach up to February, 1902, about \$375,000, and that since that time it has been widened and greatly improved and is of the value of not less than one-half a million dollars, and that it is wholly within the county of Alexander and school district No. 1, over which the board of education of the city of Cairo has jurisdiction, and that about 4,000 feet of said approach is within the city of Cairo, and that about 4,000 feet is without the limits of said city, but, inasmuch as the north end of said approach runs near to and into the original main line of said railroad, petitioner, for the purposes sought by this petition, does not include the north 1,300 feet of said approach. A description of the portion of the bridge approach which it is

sought to have valued and assessed is then set out.

The petition makes the state board of equalization, and the officers and members thereof (naming them), defendants, and prays that upon proof of the allegations of said bill a writ of mandamus may issue against the said state board, and each and every member thereof, commanding it and them to assess and value, for the purpose of taxation, the said bridge approach as above described, first assessing the whole of said bridge approach for the distance of 6,463 feet for the purpose of the extension of the state, county, and school taxes, and then assessing and valuing separately, for the purpose of the extension of the city taxes of the city of Cairo, that part of the approach within said city, and that said board, and each and every member thereof, be required to make like assessments and valuations of said approach and of said last-mentioned part thereof as omitted property for the years 1890 to 1904, both inclusive, and certify their assessments and valuations to the county clerk of the said county of Alexander, and do all other acts requisite to the full and complete assessment of said property and the certification of the same, as required by law.

The answer filed by the defendants denies all the allegations of the petition, except in so far and to the extent as therein admitted; alleges that, pursuant to the act of Congress referred to in the said petition, the General Assembly of the state of Illinois, for the purpose of carrying out the object and purposes of said Congress, passed an act entitled "An act to incorporate the Illinois Central Railroad Company," approved February 10, 1851 (Priv. Laws 1851, p. 61), that said act was duly accepted by said company within 60 days after its passage, as provided in section 23 (page 73) of said act, that said act constitutes the charter of said railroad company, and by its acceptance, as aforesaid, it became a valid existing contract between the said company and the state of Illinois. The answer then sets out sections 1, 2, 3, 8, 10, 11, 15, 18, 22, and 27 of the said act (pages 61, 63, 64, 66, 71, 72, 74), and alleges that after the passage and acceptance of said charter, as aforesaid, the said company surveyed and located its railroad and branches and began work on the main trunk thereof before January 1, 1852, as required by section 23 of its charter, and completed its road and branches, and had the same in operation before the expiration of the year 1855; that in the location and construction of its railroad at or near the city of Cairo, for the purpose of securing suitable and proper right of way lands for main tracks, depots, station grounds, switchyards, side tracks, switch tracks, turn-outs, engine houses, shops, and all other structures needful or necessary for the construction, maintaining, altering, preserving, and the

complete operation of its railroad, as contemplated by its charter and the said act of Congress providing for the construction of a railroad from Chicago to Mobile, said company on October 15, 1853, purchased from the trustees of Cairo city property, for the southern terminus of its road in the city of Cairo, a strip of land in the upper or northern part of said city extending from the Ohio to the Mississippi river, commonly known as the "Illinois Central 500-foot strip," also a certain other strip of ground 200 feet in width lying north of and intersecting said 500-foot strip about midway of the two rivers, also two certain other pieces of land lying south of said 500-foot strip in the southerly portion of said city, one tract being 1,000 feet in width and extending from Fourteenth to Eighteenth street, and the other 450 feet in width, now constituting block 1, at Second street, also the right to lay and operate a double line of rails from said 500-foot strip down and upon the Ohio river levee embankment to the two said tracts last mentioned; that said company thereafter constructed its said railroad upon and over said lands and built a passenger depot on said ground at Second street, and has ever since maintained the same, and established freighthouses, depots, engine houses, switchyards, with side tracks, etc., on said piece of ground between Fourteenth and Eighteenth streets, in said city of Cairo, and has ever since maintained the same; also constructed and laid down lines of main track over the said 200-foot strip south to said 500-foot strip, and thence curving to the left over, upon and along said 500-foot strip to the Ohio river, and from that point southward along said levee embankment to said freight and passenger depot aforesaid, and has ever since maintained and operated the same, with many side tracks and switch tracks connecting therewith, upon said several pieces of ground above described within the city limits of said city of Cairo, including said 500-foot strip, which for many years has been known as its "North Cairo yard," all of which lands were originally selected and have ever since constituted the southern terminus of said company's railroad at Cairo, Ill., and alleges that within a few years after the completion of the Illinois Central Railroad the Mobile & Ohio Railroad Company completed its road from Mobile to the city of Columbus, Ky., and that for a number of years connection was made between the two roads by a steamboat, called "The Illinois," but that this arrangement was in due course of time discontinued, owing to the increasing demands of commerce. The answer then sets forth a number of reasons for such discontinuance, among which was the consolidation of several southern lines of railroad into the Chicago, St. Louis & New Orleans Railroad Company and the extension of the line of the Mobile & Ohl,

Railroad Company from Columbus to a point on the Ohio river opposite the city of Cairo, and from that time until the completion of the bridge across the Ohio river the use of transfer boats for the transfer of cars and trains across the said river, and admits that for a period of over 20 years, during the operation of said boats, in addition to the 7 per cent. charter tax exacted of it by the state of Illinois, it paid special taxes on said transfer boats, but that said taxes on said boats were paid only because steamboats were not such property as contemplated by section 22 of its charter; that said connections across the Ohio river became wholly inadequate to meet the growing demands of commerce, and it was absolutely necessary to the successful and complete operation of both the Illinois and southern lines that some more expeditious and satisfactory means of connection across said river should be devised; that on March 29, 1886, the Chicago, St. Louis & New Orleans Railroad Company procured from the Legislature of the state of Kentucky an act authorizing the said company and the Illinois Central Railroad Company, or either of them, to build a railroad bridge in the state of Kentucky, at or near the city of Cairo, across the Ohio river to the boundary line between the states of Kentucky and Illinois; that prior to this time, on June 13, 1882, the Illinois Central Railroad Company had leased the lines of the Chicago, St. Louis & New Orleans Railroad Company, extending from New Orleans to a point opposite the city of Cairo, for a term of 400 years from July 1, 1882; that, in pursuance of said act, the last above-named company at its own expense constructed the said bridge and has ever since owned the same as part of its railroad, together with the Kentucky approach, and that said bridge extends across the Ohio river to the said 500-foot strip; that because of the increasing business of the Illinois charter lines of the Illinois Central Railroad it became necessary that said company connect its then existing tracks with the tracks of the said bridge; that said bridge was built 53 feet above high water, and because of the altitude of said bridge, in order to properly lay the necessary tracks connecting said bridge with the then existing line tracks and give the same the necessary curve and grade to reach the elevation of the bridge and pass around and over existing tracks of said company, it became absolutely necessary that additional ground adjacent to and touching said original way lands acquired in 1853 should be obtained, and that thereupon, for the purposes aforesaid, said company, on April 18, 1889, obtained, by deed from the trustees of the Cairo city property, an additional strip of land containing 17.60 acres, and after procuring said strip of land said company at its own expense constructed said Illinois Cen-

tral bridge approach, and laid tracks thereon connecting its main line with the rails on said bridge; that said bridge was completed and opened for traffic in October, 1889.

The answer further alleges that all of the tracks of the Illinois Central Railroad Company, and other railroads entering Cairo, are laid upon embankments 12 to 16 feet above the natural ground, but because of the necessity therefor the tracks of said company leading to said bridge were laid at a much greater altitude, partly on an earth embankment and partly on steel trestles; that the entire length of said tracks leading to said bridge is 7,963 feet; that the northerly portion thereof, 5,307 feet in length, is laid on an earth embankment, the northerly end thereof, intersecting with the earth embankment on which the main tracks are laid, at that point being about 15 feet above the natural surface, and thence extending southward, bearing gradually to the right, away from the main track embankment, and then curving to the left towards the bridge, with a gradual increasing height and width until it reaches the southerly end of the embankment, where the height is about 50 feet and its width 185 feet at its base; that of the land covered by said 5,307-foot embankment 7.5 acres is of the land purchased in 1889 and 8.2 acres is of the original way lands acquired in 1853; that the southerly portion of said tracks, 2,656 feet in length, leading to the bridge, is laid on a steel viaduct commencing at the terminus of said earth embankment and curving towards and extending to the bridge, all of which is upon the original way lands acquired by the Illinois Central Railroad Company in 1853; that the said earth embankment is double tracked, and that the Illinois Central Railroad Company is now engaged in filling in with earth the space covered by said steel viaduct, and proposes to make the said bridge approach a continuous earth embankment, except at crossings, where concrete or steel viaducts will be maintained, and lay a double track thereon to said bridge, all of which work and additional tracks were and are necessary to meet the demands of commerce and the increasing business of said road.

The answer denies that said bridge approach is a "branch or lateral railroad" of the Illinois Central railroad, or an "independent enterprise," or "the northern end or terminus of the Chicago, St. Louis & New Orleans Railroad Company," but, on the contrary, avers that said tracks and superstructure are a part of the Illinois Central Railroad Company's railroad constructed in pursuance of its charter, and that said approach, and the tracks laid thereon, to said bridge, are absolutely indispensable and necessary for the proper operation of said road; admits that said steel viaduct leading to said bridge crosses 50 or 60 feet above the surface tracks of said Illinois Central Railroad

Company, and that none of said tracks touch any of the tracks of said company except at the point of their junction with the main line, a mile and a half from the river, and alleges that it was practically impossible to construct said tracks otherwise, that the southern terminus of said road is not solely at its passenger depot in the city of Cairo, but is at said city, and embraces all of the land and tracks owned by said company at that point, that the southern terminus of the Chicago, St. Louis & New Orleans Railroad Company is at New Orleans and its northern terminus is its said railroad bridge over the Ohio river; alleges that about January 2, 1889, the Illinois Central Railroad Company and the Mobile & Ohio Railroad Company, which operated a road from Mobile to St. Louis through the city of Cairo, entered into an agreement for the joint use of the Illinois Central passenger station in the city of Cairo, and its tracks from the junction with the bridge approach leading thereto, and the joint use of the Mobile and Ohio company's switch tracks on the opposite side of the river, and giving the right to said company last mentioned to use said bridge and the approaches thereto for the purpose of transferring its trains and cars across the said river, for which said company pays to the Illinois Central company the sum of \$150,000 per annum, and that, in addition to such use of said bridge, the said Illinois Central company uses it for the transfer of all its trains and cars which require transfer across the said river; avers that it had the power and authority to build and operate said bridge approach not only under the provisions of its charter, but by virtue of the act of the General Assembly of February 25, 1867; denies that said company claims that said approach is exempt from taxation by the provisions of its charter, but avers that it cannot be subjected to any further or additional tax than said charter tax, to be assessed and paid as provided in said charter.

The answer denies that said bridge, or any part thereof, is a toll bridge, but admits that the tariff rates on through freights carried over said bridge include a charge of two cents per hundred on account of the bridge proper, and that, before a division of freights takes place between the different companies entitled thereto, the said 2 cents per 100 is first taken out and paid to the Chicago, St. Louis & New Orleans Railroad Company or its lessee, and that said charge is solely for carriage over the bridge proper and not over either of said approaches; admits that petitioner made application to the state board of equalization to assess and value said approach for purposes of taxation and that the action taken thereon was as stated in said petition; alleges that said company pays, and has always paid, taxes on its said property not held for railroad purposes or in use in the operation of its road, to the full extent paid by other owners of like property, and as to

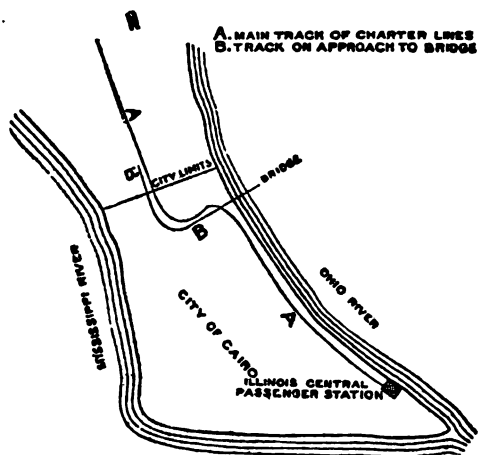
the property held and used by it for railroad purposes, including said Illinois Central bridge approach, it pays a charter tax far in excess of taxes paid by other railroad companies owning like property in the state of Illinois; admits that said approach has cost up to the present time \$500,000, that it is wholly within the county of Alexander and school district No. 1, and that the northerly portion thereof (north of the city limits and of the length of about 4,000 feet), for the distance of about 1,300 feet at the north end thereof, runs near to and into and consists of a considerable portion of the original earth embankment on which said company's original main tracks are laid; that the southerly portion of said approach of a length of about 4,000 feet is within the city of Cairo.

To the answer a general demurrer was interposed, which, upon a hearing, was sustained, and an order was entered by the court awarding a writ of mandamus in accordance with the prayer of the petition. From the judgment the defendants appeal to this court, and urge (1) the court erred in sustaining the demurrer to the answer; (2) the court erred in awarding the writ of mandamus.

Gilbert & Gilbert, for appellants. Lansden & Leek and Alexander Wilson, State's Atty., for the People.

SCOTT, J. (after stating the facts as above). The city of Cairo is located at the confluence of the Ohio and Mississippi rivers, and occupies the southern portion of a narrow strip of land lying between these two streams. The main tracks of the charter lines of the Illinois Central Railroad Company coming from the north, after passing the northern limits of the city, proceed south about a quarter of a mile, practically midway between the two rivers, and then turn to the east until within a few hundred feet of low-water mark on the Ohio river, when they turn in a southerly direction, and proceed along the west bank of the Ohio river about two miles, to the passenger depot in that city. The tracks leading to the bridge across the Ohio leave the main line tracks about three-quarters of a mile north of the city limits, and run south on the west side of the main line tracks, gradually ascending and departing a little to the west from the main line tracks, but practically parallel thereto, until the tracks leading to the bridge turn to the east at a point but little south of the place where the main lines turn to the east. The line leading to the bridge then passes over a steel viaduct and crosses the main tracks of the charter lines at a point about 50 or 60 feet above the main tracks and about 700 feet west of the most westerly portion of the bridge proper. If the bridge and the main tracks of the charter line were on the same level, those tracks and the railroad track on the bridge could be connected by a switch approximately 700 feet in length.

The accompanying plat will perhaps assist in arriving at a correct understanding of the situation:



The question is whether the tracks leading to the bridge, and the embankment and steel structure upon which they rest, should be taxed in the ordinary way for the purposes of the state and the various local municipalities, or whether they are exempt from such taxation by virtue of sections 18 and 22 of the charter of the Illinois Central Railroad Company. Appellee contends, and the circuit court held, that these tracks, and the embankment and structure upon which they rest, constitute a branch or lateral railroad of the Illinois Central Railroad Company not a part of the lines the construction of which was contemplated by the charter; while appellants contend that the tracks, and the embankment and structure upon which they rest, are a part of the lines of the company constructed pursuant to the provisions of its charter and necessary for the proper operation of the road.

In 1850 the Congress of the United States passed an act which received the approval of the executive on the 20th day of September in that year, and which, so far as here material, with its title, reads as follows:

"An act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the right of way through the public lands be, and the same is hereby granted, to the state of Illinois for the construction of a railroad from the southern terminus of the Illinois and Michigan canal to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another via the town of Galena, in said state, to Dubuque, in the state of Iowa," etc.

"Sec. 2. And be it further enacted, that there be, and is hereby, granted to the state of Illinois, for the purpose of aiding in making the railroad and branches aforesaid, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches," etc.

"Sec. 4. And be it further enacted, that the said lands hereby granted to the said state shall be subject to the disposal of the legislature thereof, for the purposes aforesaid and no other; and the said railroad and branches shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

"Sec. 6. And be it further enacted, that the United States mail shall at all times be transported on the said railroad under the direction of the post-office department, at such price as the Congress may by law direct.

"Sec. 7. And be it further enacted, that in order to aid in the continuation of said Central Railroad from the mouth of the Ohio river to the city of Mobile, all the rights, privileges and liabilities hereinbefore conferred on the state of Illinois shall be granted to the states of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio river, and that public lands of the United States, to the same extent in proportion to the length of the road, on the same terms, limitations and restrictions, in every respect, shall be, and is hereby, granted to said states of Alabama and Mississippi, respectively." Act Sept. 20, 1850, c. 61, 9 Stat. 466.

It will be observed that the words "said Central Railroad" occur in the seventh section. The word "Central" does not appear at any other place in the act, and the expression just quoted from section 7 evidently has reference merely to the location of the proposed railroad, and is not intended to designate that railroad as the property of the Illinois Central Railroad Company or of any other company.

Thereafter the state of Illinois accepted the provisions of the act of Congress by the act granting to said company its charter, and also by section 3 of an act of the Legislature approved February 17, 1851, which section reads: "Sec. 3. Be it further enacted, that the act of the Congress of the United States granting lands to the state of Illinois for the purpose of constructing a railroad from a point at or near the mouth of the Ohio to the southern terminus of the Illinois and Michigan canal, with branches to Chicago and Galena, entitled 'An act granting the right of way and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of the construction of a railroad

from Chicago to Mobile,' approved September twentieth, one thousand eight hundred and fifty, be and the same is hereby accepted, and all conditions expressed in said act are hereby agreed to and made obligatory upon the state of Illinois." Pub. Laws 1851, p. 192. The act creating the Illinois Central Railroad Company was approved February 10, 1851. Section 1 so far as material, section 2, section 3 so far as material, section 15 so far as material, section 18 so far as material, section 22, and section 27 of that act, are as follows:

Section 1 provides that the Illinois Central Railroad Company is thereby "invested with all the powers, privileges, immunities and franchises, and of acquiring, by purchase or otherwise, and of holding and conveying, real and personal estate which may be needful to carry into effect fully the purposes and objects of this act.

"Sec. 2. The said corporation is hereby authorized and empowered to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan canal to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan; and also a branch via the city of Galena, to a point on the Mississippi river opposite the town of Dubuque, in the state of Iowa.

"Sec. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, lands not exceeding 200 feet in width through its entire length; may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil-banks, turn-outs, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road," etc.

"Sec. 15. For the purpose of securing the construction of said road and branches, the right of way, and all the lands which may be selected along the lines of said road and branches within this state, under the grant made by the government of the United States to the state of Illinois by virtue of 'An act granting the right of way, and making a grant of land to the states of Illinois, Mississippi and Alabama, in aid of a construction of a railroad from Chicago to Mobile,' passed September twentieth (20), eighteen hundred and fifty (1850); and also the right of way which the state of Illinois has heretofore obtained along and on the line of said railroad and branches, as heretofore located and surveyed, for the uses of the same, as well as the lot of ground obtained by the state within the city of Cairo for a depot, and all the grading, embankments, excavations, surveys, work, materials, personal property,

profiles, plats and papers, constructed, procured, furnished and done by or in behalf of the state of Illinois, for or on account of said road and branches, also the right of way over and through lands owned by the state, are hereby ceded and granted to said corporation, for the only and sole purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches, as in this act provided and in the manner following—that is to say:

* * * That said company shall proceed to locate, survey and lay out, construct and complete said road and branches through the entire length thereof—the main trunk thereof, or central line, to run from the city of Cairo to the southern termination of the Illinois and Michigan canal, passing not more than five miles from the north-east corner of township 21 north, range 2 east of the third principal meridian, and nowhere departing more than seventeen miles from a straight line between said city of Cairo and said southern termination of said canal, with a branch running from the last mentioned point, upon the most eligible route, to the city of Galena, thence to a point on the Mississippi river opposite the city of Dubuque, in the state of Iowa, with a branch also diverging from the main track at a point not north of the parallel of thirty-nine and a half degrees north latitude, and running on the most eligible route into the city of Chicago, on Lake Michigan; that the central road or main track shall be completed, with at least one line of rails or single track, with the necessary turn-outs, stations, equipments and furnishings, within four years of the date of the execution of said deed of trust, and the branches within six years from the said date," etc.

"Sec. 18. In consideration of the grants, privileges and franchises herein conferred upon said company for the purposes aforesaid, the said company shall, on the first Mondays of December and June in each year, pay into the treasury of the state of Illinois five per centum on the gross or total proceeds, receipts or income derived from said road and branches for the six months then next preceding," etc.

"Sec. 22. The lands selected under said act of Congress, and hereby authorized to be conveyed, shall be exempt from all taxation under the laws of this state until sold and conveyed by said corporation or trustees, and the other stock, property and effects of said company shall be in like manner exempt from taxation for the term of six years from the passage of this act. After the expiration of six years, the stock, property and assets belonging to said company shall be listed by the president, secretary, or other officer, with the Auditor of state, and an annual tax for state purposes shall be assessed by the Auditor upon all the property and assets of every name, kind and description belonging to said corporation. Whenever the taxes levied for

state purposes shall exceed three-fourths of one percentum per annum, such excess shall be deducted from the gross proceeds or income herein required to be paid by said corporation to the state, and the said corporation is hereby exempted from all taxation of every kind, except as herein provided for. The revenue arising from said taxation, and the said five per cent. of gross or total proceeds, receipts or income aforesaid, shall be paid into the state treasury in money, and applied to the payment of interest-paying state indebtedness, until the extinction thereof: provided, in case the five per cent. provided to be paid into the state treasury, and the state taxes to be paid by the corporation, do not amount to seven per cent. of the gross or total proceeds, receipts or income, then the said company shall pay into the state treasury the difference, so as to make the whole amount paid equal at least to seven per cent. of the gross receipts of said corporation."

"Sec. 27. This act shall be deemed a public act, and shall be favorably construed for all purposes therein expressed, and declared in all courts and places whatsoever, and shall be in force from and after its passage." Priv. Laws 1851, pp. 61, 66, 71, 72, 74.

By the act of the Legislature of this state approved February 12, 1855, it is provided:

"Section 1. All railroad companies incorporated or organized under or which may be incorporated or organized under the authority of the laws of this state, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof, and also to contract for and hold, in fee simple or otherwise, lands or buildings in this or other states for depot purposes, and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act.

"Sec. 2. All railroad companies incorporated or organized, or which may be incorporated or organized as aforesaid, shall have the right of connecting with each other, and with the railroads of other states, on such terms as shall be mutually agreed upon by the companies interested in such connection." Priv. Laws 1855, p. 304.

An examination of the act of Congress herein above in part set out, and of the title thereto, makes it apparent that it was the purpose of that body to assist in the construction of a railroad from the city of Chicago, Ill., to the city of Mobile, Ala. By that act the southern terminus of the road in the state of Illinois was to be "at or near the junction of the Ohio and Mississippi rivers," and the road south of the Ohio was to be constructed from the city of Mobile "to a point near the mouth of the Ohio river." Pursuant to the provisions of that act, the Mobile & Ohio Railroad was built from Mobile to the city of Columbus, in the state of Kentucky, which is situated on the bank

of the Mississippi river about 20 miles below Cairo, and for a period of many years connection was made between the two roads by steamboat. Later the lines of the Mobile & Ohio were extended to a point opposite Cairo, where connection was made over the bridge there located from the lines of the Mobile & Ohio to those of the Illinois Central, and vice versa. The act of the General Assembly approved February 10, 1851, cedes and grants to this company all lands which may be selected under the grant made by the government to the state of Illinois by virtue of the act of Congress, setting out the title of the latter act, to wit, "An act granting the right of way and making a grant of land to the states of Illinois, Mississippi, and Alabama in aid of the construction of a railroad from Chicago to Mobile," from which it is apparent that the General Assembly of the state then contemplated the use of some method of transportation by which freight and passengers carried south on the lines of the Illinois Central Railroad Company in Illinois should be transported across the Ohio river, that they might thence be carried by railroad to Mobile or points en route. It is to be observed that the act of Congress by the first section grants the right of way through the public lands "for the construction of a railroad from the southern terminus of the Illinois and Michigan canal" to a point at or near the junction of the Ohio and Mississippi, and by section 7, for the purpose of aiding in "the construction of a railroad" from the city of Mobile to a point near the mouth of the Ohio, grants are made to the states of Alabama and Mississippi. It is apparent that Congress did not make the grants upon condition that the same company should own the railroad throughout its entire length from Chicago to Mobile. The act speaks of the construction "of a railroad" in Illinois and the construction "of a railroad" from Mobile to the mouth of the Ohio. It follows, therefore, that it is a matter of no importance in this litigation that the lines of road now operated by the Illinois Central Railroad Company and owned or leased by that company have their southern terminus at the city of New Orleans, in the state of Louisiana, and not at the city of Mobile, in the state of Alabama. The lines of the Mobile & Ohio and the lines of the Illinois Central now connect at Cairo. Entire trains may be transferred from the lines of one road to the lines of the other. Passengers, freight, mail, and express may pass from Chicago to Mobile by a continuous journey by rail, crossing the Ohio at a point near its mouth and near the junction of the Ohio and Mississippi rivers. The purpose of the national Congress in making the original grants has been attained. This view has been taken by the Supreme Court of the United States in the case of Illinois Central Railroad Co. v. State of Illinois, 163 U. S. 142, 16 Sup. Ct. 1096, 41 L. Ed. 107, where it

was said: "The line of railroad communication crossing the Ohio river at Cairo, and of which the Illinois Central Railroad forms part, has been established by Congress as a national highway for the accommodation of interstate commerce and of the mails of the United States, and as such has been recognized and promoted by the state of Illinois. This will clearly appear by a brief recapitulation of the acts of Congress and the state of Illinois on the subject. * * * The manifest purpose of Congress was to establish a railroad in the center of the continent, connecting the waters of the Great Lakes with those of the Gulf of Mexico, for the benefit of interstate commerce as well as of the military and postal departments of the government of the United States."

It is contended that notwithstanding this fact, the corporation created by this state is, for all purposes of local government, a domestic corporation, and that as to this controversy the Illinois Central stands exactly as if no such purpose had ever been entertained by Congress; that the question of whether this property now under consideration should be taxed as appellee seeks to have it taxed is a matter to be determined precisely as though the Illinois Central Railroad Company was authorized to construct a railroad from the mouth of the Ohio to Chicago, without any regard to the transfer of passengers, freight, mail, and express, by rail, from its southern terminus to points beyond the Ohio. This view we think entirely too narrow. It could not reasonably be expected that all traffic to the south on this road should find destination north of the mouth of the Ohio, and, while it is true that the question of the taxation of the company is solely a question for the state of Illinois, it is nevertheless true that, in determining what property was needful for the operation of a road extending from the northern part of the state to the extreme southern boundary, the Legislature could not but recognize the necessity of some means of passing and repassing the Ohio river, and if the Legislature, accepting, as it did, the provisions of the act of Congress, realized, as it must have done, the necessity of the ownership by the Illinois Central Railroad Company of property which would enable its traffic to reach the Ohio river, it would seem to follow that such property necessary for that purpose would fall within the provisions of the statute providing for commutation of the taxes or for a substituted method of taxation.

It is also urged that the bridge approach is, in law, a part of the bridge, and many authorities are cited in support of this proposition. It is then contended that the earnings of the bridge proper should be so apportioned as that a part thereof should be treated as the earnings of this approach; that none of the earnings of the bridge proper are credited to this approach; that as the Illinois Central Railroad Company has not

elected to treat the portion of the earnings of the bridge proper which are, in fact, the earnings of the approach as a part of the earnings of its charter lines, appellants cannot say that the approach in question is to be regarded as a part of the charter lines of the Illinois Central. In other words, that as the company does not pay taxes on the approach, or money in lieu thereof, in the manner that the law requires it to pay upon its charter lines, it should be required to pay taxes in the method prescribed by the general laws of the state for the taxation of railroad property. The failure of a taxpayer to comply with the law in reference to the payment of his taxes has nothing to do with the determination of the method by which the property should be taxed. If the Illinois Central Railroad Company is not paying the proper percentage of the earnings of this approach into the state treasury, it should be required to do so, but its failure so to do does not alter the law.

It is also contended that under the contract which the Illinois Central has with the Mobile & Ohio, and under the practice of the Illinois Central by which an arbitrary charge or toll is levied upon freight passing over the bridge, on account of its so passing, the bridge, including this approach, is, in fact, a toll bridge. The contention further is that under its charter the company has no right to maintain a toll bridge; that even if this approach might, under some circumstances, be exempt from ordinary taxation, it is not now so exempt because it is now devoted to a use not contemplated by the charter. Attention is called by appellee, in this connection, to the cases of *In re Swigert*, 119 Ill. 83, 6 N. E. 469, and *Illinois Central Railroad Co. v. People*, 119 Ill. 137, 6 N. E. 451. In those cases the question was whether a grain elevator known as the "Cairo Elevator," and located on ground owned by the Illinois Central Railroad Company in the city of Cairo and leased to the firm of Hallday Bros., was exempt from taxation under sections 18 and 22 of the charter of that company. The court held that it was not so exempt, on the ground that it had no necessary connection with the construction, maintenance, or operation of the company's road. The approach is not in the same class. It is directly and continually used in the operation of the lines of the Illinois Central. It is used in the business of operating a railroad, and in no other business. By the sections of the act of February 12, 1855, above set out, the Illinois Central Railroad Company was authorized to make contracts with other roads by which other roads might use the tracks of the Illinois Central. While it is true that if the Legislature, by an act subsequent to the charter, empowered the company to acquire and hold property which it was not by the charter authorized to acquire and hold, such property would not come within the charter exemption, it is also true that, when the lawmakers by the act

of 1855 authorized the company to lease its tracks to other companies, a use of the tracks by another company under such a lease would not be a use for other than railroad purposes, as was the use of the elevator. It matters not what name is given to the earnings resulting from the use of the charter line tracks of the company by other companies, they are still a part of "the gross or total proceeds, receipts or income derived from said road and branches."

It is also insisted that this approach is taxable under the law as announced by this court in *Illinois Central Railroad Co. v. Irvin*, 72 Ill. 452. In that case it was held that a steamboat owned by the company for the purpose of carrying passengers and freight between Cairo, Ill., and Columbus, Ky., thereby making a connection between the northern terminus of the Mobile & Ohio Railroad and the southern terminus of the Illinois Central Railroad, was not exempt from taxation by virtue of the provisions of the charter, on the ground that a steamboat is not railroad property, and that the right of carrying by rail, possessed by the Illinois Central Railroad Company under its charter, does not include, as a necessary incident, the right to carry by water. It is apparent that that case is not in point. This approach is like unto a switch track which would carry the cars of the Illinois Central Railroad Company from its main track to the wharf at the river's edge, and is unlike an instrumentality for transporting cars or passengers and freight upon or over the stream. In *People v. Illinois Central Railroad Co.*, 215 Ill. 177, 74 N. E. 116, it was held that the property here involved could not be taxed by the local assessor. Whether it could be taxed by the state board of equalization was not there decided, but it was there determined that this approach was used exclusively for railroad purposes and came within the denomination "railroad track." We are satisfied that the use which has been made of this approach is not such as would authorize us in holding that it was taxable by ordinary methods, as was the case with reference to the steamboat and the elevator.

The parties hereto agree that the federal government required the bridge in question to be built at a height of 53 feet above high-water mark on the Ohio river. This requirement has made necessary the expenditure of a large sum of money in the construction of this approach. Had the bridge been constructed on the same grade as the main tracks of the charter lines of the Illinois Central Railroad Company, the only thing necessary to make the connection between the rails on the bridge and such main tracks would have been a comparatively inexpensive switch track. It cannot be seriously contended that the greater expense of the method necessarily pursued under regulations established by the government of the United States in providing a way whereby cars might pass from the

main tracks of the Illinois Central Railroad Company on the Illinois shore to the tracks on the west end of the bridge, and from the tracks on the bridge to the main tracks of the company in Illinois, would affect the question as to whether or not the property made use of for that purpose is exempt from ordinary taxation. It is to be observed that no traffic of any character originates along this approach, and that no passengers, freight, express, or mail find a destination at any point which it touches. In this respect it is entirely different from an ordinary branch or lateral line. *Chicago & Eastern Illinois Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49. Section 1 of the charter vests the Illinois Central Railroad Company with the power of acquiring and holding all "real and personal estate which may be needful to carry into effect fully the purposes and objects of this act." The third section authorizes the company to acquire land "for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turn-outs, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road." In *Re Swigert*, supra, it was said that the enumeration in this charter of property that may be acquired by the corporation "doubtless includes the road, with all necessary switches and turn-outs."

In *Lake Shore & Michigan Southern Railway Co. v. Baltimore & Ohio & Chicago Railroad Co.*, 149 Ill. 272, 37 N. E. 91, the appellee sought in the county court to condemn a strip of land for the purpose of connecting its tracks with the tracks of the Chicago, Rock Island & Pacific Railway Company. It was there contended that the petitioner was without the power to condemn, for the reason that the connection which it proposed to make was either a branch line or a relocation of the main line, but it was held that the proposed connection, which was not over 800 feet in length, was not a branch road and was not a relocation of the main line, but that it was a side track needful for the operation of the main line; and it was further said that "the grant of power to locate and construct a railway carries with it the right to construct turn-outs, sidings, and such conveniences as are usual in the necessary operation of the road," and that the act of 1872, "while requiring the persons incorporating the company to name the places from which and to which it is intended to construct the proposed railway, lays down no limitation as to the places where such switches, side tracks, or turn-outs are to be constructed."

We conclude, upon consideration of the fact that the act creating the Illinois Central Railroad Company was passed, in part, for the purpose of carrying out the object of the national Congress as expressed in

the act of Congress approved September 20, 1850, upon consideration of the various provisions of the charter of that company, and upon consideration of the language used and the conclusions reached by this court in the two cases last referred to, that it is clear and certain that power to acquire and construct this approach for the purpose of connecting the main tracks of the charter lines of the Illinois Central Railroad Company in Illinois with the tracks upon the bridge over the Ohio at the east line of the state was granted by the charter to the company, and that the approach is therefore within the exemption created by sections 18 and 22, *supra*. This approach must be regarded as a switch or side-track "needful to carry into effect fully the purposes and objects" of the act, and not as a branch or lateral railroad.

The question whether the sections of the charter providing for the commutation of the taxes of the Illinois Central Railroad Company or for substituted taxation of its property should be liberally or strictly construed has been much discussed. We find it unnecessary to determine that question, for the reason that in our view the property involved in this litigation comes clearly within that class of property exempted from ordinary taxation by the charter, whether the sections in question be liberally or strictly construed.

It is also urged that long prior to the construction of this approach the power of the Illinois Central Railroad Company to condemn lands for the purpose for which this approach is used had been exhausted, and that, as it could not acquire this property by condemnation, it could not acquire it for the purposes contemplated by its charter, and therefore could not hold it free from such taxation as is imposed by the general law. The power to acquire land by condemnation for side or switch tracks, such as this, is not exhausted by an apparent completion of the road, but may be exercised as other or additional conveniences of this character may become needful or requisite for the operation of the railroad. *Chicago, Burlington & Quincy Railroad Co. v. Wilson*, 17 Ill. 123. The power to acquire land for switch or side tracks "is a continuing power, which may be exercised from time to time as the needs of the company may require." *Chicago & Western Indiana Railroad Co. v. Illinois Central Railroad Co.*, 113 Ill. 156. Whether the approach is, in law, a part of the bridge, so as to draw to itself a portion of the earnings of the bridge proper which are now not credited to the approach or to the charter lines in Illinois, is not for our consideration or determination in this suit.

The judgment of the circuit court will be reversed and the cause will be remanded, with directions to overrule the demurrer to the answer.

Reversed and remanded, with directions.

(230 Ill. 53.)

CHICAGO CITY RY. CO. v. STRONG.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. STREET RAILROADS—INJURIES TO PERSON ON TRACK—EVIDENCE.

Evidence in an action for the death of plaintiff's intestate, a boy six years old, who was killed by a street car, held not to warrant a peremptory instruction for defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251-257.]

2. WITNESSES—CROSS-EXAMINATION—SCOPE.

In an action for the death of plaintiff's intestate, a boy six years old, who was killed by being run over by a street car, plaintiff, who had not been asked any question, on his direct examination, in regard to the accident, stated on cross-examination that he had heard there were other boys on the street at the time and had learned the name of one. Held, that an objection was properly sustained to a further question as to that boy's name.

3. APPEAL—REVIEW—HARMLESS ERROR—REMARKS OF COUNSEL.

In an action for the death of plaintiff's intestate by being run over by a street car, previous to the amendment of 1903 raising the limit of recovery, plaintiff's counsel in his argument stated this change to the jury, and on objection made a colloquy between counsel occurred, wherein plaintiff's counsel stated that that law, like every other law, was expanding and being made more sensible. Held that, though the allusion to the change of law was improper, counsel's remarks were not of such a prejudicial character as to require a reversal.

4. SAME.

In an action for the death of plaintiff's intestate, who was killed by being run over by a street car, plaintiff's counsel, in his argument, in referring to certain evidence, said: "Some of this is made for you, Mr. R. You are a motorman. A whole lot of this stuff is for you." Defendant's counsel objected to the addressing of a juror by name, which objection was sustained. Held, that counsel's remarks were not of such a prejudicial character as to require a reversal.

5. SAME—DISCRETION OF COURT.

Reliance must be placed in the sound judgment and discretion of the trial court in controlling the conduct of counsel and the scope and character of their argument, and, unless it satisfactorily appears that there has been an abuse of this discretion, a court of review will not interfere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3847.]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; A. H. Frost, Judge.

Action by Joseph H. Strong, administrator of the estate of his minor son, against the Chicago City Railway Company. From a judgment of the Appellate Court, First District (129 Ill. App. 511), affirming a judgment of the superior court for plaintiff, defendant appeals. Affirmed.

William J. Hynes, Samuel S. Page, and O. Le Roy Brown (Mason B. Starring, of counsel), for appellant. James C. McShane, for appellee.

DUNN, J. This is an action on the case to recover damages for the death of appellee's intestate, a boy between six and seven years old, who was killed by being run over by a car on appellant's street railway track.

A judgment for plaintiff has been affirmed by the Appellate Court, and the appellant prosecutes this further appeal. The errors urged for reversal are the overruling of a motion to find the defendant not guilty, sustaining objections to questions asked by defendant of one of plaintiff's witnesses on cross-examination, and improper remarks by plaintiff's attorney in his argument to the jury.

The train by which the deceased was killed consisted of two cinder cars and a motor car, and was backing north on the south-bound track; the motor car being on the south end of the train. Just before the accident the trolley came off the wire and there was a brief stop, during which the conductor climbed up on the motor car and fixed the trolley rope, which had broken. No one was on the north end of the train to give warning to pedestrians using the street. There was evidence tending to show that the deceased started to cross the tracks north of the train while it was standing still; that he was between the rails in the act of crossing when the train was started; that neither the motorman nor conductor, from their positions at the time, could see him or know whether or not the track was clear; and that the train was started without warning of any kind. It was not error to refuse the peremptory instruction.

The father of the deceased, in answer to the defendant's question on cross-examination, stated that he had heard there were other boys on the street at the time of the accident and had learned the name of one. An objection was sustained to a question as to that boy's name, and this ruling is assigned as error. The witness was not present at the time of the accident, and no question was put to him, on his direct examination, in regard to it. What he had heard about the accident after its occurrence was hearsay. The question was not within the scope of proper cross-examination, and the objection to it was properly sustained.

The accident occurred in October, 1902, before the amendment of 1903 raising the limit of recovery from \$5,000 to \$10,000. In the course of his closing argument to the jury counsel for appellee stated this change to the jury, and, upon objection made, a colloquy between counsel occurred, in which appellee's counsel stated: "And that law, like every other law, is expanding and being made more sensible every day." Appellee's counsel, in referring to a certain phase of the evidence, said: "Some of this was made for you, Mr. Russell. You are a motorman. A whole lot of this stuff is for you." Appellant's counsel objected to the addressing of a juror by name, and the court sustained the objection. Other statements made in the argument were also objected to.

The allusion to the change of law raising the limit of damages recoverable should not have been made; but, while it was improper, it does not appear that any of the remarks

complained of were of such a prejudicial character as to require interference on our part. Brief extracts, only, from the addresses of counsel on either side, appear in the record. It was the duty of the trial judge to prevent improper conduct on the part of counsel and the use of unfair means to obtain a verdict. Reliance must be placed, to a great extent, in his sound judgment and discretion in controlling the conduct of counsel and the scope and character of their arguments to the jury. Being present at the trial and cognizant of all that occurred, he had a much better opportunity than we have to determine whether the defendant was prejudiced by anything that was said there. Unless it satisfactorily appears from the record that he has abused his discretion in this regard, a court of review will not interfere. *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Lake Erie & Western Railroad Co. v. Middleton*, 142 Ill. 550, 32 N. E. 453.

We cannot say that the court committed error in refusing to grant a new trial because of the misconduct of counsel.

Judgment affirmed.

(229 Ill. 540)

TEMBY v. WILLIAM BRUNT POTTERY CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. DEPOSITIONS — SIGNATURE — AUTHENTICATION.

Where a commission to take depositions is directed to a competent person, he derives his authority from the commission, and because he is described therein as a notary public does not render necessary the affixing of a certificate of his official character to the depositions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 191-196.]

2. PRINCIPAL AND AGENT—COMPENSATION OF AGENT—CONTRACT.

Under a contract with an agent that no commissions are to be paid on orders not shipped, and that the acceptance of orders is at the discretion of the principal, the agent cannot collect compensation for orders not accepted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 216-223.]

Error to Appellate Court, First District, on Writ of Error to Superior Court, Cook County; M. Kavanagh, Judge.

Bill by the William Brunt Pottery Company against Gwynne M. Temby. From a judgment of the Appellate Court for the First District (127 Ill. App. 441), affirming a decree for complainant; defendant brings error. Affirmed.

Henry W. Prouty and Aaron C. Harford, for plaintiff in error. William J. Pringle and Edwin Terwilliger, Jr., for defendant in error.

CARTWRIGHT, J. Gwynne M. Temby, plaintiff in error, commenced a suit in assumpsit in the circuit court of Cook county against the William Brunt Pottery Company, defendant in error, a corporation engaged in

the manufacture of pottery at East Liverpool, Ohio, and the summons was returned by the sheriff with an indorsement thereon of service on said company "by delivering a copy thereof to Courtland A. Saunders, agent of said corporation, this 29th day of August, 1903, the president of said corporation not found in my county." Saunders was not an agent of the pottery company. He took orders for goods for it in Indian Territory, Oklahoma, Texas, and Kansas, for which he received commissions. He had no authority to fix prices, collect accounts, or transact any other business for the company, and at the time of the alleged service was in Chicago during his vacation, on a pleasure trip, at the invitation of Temby. When the deputy sheriff offered him a copy of the summons, he refused to receive it and told the officer that he had nothing to do with the William Brunt Pottery Company. A week afterward he went back to Kansas and never notified the company of the suit. The company had no knowledge of the suit from any other source, and was defaulted, and judgment was entered against it on September 29, 1903, for \$1,859.75 and costs. An execution was issued, and, no property being found, it was returned accordingly. A proceeding in garnishment was begun against various persons and corporations for the purpose of collecting the judgment. The company then learned of the existence of the judgment and filed its bill in the superior court of Cook county to enjoin the prosecution of the garnishment suit and the collection of the judgment, on the grounds that Saunders was not the agent of the company, and that it was not indebted to Temby in any manner or to any amount, at the time of the judgment or afterward. Temby and the sheriff were made defendants and answered the bill, denying the averments that Saunders was not an agent of the company and that it was not indebted to Temby. There was a hearing, at which the superior court entered an interlocutory decree finding that the return of the summons was false; that Saunders was not an agent of the company; and that it had no knowledge of the pendency of the suit, and referring the cause to a master in chancery to take proof whether there was anything due Temby and to report his conclusions. The master reported that there was nothing due, and the cause was then heard on exceptions to the master's report, which were overruled, and a decree was entered in accordance with the prayer of the bill. Temby sued out a writ of error from the Appellate Court for the First District, and the decree was affirmed by the branch of that court. Temby then sued out a writ of error from this court to review the judgment of the Appellate Court.

At the hearing before the master the defendant Temby objected to the admission in evidence of depositions taken on behalf of the complainant on the grounds that they

contained no evidence that the witnesses were examined under oath, and that they were certified to by George E. Davidson as a commissioner purporting to act as a notary public of Columbiana county, Ohio; but the certificate was not under his notarial seal, and he failed to return with the depositions a certificate of his official character as a notary public. The depositions were received in evidence, and the court sustained the master in considering them. They were taken by virtue of a commission issued out of the superior court to George E. Davidson, who was described as a notary public and was thereby authorized to take and return them to the court. He derived his authority from the commission, and it is immaterial that he was also described as a notary public. It is not necessary that a commissioner should hold any office, and a commission may be directed to any competent and disinterested person. The person to whom a commission to take depositions is issued need only be designated by his name, or he may be designated by the office which he holds, and in either case he obtains his authority from the commission. *Brown v. Luehrs*, 79 Ill. 575. The addition of the description to the name of the commissioner did not add to or detract from his authority, and no certificate was necessary. *Kendall v. Limberg*, 69 Ill. 355. The certificate showed that the witnesses were sworn and examined under oath, and the objections were properly overruled.

Temby was employed by the complainant under a written contract signed by the parties, which fixed the prices of certain packages or assortments of pottery and the commissions for the sales, and it contained these provisions: "Commissions paid on the first of each month for all orders shipped. No commissions paid on orders not shipped or on uncollectible accounts. All orders guaranteed genuine, and acceptance of orders at the discretion of the William Brunt Pottery Company." The goods were to be sold in Oklahoma, Indian Territory, Kansas, and Texas, and Temby operated under the contract, taking orders through himself and other agents, for about six months, when he was notified by the complainant that the relation was terminated. The grounds alleged were that the complainant received complaints of misrepresentations to customers and unfair means to secure orders, and was not satisfied with the credit of many persons from whom orders were taken. The complainant received orders that it did not accept or ship because dissatisfied with the credit of the parties ordering the goods, and some orders were repudiated by the persons giving the orders, and some accounts were uncollectible. Temby was paid all that was due him for commissions on orders which were accepted and shipped and which proved to be collectible. There is nothing tending to prove bad faith on the part of complainant, and, if the

true construction of the contract is that the acceptance of orders was to be at the discretion of complainant, there was nothing due Temby. We do not see how there can be any doubt that under the terms of the contract complainant was authorized to reject, in its discretion, any order, whether the credit of the party ordering would have satisfied some other person or not. Surely it was not the intention of the complainant in making the contract that it should pay commissions on orders not accepted or shipped, upon proof that some one else would have taken the risk and shipped the goods. There was no rule of law which would prevent Temby from making a contract leaving the acceptance of orders to the discretion of the complainant if he saw fit to do so, and the proper function of courts is to enforce contracts as made if they do not conflict with some rule of law. The contract fixes no standard, other than the discretion of the complainant, for acceptance of orders, from which a court or jury or any one else would be authorized to say that the complainant ought to have been satisfied with any order which it rejected.

In the case of *Goodrich v. Van Nortwick*, 43 Ill. 445, it was held that the question whether a fanning mill suited Van Nortwick did not depend upon the opinion or judgment of other persons, and that having reserved, by his contract, the right to return the mill if it did not suit him, he could not be prevented from exercising such right according to the contract. The same doctrine was held in *Kendall v. West*, 196 Ill. 221, 63 N. E. 683, 89 Am. St. Rep. 317.

In the case of *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248, Keeler was to pay \$5,000 for removing and leveling dirt, and payments of \$1,000 each were to be made when one-fourth, one-half, and three-fourths of the work should be done by Clifford. Keeler refused to make payment as provided by the contract, and it was held that the contract was severable, that a failure to make the payments justified Clifford in abandoning the contract, and that he was entitled to recover for the work done pro tanto at the contract price. When the whole work should be completed, Keeler was to pay the unpaid portion of the \$5,000, and all of the grading was to be done to his satisfaction. There is nothing to indicate that Keeler expressed any dissatisfaction as the work progressed, and the court said that in the nature of things it would rarely happen that a contract abandoned or uncompleted by one party would be fulfilled to the satisfaction of the other party.

In the case of *Union League Club v. Blymyer Ice Machine Co.*, 204 Ill. 117, 68 N. E. 409, there was no provision that the club was to have the option not to accept and pay for the refrigerating machine unless it suited the club, and the case was distinguished from *Goodrich v. Van Nortwick*, supra, and *Low v. Pardee*, 48 Ill. 466, on that ground.

The court said (page 125 of 204 Ill., page 412 of 68 N. E.): "On the contrary, the club was to pay for the machine if it fulfilled the guaranties, and if for any cause other than the nonfulfillment of the guaranties the machine was unsatisfactory, the club had a certain option. The very fact that there was to be some other cause than the nonfulfillment of the guaranties shows that the club did not have an arbitrary option to reject the machine. * * * It was the duty of the club to show what the cause was which was claimed by it to establish the unsatisfactory character of the machine." It was then said that there are authorities holding certain doctrines relating to cases where one party agrees to do a thing to the satisfaction of another, but the decision then proceeded upon the admission that the club had an option to be exercised according to its own judgment, and the decision was against the club on the ground that it kept and used the machine for so long that it was bound to pay for it. The final conclusion was that the correct interpretation of the contract did not give to the club an option to reject the machine if not suited with it.

This is not a case where material has been furnished or work done under an executed contract, the benefits of which have been received and retained by a party refusing to make payment.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(230 Ill. 19)

HILL v. SIFFERMANN.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. APPEAL—REVIEW—MATTERS NOT PLEADED.

In a suit to subject land, conveyed by a husband to his wife, to the satisfaction of an execution against the husband, a defense that the land was conveyed to the wife as a preferred creditor cannot be interposed on appeal where not pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1053, 1079.]

2. SAME—BRIEFS—FAILURE TO URGE DEFENSE—WAIVER.

A ground for reversal not urged in brief or argument is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

Appeal from appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Bill by Alois Siffermann against Minna Hill, in aid of an execution. From a judgment of the Appellate Court for the First District reversing a decree for defendant, she appeals on a certificate of importance. Affirmed.

On December 19, 1904, appellee filed in the superior court of Cook county, against Minna Hill and Charles J. Hill, her husband, a bill in aid of an execution issued upon a judgment recovered in the circuit court of that county on January 10, 1899, against the hus-

band, for \$434.30 and costs. The bill alleged, among other things, that prior to the date of the judgment Charles J. Hill had been the owner of certain described property on Hermitage avenue, in Chicago, Ill.; that on May 25, 1898, and after the indebtedness had been incurred upon which the judgment was based, Hill and wife conveyed the premises to Felix Babbage, who on the same day, without consideration, conveyed the same to the wife; and that this was done for the purpose of defrauding appellee. The defendants answered the bill, and a replication was filed. The cause was then referred to a master, who heard the evidence, from which it appears that Minna Hill was married to Charles J. Hill in 1882; that at an earlier time she had been the wife of Jacob Koenig, who departed this life in 1880; that from Koenig's estate she received the sum of \$3,000, and after her marriage to Hill, and in 1884 or 1885, she loaned him \$500 of this money, which was to be repaid, with interest, in one year, and was to be used in conducting a meat market. Hill paid but one year's interest and never repaid the principal in cash. No note or written memorandum was given to evidence this indebtedness. Hill's meat market was carried on at the corner of O'Brien and Jefferson streets, in the city of Chicago. About the year 1886 the realty at that number was purchased by him for \$6,250, which was paid as follows: \$2,500 in cash, delivered to Charles J. Hill by his wife and paid by him to the vendor; \$250 by the personal note of Charles J. Hill; and \$3,500 borrowed upon note secured by mortgage on the real estate purchased. The \$2,500 in cash was the balance of the money received by Mrs. Hill from the estate of her former husband. The title to this property was taken in the name of Charles J. Hill, and so remained until 1893. During that period Hill engaged in the meat business on the premises and reduced the principal of the mortgage indebtedness \$500. In that year this property was sold for \$12,000. Of the proceeds, \$3,000 was used in paying off the mortgage indebtedness, and the balance (\$9,000) was deposited in bank to the credit of Charles J. Hill. Within a month thereafter the property in question in this suit, located on Hermitage avenue, was purchased for \$4,750 and paid for with a part of the money so deposited in bank, and the title to the property was taken in the name of Charles J. Hill. That real estate was improved by a residence building, consisting of two "flats," one of which was occupied by the Hill family as a home, and the other was rented. Mrs. Hill testified that her husband agreed with her, at the time the property at O'Brien and Jefferson streets was sold, that she should select a home to cost not to exceed \$5,000, the title to be in his name; that he should attend to the payment of the taxes, but that the property should be deeded to her at any time on her request. She testified that he agreed to pay the taxes, "and I kept

the rent and used it in the family; that was the understanding at the time when the property was bought in Mr. Hill's name, because my health was very poor at that time, and I wanted to save the trouble of my going down and paying the taxes, and different things of that kind, so I trusted it in his name."

Charles J. Hill became insolvent in 1898. Some time previous to his failure the Hermitage avenue property was sold for taxes. Mrs. Hill testified that she discovered this fact in May, 1898, and then insisted that the title to the home should be placed in her name, and that at this time, on account of her insistence, the property was deeded to Babbage and by Babbage to her. Except in collecting the rents arising from the flat, as above stated, all the business with reference to the real estate held in the name of the husband, down to the time when the Hermitage avenue property was deeded to the wife, was conducted by Charles J. Hill and in his name. Appellee and Charles J. Hill had been acquainted for years. Hill testified that Siffermann advised him in his business affairs, and that they met very frequently, generally as often as twice a week; that appellee knew all about the sale of the first piece of property and of the purchase of the other realty and knew who furnished the money for this last purchase. Appellee denied that he knew anything about any of the wife's money having been used for the purchase of the property involved in this suit. Hill stated that appellee understood that the Hermitage avenue property was his (Hill's) "to a certain extent. He knew that we sold the Jefferson street property, and by that he thought the property was mine there on Hermitage. * * * He knew that I lived on this property and owned the property; that is, he imagined I owned it." Charles J. Hill further stated that he did not know that he told the appellee whose name that property was in or whose money went into it.

Appellee loaned Charles J. Hill \$300 in 1894, and \$100 on August 18, 1898, in each instance taking a promissory note, in which was embodied a warrant of attorney authorizing the holder of the note to confess judgment thereon, and both of these notes were merged in the judgment, satisfaction of which is desired by appellee. Siffermann testified that about the time the first loan was made he said to Charles J. Hill, "Now, I want you to be straight and square with me," and that Hill replied, "I will," when appellee said, "In case anything happens let me know, so I will record my judgment notes," and that Hill then said, "As sure as my name is Charlie Hill I will never assign my property to my wife or anybody else." Appellee further testified that just after the Hermitage avenue property was purchased, and before the judgment notes were given, Charles J. Hill stated to the appellee that he owned the property last mentioned. Charles J. Hill denied these conversations, and Mrs. Hill

testified that she never knew anything about her husband's business or his creditors after the purchase of the Hermitage avenue property. Hill never made any cash payment to his wife on account of the principal or interest of any of the money obtained from her by him, except the payment of one year's interest on the \$500, made at some time soon after it fell due, and, so far as appears from the record, after receiving the money he never made any promise to repay it, unless his agreement to deed the Hermitage avenue property to her upon her demand can be regarded as a promise to pay.

On January 19, 1906, the master reported, recommending that the property should be subjected to the lien of that portion of the judgment which represented the \$300 note, with interest thereon; that is to say, the sum of \$300, with interest at the rate of 6 per centum per annum from the 18th day of August, 1894, to January 10, 1899, and with interest on that aggregate at 5 per centum per annum from the last-mentioned date. The note for \$100 was not given until after the transfer of the property to Mrs. Hill. Objections to this report were filed with and overruled by the master. Exceptions were then filed in the superior court and sustained, and the bill was dismissed for want of equity. The decree of the superior court, upon appeal to the Appellate Court for the First District, was reversed, and the cause was remanded, with directions to enter a decree in accordance with the recommendation of the master. The Appellate Court made a certificate of importance, and Mrs. Hill alone appeals to this court.

Blum & Blum, for appellant. Edmund S. Cummings, for appellee.

SCOTT, J. (after stating the facts as above). The only defense to the bill insisted upon in this court is indicated by the following language quoted from the brief and argument of the appellant: "Appellant submits as the salient features of this case these facts: That she is the creditor of her husband to the extent of \$3,000, and was such creditor before the existence of the indebtedness from her husband to appellee. * * * These being the facts, we submit as the law that appellant's husband had a right to prefer her to his other creditors; that, the equities of appellant and appellee being equal from the standpoint most favorable to appellee, the prior legal right of appellant must prevail," etc. The same contention was made in the Appellate Court, and that tribunal, after a careful consideration of the evidence, arrived at the conclusion that Mrs. Hill held no indebtedness against her husband which was enforceable at the time the conveyance to her was made, and it is now earnestly insisted that in so finding the Appellate Court erred. We are of the opinion that it is not necessary to determine whether

appellant was a bona fide creditor of her husband at the time she took title to the Hermitage avenue property. The defense interposed in the superior court appears from the following language, quoted from the answer as that document is abstracted by appellant: "That the premises described in the bill of complaint were bought with money that was the sole and exclusive property of Minna Hill, and the title to said real estate was taken in the name of Charles J. Hill under an agreement between him and Minna Hill that he would at any time convey same to her when requested, or to any person to whom she should request a conveyance; that Minna Hill requested said Charles J. Hill to convey said premises to her, as he was in duty bound to do; that in pursuance of said request the said Charles J. Hill, as trustee for her, agreed to convey the legal title to her, and thereupon, in order to effect the transfer of the legal title to said premises, as aforesaid, the conveyances set forth in the bill of complaint were made and executed, and ever since the purchase of said premises with the money of said Minna Hill she had been in the actual possession of the same and had been collecting the rents arising therefrom (except the part thereof used as a family residence) for her sole use and benefit; that no money consideration passed with reference to said conveyances; and that said conveyances were not made to prevent said premises being subjected to the lien of any judgment against Charles J. Hill, or to prevent his creditors from having recourse to said real estate to satisfy their claims; and they deny that said conveyances were a fraud upon the rights of the complainant, and pray to be dismissed at complainant's costs."

It does not appear from this answer that appellant was at any time the creditor of her husband. The manifest purpose of the appellant in the superior court, so far as it can be gleaned from this answer, was to establish the fact that the property was held in trust for her by her husband. She did not in that court, by her pleading, seek to show that the property had been conveyed to her in payment of any indebtedness due to her from her husband. She will not be permitted to prevail in this court by showing that the evidence established a defense to the bill which was not interposed by the answer. *Crone v. Crone*, 180 Ill. 599, 54 N. E. 605.

As appellant does not contend, by her brief and argument, that the judgment of the Appellate Court should be reversed for the reason that the Hermitage avenue property was held in trust for her by her husband, that defense to the bill must be regarded as waived in this court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(230 Ill. 50)

REED v. NEW YORK NAT. EXCH. BANK
et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. JUDGMENT—EQUITABLE RELIEF—MERITORIOUS DEFENSE.

Under the rule that equity will not interfere to prevent the collection of a judgment at law unless a meritorious defense be shown, an allegation that the judgment was obtained without process is not sufficient.

2. SAME.

Under the rule that a bill must set forth facts, and not mere conclusions of law, an allegation, in a bill to enjoin the collection of a judgment on a note, that complainant has a good defense to any action brought on the note, which fails to state facts constituting the defense, is insufficient.

3. APPEAL—REVIEW—INJUNCTION BOND.

Where a person furnishes an injunction bond required by the court and secures the writ, he cannot on appeal from assessment of damages on the bond object to the burdensome character of the bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 8611-8616.]

4. INJUNCTION—DAMAGES ON DISSOLUTION—COMPENSATORY DAMAGES—STATUTORY REGULATIONS.

The court upon the dissolution of an injunction to stay the collection of a money judgment cannot award damages without hearing evidence and without regard to actual damages under the authority given it by Starr & C. Ann. St. 1896, c. 69, § 8, p. 2144, providing that complainant shall pay such damages as the court shall award not exceeding 10 per centum on the part released from the injunction, nor under Hurd's Rev. St. 1905, c. 89, § 12, p. 1151, allowing the assessment of such damages as the nature of the case may require upon a suggestion of damages and evidence heard.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 550.]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Bill by William S. Reed against the New York National Exchange Bank and others. From a judgment of the Appellate Court for the First District affirming a decree for defendant, plaintiff appeals. Reversed in part and remanded.

The New York National Exchange Bank commenced proceedings in the superior court of Cook county to revive a certain judgment for \$1,019.29 obtained by it against appellant in the latter part of 1903. It appears that the process against appellant was made returnable to the January term, 1906, and that the same was served prior to December 20, 1905. On December 30, 1905, appellant filed in the superior court of Cook county a bill in chancery, seeking to restrain, by injunction, both the collection and revival of said judgment. The bill alleges that the judgment was rendered on the 11th day of November, 1903, upon a supposed promissory note purporting to be signed by W. S. Reed & Co. and payable to the order of the Ansonia Electric Company; that the said judgment was and is null and void and should be so declared by the court, for the reason that in entering said

judgment and proceeding to the hearing of the cause leading up to the same the court had no jurisdiction over appellant, and he was not therefore before the court for any purpose, and had never been served with process in said cause and had no legal notice of the proceedings therein; that appellant has, and always had, a good defense to any suit which might be brought on said supposed note on which the judgment complained of was rendered; that said judgment is and was null and void, for the reason that no cause of action in favor of appellees is stated in the declaration on which judgment was rendered, and no evidence to support a judgment in said cause in favor of appellees and against appellant was or could have been properly introduced under the pleadings in said cause. The bill alleges irreparable injury in case of the enforcement of said judgment, and asks for an injunction restraining the collection of the judgment and further proceedings to revive the same. Appellees demurred to the bill upon the ground that the facts alleged therein would not constitute a good defense to the note upon which the judgment in question had been rendered. The demurrer was sustained by the court. Appellant then asked leave to amend the bill. The essential features of such amendments were that appellant was precluded from urging a valid defense in said cause by reason of not having been served with process, and having, therefore, no knowledge of the proceedings by which the judgment was obtained; that the judgment was not only irregularly rendered, but was also unjust, because there was no consideration for the alleged promissory note, as set forth in the declaration filed by appellees in said cause; that appellant did not at any time, and does not now, owe said judgment or any part thereof, and did not at any time, and does not now, owe the alleged indebtedness, or any part thereof, for which said judgment was rendered; that appellant never knew of said judgment, nor the proceedings in which the same was rendered, until after the year 1899. The court denied the motion to amend and dismissed the bill for want of equity. Leave was given appellees to file suggestion of damages, and upon the filing of the same the court allowed the sum of \$100. Appellant prosecuted an appeal to the Appellate Court for the First District, where the judgment of the superior court was affirmed, and by his further appeal the record is brought to this court for review.

Charles F. Davies and Sol. Rosenblatt, for appellant. Adams & Froehlich, for appellees.

VICKERS, J. (after stating the facts as above). In this case appellant seeks to restrain the revival and enforcement of a judgment at law against him. He places great reliance upon the allegations in his bill that no process was served upon him in the proceedings resulting in the judgment, and that he

had no knowledge of the proceedings or of the judgment until after the expiration of the time allowed for the prosecution of an appeal or writ of error. It is the well-settled rule of law in this state that courts of equity will not interfere to prevent the collection of a judgment, even though the judgment was rendered without service of process, unless a meritorious defense be shown. *Colson v. Leitch*, 110 Ill. 504. It would be useless to set aside a judgment at law unless it is shown that there would be a different result upon another trial at law. *Colson v. Leitch*, supra; *Telford v. Brinkerhoff*, 163 Ill. 439, 45 N. E. 158. It is not sufficient that a judgment is irregular, but it must be unjust before equity will interfere. A showing in the bill for injunction that the judgment in question was obtained without process does not show, nor tend to show, that, if process had been served and defense interposed, the result of the suit would have been different. In the case at bar appellant alleges in his bill that the judgment complained of was obtained without service of process, and the court, upon demurrer, held, and we think properly, that this was not a sufficient showing of a valid defense to justify the intervention of equity. Everything in this bill might be true, and still the judgment might have been by confession under a power of attorney contained in the note, waiving notice and service of process.

Appellant alleges that he has always had a good defense to any action which might be brought on the supposed note, but he fails to allege any of the facts constituting such defense. The mere statement that he has a good defense is not sufficient to justify a court of equity in entertaining the bill. In suits for injunction the general rule of equity pleading is that the cause of action should be set forth with such particularity as to enable the chancellor, from an inspection of the bill alone, to grant the relief sought. The pleader must allege the facts entitling him to an injunction with precision and certainty, so as to distinctly inform the opposite party of the nature of the case which he is called upon to meet, and, if the bill contains only indefinite allegations, a demurrer will be sustained. The bill must set forth facts, and not mere conclusions of law, and, if conclusions are used, they must be supported by allegations of fact. *Dill v. Wabash Valley Railroad Co.*, 21 Ill. 90; *O'Kane v. Treat*, 25 Ill. 553; *Taylor v. Thompson*, 42 Ill. 9; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602. Applying these rules to the case at bar, it is apparent that appellant has not stated a case which will justify equitable relief by injunction against a judgment at law. In 1 High on Injunctions (4th Ed.) § 126, the rule is stated as follows: "It is not sufficient to bring the case within the rule that the bill should allege generally that the complainant has a good defense to the action at law and that it would be inequitable to enforce it, but the facts

constituting such defense should be clearly set forth." For a court of equity to entertain a bill and enter upon a hearing of the evidence touching the merits of the case without any previous information in the pleadings as to what the evidence would be would amount to such court converting itself into a court of appeals in matters at law. To justify the interposition of equity the bill must allege facts which, if true, would warrant the relief prayed for. The bill in the case at bar did not allege facts, but set forth conclusions, and was therefore properly held insufficient. The proposed amendments would have made the bill no better under the above rules, and the court did not err in denying appellant leave to file them.

Appellant insists that the court erred in requiring him to give an improper and burdensome injunction bond. This question is not open for review on this appeal. Appellant gave the bond and secured the writ. If he had refused to give the bond and suffered a dismissal of his bill, the question could have been raised. But there is nothing in the point raised even if properly presented. The bond required was the statutory bond, and contained no condition not warranted by section 8 of chapter 69 of Hurd's Revised Statutes of 1905.

It is next insisted that the court erred in awarding \$100 damages as solicitor's fees. This being an injunction to stay the collection of a money judgment at law, section 11 of chapter 72 of the Revised Statutes of 1845, now found as section 8 of chapter 69 of Starr & Curtis' Annotated Statutes of 1890, on page 2144, applies. In said section it is provided that, "If the injunction be dissolved in the whole or in part, the complainant shall pay, exclusive of legal interest and costs, such damages as the court shall award, not exceeding ten per centum, on such part as may be released from the injunction." Under this statute it is contended that damages can be allowed, in addition to the interest and costs, of not exceeding 10 per cent. of the judgment, without any evidence and without regard to the actual damages. Such a construction of this statute does not seem to be warranted by its language or to accord with equitable principles. The statute requires the payment of "such damages as the court shall award, not exceeding ten per centum, on such part as may be released from the injunction." The clause "not exceeding ten per centum" is in the nature of a limitation of the amount of damages that may be awarded; but it does not imply that the damages may be arbitrarily fixed by the court at 10 per cent. of the judgment released, or any other amount within that limit, without any regard to the actual damages sustained.

Section 12 of the chapter on Injunctions (Hurd's Rev. St. 1905, p. 1151, c. 69), which was enacted in 1861, provides as follows: "In all cases where an injunction is dis-

solved by any court of chancery in this state, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damaged by such injunction, and may award execution to collect the same: provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond." The above section is broad enough to apply to cases where an injunction against the collection of a judgment has been dissolved. But it has been held that section 11 of the statute of 1845 is not repealed by the act of 1861 (*Shaffer v. Sutton*, 49 Ill. 506), and that the assessment of damages is still properly made under the statute of 1845 in cases to which it applies. It has been uniformly held under the statute of 1861 that damages awarded must be purely compensatory and based on a suggestion filed and supported by evidence. In *Smith v. Powell*, 50 Ill. 21, there is a remark made by Mr. Justice Breese, which, taken in connection with the facts of that case, might be construed as a holding that damages might be assessed under the act of 1845 without regard to the pleading or evidence, and in *Forth v. Town of Xenia*, 54 Ill. 210, there is a dictum by the same learned justice which might be construed in the same way, but we do not regard the remarks as an adjudication by this court which binds us under the rule of stare decisis. What was doubtless meant by the remarks was that no evidence was needed to enable the court to ascertain the damages based upon calculation. In fact, in the case of *Forth v. Town of Xenia*, supra, this was clearly what the writer of the opinion meant, since he gives as a reason why evidence was not necessary the fact that the amount of the judgment was apparent from the papers. Damages awarded on the dissolution of an injunction are governed by equitable principles, and nothing will be allowed which is not the natural and proximate result of the wrong committed. 2 *High on Injunctions*, § 1663, and cases there cited. If the court may allow 10 per cent. damages without any evidence, it follows that damages may be awarded which, in fact, have not been sustained. This would be nothing less than the imposition of a penalty on a party who unsuccessfully attacked a judgment by a bill in equity. The enforcement of penalties and forfeitures is not favored in law, and they are never enforced in a court of equity. 2 *Story's Eq. Jur.* § 1319; *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613; *Woolverton v. Taylor*, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521. Compensation is the rule of law courts for wrongs committed, and is never willingly departed from, and it would be monstrous to hold that a

court of equity would lend itself to the enforcement of a thing so abhorrent as taking the money of one party and transferring it to the other when in good conscience it ought not to be done. The allowance of \$100 damages as attorney's fees in this case is wholly unsupported. There is no evidence here whatever that appellees had paid, or become liable to pay, any attorney's fees in and about the dissolution of the injunction. If no damage has been sustained, none ought to be awarded, and this can only be determined from evidence.

That part of the decree below awarding appellees \$100 damages is reversed, and the cause remanded to the superior court of Cook county for a rehearing upon the assessment of damages. In all other respects the decree is affirmed.

Reversed in part and remanded.

(239 Ill. 638)

CLEFFORD v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CRIMINAL LAW—CONDUCT OF COUNSEL—CHALLENGING DEFENDANT TO TESTIFY.

In a prosecution for murder, the state's attorney in his opening statement remarked that he inferred that the defense would be self-defense and challenged the defendant to take the stand and make it. The defendant did not object to the remarks, but his counsel in his opening statement declared that he accepted the challenge, admitted the killing, and said the defense was self-defense, but defendant did not take the stand. *Held*, that defendant could not insist on the error on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2645.]

2. HOMICIDE—EVIDENCE—INSTRUMENT USED.

Where about the time deceased was killed, and after one shot had been heard, defendant was seen to place a gun to his shoulder and fire, and was then seen to go into the deceased's house and come out in a few moments, and that shortly afterward a gun in deceased's house, which belonged to him, and which had not been used for five days, and had been put away without any loads in it, was found to have been freshly used, though it contained no shells, the gun was admissible in evidence, where there were circumstances tending to show its use by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 314.]

3. SAME—APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where the evidence showed that deceased had had considerable money in bills and about 10 pieces of gold, and that shortly after the homicide defendant had been in a neighboring town with over \$700. \$5 of which was gold, the admission of testimony of a clerk in that town that defendant had handed him two gold coins in payment of certain purchases was harmless error, even though defendant was not sufficiently identified by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 705, 709.]

4. SAME—EVIDENCE—SUFFICIENCY.

If the jury believes from the evidence beyond a reasonable doubt that the defendant killed deceased with malice aforethought, it is wholly immaterial what his motive was, or whether

the evidence indicates the existence of any motive whatever.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 481.]

5. JURY—COMPETENCY OF JURORS—FAILURE TO CHALLENGE.

A juror on his voir dire stated that he had formed and expressed an opinion as to the guilt or innocence of defendant; that at the time of the trial he had an opinion on that question "to a certain extent"; that nothing had intervened to change his former opinion, but that he could give the defendant a fair and impartial trial upon the evidence. He further stated that it would require evidence to remove the opinion he then had which was based on what he had read and heard in the case, and, finally, in response to the question, "Notwithstanding the fact that you have an opinion which would require some evidence to remove, you say you could give the defendant a fair and impartial trial?" he answered, "Yes, sir." Defendant interposed no challenge. *Held*, a new trial should not be granted on account of the prejudice of the juror.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 504.]

6. HOMICIDE—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction of murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 482-492.]

Error to Circuit Court, Peoria County; T. N. Green, Judge.

Edward Clefford was convicted of murder, and brings error. Affirmed.

Edward Clefford, plaintiff in error, was indicted by the grand jury of Peoria county for the murder of Isaac Clefford, and on that charge was tried at the January term, 1907, of the circuit court of that county. He was found guilty by a jury and his punishment fixed at death. Motions for a new trial and in arrest of judgment were overruled, and he was sentenced by the court to be hanged on February 25, 1907. The record is brought to this court for review by a writ of error, which has been made a supersedeas.

Isaac Clefford was the father of plaintiff in error. At the time of his death, on November 26, 1906, he was 55 years of age, and lived with his son Charles in a two-room cabin boat at Lancaster Landing, a point on the west bank of the Illinois river, in Peoria county, where boats passing up and down the river are loaded with coal. There is no village at that place, and the nearest residence in November, 1906, was about 80 rods away. The only habitations nearer were the cabin boat of the deceased above the landing and another cabin boat about 300 yards below the landing, which was occupied by Albert Morris, a fisherman, and his family. The deceased was a coal miner and was employed in loading barges and filling boxes with coal. At Lancaster Landing the river runs in a northerly and southerly direction, and the boat in which the deceased lived had been taken out of the water and located on blocks on the bank between 50 and 100 feet north of the landing, and within 50 feet, and to the north, of a grade 6 or 7 feet in height, leading from the landing in a direction north of

west to a coal mine about a half mile distant. The boat had been blocked up from the ground between 2 and 3 feet, and was placed with its front door to the west and with the back of the boat to the east and toward the river. The hull of the boat was 2 feet and 4 inches deep, and above that, upon the deck, the cabin was built. The front end of the deck extended beyond the cabin and was used as a porch, and a plank had been laid from the ground to the northwest corner of the porch upon which to enter the boat. The back room in the cabin, next to the river, was used as a bedroom, and in this room were kept, among other things, a 12-gauge breech-loading shotgun belonging to the deceased, and loaded shells for the same, which latter were hung in a sack on the wall at the river end of the boat. Not far from the river, in the grade leading to the mine, scales had been placed. Under the scales there was an opening extending through the grade. This opening was 12 or 13 feet in length, measuring the way the grade runs, and about 5 feet from top to bottom. A few days before the alleged murder occurred, plaintiff in error came to visit his father and brother. He was an unmarried man, 22 years of age, a laborer, and had spent several years of his life working by the month on farms in that vicinity. He remained until the day before the homicide, and during that time the relations between the father and sons appear to have been friendly. On the morning of November 24, 1906, Edward and his father started for Glasford, a small town a few miles away. That night about 8 o'clock the father returned alone.

Charles Clefford is a fisherman, and early the next morning, after he and his father had eaten their breakfast, he went across the river to fish. Later, on the same morning, Sunday, November 25, 1906, Albert Morris and his son, Edward, a boy of 16, were at work piling nets on the river bank about 50 feet south of the grade and about 100 feet from the Clefford cabin boat. Some time between 9 and 10 o'clock their attention was attracted toward the boat by the report of a gun. Edward Morris was working where he could see the front part of the boat through the opening in the grade beneath the scales. Looking up he saw Edward Clefford standing on the northwest corner of the boat with a gun in his hands. At the moment that Edward Morris saw Edward Clefford the latter placed the gun to his shoulder and fired, and then passed through the door in the front end of the cabin. He was gone but a few moments, when he came out, jumped off the porch and disappeared. At this time the only persons in that immediate vicinity were Isaac Clefford, Edward Clefford, Albert Morris, and his son, Edward. Soon after the shooting occurred, Edward Clefford was seen coming from the direction of his father's boat by one Andrew Wolschlag, about a mile and one-half north of Lancaster Land-

ing. He was walking rapidly and passed within 100 feet of Wolschlag and went on north, but did not speak to Wolschlag, although they had been acquainted for several years. He was then going toward the Toledo, Peoria & Western Railroad, which runs from that vicinity to the city of Peoria. Fifteen or 20 minutes after the shots were fired, Morris and his son had occasion to go over the grade to pile some nets on that side. When they reached the top they discovered Isaac Clefford lying on the ground about 15 feet in front of his cabin boat, with his face down, his feet pointing towards his boat, and his head towards the west. He had been shot with a shotgun and badly wounded in the back part of his head and neck. Dr. A. C. Barnes, of Glasford, was immediately summoned, and it was about 10 o'clock when he arrived. By that time Clefford had been taken into a shanty near by. The doctor had him removed to his cabin boat and made an examination of the wound and found between 250 and 300 shot in the back part of his head, also a scar or wound across the side of his face that reached to the corner of his eye. The physician gave the wounded man a stimulant, to which he responded but slightly. He died at 1 o'clock in the morning of the following day as a result of the gunshot wounds. A post mortem examination showed that most of the shot had struck him around the base of the skull, but that none of them had reached the brain. He was never fully conscious after he was found lying on the ground.

After the shooting had occurred, and before the arrival of Dr. Barnes, Charles Clefford returned home. He testifies that he then went into the boat and examined the shotgun, which before that day had last been used on the preceding Thursday and had then been put away without any loads in it. On this occasion Charles "broke" the gun, observed that there were no shells in it, and then put his finger in the muzzle of the gun and thereby ascertained that it had been "freshly used." Several months prior to this time Isaac Clefford, in the cabin boat, had exhibited to his son Charles a considerable amount of money, consisting of bills and about 10 pieces of gold. Edward Clefford spent the evening and part of the night of November 25, 1906, in the city of Peoria, in company with one Robert Miller, in saloons and houses of ill fame. He displayed a large roll of money to Miller, handed him \$160 for safe-keeping, and loaned him \$10 to spend. The next morning Edward Clefford was arrested by police officers in Peoria, and \$544.60 was found in his pockets. Of this, \$5 was in gold, a small amount in silver, and a large part of the remainder was in \$10 and \$20 bills. The defendant stated to Miller, while in his company, that he had \$200 or \$300 which had been paid to him by a coal miner's insurance company on account of an injury sustained by him some years before.

In his opening statement counsel for the defendant advised the jury that the killing of the deceased by the accused was admitted, and that self-defense was relied upon as a justification. Later in the progress of the trial, while discussing an objection made to evidence offered by the prosecution, the court, addressing counsel for the defendant, said he understood that the latter admitted the shooting, whereupon counsel so addressed responded: "Yes; but we say it was done in self-defense." No evidence was offered on the part of the defendant. The case went to the jury solely upon proof adduced by the prosecution. The alleged errors relied upon are: (1) The state's attorney made improper remarks in his opening statement to the jury; (2) the court erred in passing on objections to evidence offered; (3) the proof is fatally defective in that it failed to show any motive for the crime; (4) one of the jurors had prejudged the rights of the accused and was disqualified—wherefore the defendant did not have a fair and impartial trial.

Granville A. Stultz, for plaintiff in error.
W. H. Stead, Atty. Gen., and Robert Scholes, State's Atty., for the State.

SCOTT, J. (after stating the facts as above). In his opening address to the jury, the state's attorney made use of the following language: "I infer from the interrogatories asked by the defense touching your competency to sit as jurors in this case that the defense in this case will be that of self-defense. I now challenge the defendant to take the witness stand and make that defense, for if you do I will put a noose around your neck and hang you." It is urged that for this reason the judgment should be reversed. Section 426 of chapter 38, Hurd's Rev. St. 1905, provides that the neglect of the defendant to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect. The effect of the remarks of the prosecutor was to impress upon the minds of the jury the fact that the defendant (by which term we designate Edward Clefford) could, if he so desired, be sworn and testify in his own behalf. In this case he did not so testify, and the words of the prosecutor above set out were calculated to cause the jurors to dwell upon the defendant's failure to testify precisely as though some comment upon or reference to that failure had been made after the close of the testimony. The defendant, however, did not object to the statement and was not content to leave the record in this respect as it had been made by the prosecutor; but, in response to the challenge above set out, counsel for the accused, in his opening statement to the jury, said: "I accept your challenge, Mr. Scholes. We admit the killing, and our defense is self-defense." The statement that the challenge was accepted was an assurance to the jury from counsel

for the accused that the latter would testify, and the effect of that statement upon the minds of the jurors, so far as directing their attention to the failure of the defendant to testify, was precisely the same as that of the words used by the representative of the people. Under these circumstances, error cannot be insisted upon. The purpose of the statute is not to protect the defendant from his own attorney.

Complaint is made of the action of the court in admitting in evidence the shotgun which the deceased owned in his lifetime, on the ground that there is no proof that it was used by the defendant in the commission of the crime. The evidence set out in the foregoing statement establishes circumstances tending to show that the defendant killed his father with this identical gun.

Harry Cominsky was called as a witness, and it is claimed by the prosecution that his testimony shows that about 1 o'clock p. m. on the day of the homicide the defendant made purchases in the Bell Clothing Store, in Peoria, and handed the clerk two gold coins in payment. This evidence was objected to on the ground that the witness did not sufficiently identify the accused. In view of the fact that the testimony of Miller and the police clearly and certainly shows that Edward Clefford, after he reached Peoria following the homicide, had several hundred dollars in his possession, we do not think Cominsky's testimony, even if improperly admitted, could have been harmful to defendant.

It is then urged that no motive for the commission of the crime is shown, and that for this reason the proof does not warrant the verdict. If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant killed the deceased with malice aforethought, it is wholly immaterial what his motive was, or whether the evidence indicates the existence of any motive whatever. *Farris v. People*, 129 Ill. 521, 21 N. E. 792, 6 L. R. A. 400, 16 Am. St. Rep. 267.

It is finally argued that Frederickson, one of the jurors, was not impartial, that he had prejudged the rights of the defendant, and that for this reason the defendant did not have that fair and impartial trial which he is guaranteed by the laws. In support of the motion for a new trial, there were filed therewith affidavits of William Partridge and Robert Bennett, from which it appears that they were co-employees with Frederickson in the factory of the Avery Manufacturing Company, located in the village of Averyville, in Peoria county; that on or about the 27th day of November, 1906, a little less than two months before the beginning of the trial of this cause in the circuit court, Frederickson, in conversation with Bennett, in the presence of Partridge, at the place of their employment, stated, in substance, that the defendant was guilty and should be hung like a dog, and Partridge alone further states

that Frederickson also said that, if he (Frederickson) were a member of the jury which tried Clefford, he (Frederickson) would hang him. On turning to the examination of this juror in regard to his competency, we find that he stated, in response to interrogatories propounded by counsel for the defendant, that he had read about the case in the Peoria newspapers, which purported to give the facts; that he had talked with more than one person about the case; that from his reading and conversations he had formed an opinion as to the guilt or innocence of the defendant; that he had expressed that opinion; that at the time of his examination he had an opinion on that question "to a certain extent"; that nothing had intervened to change the opinion that he first entertained, but he could give the defendant a fair and impartial trial upon the evidence introduced in court. Upon further interrogation, he stated, however, that it would require evidence to remove the opinion which he then had, which was based upon what he had read and heard in regard to the case. In the continuation of his examination by counsel for the defendant, this question was asked: "Notwithstanding the fact that you have an opinion as to the guilt or innocence of the defendant in this case which would require some evidence to remove, you say you could give the defendant a fair and impartial trial?" To which Frederickson answered, "Yes, sir," and this concluded his examination in reference to the opinion entertained by him and in reference to conversations theretofore had by him. The examination of this juror discloses the fact that he did not fully comprehend the questions propounded. If his opinion could only be removed by evidence, then he could not try the case solely upon the evidence introduced in court. The material question, however, in the situation disclosed by this record, is: Did he answer truthfully the questions propounded to him? And there seems no ground for concluding that he did not. He testified that he had both formed and expressed an opinion, which he still entertained. Nothing in his examination is inconsistent with the affidavits of Partridge and Bennett. His answers seem to have been entirely frank. There is no indication that he concealed anything, or that he did not correctly state the nature of the views which he then entertained, in so far as he was interrogated. His confusion or his inability to clearly understand the questions asked appears by the examination itself. He was not challenged, either for cause or peremptorily. If it be true that he had prejudged the rights of plaintiff in error and was not a fair and impartial juror, these facts were fully disclosed by his examination, and in that respect this case is distinguished from cases relied upon by the defendant, in each of which it appeared that the juror had prejudged the cause and entertained views unfavorable to the party against whom the verdict was thereafter ren-

dered, but that this fact was unknown to that party at the time the juror was sworn. As defendant interposed no challenge, he is not now in a position to insist that a new trial should have been allowed on account of the prejudice of the juror. If he saw fit to have his case tried by a juror known to him to be prejudiced, a new trial should not be granted on account of the prejudice so entertained by that juror. *Van Blaricum v. People*, 16 Ill. 364, 63 Am. Dec. 316; *Stampofski v. Steffens*, 79 Ill. 303.

We are satisfied that the jury were warranted by the evidence in finding the defendant guilty of the crime with which he was charged, and that there appears in the record no error of which the accused can avail himself that could have affected the result. The judgment of the circuit court will therefore be affirmed.

The clerk of this court is directed to enter an order of this court fixing the period between 9 o'clock a. m. and 5 o'clock p. m. of the 20th day of December, A. D. 1907, as the time when the original sentence of death entered in the circuit court shall be executed. A certified copy of that order will be furnished by the clerk of this court to the sheriff of Peoria county.

Judgment affirmed.

(230 Ill. 15)

CITY OF OLNEY v. CONOUR et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—POWER TO MAKE—ADOPTION OF LEGISLATIVE ACT.

Local Improvement Act (Act June 14, 1897, Laws 1897, p. 135) § 98, provides that the act should apply wherever authority of law existed to levy special assessments for local improvements, and, for that purpose, to use the methods provided by Act April 10, 1872 (Laws 1871-72, p. 247), art. 9, relating to the incorporation of cities and villages. *Held*, that general expressions in improvement ordinances passed by a city prior to the local improvement act, adopting the provisions of Act April 10, 1872, art. 9, applied only to the improvement described in the ordinances, and did not amount to a general adoption of the provisions of the act so as to repeal the special charter of the city, expressly providing a different method for making the improvement.

2. SAME.

Local Improvement Act (Act June 14, 1897, Laws 1897, p. 135), § 97, provides that the act may be adopted by ordinance by any city. A local improvement ordinance of a city provided that all proceedings thereunder should be governed by Act June 14, 1897, concerning local improvements, and all amendments thereto. *Held*, that the language was too indefinite to constitute a general adoption of the act and a repeal of the special charter providing a different method for making the improvement.

Appeal from Richland County Court; John A. MacNeil, Judge.

Petition by the city of Olney for the confirmation of a special sidewalk assessment, to which J. N. Conour and others, property owners, file objections. From a judgment dismissing the petition, petitioner appeals. Affirmed.

John Lynch and T. W. Hutchinson, for appellant. H. G. Morris, R. S. Rowland, Levi Clodfelter, R. F. Powers, and E. M. Rowland, for appellees. J. E. Wharf, pro se.

HAND, C. J. This was a petition filed by the city of Olney in the county court of Richland county for the confirmation of a special tax to defray the cost of constructing a cement sidewalk upon several of the streets of said city of Olney. The appellees' property was taxed, and they appeared specially and moved the court to dismiss the petition upon three grounds: First, that the improvement ordinance was passed without the petition of a majority of the property holders whose property fronted upon said improvement, as was required by section 6 of article 7 of the special charter of the city of Olney; second, that the ordinance did not provide that the property owner whose property fronted upon the sidewalk should have 40 days after the time at which said ordinance went into effect in which to build the sidewalk opposite his land; and, third, that the notice of the passage of the ordinance did not state that the property owner had 40 days after the time at which said ordinance went into effect in which to build the sidewalk opposite his land. The court sustained the first and overruled the second and third contentions made by appellees in their motion, and dismissed the petition, and the city has prosecuted an appeal to this court and has assigned as error the action of the trial court in dismissing said petition, and the appellees have assigned as cross-errors the court's action in holding that it was not necessary that the ordinance, and the notice of its passage, should state that the property owners had 40 days after the ordinance went into effect in which to construct the sidewalk in front of their property.

The city of Olney is governed by a special charter, which provides that a sidewalk to be paid for by special taxation can only be built upon the streets of said city upon the petition of a majority of the property holders whose property fronts upon the improvement, which provision must control in this case unless the city has brought itself within the provisions of either section 97 or 98 of the local improvement act. Act June 14, 1897 (Acts 1897, p. 135). Section 97 provides the local improvement act may be adopted by ordinance by any city, incorporated town or village; and section 98 that the provisions of said act shall apply wherever authority of law now exists in corporate authorities in this state to levy special assessments or special taxes for local improvements, and for that purpose to use the proceedings or methods provided by article 9 of an act entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872. Laws 1871-72, p. 247.

It is not claimed by the city that it ever, by separate ordinance, adopted article 9 of the act

of 1872 or the local improvement act of 1897; but it is urged, from certain general expressions found in improvement ordinances passed by its city council prior to 1897, article 9 of the act of 1872 was adopted by the city, and that the local improvement act of 1897, and its amendments, were adopted by virtue of section 8 of the ordinance providing for the improvement now under consideration, which section reads as follows: "In all proceedings for assessing, levying and collecting said special tax herein provided for, and for each and every installment thereof, and for letting contract for said improvements and the payment for said work and material, all, each and every proceeding shall accord with and be governed by an act entitled 'An act concerning local improvements,' approved June 14, A. D. 1897, and in force July 1, A. D. 1897, and all amendments thereto." We do not agree with appellant's contention. The special charter of the city of Olney in express terms provides that a sidewalk shall not be built in said city, to be paid for by special taxation, other than upon the petition of a majority of the property holders owning property fronting upon the improvement. That provision of the charter secures a valuable right to the property owners of said city in front of whose property sidewalks are to be built under the direction of the city and paid for by special taxation, and that right should not be taken from them unless it be done by clear and positive language. A city council might be willing to adopt the methods provided for by article 9 of the act of 1872 when providing funds for laying a short line of sewer or a few blocks of sidewalk, when they would not be willing to adopt such article 9 in all its terms if the same were to be applied to all local improvements which were to be made in said city during its future history. We think therefore that the language found in the improvement ordinances introduced into this record, whereby the provisions of article 9 of the act of 1872 are adopted, should be confined to the local improvement described in the ordinance in which they are found, and not extended to all local improvements which might be constructed in said city after their passage; and we are also of the opinion the language found in the present improvement ordinance is too uncertain and indefinite to be held to work a repeal of section 6 of article 7 of the special charter of said city, and to amount to an adoption of all the provisions of the local improvement act of 1897 and its amendments.

It is doubtless true that under the provisions of section 97 of the local improvement act the city of Olney has the power, through its city council, to adopt the provisions of that act and the amendments thereto, but until such adoption has been made by an ordinance, clear and certain in its terms, the provisions of section 6 of article 7 of the special charter of said city must be held to be in force and to govern in the construction

of sidewalks in said city. We think therefore the county court did not err in dismissing the petition of the city for want of the necessary property consents.

If we are correct in holding, as we do, that the local improvement act of 1897, and its amendments, are not in force in said city of Olney, it follows that the provisions of that act providing for the construction of sidewalks in front of the property owner's property by the property owner are not in force, and the questions whether the right to construct a sidewalk in front of his property by the owner within 40 days after the sidewalk ordinance goes into effect, and whether the notice of the passage of the ordinance should contain a provision to that effect, need not now be considered or determined.

Finding no reversible error in this record, the judgment of the county court will be affirmed.

Judgment affirmed.

(229 Ill. 506)

SWEDISH EVANGELIST LUTHERAN CHURCH v. JACKSON et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. DEDICATION—HIGHWAYS—DESIGNATION IN PLATS—ACCEPTANCE.

Public authorities in an unincorporated village have no rights in streets and alleys designated on a plat, where there has been no acceptance of the plat or the streets and alleys, and they have never been thrown open to or used by the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Dedication, §§ 64, 65.]

2. EASEMENTS — CREATION — IMPLICATION — PLAT OF STREETS AND ALLEYS.

A purchaser of a lot, according to a plat showing streets and alleys which was made by the vendor, acquires the right to use them and to have them remain open to the use of the public, and the question of acceptance by the public is unimportant, since the question is one of private right.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 47, 48.]

3. SAME—ABANDONMENT OR NONUSER.

The easement in streets and alleys appurtenant to lots purchased with reference to a plat showing them is private property and cannot be lost by nonuser when there is no adverse possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 77-79.]

4. SAME—ADVERSE POSSESSION.

Complete nonuser of a private easement for 20 years with possession inconsistent with and adverse thereto will bar the easement.

5. SAME—INJUNCTION—GROUNDS.

In an action to enjoin the obstruction of certain streets and alleys, it appeared that the land was platted as an addition to an unincorporated village, and the plat showing streets and alleys was recorded, and plaintiffs and defendants by mesne conveyances became the owners of some of the lots. Defendants fenced in portions of adjoining streets and alleys with their respective lots and kept them so for more than 20 years before suit was brought to remove the obstructions, except as to a part of one fence, which was removed, but that portion of the alley adjoining had since been used for a garden. It was not shown that those portions

of the streets and alleys were used by any one else during that period. *Held*, there was a prima facie adverse occupancy by defendants, and plaintiffs had no right to have the obstructions removed.

6. ADVERSE POSSESSION—HOW ASSERTED.

Using and controlling property as owners is the ordinary method of asserting a claim of title.

Appeal from Circuit Court, Mercer County; E. C. Graves, Judge.

Action by the Swedish Evangelist Lutheran Church against W. Earl Jackson and others to enjoin the obstruction of certain alleged streets and alleys. From an order sustaining a demurrer to the bill and dismissing it for want of equity, plaintiff appeals. *Affirmed*.

The appellants, by their bill filed in the circuit court of Mercer county, sought to enjoin the appellees from obstructing certain alleged streets and alleys. A demurrer having been sustained to their amended bill, it was dismissed for want of equity, and they appeal from the decree.

The amended bill alleges that on June 30, 1873, John T. Brown and William H. Brown, being the proprietors of a certain tract of land, did lay out thereon Brown's first addition to North Henderson and made a plat thereof, which was duly acknowledged as provided by law, and recorded; that afterward, by mesne conveyances from the Browns, the Swedish Evangelist Lutheran Church became the owner of lot 1 and 20 feet off the east side of lot 2 in block 2, the other appellant, Frank A. Mathers, the owner of lots 1 and 4 in block 3, the appellee W. Earl Jackson the owner of lots 1, 2, 3, and 4 in block 1, and the appellee John C. Jackson the owner of lots 5, 6, 7, and 8 in block 2, all in said addition. On the original plat appears an alley 16 feet wide between lots 1, 2, 3, and 4 and lots 5, 6, 7, and 8 in block 2, another alley of the same width between lots 1, 2, 3, and 4 and lots 5, 6, 7, and 8 in block 1, and a street on the east side of block 1, 33 feet wide. Immediately after John C. Jackson obtained title to his lots, and over 20 years before the filing of the bill, in violation of the rights of the appellants and other grantees of the Browns, owners of lands in said addition, he erected a certain fence around and about the south half of the alley traversing said block 2 and has ever since kept and maintained the same. Appellant the Swedish Evangelist Lutheran Church acquired its title October 15, 1887, and on June 1, 1906, and not before, requested the appellee John C. Jackson to remove said fence, which he refused to do and still refuses, and has since that time forbidden said appellant and the public the use of said alley, and has claimed ownership of said portion thereof for virtue of possession thereof for 20 years or over. There are now growing upon the south half of the alley ten small volunteer peach and plum trees, averaging about four inches in diameter at the trunk, and four young maple

trees. In 1902 there was erected upon the premises of John C. Jackson a frame barn about 18 by 20 feet, which projected upon the inclosed portion of the alley and remained there until about August 6, 1906, when it was removed to that portion of East street inclosed by W. Earl Jackson. Upon the removal of the barn John C. Jackson erected upon its former site a small frame chicken house worth about \$10, standing upon wooden blocks not fastened to the ground. No other improvements are now on the alley.

The appellee W. Earl Jackson, and his grantors, after acquiring title to the lots now owned by him, erected and maintained a fence around and about the north half of the alley in block 1 and that part of East street extending from the north line of block 1 to the center of said alley, and for more than 20 years those parts of said alley and street have been used by the said W. Earl Jackson as a garden. The fence has fallen into bad repair, and there is now no fence along the south side of the inclosed part of the alley. Just north of the premises of W. Earl Jackson, and connecting with the north end of the inclosed portion of East street, is South street, which had been inclosed for about 15 years by one Luther J. Smith. In August, 1906, W. Earl Jackson requested Smith to open South street, which he did. Whereupon W. Earl Jackson removed the fence from the north end of East street and caused the barn heretofore mentioned to be placed on that portion of East street formerly inclosed; the west side of the barn being on the west line of the street, and the east side of the barn being about 17 feet from the east line of the street. Since that time there has been no fence across the 17-foot strip, and nothing to prevent the public from entering the formerly inclosed portion of East street on the north. Since the filing of the bill the appellees have obtained from John T. Brown and the heirs of William H. Brown, deceased, the original proprietors, deeds for the streets and alleys inclosed by them.

The appellants have requested appellee W. Earl Jackson to remove the said obstructions from said alley and street, but he has refused to do so, and the appellants are thereby deprived of the use of said alley and street. The appellant the Swedish Evangelist Lutheran Church is a corporation, and needs the use of said street and alleys, and particularly that portion of the alley in block 2 south of its premises, for the uses and purposes of its church society. It has erected and maintained on its premises a public church building, where many people, members of said church, congregate for worship, and on account of the obstruction of said alley they cannot tie their horses or use in any necessary manner said alley. A certain tract of land of which the said Brown's first addition is a part is commonly called the "Village of North Henderson," but the village is

unincorporated, and the streets are under the control of the commissioners of highways of the town of North Henderson. There are in the village a post office, railroad depot, and various other places of business, and about 250 people reside there, who are engaged in various mercantile pursuits. The said alleys and street are of great public use and a great public necessity to the people who live in said village and in Brown's first addition, but by the acts of the appellees the appellants and the public are deprived of the use of said street and alleys and for over 20 years last past have not used the said street and alleys, which during the whole of that period have been closed to the public by the said obstructions.

William J. Graham, for appellant. Cooke & Wilson (C. C. Craig, of counsel), for appellees.

DUNN, J. (after stating the facts as above). The village of North Henderson has never been incorporated. There is no allegation that the public authorities ever accepted the plat or the streets and alleys in question, or that such streets and alleys were ever thrown open to or used by the public. Until acceptance by the proper authorities they have no right in the streets and alleys designated on a plat. *Hewes v. Village of Crete*, 175 Ill. 348, 51 N. E. 696; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191; *Russell v. Chicago & Milwaukee Electric Railway Co.*, 205 Ill. 155, 68 N. E. 727. There is therefore no question of public right here involved.

The purchaser of a lot from an owner of land who has made and exhibited a plat thereof showing streets and alleys acquires a right not only to the use of the streets and alleys, but that such streets and alleys shall remain open to the use of the public. The sale and conveyance according to the plat imply a grant or covenant to the purchasers of lots and their grantees that the public streets indicated upon the plat shall be forever open as public highways, free from all claim of the proprietor, or those claiming under him, inconsistent with their use as such public highways. In such case the acceptance by the public is unimportant, for the question involved is simply one of private right. *Zearing v. Baber*, 74 Ill. 409; *Earl v. City of Chicago*, 136 Ill. 277, 26 N. E. 370. The easement which was appurtenant to each lot by reason of the existence of the plat and the sales with reference to it was private property. It could not be lost merely by nonuser where there was no adverse possession. *Kuecken v. Voltz*, 110 Ill. 264. But a complete nonuser of an easement for 20 years, with possession in another that is inconsistent with or adverse to the right of such easement, will bar the easement. *Illinois Central Railroad Co. v. Moore*, 160 Ill. 9, 43 N. E. 364; *Illinois Central Rail-*

road Co. v. O'Connor, 154 Ill. 550, 39 N. E. 563; *Illinois Central Railroad Co. v. Houghton*, 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581. Here there was a complete nonuser, and for more than 20 years the appellees have been in the visible, exclusive possession of the premises, having them fenced within their respective inclosures, except that recently the fence on one side of one of the tracts has been taken away, but that tract is in the exclusive occupation of one of the appellees as a garden. This was prima facie a hostile or adverse occupancy. The bill makes no attempt to explain it. Using and controlling property as owner is the ordinary mode of asserting a claim of title. *Illinois Central Railroad Co. v. O'Connor*, supra; *Illinois Central Railroad Co. v. Houghton*, supra.

The possession and exclusive occupation of the appellees being wholly inconsistent with the existence of any easement to travel over said premises or to have them remain open as public streets, and having continued for 20 years, the bill shows no right in appellants to have the obstructions complained of removed, and the demurrer was properly sustained.

Decree affirmed.

(229 Ill. 562)

BEATY v. HOOD.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. DEEDS—CAPACITY OF GRANTOR.

To justify a decree setting aside a deed for alleged incapacity of the grantor, it must be shown that he was so mentally unsound as to be incapable of understanding the nature and effect of the transaction or of protecting his own interests; mere partial impairment of mental faculties being insufficient, if at the time of making the deed he had a full comprehension of the meaning, design, and effect of his act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 151-155.]

2. WRIT OF ERROR—EQUITY SUIT—FINDINGS—REVIEW.

Where the evidence was conflicting, the chancellor's finding of facts will not be set aside on a writ of error, unless clearly contrary to the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

3. DEEDS—VACATION—CAPACITY OF GRANTOR.

A grantor in a deed must have sufficient mental capacity to form and exercise some judgment as to whether he will be benefited, and to understand in a reasonable manner the nature and effect of his act; and where a physician testified as to complainant's capacity to make a deed in controversy, and was cross-examined and excused and later recalled for re-examination, a restriction of the inquiry to the question whether complainant at the time he executed the deed to defendant possessed sufficient mental capacity to know and understand the transaction in which he was engaged was too narrow; the issue being as to complainant's mental capacity to make the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 151-155.]

4. WRIT OF ERROR—LIMITATION OF EVIDENCE—PREJUDICE.

Where, on an issue as to complainant's mental capacity to make a deed in controversy,

a physician had previously been permitted to testify fully as to complainant's mental capacity to transact ordinary business, complainant was not prejudiced by the subsequent erroneous limitation of the witness' re-examination to the question whether complainant had sufficient mental capacity to know and understand the transaction in which he was engaged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4199.]

5. DEEDS—EVIDENCE—MENTAL CAPACITY—INDISCRETION.

On an issue as to complainant's mental capacity to make a deed, a question calling for the witness' belief as to whether complainant had sufficient mental capacity and soundness of mind to act with ordinary discretion in the matter of the sale or exchange of lands was properly disallowed; indiscretion in trade not being evidence of want of mental capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 606.]

Error to Circuit Court, Richland County; P. A. Pearce, Judge.

Suit by Elishama Beaty by R. S. Hanna, his conservator, against J. C. Hood. From a judgment dismissing the bill, complainant brings error. Affirmed.

H. G. Morris, for plaintiff in error. John Lynch and J. S. C. Nichols, for defendant in error.

FARMER, J. This suit was begun by Elishama Beaty filing a bill in the circuit court of Richland county to set aside a deed made by him to defendant in error. Shortly after the suit was instituted, the county court of said Richland county, in a proceeding instituted in that court for that purpose, appointed R. S. Hanna conservator of said Beaty, and by leave of the circuit court the conservator was made a party complainant before the cause was heard. The bill alleged that Beaty (whom we shall hereafter refer to as plaintiff in error) in January, 1906, owned 80 acres of land in Richland county, worth from \$4,000 to \$5,000, which was incumbered by a mortgage of \$1,500; that defendant in error told him he owned 125 acres of land in the Wabash bottom, in Gallatin county, Ill., for which he had paid \$3,600; that it was incumbered by a mortgage of \$600, and he desired to exchange said land with plaintiff in error for his farm in Richland county. The bill charges the defendant in error with falsely representing himself to be the owner of the land, with false representations as to its value, and with obtaining an undue influence over plaintiff in error on account of his weak and distracted condition of mind and by reason of the fact that they were both members of the Masonic order, and thereby inducing plaintiff in error to execute the conveyance. Upon a replication and answer being filed, the cause was heard on oral proofs in open court and a decree entered dismissing the bill. Complainant below has brought the case to this court by writ of error.

Both parties lived at the time the exchange was made in the village of Noble,

Richland county, Ill., and the 80-acre farm of plaintiff in error was nearby. Defendant in error was a merchant. The trade between the parties was first talked of prior to February 1, 1906, and on that day the parties went to Gallatin county and examined the land defendant in error is alleged to have claimed to own and proposed to trade to the plaintiff in error. As a matter of fact, defendant in error had no title to the land at that time, but it then belonged to a man named Parkinson, who lived in Mt. Carmel, Ill. Defendant in error obtained a deed from Parkinson for the land February 15, 1906. The consideration expressed in the deed was \$3,600, but the actual amount paid by the defendant in error for the land was \$1,200. On the 9th of March, 1906, and before the trade with plaintiff in error, defendant in error placed a mortgage upon the land to one Mary Ledford to secure the payment of \$1,000. The trade proposed by defendant in error was that he would give his Gallatin county land, subject to the incumbrance, for plaintiff's 80-acre farm, subject to the incumbrance on it, which, with accumulated interest, amounted to \$1,600. He afterwards added \$100 to this offer, and the exchange was made upon that basis. The deed from himself and wife to plaintiff in error bears date March 13, 1906. Plaintiff in error and his wife were living separate and apart, and the deed from them to defendant in error bears date February 14, 1906, and was acknowledged by Mrs. Beaty at Rock Island on that day. The acknowledgment of plaintiff in error is dated April 12, 1906, and was taken before R. S. Hanna, notary public, now the conservator of Elishama Beaty. The bill in this case was filed April 7, 1906, and the conservator appointed by the county court May 16th following.

E. C. Donaldson testified he lived in Ridgeway, Gallatin county, on the 1st day of February, 1906, and on that day met the parties to this suit at the train and the following day drove them out to see the Gallatin county land; that before they started to see the land defendant in error asked him if he was well enough acquainted with the land to show it up to the best advantage; that he told him he was, and said he did so. He testified that on the way out to the land the parties would ask him what land they passed was worth; that he replied \$75 per acre, and defendant in error seemed to be telling plaintiff in error what a bargain he was getting, considering the price he was paying and the price of land nearby. He testified defendant in error represented to the plaintiff in error that he had bought the land, and thought he said the price paid for it was \$3,500; that defendant in error bragged about the amount of corn raised on the land 10 years ago, and said if properly tended it would produce 60 to 80 bushels per acre. He testified they were on the land about half an hour, and that at the hotel, before they started out to

the land, defendant in error told him he did not want any one who knew the land to see plaintiff in error; that plaintiff in error had a farm at Noble that he wanted to beat him out of; that in the evening, after they returned to the hotel, he (witness) told defendant in error he thought the land belonged to a man in Mt. Carmel, and asked him whether he had bought it; that defendant in error said: "I see you are an Odd Fellow. I being one, we are talking through the links. I do not want you to tell any one here I have not bought this land. I am in a position to get it if I make the deal with this man." The same witness testified the land that had been cleared—about 80 acres—was mostly grown up in brush and weeds, and that the year previous only about 5 or 6 acres had been in corn and had produced 15 or 16 bushels per acre. He testified it was old, worn-out land, soil thin and subject to overflow; that for farming purposes he did not consider it of any value, but as a trading proposition it might be worth \$5 or \$6 per acre.

Parkinson, from whom defendant in error bought the land, testified he had owned it about 10 years, and that in 1896 or 1897 he got 150 bushels of corn that was raised on it, but did not know whether it had been cultivated after that time.

T. A. Boone, son-in-law of plaintiff in error, testified he was a farmer, and after the trade between the parties, at the request of plaintiff in error, he went to see defendant in error, and told him his father-in-law was dissatisfied and claimed he had been swindled out of \$2,600; that defendant in error said he could trade plaintiff in error 320 acres of land in Nebraska for the land, and that there was a man in Louisville, Ill., who would give \$2,600 for it, subject to the mortgage, and that defendant in error said one acre of the Gallatin county land would produce twice as much as an acre of the Richland county land.

R. S. Hanna, the conservator, testified that after his appointment he went to Gallatin county and examined the land, and, after describing its soil, condition, and appearance, gave it as his opinion that as farm land it was worth nothing.

George Moyer testified he lived eight miles from Ridgeway; was a farmer and acquainted with the Gallatin county land. He described it as badly worn out, subject to overflow, and unproductive. He gave it as his judgment that for farming purposes it was not worth over \$5 or \$6 per acre.

On the question of mental capacity of plaintiff in error, Dr. Palmer, his family physician, testified he had known him several years and was acquainted with his mental condition about the time the deed was made; that he considered his business judgment bad as to values in making trades; that he did not think he had any conception of trading values; that he was capable of transacting ordinary affairs of life, such as buying and sell-

ing property, but that in all the trades he knew of him making plaintiff in error lost; that he was rational enough so far as laboring and coming and going was concerned, but was erratic, irritable, and changeable in his views and ideas of values; that he understood how to manage and conduct his farm and raise crops, but the witness did not think his mental capacity good in buying and selling. The witness further testified that these conditions had existed about 15 years, during which time plaintiff in error managed and conducted his business in farming, buying and selling stock, and had sufficient capacity to know the effect of his act when he signed the deed and comprehended the effect of a conveyance to him, and that as to the condition of land and soil he thought the judgment of plaintiff in error normal.

C. E. Palmer, a merchant residing in Noble, testified he had known plaintiff in error ever since he had lived in the county; that during the last two years plaintiff in error had lived in Noble, and witness had seen him very often. In answer to the question by counsel for plaintiff in error, "You may state whether you believe that the complainant, E. Beaty, is capable of understanding and acting with discretion in the ordinary affairs of life," the witness answered: "Mr. Beaty, as a farmer, is one of the best I ever knew. He cultivated his farm well, raised good crops, and took care of his orchard. On that farm is one of the best orchards in our neighborhood. He cleared his land, placed it in a high state of cultivation, and, so far as his work on the farm is concerned, his superior, perhaps, was not in that neighborhood. He was a farmer par excellence, but when you take him away from his farm, get him out to trading—when he comes in contact with keen, shrewd men—Mr. Beaty is a child. He is nothing more and nothing less, in my opinion. He does his work well and his farm showed it. He built his farm out of raw material, but aside from that he is not capable of meeting men who are traders and business men—men who are trained and skilled in that line." The witness further testified that, while plaintiff in error was a first-class farmer, he regarded his judgment as to trading poor, but that he had sufficient mental capacity to know what he was doing when he executed a deed, and to know when he made a deed to his farm that it was gone from him, but he did not think his mental capacity and judgment sufficient to comprehend whether he was making a good trade or a bad one. On cross-examination the witness testified that what he meant was that plaintiff in error had not sufficient judgment to cope with other traders. He further testified plaintiff in error knew how to raise good crops, build up and make his farm a fine one, sell his crops and buy and sell stock.

Marion Martin testified he was a farmer, living in Noble, and knew plaintiff in error

16 years; that in his opinion plaintiff in error had sufficient mental capacity February 16, 1906, to know what he was doing when he made a deed.

Plaintiff in error himself was sworn, and testified in the case. His testimony is too voluminous to even set out in substance, but his relation of the negotiations between himself and defendant in error before the trade was consummated and of his visit to and examination of the land tended to show that his mind and memory as to those matters were reasonably clear. He testified defendant in error pledged him, as a Mason, to secrecy pending the negotiations, and that he relied upon defendant in error and the representations made by him by reason of their being brother Masons and members of the same lodge. He further testified he had no recollection of signing the deed to defendant in error.

On behalf of defendant in error A. A. Shannon testified he had known plaintiff in error seven years; that he had traded with him for stock at different times for three or four years, and considered his mental capacity as good as the average; that at one time he entered into a written contract with him concerning a business matter and plaintiff in error drew it up himself.

J. O. Henry testified he lived in Noble, was a stock dealer, and had bought most of plaintiff in error's stock; that plaintiff in error knew how to figure prices, and was capable of understanding and transacting the ordinary affairs of life.

M. L. Taylor testified he had known plaintiff in error 15 or 20 years and lived about two miles from him; that he considered plaintiff in error a little above the average man in education and capable of understanding and transacting the ordinary business of life; that he attended to his own business and witness had traded and dealt with him at different times. Witness further testified plaintiff in error stayed all night at witness' house after he had traded for the Gallatin county land, and left the next day for Oklahoma; that he said he was going there to trade the Gallatin county land for western land. The witness testified this was after plaintiff in error had been to see the Gallatin county land the second time, and that he appeared to think it was pretty good land. On cross-examination the witness testified the plaintiff in error had funny ways—was "cranky"—but was a man of good education, and he "sized him up as an average man," and that he was always able to take care of himself with witness in a trade.

A. A. Jenkins, postmaster at Noble, testified he had known plaintiff 15 or 16 years, and that his mental capacity for transacting the ordinary affairs of life was good, though he was considered an eccentric man.

M. C. Donovan testified he had known plaintiff in error intimately 17 or 18 years,

and during that time thought his mental capacity for transacting the ordinary affairs of life was good, or, as he expressed it, perfect.

C. N. Statts testified he had known plaintiff in error 20 years; that he had had some business transactions with him, and considered his mental capacity good, and that he was capable of transacting the ordinary affairs of life and of making and understanding the nature and consequences of a deed.

Grant Black testified he had known plaintiff in error eight or nine years; that in January and February, 1906, plaintiff in error hired horses of the witness, and that his mental capacity for understanding and transacting ordinary business at that time was all right. The witness further testified plaintiff in error told him, after the trade had been made, that defendant in error had beaten him out of his land, and he was going to have a conservator appointed to see if he could not get his land back.

William Inmann testified he lived in Ridgeway, Gallatin county, and knew plaintiff in error's land; that he helped clear it and had seen good crops raised upon it; that 60 acres of it was black, sandy land, but the rest of it was not quite so good; that part of it had not been cleared; that in February, 1906, the land was worth from \$25 to \$30 per acre.

Frank Rister testified he lived in Gallatin county, and knew plaintiff in error's land there, and that in February, 1906, it was worth \$25 or \$30 per acre.

Jess Inmann testified he lived in Gallatin county and knew the land in question, and, after describing its location and soil, gave it as his judgment that it was worth from \$25 to \$30 per acre.

This was all the testimony offered by defendant in error except that of himself. His testimony was voluminous, and we shall not undertake to set it out in full or all of it in substance. It is sufficient to say he denied making any false representations as to the character or value of the land or attempting in any way to deceive plaintiff in error, by reason of their being brother Masons or otherwise. He denied telling plaintiff in error he owned the Gallatin county land, but said he told him he had it to trade on. He further testified that after he and plaintiff in error had returned from viewing the land they had a number of talks about the trade, and finally plaintiff in error insisted on his paying him \$100 additional, which he paid and the trade was then consummated.

We have only undertaken to set out the substance of the most material portions of the evidence. It will be seen that, so far as the facts involved are concerned, the testimony was not altogether harmonious. The testimony shows plaintiff in error was a man of some peculiarities and eccentricities; but that alone would not justify setting aside the deed executed by him. To justify a decree in his favor on that ground it must be shown

that he was so mentally unsound as to be incapable of understanding the nature and effect of the transaction and of protecting his own interests. Partial impairment of the mental faculties of a grantor is not sufficient to authorize the setting aside of a deed made by him, if at the time of making it he has a full comprehension of the meaning, design and effect of his act. *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150.

Upon the question of false representations as to the character and value of the Gallatin county land and of undue influence charged in the bill, the evidence was conflicting. As to the respective values of the two tracts of land, it is not disputed that the Richland county farm was worth from \$40 to \$50 per acre, and it will be seen from the testimony that the proof on the part of plaintiff in error tended to show the value of the Gallatin county land to be from \$5 to \$6 per acre, while the proof of the defendant in error tended to show it was worth from \$25 to \$30 per acre. The burden was on plaintiff in error to prove the allegations of his bill by a preponderance of the testimony. It has been the long-established rule of this court that, where the evidence is heard in open court, the chancellor, who saw the witnesses and heard them testify, is better qualified to determine the weight and credit to be given their testimony than this court, and where, in such cases, the evidence is conflicting, it will not be disturbed on account of the finding of the facts by the chancellor, unless it should appear that such finding is clearly and palpably contrary to the weight of the evidence. *Elmstedt v. Nicholson*, 186 Ill. 580, 58 N. E. 381; *Biggerstaff v. Biggerstaff*, 180 Ill. 407, 54 N. E. 333. We are unable to say, after a careful reading of the testimony in this case, that the decree entered by the chancellor was clearly and palpably contrary to the weight of the testimony.

After Dr. Palmer and C. E. Palmer had testified, been cross-examined and excused from the witness stand, Dr. Palmer was recalled by plaintiff in error for further examination. During the progress of this re-examination the court restricted the inquiry to the question, "Did Mr. Beaty, at the time he executed the deed to the defendant in this case, possess sufficient mental capacity to know and understand the transaction in which he was engaged; that is, the execution of the deed?"—and this ruling of the court is assigned as error. We think the rule announced by the court was too narrow where the question is as to the mental capacity of a grantor to make a deed. Proof of the mental capacity to make a deed differs somewhat from proof of mental capacity necessary to the making of a valid will. In the case of a will, proof that the testator had sufficient mind and memory to enable him to know and understand the transaction he was engaged in when he was making the will is the test of mental capacity, and not whether he had

sufficient mind and memory to transact ordinary business. *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760. But in *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881, it was held that, as a sale of property becomes effective during the life of the vendor and the right of enjoyment and possession passes from him, it becomes important for him to understand and comprehend the value of what he is parting with and what he is receiving in return for it, and to that end he must have mental capacity to form and exercise some judgment as to whether he will be benefited or injured by the transaction. These elements do not enter into the execution of a will. In that case it was said (page 532 of 190 Ill., page 885 of 60 N. E.): "The test of mental capacity necessary to enable a grantor to make a valid deed is that he is capable of understanding, in a reasonable manner, the nature and effect of the act in which he is engaged [citing cases]. That he has such capacity may be shown by proof that he is capable of transacting ordinary business affairs wherein his interest is involved. If he has mental power to comprehend and protect his own interest in such ordinary business affairs, the tribunal to whom the question is submitted may regard him as competent to understand the nature and effect of the act of disposing of his property by deed. If he is lacking in that degree of comprehension, it may well be regarded he is incapable of understanding the nature and effect of the act of disposing of his land to another."

But while the ruling of the court restricted the proof within narrower bounds than should have been done, inasmuch as the witness had previously been permitted to testify fully upon the subject of the grantor's mental capacity to transact or understand ordinary business, we do not see that the ruling prejudiced plaintiff in error. The question which led to the ruling made by the court was: "Do you believe that the complainant in this case, E. Beaty, had sufficient mental capacity and soundness of mind to act with ordinary discretion in the matter of a sale or exchange of lands?" The court properly refused to allow this question to be answered. The fact that a man may make indiscreet trades is not an evidence of want of mental capacity. It is well known that many men of a high order of mental capacity are very indiscreet traders. Counsel for the plaintiff in error did not claim at the time the ruling complained of was made, and does not now claim, that there were any other facts not testified to by the witness in his original examination which he desired to prove, other than an answer to the question propounded. We are unable to see that plaintiff in error was deprived by the ruling of the court of the right to prove any fact competent to be proven, and he was therefore not prejudiced by said ruling.

The decree of the circuit court is affirmed.
Decree affirmed.

(230 Ill. 34)

BURWASH v. BALLOU et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CORPORATIONS—SALES OF STOCK—IMPLIED WARRANTIES—MINING STOCK OF DE FACTO CORPORATION.

Where a person buys stock of a de facto corporation, no warranty being made that it is a de jure corporation, he cannot avoid payment by showing that the corporation was not legally organized and that the stock was illegally issued, since the only warranty implied is that the stock is genuine and that the vendor is the owner and authorized to transfer title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 495.]

2. APPEAL—CONFLICTING EVIDENCE—FINDING BY COURT.

Where the evidence is conflicting in a trial before the chancellor, his findings will not be disturbed, unless manifestly wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983–3989.]

3. CORPORATIONS—SALE OF STOCK—FRAUD—FRAUDULENT REPRESENTATIONS—"PUFFING."

"Puffing" mining claims does not amount to such a false representation as will authorize the setting aside of a sale of mining stock, where the parties are *compos mentis* and deal at arm's length.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 506; vol. 23, Fraud, §§ 8–14; vol. 43, Sales, § 67.]

4. SAME—SALE OF STOCK—RESCISSION—LACHES.

In a suit commenced August 3, 1904, by a vendee of mining stock, to have the sale rescinded and the consideration repaid on the ground of fraud, it appeared that the sale was made July 15, 1903, that about September 15, 1903, the vendee was put upon inquiry as to the fraud, and about February 1, 1904, was first informed that representations made to him were false. *Held*, that he was guilty of laches in bringing suit.

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Bill by Henry J. Burwash against A. Percy Ballou and others. From a judgment of the Appellate Court, affirming a decree for defendants, complainant appeals. Affirmed.

This was a bill in chancery, filed by the appellant in the circuit court of Cook county against the appellees, to set aside a sale of 7,000 shares, of the par value of \$1 per share, of the capital stock of the International Copper & Gold Company, a corporation purporting to be organized under the laws of Arizona, made by the appellees to the appellant at 80 cents per share on the 15th day of July, 1903, and to enjoin the appellees from converting to their own use \$1,400 in cash paid on said sale by the appellant to appellees, and from transferring 15 promissory notes, aggregating the sum of \$4,200, given by the appellant to the appellees in part payment for said stock, which promissory notes were not due at the time said bill was filed, and to require the appellees to repay to the appellant said sum of \$1,400, and to cause said promissory notes to be surrendered and delivered up by appellees for cancellation, on the ground (1) that said International Cop-

per & Gold Company was not legally organized; (2) that the appellees fraudulently represented to the appellant, at the time he purchased said stock, that said International Copper & Gold Company owned rich and valuable mines and water rights in Mexico, Colorado, and Montana, which were fully developed, which representations were relied upon by appellant, but were known to be untrue by appellees; and (3) that the appellees represented to appellant, at the time of said sale, that said shares of stock were the stock of the International Copper & Gold Company, which were held by the appellees in trust for said company, and that the proceeds of the sale of said stock made to the appellant would be used by said company to develop the property of said company, when in truth and in fact said stock was the individual stock of the appellees and they were intending to convert the proceeds of said sale to their own use. Answers were filed by the appellees, admitting the sale of the stock by the appellees to the appellant, and averring that the International Copper & Gold Company was duly organized under the laws of Arizona, and that said company had the lawful right to issue the stock sold by the appellees to appellant, and denying that the appellees, or any of their agents, made any false representations to the appellant, at the time of said sale, with reference to the value of the mines or other property owned by said International Copper & Gold Company, or the character of said mines, or stated that the same were fully developed, or represented to the appellant that the 7,000 shares of the capital stock of said company sold to the appellant by them belonged to said company and were held by them, or either of them, in trust for said company, or that the proceeds of said sale would be used for developing the property of said company. Replications were filed, and the cause was tried in open court, and a decree was entered dismissing the bill for want of equity, which decree, on appeal, was affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

Frank M. Burwash, for appellant. Holcomb & McBean (Edgar Bronson Tolman, of counsel), for appellees.

HAND, C. J. (after stating the facts as above). The International Copper & Gold Company was a de facto corporation, and, the appellant having purchased its stock of the appellees, in a proceeding like this, no warranty having been made by the appellees that the corporation issuing said stock was a de jure corporation, the appellant cannot escape the payment of the consideration agreed to be paid by him for said stock, by showing that the International Copper & Gold Company, which issued said stock, was not legally organized, or that its increase of stock, of which that purchased by appellant formed a part, was illegally issued. *Marshall v. Keach*, 227

Ill. 35, 81 N. E. 29. In *Higgins v. Illinois Trust & Savings Bank*, 193 Ill. 394, 61 N. E. 1024, it was held that the vendor of stock in a corporation impliedly warrants that the stock is genuine, and that he is the owner thereof and authorized to transfer title, and that, if the assignee desires further protection, he must exact a special warranty. See, also, *First Nat. Bank of Sterling v. Drew*, 191 Ill. 186, 60 N. E. 856.

The questions whether the appellees fraudulently represented to appellant that the International Copper & Gold Company was possessed of rich and valuable mines and other property, which were fully developed, and that the stock which appellants purchased from appellees was held by them, or either of them, in trust for said company, and that the proceeds of the sale of said stock to him would be used to develop the property of the company, were questions of fact. There was a direct conflict between the evidence of appellant and his witnesses and that of the appellees and their witnesses upon those questions, and the rule is too firmly established in this jurisdiction to be shaken that in such state of case the rulings of the chancellor, who tried the case and saw the witnesses and heard them testify upon questions of fact, will not be disturbed, unless it is manifest that his rulings are wrong. *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961; *Fabrice v. Von der Brelle*, 190 Ill. 460, 60 N. E. 835; *Arnold v. Northwestern Telephone Co.*, 199 Ill. 201, 65 N. E. 224. We have read the testimony of all the witnesses as it appears in the abstract, and are unable to point out wherein the chancellor committed error in his determination of the facts of this case. It would serve no useful purpose, therefore, to incorporate into this opinion a discussion of the complicated state of facts found in this record. In the decision of a case like this it must be borne in mind that "puffing" mining claims or making glowing predictions as to how such claims will "pan out" does not amount to such false representations as will authorize a court of chancery to set aside a sale of stock in a mining company when the parties are compos mentis and deal at arm's length. *Gage v. Lewis*, 68 Ill. 604; *Tuck v. Downing*, 76 Ill. 71; *Brady v. Cole*, 164 Ill. 116, 45 N. E. 438.

The sale of the stock in question was made on July 15, 1903, and the bill was not filed until August 3, 1904. In the bill of complaint appellant alleges that shortly after the payment of the second note, which fell due September 15, 1903, and which presumably was paid when due, he was put upon inquiry as to the conspiracy and fraudulent agreement entered into between the appellees and others, whereby complainant was induced and persuaded to purchase said seven thousand shares of stock, and, again, that about February 1, 1904, complainant was for the first time informed and became aware that some of the representations and statements made

to him by appellees were false. The rule is that a party who desires to rescind a sale for fraud must act promptly; that he cannot be permitted to stand passively by and speculate as to the result of an investment, especially an investment in mining stock, which usually fluctuates in value, and, after the future has disclosed his investment was a mistake, rescind the contract of purchase for fraud and recover back the consideration paid for the stock. *Greenwood v. Fenn*, 136 Ill. 146, 26 N. E. 487; *Follett v. Brown*, 188 Ill. 244, 58 N. E. 943; *Coolidge v. Rhodes*, 199 Ill. 24, 64 N. E. 1074; *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(230 Ill. 39)

SILL v. PATE et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. JUDGMENTS — CONCLUSIVENESS — PERSONS CONCLUDED.

Where defendants against whom a bill was filed, alleging that they had conspired with certain persons not defendants to defraud complainant out of certain notes and trust deeds, were not parties to a suit theretofore brought against such other persons, wherein it was alleged that they had defrauded complainant in obtaining possession of such notes and trust deeds, and defendants had purchased such notes and trust deeds before such prior suit was commenced, the decree therein entered for complainant was not admissible in evidence against them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1177-1180.]

2. BILLS AND NOTES—BONA FIDE PURCHASERS.

Where a broker had possession of a collateral note and a note and trust deed accompanying it as collateral security, so indorsed as to transfer title by delivery, persons dealing with him would have the right to presume that he had authority to secure a loan on the collateral note and deposit the note and trust deed as security; but, the collateral note reciting that such other note and trust deed had been deposited to secure its payment, such persons would not have the right to presume that the broker had authority to sell the note and trust deed, but would be bound to take notice that the equity therein over the loan was in the maker of the collateral note, and, having purchased the note and trust deed from the broker, they would be bound to account therefor, subject to payment to them of the amount loaned on the collateral note.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 853-855, 864, 865.]

3. APPEAL—REVIEW—QUESTIONS OF FACT.

A finding of fact by the chancellor cannot be disturbed on appeal, unless palpably wrong.

4. BROKERS—AUTHORITY—EVIDENCE — SUFFICIENCY.

Evidence held to support a finding that complainant had authorized a broker to sell a note and trust deed.

5. SAME — RATIFICATION — KNOWLEDGE OF FACTS.

A principal cannot be deemed to have ratified an unauthorized act of an agent, unless he does so with full knowledge of all the facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 627-633.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; O. E. Heard, Judge.

Bill by Mary D. Sill against Willard H. Pate and others, alleging that they had conspired with certain persons not named as defendants to cheat and defraud complainant out of certain notes and trust deeds. From a judgment of the Appellate Court, First District, affirming a decree for defendants, complainant appeals. Reversed in part, and remanded.

It appears from the pleadings and proofs: That on February 5, 1902, the appellant was the owner of a promissory note bearing date October 26, 1895, for the sum of \$2,500, bearing interest at 6 per cent. per annum, payable semiannually, signed by Mary A. Jones and Stephen B. Jones, payable to the order of themselves and by them indorsed, and that the time of payment of said note at its maturity was extended by the appellant for five years, the payment of which note was secured by a trust deed upon real estate located in Cook county. That on February 5, 1902, the appellant executed her promissory note for the sum of \$1,600, due one year after date, to the order of Willard H. Pate, with interest at the rate of 6 per cent. per annum, which note recited said \$2,500 note and trust deed had been deposited with said \$1,600 note as collateral to secure its payment, which \$1,600 and \$2,500 notes and said trust deed were delivered to one William Freudenberg by the appellant, accompanied by the following letter: "Application for Collateral Loan. Chicago, Ill., Feb. 5, 1902. Wm. Freudenberg, Esq., 516 Chamber of Commerce, Chicago, Ill. —Dear Sir: I hereby authorize you to negotiate for me a collateral loan for sixteen hundred dollars (\$1,600) on collateral which is described in the collateral note which I have signed to-day, and the proceeds of this loan to be paid to Frank Weiss after deducting of said amount of sixteen hundred dollars (\$1,600) the following items: Forty dollars (\$40), being two and one-half per cent. (2½%) on said amount applied for, as commission; fifty dollars (\$50) for a guarantee policy issued by the Chicago Title & Trust Company; twelve dollars (\$12) for a two thousand dollar (\$2,000) fire insurance policy on premises 1001 Wilcox ave.; also for recording extended agreement. Mary D. Sill" —which letter bears the following indorsement of Frank Weiss: "Received of Wm. Freudenberg the above amount, less expenses mentioned. Chicago, Febr. 13th, 1902. Frank Weiss." That on February 11, 1902, Willard H. Pate received said promissory notes and trust deed from William Freudenberg, and delivered to said Freudenberg his check upon the Commercial National Bank of Chicago for the sum of \$1,600, less \$20 retained as one-half of Freudenberg's commission. That on August 12, 1902, said Willard H. Pate purchased from William Freudenberg the said \$2,500 note and trust deed, and

delivered to him said \$1,600 note, and his check upon the same bank for \$847.05, in payment for said \$2,500 note and trust deed. It further appears that on April 23, 1902, the appellant was also the owner of a promissory note bearing date May 11, 1901, for the sum of \$2,000, bearing interest at the rate of 6 per cent. per annum, payable semiannually, signed by Charles M. Mueller, payable to the order of the appellant, the payment of which note was secured by trust deed upon real estate situated in the county of Cook. On April 23, 1902, the appellant indorsed said \$2,000 note in blank and delivered the same to said William Freudenberg, with the following letter: "Application for Collateral Loan. Chicago, Ill., Apr. 23d, 1902. Wm. Freudenberg, Esq., 516 Chamber of Commerce, Chicago, Ill.

—Dear Sir: I hereby authorize you to negotiate for me a collateral loan for thirteen hundred dollars (\$1,300), which is described in the collateral note which I have signed to-day, and the proceeds of this loan to be paid to Frank Weiss after deducting of said amount of thirteen hundred dollars (\$1,300) thirty-two dollars and fifty cents (\$32.50), being two and one-half per cent. on said amount applied for, as commission; thirty-five dollars (\$35) for a guarantee policy issued by the Chicago Title and Trust Company; ten dollars (\$10) for insurance. Mary D. Sill"—which letter bears the following indorsement by Frank Weiss: "Received the above amount this 26th day of April, 1902. Frank Weiss."

William Freudenberg testified that he made the \$1,300 loan himself from funds obtained from his bank, and held the \$2,000 Mueller note and trust deed as security therefor, and that when the note was subsequently sold by him to Cline he paid himself the \$1,300 loan; that on May 26, 1902, the appellant signed and delivered to William Freudenberg the following letter: "Chicago, May 26th, 1902. Mr. Wm. Freudenberg—Dear Sir: I hereby authorize you to negotiate for me the sale of a two thousand (\$2,000) note secured by trust deed on the following described property: Lot 13, block 11, in Watson, Tower & Davis' subdivision of the west half (W. ½) of the northwest quarter (N. W. ¼) of section six (6), township 39 north, range 14 east of the third P. M., also known as No. 701 North Oakley ave., signed by Chas. M. Mueller, bearing interest at the rate of six per cent. per annum. I hereby agree to pay you two and one-half per cent. as commission on such sale. You will also deduct \$1,300 from said amount, which I have already received. Mary D. Sill. [Seal.]" In the latter part of May, 1902, said William Freudenberg sold said \$2,000 note and trust deed to Hubert S. Cline, who paid him therefor \$2,000. A copy of the following instrument in writing purporting to be signed by the appellant, the original having been lost, was introduced in evidence: "Mr. Freudenberg: Please hand Mr. Frank Weiss the money due me of mortgages sold by you, signed Charles M. Mueller and Susan

A. Jones. Mary D. Sill." And William Freudenberg testified he paid the proceeds received from the sale of the \$2,500 and \$2,000 notes either to Frank Weiss or the appellant. It further appears from the evidence that the appellant was a maiden lady about 76 years of age in 1902, residing in the city of Chicago; that she owned the promissory notes and trust deeds above referred to, and the inference is she had other property which Frank Weiss swindled her out of, as in the bill filed by her against Weiss and Freudenberg, herein referred to, she recovered a money decree against Weiss for the sum of \$10,641.64, which amount greatly exceeded the amount of the Jones and Mueller notes; that she was a woman of education and refinement, but of little business experience, and relied largely upon others to assist her in her business transactions; that she became acquainted with Frank Weiss in the city of Chicago in the year 1901, where he was then in the real estate business; that he soon obtained her complete confidence; that she relied upon him as her trusted adviser; that he soon induced her to take a room at his house, where he and his two children resided, and that he borrowed money of her; and she testified she relied upon him to such an extent that she signed any papers that he asked her to sign, without question. She testified he first obtained the possession of the Jones note and trust deed by pretending that the title to the real estate covered by the trust deed was defective, and he desired to show the trust deed to William Freudenberg and have it corrected, and she says Weiss and Freudenberg both told her the defect had been remedied. She further testified that Weiss borrowed \$75 of Freudenberg and gave his note to him for that amount, and that through the advice of Weiss she deposited the Jones note and trust deed with Freudenberg, so that he could collect the interest when due and repay himself said \$75 loan. She also testified that Weiss borrowed \$60 of Freudenberg and gave him his note for that amount, and that under the advice of Weiss she indorsed the Mueller note and delivered said note and trust deed to Freudenberg, so that he could collect the interest thereon and repay himself that claim. She admits her genuine signature appears upon the \$1,600 collateral note, and to the letter authorizing said collateral loan, and upon the back of the \$2,000 note, and to the letter authorizing the \$1,300 collateral loan, and to the letter authorizing the sale of the \$2,000 note and trust deed, but says she must have signed them because Frank Weiss asked her to; that she did not knowingly sign the \$1,600 note, or said letters, for the purpose of borrowing money, or for the purpose of selling said notes and trust deeds. In the summer of 1902, and after the said notes and trust deed had been turned over to Freudenberg, Frank Weiss absconded, and the appellant then realized that she had been swindled by Weiss

and Freudenberg, and thereupon filed a bill in chancery to the May term, 1903, of the circuit court of Cook county, charging fraud against Weiss and Freudenberg in obtaining possession of said Jones and Mueller notes and trust deeds, and asking that they be required to surrender said notes and trust deeds to her, or, in default thereof, to account to her for their proceeds. Weiss was served by publication, and Freudenberg personally. Freudenberg appeared and answered. Weiss was defaulted, and upon the trial the court found that Weiss and Freudenberg had fraudulently obtained possession of the said Jones and Mueller notes and trust deeds, and rendered an alternative decree against them that they deliver to the appellant said notes and trust deeds, or that they pay to her, in lieu of their surrender, the amount thereof (fixing the amount), and that execution issue therefor.

It developed shortly before the trial that the Jones note and trust deed had been sold by Freudenberg to Willard H. Pate for his mother, Rebecca Pate, and that the Mueller note and trust deed had been sold by Freudenberg to Hubert S. Cline, and that they then were holding said notes and trust deeds; and after the decree was entered in the original case this bill, which is in the nature of a supplemental bill, was filed by the complainant against Willard H. Pate and Rebecca Pate and Hubert S. Cline, alleging that they had conspired with Weiss and Freudenberg to cheat and defraud the appellant out of said Jones note and trust deed and said Mueller note and trust deed, that they had paid no consideration for the pretended transfer thereof to them, and had full notice of the rights of the complainant thereto, and asking that they be required to surrender the possession of said notes and trust deeds to the appellant, and in default thereof that they be required to account to the appellant for their value. Answers and replications were filed, and a trial was had before the chancellor, and a decree was entered dismissing the bill for want of equity, which decree has been affirmed by the Appellate Court for the First District and a further appeal has been prosecuted to this court.

Henry C. Adams (Dewitt C. Jones, of counsel), for appellant. James Maher, for appellee Cline. W. T. Underwood, for other appellees.

HAND, C. J. (after stating the facts as above). The court admitted in evidence the bill, but declined to admit in evidence the decree in the case commenced by the appellant against Freudenberg and Weiss, and the first contention of the appellant is that the court erred in declining to admit in evidence the decree in that case against the defendants. The defendants were not parties, either complainant or defendant, in that suit, and they had purchased said notes

and trust deeds long before the suit was commenced. We think it, therefore, too plain for argument that the decree entered in that case did not bind them, and that the court did not err in declining to admit the same in evidence. *Bradley v. Luce*, 99 Ill. 234; *Gage v. Parker*, 178 Ill. 455, 53 N. E. 317.

The next contention is that the defendants were not bona fide purchasers of said notes. We have read all the evidence in this record, and find nothing therein which indicates to our minds, in the slightest degree, that either of the Pates or Cline, as alleged in the bill, was in any way engaged in a conspiracy with Weiss and Freudenberg, or either of them, to defraud the appellant out of her property. Freudenberg was a broker. He borrowed of Rebecca Pate, through her son, Willard H. Pate, \$1,600 upon the collateral note of the appellant, for one year, secured by the Jones note and trust deed. The collateral note was in legal form, and the collateral accompanying it so indorsed as to transfer title by delivery, and up to the amount of the \$1,600 note the Pates were clearly bona fide purchasers of the Jones note and trust deed from Freudenberg. *Mayo v. Moore*, 28 Ill. 423; *Saylor v. Daniels*, 37 Ill. 331, 87 Am. Dec. 250. Willard H. Pate and Rebecca Pate, however, had full notice, from the recitals contained in the \$1,600 collateral note, that the Jones note and trust deed were the property of the appellant, and, while they had the right to presume, from the fact that William Freudenberg held the \$1,600 collateral note, duly executed, and the collateral so indorsed as to transfer title, in his possession, that Freudenberg had authority to make the \$1,600 loan and deposit the Jones note and trust deed to secure its payment, they had no right, from such possession, to presume that Freudenberg had the right to negotiate said Jones note and trust deed. In other words, Willard H. and Rebecca Pate were bound to take notice, from their knowledge of the fact that the note and trust deed belonged to the appellant, that the equity in said Jones note and trust deed, over and above said \$1,600 represented by the collateral note, was in the appellant, and when they made the purchase of the \$2,500 note from Freudenberg, to make the purchase valid they were bound to know he was acting with the authority of appellant and that Freudenberg had authority to make such transfer. *Chicago Title & Trust Co. v. Brugger*, 196 Ill. 96, 63 N. E. 637. And as it clearly appears Freudenberg had no authority to use said Jones note and trust deed, except as collateral to secure the payment of said \$1,600, we are of the opinion that Willard H. Pate and Rebecca Pate should be held to account to the appellant for the Jones note and trust deed, subject to the payment to them of the amount of said collateral note of \$1,600.

It appears that Hubert S. Cline, who had been a mechanic in the employ of the fire department of the city of Chicago for many years, was informed by Willard H. Pate, who was secretary of the Woolf Clothing Company and whom he had known for some years, that Freudenberg had notes and trust deeds and other securities for sale; that Cline had about \$2,000 which he desired to invest, and sent Mrs. Cline to Freudenberg with a view to purchase some of said securities; that she reported that she had seen in Freudenberg's possession the Mueller \$2,000 note and trust deed. Shortly thereafter Mr. and Mrs. Cline went to look at the property covered by the trust deed, and, finding it satisfactory, Mr. Cline instructed Mrs. Cline to go to Freudenberg's office and purchase the Mueller \$2,000 note and trust deed, which she did within a short time. She paid therefor a certificate of deposit in one of the banks of Chicago for \$1,945 and \$55 in cash, and received the \$2,000 note indorsed by appellant in blank, the trust deed, guarantee policy, etc. The only evidence as to any knowledge of the Clines that the appellant claimed any interest in the Mueller note and trust deed which they were purchasing is: Mrs. Cline testified that Freudenberg informed her, at the time she bought the note and trust deed, that an old lady—a Miss Sill—wanted to get all her money together and she was selling her paper. She says, in one part of her testimony, she supposed that Mr. Freudenberg was the owner of the note and trust deed, and she was buying it from him, and in another part of her testimony that she supposed she was buying it from Miss Sill. This transaction differs from the sale of the equity in the Jones note and trust deed to the Pates in this: That Freudenberg had the authority of the appellant, in writing, to sell the Mueller note and trust deed, while he had no authority to sell the Jones note and trust deed. The question whether Freudenberg was authorized to sell the Mueller note and trust deed at the time he sold them to Hubert S. Cline, through his wife, was a question of fact. The chancellor heard and saw the witnesses, and he held that appellant had authorized Freudenberg to sell said note and trust deed, and we cannot disturb his finding upon that question of fact, unless it appears from the evidence to be palpably wrong, which we do not think it does. Appellant admits she indorsed said note, and delivered the note and trust deed to Freudenberg, and that she signed the letter of May 26, 1902, which authorized him to negotiate that note and trust deed. She could read and write, and was a woman of ordinary intelligence; and her only excuse for having placed said letter and the Mueller note, indorsed in blank, and the trust deed, in Freudenberg's hands, is that she was overreached by Weiss and Freudenberg. It is apparent that Weiss and Freudenberg, after

they procured the funds of the appellant from the sale of her securities, converted such funds to their own use; but it is not clear from this record that the appellant did not consent that \$1,600 might be borrowed from the Pates upon her note, secured by the Jones note and trust deed, and that the Mueller note and trust deed might be sold by Freudenberg, and that she only took the position that she had not consented to said loan and sale after she knew that Weiss had absconded and the funds derived from the Pate loan and the sale of said Mueller note and trust deed had been embezzled by Weiss and Freudenberg, whom, she testified, she trusted up to the time that Weiss absconded; and the fact that Freudenberg stated to Mrs. Cline, at the time of the sale to her of the Mueller note and trust deed, that they belonged to an old lady who wanted to sell them and get all her money together is not inconsistent with the view that Freudenberg had authority to make the sale of the Mueller note and trust deed; and if Freudenberg, at the time he made the sale to Cline of the Mueller note and trust deed, had authority from the appellant to make the sale, it is immaterial whether he at that time notified Mrs. Cline to whom the note and trust deed really belonged or not.

It is also urged that by the copy of the lost memorandum introduced in evidence it appears that the appellant ratified the sale of the Jones note and trust deed and the sale of the Mueller note and trust deed. As we understand this record, the equity of the appellant in the Jones note and trust deed was not sold to the Pates until the 12th of August, 1902, and that Weiss had absconded long before that time. Therefore, if that memorandum should be treated as a ratification of the sale to Cline of the Mueller note and trust deed, it could not amount to a ratification of the sale of the Jones note and trust deed to the Pates, as the sale of the Jones note and trust deed took place after the execution of that paper, and after Weiss had absconded, and the general rule is that a party will not be deemed to have ratified an unauthorized act of an agent, unless he does so with full knowledge of all the facts; and there is no pretense in this record that the appellant knew of the sale to the Pates of the Jones note and trust deed until just before the trial of this suit.

The judgment of the Appellate Court, affirming the decree of the circuit court, will be affirmed in all things, except in so far as said decree dismissed the bill as to Willard H. Pate and Rebecca Pate, and as to them the decree of the circuit court dismissing the bill, and the judgment of the Appellate Court affirming that part of the decree, will be reversed, and the cause as to them will be remanded to the circuit court for further proceedings in accordance with the views expressed in this opinion. One-half of the costs attending this appeal will be paid by

the appellant, and one-half by Willard H. Pate and Rebecca Pate.

Reversed in part, and remanded.

(229 Ill. 533)

KEESHAN v. ELGIN, A. & S. TRACTION CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. NEGLIGENCE—CARE REQUIRED BY ONE INTOXICATED.

Where plaintiff's intestate was killed by falling from a bridge while in a state of intoxication, the fact that he was intoxicated did not excuse him from exercising such care as may reasonably be expected from one who is sober.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 119.]

2. CARRIERS—INJURY TO PASSENGER—DECLARATIONS—SUFFICIENCY.

A declaration alleged that defendant's servants, after accepting intestate on its car as a passenger, put him off at a station five miles from his destination on a stormy night and where he could obtain no shelter, knowing that he was intoxicated and unable to care for himself, and that in attempting to walk home along defendant's track he fell from its bridge and received injuries from which he died. *Held* insufficient, since it fails to establish a connection between the alleged wrongful act of ejection and the injury received by falling from the bridge.

3. SAME—PROXIMATE CAUSE OF INJURY.

It is not necessary, to the liability of a common carrier for an injury resulting from an act of its servants, that they should be able to anticipate the particular injury which might result; but it cannot be held liable for failing to provide against a possible injury which could not have been reasonably anticipated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1412.]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Kane County; C. A. Bishop, Judge.

Action by Mary E. Keeshan, administratrix of the estate of Edward J. Keeshan, deceased, against the Elgin, Aurora & Southern Traction Company, for wrongfully causing the death of plaintiff's intestate. From a judgment of the Appellate Court, affirming a judgment of the circuit court sustaining a general and special demurrer to the declaration, plaintiff appeals. Affirmed.

Fisher & Mann (R. N. Botsford of counsel), for appellant. Hopkins, Peffers & Hopkins, for appellee.

CARTWRIGHT, J. The appellant, Mary E. Keeshan, administratrix of the estate of her deceased husband, Edward J. Keeshan, filed in the circuit court of Kane county her declaration against appellee, the Elgin, Aurora & Southern Traction Company, charging it with wrongfully causing the death of said Edward J. Keeshan. The defendant filed a general demurrer to the declaration, and afterward, by leave of court, added seven special causes of demurrer. The court sustained the demurrer, general and special, and, the plaintiff having elected to stand by

the declaration, the court entered judgment against her for costs. The Appellate Court for the Second District affirmed the judgment, except as to an order for execution against the plaintiff, and this further appeal was prosecuted.

The declaration consists of three counts, the first of which alleges the following facts: That on March 13, 1904, defendant was operating a railroad extending from the city of St. Charles, in Kane county, to the city of Elgin, in the same county; that on said day, at Riverview Switch, a station on said road, Edward J. Keeshan became a passenger, for a certain fare and reward, in a car bound for the said city of Elgin; that when he entered said car he was very much intoxicated and unable to care for himself, which was known to the defendant's servant in charge of the car; that on the arrival of the car at station 31, and before the arrival of the car at Elgin, the defendant, by its said servant, forcibly and violently, and with insult and injury, and with great and unnecessary violence, expelled Keeshan from said car and refused to permit him to re-enter the same; that it was nighttime, and the weather was cold and stormy, and snow was rapidly falling, and the wind was blowing very hard; that there was no shelter at station 31, or in the immediate neighborhood; that the home of Keeshan, where he wished to go, was at Elgin, five miles from station 31; that he was still very much intoxicated and unable to care for himself; that 10 minutes after he was expelled from the car he started to walk from said station to his home in Elgin while so intoxicated and in said state of the weather; that in endeavoring to cross a certain bridge over Fox river, on the line of said railroad, on his way home, and while using due care and caution for his own safety, and while the weather was cold and stormy, and the snow then and there rapidly and heavily falling, he fell off or walked off said bridge into the water of the river, which was icy cold, and out of which he was unable to get without assistance; that he remained there for two hours, until assisted by other persons to get out, and that as a result thereof he died on March 14, 1904, leaving plaintiff, his widow, and a daughter, who were deprived of their means of support. The same facts are alleged in the second and third counts, with the exception that in the second count it is alleged that at Riverview Switch the deceased changed from a passenger car used for the conveyance of passengers towards the city of St. Charles and entered the car for the carriage of passengers towards the city of Elgin.

The declaration alleges that Keeshan was expelled from the car with unnecessary violence, and the law does not justify the use of unreasonable or excessive force; but the declaration does not allege that any injury resulted from the act of expulsion from the car or the unnecessary violence charged. The

death of Keeshan is alleged to have been caused by his falling off or walking off of a railroad bridge at another time and place, so that the averment of excessive force adds nothing to the supposed cause of action. It is neither alleged in the declaration nor claimed by counsel that defendant was bound to carry Keeshan to the city of Elgin, where he resided, nor that he could not have been rightfully ejected from the car at a proper time and place; but it is insisted that the declaration states a cause of action by averring that he was expelled from the car when he was intoxicated and incapable of exercising care in his own behalf, at a place and under conditions where he was exposed to a known peril. The propositions stated by counsel are, in substance, that although a passenger who is intoxicated to such a degree as to render him unable to care for himself, and who refuses to pay fare, may be rightfully ejected at the proper time and place, such facts will not justify an expulsion without exercising due care with reference to time, place, and surroundings; that a carrier of passengers has no right to eject such a person at a time or place where he will be subject to danger of bodily injury; and that, if he is ejected under such circumstances, the carrier is liable for resulting damages. If these propositions are correct, it does not follow that the declaration states a cause of action, since it is necessary that the declaration should establish a connection between the alleged wrongful act and the injury. If a helpless drunken passenger is expelled from a car in the condition of the weather alleged in the declaration, it might be a probable consequence that he would be injured by exposure to the cold and storm, or, if he was unfit to care for himself, it might be a natural result that he would be run over and injured or killed by other cars. But no such injury resulted. It is true that, if Keeshan had not been ejected from the train and had been carried to Elgin, he would not have walked off or fallen off the bridge; but it is conceded by counsel that defendant was not bound to carry him to Elgin, and that the only wrong alleged relates to his expulsion in the state of the weather alleged and at a place where there was no shelter.

It is alleged that he wished to go to his home in Elgin, and, if the defendant was not bound to carry him, his only recourse was to walk, and that he attempted to do. He would naturally and probably have set out for home on foot, if he had never been admitted to the car, or never been expelled therefrom. His starting for home had no connection with his being or having been on the car, except that the defendant refused to carry him, which it had a right to do, and his attempt to walk to his home across defendant's bridge has no apparent connection with his expulsion from the train. There is no allegation that it was necessary for him to cross the bridge on account of the

weather, or the place where he was left, or that there was no highway by which he could have reached his home. The defendant is not charged with any fault in respect to its bridge, if there could be any duty to maintain a railroad bridge in condition for foot passengers. Keeshan's falling from the bridge is not chargeable to any defect in the bridge, but to his intoxication, and voluntary intoxication will not excuse a person from exercising such care as may reasonably be expected from one who is sober. *Toledo, Peoria & Warsaw Railway Co. v. Riley*, 47 Ill. 514; *Chicago, Rock Island & Pacific Railroad Co. v. Bell*, 70 Ill. 102; *Illinois Central Railroad Co. v. Cragin*, 71 Ill. 177; *South Chicago City Railway Co. v. Dufresne*, 200 Ill. 456, 65 N. E. 1075; *Thompson on Negligence*, § 2935. If putting Keeshan off at the time and place alleged was a wrongful act on account of the condition of the weather, the declaration shows no natural connection between that act and the consequences which resulted from his attempting to walk to his home, in his intoxicated condition, across defendant's bridge. If it was not necessary to a liability of the defendant that its servant in charge of the car should be able to anticipate the particular injury which might result from a wrongful act, still the defendant cannot be held liable for failing to provide against a possible injury which could not have been reasonably anticipated. If Keeshan was expelled and left in a place where he was exposed to unnecessary peril in his drunken condition, on account of the cold and storm, there is no connection between that act and his walking or falling off the bridge.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(22) Ill. 390)

ILLINOIS CENT. R. CO. v. SILER.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. RAILROADS—FIRES—ACTIONS FOR INJURIES—PLEADING—STATUTES.

Counts in a declaration for causing the death of plaintiff's intestate, alleging that intestate, while exercising due care, was burned to death in attempting to put out a fire on her premises which had spread from combustible material negligently left by defendant railroad on its right of way and ignited from sparks from defendant's locomotive, are not statutory, and therefore bad, because 3 Starr & C. Ann. St. 1896, c. 114, par. 69, relating to the accumulation of combustible material on the right of way of a railway, refers back to the preceding section for a penalty, and applies only to stock, and not to persons, since they do not refer to the statute, and do not depend upon it for their validity.

2. SAME—QUESTIONS FOR JURY.

Before the statute as to allowing the accumulation of combustible material on the right of way of a railway, the question whether the company was negligent in so doing was one of fact, to be determined by the jury under the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1744.]

3. NEGLIGENCE—PROXIMATE CAUSE—QUESTION OF LAW OR FACT.

What is the proximate cause of an injury is ordinarily a question of fact for the jury, and is only a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 327-332.]

4. SAME—PROXIMATE CAUSE.

In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and particular manner of its occurrence could reasonably have been foreseen; but if the consequences follow in unbroken sequence from the wrong to the injury, without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69-82.]

5. RAILROADS—FIRES—PROXIMATE CAUSE.

Where a railway company allowed combustible material to accumulate upon its right of way next to intestate's premises, it was bound to anticipate that, if a fire started therein and endangered her property, she would try to put it out; and where a fire started from a spark from defendant's locomotive and spread to intestate's premises, and she, in attempting to extinguish it and while exercising due care, was burned to death, defendant's negligence was the proximate cause of the injury, since it should have anticipated such a result as probable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1687-1693; vol. 37, Negligence, § 103.]

6. NEGLIGENCE—FIRES—DUTY OF OWNER TO PROTECT PROPERTY.

One whose property is exposed to danger by fire caused by another's negligence is bound to make such effort as an ordinarily prudent person would to save it; and if in doing so, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury is liable in damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 103.]

7. APPEAL—INTERMEDIATE COURTS—QUESTIONS OF FACT.

The judgment of the Appellate Court, affirming a judgment of the trial court, is final as to controverted questions of fact.

8. NEGLIGENCE—CONCURRENT CAUSES—ACCIDENT.

A defendant is liable for an injury caused to one using due care for his personal safety by the defendant's negligence concurring with an accident without which the injury would not have occurred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 74, 75.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Crawford County; E. E. Newlin, Judge.

Action by X. F. Siler, as administrator for Mary E. Mullens, deceased, against the Illinois Central Railroad Company, to recover for the death of plaintiff's intestate. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

On the 11th day of November, 1905, appellee's intestate, Mrs. Mary E. Mullens, having discovered fire among the dry grass and weeds on her premises adjoining appellant's right of way, in order to stop its progress, began raking the leaves between the fire and her house toward the fire, and while doing so her clothing caught fire and she was so badly burned that she died. Her administrator, alleging that the fire was caused by appellant's negligence, brought an action on the case against appellant in the circuit court of Crawford county to recover damages for the injury to the surviving husband and next of kin. He recovered a judgment, which was affirmed by the Appellate Court, and an appeal has now been taken to this court.

John G. Drennan (J. M. Dickinson and Parker & Crowley, of counsel), for appellant. George W. Jones and Bradbury & MacHattton, for appellee.

DUNN, J. Appellant presents two propositions only: First, the declaration does not state a cause of action; second, there is no proof that appellant set out the fire or that the deceased used due care. The declaration consisted of five counts, the second and fifth of which were substantially alike, and alleged that defendant negligently suffered large quantities of combustible material to accumulate upon its right of way; that fire from one of defendant's engines ignited said combustible material, and thence spread and was communicated to the decedent's premises, and while decedent, with all due care and caution for her own personal safety, was endeavoring to suppress said fire and protect her dwelling house on said premises, whose destruction was threatened, her clothing was ignited by said fire, in consequence whereof she was burned and died. The third and fourth counts allege that fire escaped from one of defendant's locomotives by defendant's mere neglect, and set fire to certain combustible material on its right of way and decedent's adjoining close, and while decedent, with all due care for her personal safety, was endeavoring to extinguish the fire and protect her dwelling house, which was threatened with destruction, her clothing was ignited and she was burned, and in consequence thereof died.

It is claimed that the second and fifth counts are statutory, and therefore bad, because the statute in reference to the accumulation of dangerous combustible material upon the right of way of a railroad company (3 Starr & C. Ann. St. 1896, p. 3263, c. 114, par. 69) refers back to the preceding section for its penalty, and applies only to stock, and not to persons. But these counts do not refer to the statute, and do not depend upon it for their validity. Before the statute, while the presence of dry grass and weeds upon the right of way of a railroad company was not conclusive evidence of neg-

ligence, yet the question of negligence was one of fact, to be determined by the jury from all the circumstances in the case. *Illinois Central Railroad Co. v. Mills*, 42 Ill. 407.

It is insisted that all the counts are bad, because they show specifically that the injury to decedent was not the proximate result of the negligence charged. What is the proximate cause of an injury is ordinarily a question of fact, to be determined by the jury from a consideration of all the attending circumstances. *Fent v. Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349, 14 Am. Rep. 13; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *West Chicago Street Railroad Co. v. Feldstein*, 169 Ill. 139, 48 N. E. 193. It can only arise as a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference, in the judgment of reasonable men, as to the inferences to be drawn from them. The counts all allege, substantially, that the fire was communicated to the decedent's premises by the negligence of appellant. They all allege, substantially, that while the deceased, with all due care for her safety, was trying to extinguish the fire, her clothing was ignited and her burning and death resulted. The question presented, so far as the demurrer is concerned, is whether one who has negligently set fire to another's premises can be held liable for damages caused by burning the owner while engaged in trying, with reasonable prudence and care, to extinguish such fire. Even though one's property has been negligently set on fire by another, the owner cannot permit it to be consumed without an effort to save it and then claim reimbursement from the setter out of the fire. He must use every reasonable effort, consistent with his personal safety, to preserve the property. *Toledo, Peoria & Warsaw Railway Co. v. Pindar*, 53 Ill. 447, 5 Am. Rep. 57; *Chicago & Alton Railroad Co. v. Pennell*, 94 Ill. 448. Where a person sees his property exposed to imminent danger through the negligence of another, he is justified in using every effort to save it which a reasonably prudent person would use under similar circumstances, even though the effort exposes him to some danger which he would otherwise have avoided. Due care depends upon the circumstances surrounding the action. It is to be determined with reference to the situation in which he finds himself at the time. What is due care in one situation might be gross recklessness under different circumstances. Every one is bound to anticipate the results naturally following from his acts. The appellant was therefore bound to anticipate, when the fire started, that the decedent would try to put it out. This she was doing, and the allegation is that she was using all due care and caution for her own personal safety. If in so doing the fire which appellant had negligently set out spread to

and ignited her clothing without any want on her part of the care which an ordinarily prudent person would exercise under the circumstances, the appellant should be held to have anticipated such result as probable and to be liable therefor.

In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. *City of Dixon v. Scott*, 181 Ill. 116, 54 N. E. 897. If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. *Chicago & Alton Railroad Co. v. Pennell*, supra; *Pullman Palace Car Co. v. Laack*, supra; *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51. The rule as to what constitutes proximate cause was considered in the case of *Atchison, Topeka & Santa Fé Railroad Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362, and it was said: "Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and, if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. But whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action." In *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, it is said: "The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury." It is true that in this case the voluntary act of the decedent intervened between the negligent act of the appellant in setting out the fire and the injury occasioned by the burning of decedent. But this act was one of the intervening causes which the appellant with reasonable diligence might have foreseen. It was a consequence of the wrongful act of appellant which it ought to have anticipated. It was not a new and independent cause intervening

between the wrong and the injury, or disconnected from the primary cause and self-operating, but was itself the natural result of appellant's original negligence.

The case of *Seale v. Railway Co.*, 65 Tex. 274, 57 Am. Rep. 602, has been cited by appellant and fully sustains its position. That case holds that, whether the deceased was negligent or not in her attempt to put out the fire, it was this attempt, and not the original negligence of the defendant in starting the flame, that was the proximate cause of her death. This case was followed by the Missouri Court of Appeals in *Logan v. Wabash Railroad Co.*, 96 Mo. App. 461, 70 S. W. 734. In the case of *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616, 60 L. R. A. 459, 97 Am. St. Rep. 844, the injury resulted from "an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence." The court, while reversing the judgment against the defendant, said: "The rule has been extended so as to give the injured party redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances." The cases which sustain the position of the appellant we think are wrong in principle and opposed to the weight of authority. One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages. It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned as sustaining the position of appellant. *Berg v. Great Northern Railway Co.*, 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524; *Liming v. Illinois Central Railroad Co.*, 81 Iowa, 246, 47 N. W. 66; *Glanz v. Chicago, Milwaukee & St. Paul Railway Co.*, 119 Iowa, 611, 93 N. W. 575; *Wasmer v. Delaware, Lackawanna & Western Railroad Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Page v. Bucksport*, 64 Me. 51, 13 Am. Rep. 239.

The declaration was sufficient to support the judgment. There was evidence tending to show that appellant had allowed dry grass and weeds to accumulate upon its right of way; that the fire started in such grass and weeds, and spread to the deceased's premises, immediately after the passage of a gravel train of appellant; that the deceased commenced to rake the grass and leaves on her lot and near her house, and while doing so her clothes caught fire; that the fire was started by the negligence of appellant; and

that the deceased exercised ordinary care, under the circumstances, for her own safety. In this condition of the record, the judgment of the Appellate Court is final as to the facts.

Appellant insists that, if the deceased was not guilty of contributory negligence, she was injured as the result of a pure accident. But the law is well settled in this state that a defendant is liable for an injury caused to one using due care for his personal safety by the defendant's negligence concurring with an accident without which the injury would not have occurred. *City of Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440; *City of Joliet v. Shufeldt*, 144 Ill. 403, 32 N. E. 969, 18 L. R. A. 750, 36 Am. St. Rep. 453; *Village of Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248; *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037.

We find no error in the record, and the judgment will be affirmed.

Judgment affirmed.

(229 Ill. 557)

BAUCHENS et al. v. DAVIS et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WILLS—TESTAMENTARY CAPACITY—"INSANE DELUSION."

An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 78-81.]

For other definitions, see Words and Phrases, vol. 4, pp. 3644-3646; vol. 8, p. 7689.]

2. SAME—EVIDENCE.

The fact that testator's regard for his children was lessened by the fact that one of them had sympathized with and aided testator's wife in certain family difficulties, and that his son had refused to repay a sum of money which testator had loaned him, constituted no indication that testator entertained an insane delusion against his children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 142.]

3. TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in a suit to set aside a will, there was no evidence that testator entertained an insane delusion against his children, the court properly refused to charge that, if the jury believed from the evidence that testator entertained such a delusion, they might consider such fact, with other evidence, in determining whether the writing offered was his will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

4. WILLS—UNDUE INFLUENCE.

Where a legatee knew nothing of the purport of testator's will until after it had been executed, and did not suggest the making of the will, nor bring about its execution, the court properly excluded evidence offered for the purpose of showing undue influence by such legatee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 385.]

Appeal from City Court of East St. Louis; B. R. Burroughs, Judge.

Bill by Louis P. Bauchens and others against Lillie D. Davis and others to set

aside an instrument probated as the last will of Adam Bauchens, deceased. From a judgment in favor of defendants, complainants appeal. Affirmed.

On July 6, 1905, appellants, who are heirs at law of Adam Bauchens, deceased, filed their bill in the city court of East St. Louis against Mrs. Lillie D. Davis and Ralph Duncan, administrator, appellees, to set aside an instrument which had been admitted to probate in the county court of St. Clair county as the last will and testament of the deceased. Lillie D. Davis was one of the devisees under said will, and Duncan had been appointed administrator with the will annexed. The bill averred, among other things, that at the time of the execution of said will the said Adam Bauchens was not of sound mind and memory, and that he had been prompted to make the said will by the misrepresentations and undue influence of said Lillie D. Davis. Adam Bauchens died March 23, 1905, aged 69 years, leaving an estate of the value of about \$10,000, as estimated by appellants. For a number of years prior to his decease he had been a resident of the city of East St. Louis. He was during his business life a close, economical, industrious, and strong-willed man. He was divorced from his wife in 1903, and at the time the will was executed, and for some time prior thereto, he did not have a very friendly feeling toward his children. From December, 1902, until about August, 1904, Bauchens boarded with the family of a man by the name of Newton, who lived in one of his houses on Collinsville avenue. He then went to board with the defendant Mrs. Davis and her husband, who occupied another house on the same street. About a month later he purchased a piece of property on Minnie avenue for \$1,700, and moved with the Davis family into that house, and on December 10th following, having concluded that the house in which they were living was not suitable for him, as it was not built with proper regard to excluding the cold and was without a furnace, he purchased another residence property on Eighth street for \$4,500, where the house was better built and heated by a furnace, and from that time until a few days before his death, when he was removed to St. Mary's Hospital, he occupied that property with the Davis family, which consisted of Mr. and Mrs. Davis, Mr. Murray, who was a brother of the wife, a young man by the name of Reynolds, who boarded there, and a woman employed to assist in housework.

The will was executed on December 19, 1904, and in and by the second clause of said will he devised to Lillie D. Davis the last-mentioned residence property, free and clear of all incumbrances, reciting that said devise "is made in recognition of services rendered and to be rendered to me by her and her family during declining years of my

life, I having made my home with them, and who are taking care of me." After making certain other minor bequests, the residue of his property was bequeathed to the appellants, his children, and Pearl Adolph, a granddaughter, in equal parts, except that his daughter Annie was given but \$5 and his son Adam was charged with a sum of money which, according to the recitals of the will, the father had loaned him. The will was executed without the knowledge of Mrs. Davis. The attorney who drew the will testified that Bauchens consulted him at least 10 times concerning it before it was finally prepared. About the time the instrument was executed Bauchens stated to a number of persons that it was his intention to make the Eighth street property his permanent home, and if Mrs. Davis would take care of him he was going to will it to her; that he had a room there to himself, and went in and out when he pleased; that he had the comforts of a home, a nice bed, and a comfortable room, and that his meals were cooked to his liking; that she would do more for him than any of his own family. At all times he expressed the highest regard for her. He often talked to persons of the manner in which his family treated him, complaining that they had forsaken him and taken sides with his wife; that when they came to see him they always wanted money, and on several occasions he stated that he did not want to leave anything more to them than he could help; that he was going "to spend it himself and get the good of it." Shortly after the will was executed, while in conversation with one of the witnesses, the deceased stated (referring to the devise in his will to Mrs. Davis): "I met one of my sons, and they throwed it up to me, and said, 'When you are dead, we will show you who gets that property. We will see whether Mrs. Davis gets it.'" During the last year of Bauchens' life he was afflicted with a loathsome disease and his health failed rapidly.

Defendant Davis answered the bill, denying that Adam Bauchens, at the time of the execution of the will, was not of sound mind and memory, and denying that she induced him to execute the said will by misrepresentation or undue influence. Upon a trial the jury returned a verdict finding that the writing in question was not the last will and testament of Adam Bauchens, deceased. Upon motions of proponents a new trial was granted. On the second trial the court, upon motion of Lillie D. Davis, withdrew from the consideration of the jury evidence offered by appellants upon the question of undue influence, and a verdict was returned finding that said instrument was the last will and testament of Adam Bauchens, deceased. After overruling a motion for a new trial, a decree was entered in accordance with the verdict. From that decree, contestants appeal, and contend, first, the court erred in

passing on instructions; second, the court erred in withdrawing from the consideration of the jury all evidence offered in support of the allegation of undue influence.

Daniel McGlynn and E. W. Eggmann, for appellants. Wise & McNulty and Keefe & Sullivan, for appellees.

SCOTT, J. (after stating the facts as above). It is not contended by appellants that the verdict of the jury was so manifestly against the preponderance of the evidence as to warrant a reversal. It is urged, however, that there was evidence which tended to show that the deceased entertained an insane delusion in regard to his children, and that the court improperly refused instruction No. 14 asked by appellants, which was designed to inform the jury that if they believed, from the evidence, that Adam Bauchens entertained such a delusion, the jury might take that fact into consideration, with the other evidence, in determining whether the writing offered was his will. "An insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the afflicted individual, and which refuses to yield either to evidence or reason." *Scott v. Scott*, 212 Ill. 597, 72 N. E. 708. There is no evidence in this record which tends to show that the deceased had any such delusion in regard to his children. His affection for them was not as warm as the affection which a father ordinarily entertains for his children. He explained this by stating that, at the time of the difficulties between himself and wife, the children sympathized with and aided the wife, and he was more incensed by his daughter Annie than by either of his other children, for the reason, as he said, that she had been more active in the wife's behalf than the others. He also complained that his son Adam refused to repay a sum of money which he had loaned him. There is no evidence whatever that the belief which he entertained in regard to these matters was not well founded. The fact that his regard for his children was thereby lessened is no indication that he entertained an insane delusion. By the will he left but \$5 to the daughter Annie, and charged the son Adam with the money which he said had been loaned to him, and the will was in those respects entirely consistent with his sentiments regarding those two children as he had theretofore expressed them. There was in the record nothing upon which to base the instruction now under consideration.

It is also urged that the court should not have excluded the evidence which was offered for the purpose of showing undue influence, and appellants seek to support this assignment of error by language quoted from *Sands v. Sands*, 112 Ill. 225, and repeated with approval in *Dorsey v. Wolcott*, 173 Ill. 539, 50 N. E. 1015, as follows: "Where a person en-

feebled in mind by disease or old age is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act and that it was not done through the influence of the donee." In each of those cases the person who would profit by the instrument attacked was largely instrumental in securing its execution, and that fact must be considered in determining the meaning which attaches to the language quoted. In the case at bar Mrs. Davis knew nothing of the preparation of the will until after it had been signed and attested. So far as appears from the excluded evidence, she did not suggest the making of the will, and did nothing to bring about its execution. In *Re Will of Barry*, 219 Ill. 391, 76 N. E. 577, the distinction above pointed out was recognized in these words: "In cases in which the burden of proof is thrown upon one standing in a confidential relationship to show the absence of fraud or undue influence in the making of a will, such person must be shown to have been directly connected in some manner with the making of the will." We think there was no error in excluding the evidence in question.

What has already been said disposes of other objections raised to the action of the court in passing on instructions. The decree of the city court will be affirmed.

Decree affirmed.

(229 Ill. 613)

STREET et al. v. THOMPSON.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. PARTNERSHIP—WHAT CONSTITUTES—CONSTRUCTION.

Plaintiff and defendants agreed that, in consideration of a certain weekly salary paid plaintiff and one-half of the yearly net profits of defendants' business, plaintiff was to give his entire time and services to the selling of defendants' goods; defendants to pay plaintiff's necessary traveling expenses, etc. *Held*, that plaintiff was an employé, and not a partner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 23, 24.]

2. EQUITY—JURISDICTION.

Where, to ascertain the amount of the profits of a business, a share of which plaintiff was to have as compensation for services rendered defendant partnership, it was necessary that the partnership accounts be adjusted, a court of equity had jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 30, 31.]

3. PARTNERSHIP—SALARIES—PRESUMPTION.

In the absence of a contract providing that partners shall receive salaries, salaries are not payable out of the proceeds of the firm business; and hence, where plaintiff, in consideration of services rendered to defendant partners, was to receive a share of the profits of the partnership, he was not chargeable with any portion of the salary paid one of the partners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 131.]

4. SAME—PLEADING—PROOF—VARIANCE.

In an action by plaintiff to recover for services rendered defendant partners, the bill

alleged that plaintiff was entitled to one-half the profits of a certain department, while the proof showed that he was entitled to one-half the net profits, the variance was immaterial.

5. APPEAL—CROSS-ASSIGNMENTS OF ERROR—NECESSITY.

A successful party, failing to question on appeal the judgment by assignment of cross-errors, is not entitled to have it reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3063.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by John T. Thompson against Robert R. Street and others. Decree for complainant, and defendants appeal. Affirmed.

On March 9, 1905, John T. Thompson, the appellee, filed a bill in the circuit court of Cook county against Robert R. Street, Elizabeth Street, and Charles A. Street, the appellants, members of the firm of Robert R. Street & Co., for an accounting and other relief. From the decree of that court in favor of complainant an appeal was taken by defendants to the Appellate Court for the First District, and from the judgment of that court affirming the decree of the circuit court they have prosecuted a further appeal to this court. The bill alleges that on July 2, 1902, complainant and the firm of R. R. Street & Co. entered into a copartnership for the purpose of dealing in and buying and selling engines, boilers, steam appliances, and auxiliaries at Chicago, Ill., which business was to be conducted under the firm name of R. R. Street & Co.; that complainant engaged to and did bring into said business his experience, skill, and knowledge, his entire time and services, and was to contribute in every way possible to make the enterprise a success; that he was to receive a salary of \$25 per week and his necessary traveling and incidental expenses and one-half of the net profits of the business, settlement to be made at the end of the year; that said R. R. Street & Co. engaged to and did bring into said business that branch of their business in the city of Chicago known as the "power generation department," being a line of goods including boilers, engines, steam appliances, etc., and agreed to pay to complainant his salary and necessary traveling and incidental expenses; that they were to contribute in every way possible to make the enterprise a success and to receive one-half of the profits of the business of said department; that the said partnership was to commence on July 2, 1902, and continue for one year, from which time it was continued until July 2, 1904, when it was dissolved; that during the continuation of said copartnership a large amount of goods were sold by the said firm to various parties on credit; and that said business remains unsettled. The bill further alleges that no settlement of said business has ever been made between complainant and defendants; that upon a true and just settlement of said accounts it would appear that

there is a large balance due from said copartnership to complainant; that defendants are using the funds of said copartnership in rash speculation on their own account and are in danger of becoming insolvent; and that complainant is in danger of losing the amount so due him from said copartnership. The bill prays for the appointment of a receiver, for an accounting, and that defendants may be decreed to pay to complainant whatever sum is found to be due him. The answer of defendants denies the material allegations of the bill, and avers that the complainant was their employe, bound to devote his entire time, skill, and knowledge to their service, and that he has been paid more than the entire sum due him; that the agreement with him was in writing, and reads as follows: "This agreement, entered into by and between R. R. Street & Co. and John T. Thompson, all of Chicago, Illinois, this second day of July, 1902, and to be in effect until July 1, 1903. John T. Thompson, in consideration of the salary of twenty-five dollars (\$25) per week, payable weekly, and one-half of the net profits of the power generation department for the above term, settlement to be made at the end of the year, agrees to give his entire time and services to the selling of the lines of R. R. Street & Co.'s power generation department, including engines, boilers, steam appliances, and auxiliaries. R. R. Street & Co. agree to advance and pay the necessary traveling and incidental expenses, the salary as above stated, and share the net profits of the power generation department, as hereinbefore provided. Both parties agree to contribute in every way possible to make the agreement successful and profitable to the parties thereto. It is understood that the above agreement does not apply to sales made to dealers. (In duplicate.) R. R. Street & Co. John T. Thompson." It alleges that one-half of the net profits, as provided in the agreement, was less than the sum of \$300, which sum last mentioned has been paid to complainant over and above his salary and traveling expenses, and that he is indebted to defendants in the sum of \$200. A replication was filed, and the cause referred to the master in chancery to take proofs and report his findings to the court.

The master found, among other things, that on July 2, 1902, complainant and defendants entered into the written agreement set out in the answer, and that defendants had paid to complainant the salary of \$25 a week and all his traveling and incidental expenses and \$300 in addition thereto; that no statement was rendered by defendants at the end of the first year, but that at the end of the second year, when complainant ceased working for defendants, they rendered to him statements which purported to show his account for the entire time of his employment; that said statements showed the gross profits of the first year to be \$4,995.20 and for the second year to be \$3,106.93, and against those

profits were charged the following items of expense:

For the first year:

Salary of J. T. Thompson from July 1, 1902, to July 1, 1903.....	\$1300 00
Expenses of J. T. Thompson for the same period	375 87
Part of salary of Charles A. Street for said period	1800 00
Expenses of Charles A. Street for said period	373 88
Office expenses, including telegrams, postage, stationery, telephone, typewriter, etc., for said period of 12 months, at \$30 a month.....	360 00
	<u>\$4209 67</u>

For the second year:

Salary of J. T. Thompson from July 1, 1903, to July 1, 1904.....	\$1300 00
Expenses of J. T. Thompson for said period	395 60
Part of salary of Charles A. Street for said period.....	1800 00
Expenses of Charles A. Street for said period	550 72
Office expenses as before.....	360 00
	<u>\$4406 32</u>

—that complainant concedes the correctness of said statements, excepting the two items of \$1,800 each for part salary of Charles A. Street; that during the hearing defendants submitted revised statements of account for said two years, in which two sales to the Chicago Brick Machinery Company, two sales to the Aultman Company, and one sale to the Allis-Chalmers Company were omitted from the statement of sales and gross profits, and an item of \$158, being a loss sustained on account of A. Stein & Co., to whom a sale had been made, was deducted from the gross profits. The master found that the Chicago Brick Machinery Company, the Aultman Company, and the Allis-Chalmers Company were not dealers, within the meaning of the contract, and that the sales to them should be included in the statements, and that the item of \$158 was properly deducted. The master found that during the employment of complainant Charles A. Street received a salary of \$3,600 a year for his services to the business of the firm, and that he devoted approximately two-thirds of his time to the power generation department, and that it was the custom of said firm to deduct from the gross profits the salaries of the members of the firm in arriving at the net profits of the business; that at the time the agreement was made with complainant nothing was said about this practice, and complainant had no knowledge that defendants intended to charge any part of their salaries against the proceeds of said business until about six months after the expiration of the first year, and that at that time he protested against such charge being made; that Thompson was not a partner, and was merely a salesman; and that no part of the salary of Charles A. Street should be deducted from the gross profits in determining the net profits of the power generation department. The master stated the account between the parties, and found that complainant was entitled to a decree against defendants for the sum of \$1,164.07. The master further found that the

bill averred that said agreement created a partnership between complainant and defendants, and prayed for an accounting on behalf of complainant as a partner and for the appointment of a receiver for said partnership business, and that the averment of the bill as to the existence of a partnership between complainant and defendants had not been proven; but the master recommended that, if the bill be properly amended to conform to the facts as found by him, a decree be entered in favor of complainant for the sum last stated.

In accordance with the recommendations of the master, on November 17, 1905, the bill was amended, and on November 29, 1905, the demurrer of the defendants interposed thereto was overruled. The answer of defendants to the original bill was then ordered to stand as the answer to the amended bill, and the objections of defendants to the report of the master, which had been overruled by the master, were filed as exceptions to that report, and on January 13, 1906, the exceptions were overruled by the court, and a decree was entered against defendants, in favor of complainant, for the sum of \$1,164.07. It is urged by the appellants, as grounds for reversal, (1) that the complainant had an adequate remedy at law; (2) that there were variances between the proof and the allegations of the amended bill; (3) that the court erred in entering a decree in favor of complainant.

William Street, for appellants. George E. Wissler, for appellee.

SCOTT, J. (after stating the facts as above). Upon the record as it is here presented, appellee and appellants must be regarded as agreeing that appellee was an employé and not a partner of appellants. It is first urged that, as appellee was not a partner, he had an adequate remedy at law for the recovery of the compensation due him. His compensation was to consist, in part, of a share of the profits of the business of the firm. To ascertain the amount of these profits it was necessary that the partnership accounts be adjusted. A court of equity, therefore, has jurisdiction. *Channon v. Stewart*, 103 Ill. 541.

Two of the three members of the firm of R. R. Street & Co. received salaries under a provision of the partnership contract of that firm, by which it was agreed that one of the members of that firm should not be required to devote any time or personal service to the business of the copartnership; that the other two should devote all their time to that business; and that each of these two should receive, "from time to time, such a salary for his services as should be mutually agreed upon between the said three partners" before a division of profits should be made. Appellee had no knowledge or notice of this fact at the time he entered into the contract under which he claims. Appellants contend

that a portion of the salary of one of the partners of the firm of R. R. Street & Co. should be deducted from the profits of the power generation department, and that appellee is entitled to but one-half of the profits of that department remaining after that deduction is made. The amount so sought to be subtracted is such proportion of the salary of that partner as is commensurate with the time he gave to that department of the business of the firm. In the absence of a contract providing that the partners shall receive salaries, no such salaries are payable out of the proceeds of the firm business. Neither partner "is entitled to charge for his time or skill in conducting the business of the firm, as no agreement was made that there should be any such charges, and according to the law governing partnerships the presumption is that each is required to use his skill, time, and labor for the promotion of the interest of the firm, unless it is otherwise provided by agreement of the parties." *Ligare v. Peacock*, 109 Ill. 94. Such being the presumption, we think appellee cannot equitably be charged with any portion of the salary to which one of the partners was entitled by virtue of the provision in the copartnership agreement of the firm of R. R. Street & Co. which was not disclosed to him at the time of the execution of his contract. As was well said by the Appellate Court in its opinion in this case, referring to the contract signed by appellee: "In this agreement a salary was provided for complainant, and, if it was intended that one should be allowed any one of the Streets, that should also have been expressed."

Appellee was entitled to no part of the profits resulting from sales made from the department in which he was interested to "dealers." Certain profits were realized from sales made to the Chicago Brick Machinery Company, the Aultman Company, and the Allis-Chalmers Company. Appellants contend that these companies were dealers, and that the profits were not of those in which appellee could rightfully share. In the original statements made by appellants and furnished to appellee, showing the condition of his account, these profits were included as a part of those for which appellants must account. After the litigation was under way appellant set up a claim to the whole of these profits, on the theory that they resulted from sales to "dealers." We have examined the evidence on this subject, and are satisfied that appellants' first view of the matter is the correct one.

It is then urged that there are variances between the amended bill and the proofs. The variances pointed out are not material. For example, it is said that the amended bill alleges that the appellee was entitled to one-half of the profits of the power generation department, while the proof shows that he was entitled to one-half of the net profits. Such a variance, under the circumstances of

this case, is merely verbal, and not substantial or material.

Appellee argues that the circuit court erred in not allowing him interest at 5 per centum per annum upon the amount found due him from the time when that amount should have been paid. He has not questioned the judgment of the Appellate Court by the assignment of cross-errors, and we are therefore precluded from considering this proposition.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(229 Ill. 363.)

CLARK et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS.

Though courts may review the legislative acts of municipal councils to the extent of declaring their ordinances void for unreasonableness, the power will be exercised with great caution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 247.]

2. SAME—STREET IMPROVEMENT—REASONABLENESS.

A Chicago ordinance to improve a street by adjusting sewers, catch-basins, and manholes, constructing new catch-basins, plastering curb walls, resetting curbstones, curbing with sandstone on limestone blocks, and grading and paving with granite blocks, will not be declared void as unreasonable; there having been no unjust discrimination and no violation of legal provisions, the street having been last paved with wooden blocks several years ago and being now useless, and the testimony tending to show the proposed improvement will facilitate travel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 718, 719.]

3. SAME—APPORTIONMENT OF COST—CONCLUSIVENESS.

On appeal to the Supreme Court from a judgment confirming a special assessment for a street improvement, the question whether the court erred in apportioning the amount to be paid by the property owners and by the public, assessing appellant owners more than their pro rata share and more than the benefit to their property, is not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1181.]

4. SAME—ASSESSMENT—PRESUMPTION OF REGULARITY.

It is presumed, in the absence of proof to the contrary, that a superintendent of assessments in making up an assessment roll exercised sound judgment and discretion, and not that he acted negligently or improperly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1181.]

Appeal from Cook County Court; W. L. Pond, Judge.

Petition by city of Chicago in a special assessment proceeding. From a judgment confirming an assessment, Robert E. Clark and others appeal. Affirmed.

On May 28, 1906, the city council of the city of Chicago passed an ordinance providing that Elston avenue, from the northeasterly line of Milwaukee avenue to a line parallel with and 215 feet southeast of the south line

of West Division street (except the roadway of Elston avenue from a line parallel with and 60 feet south of the south line of Augusta street produced east to the north line of Cornell street produced west), be improved by adjusting sewers, catch-basins, and manholes, constructing new catch-basins, plastering curb walls, resetting curbstones, and curbing with sandstone curbstones on limestone blocks, grading, and paving with granite blocks. The recommendation of the board of local improvements estimated the cost of the improvement at \$26,000. On June 26, 1906, the city filed a petition in the county court of Cook county praying that steps be taken to levy a special assessment for said improvement in accordance with the provisions of said ordinance and in the manner prescribed by law, and a copy of the ordinance was attached to the petition. The appellants Moonsey and Bechtel are the owners of block 18 on the west of Elston avenue and the south parcel of block 19 on the east of said avenue. Said block 18 is occupied by the Lake Tanning Company, and the south parcel of block 19, together with the north part of block 1, is occupied by the Chandler Lumber Company. Appellant Clark is the owner of block 1 on the east side of Elston avenue, and also of lots 36 and 37 in block 17 on the west side of said avenue. The portion of block 1 south of the Chandler Lumber Company is occupied by the Eldridge Coal Company. Upon the filing of the petition the court entered an order directing the superintendent of special assessments to make a true and impartial assessment of the cost of said proposed improvement. On September 14, 1906, the superintendent of assessments filed his assessment roll, taxing the entire cost of the proposed improvement against the abutting property along the line of the proposed improvement. Appellants filed their objections, and the cause came to a hearing March 7, 1907. The court overruled all legal objections, and upon a hearing on the question of benefits, a jury having been waived, on March 8, 1907, an order was entered modifying the assessment roll. It was ordered that the city should be assessed 20 per cent. of the total cost of the proposed improvement, amounting to \$5,200, and the assessment against the property owners was reduced accordingly. Judgment of confirmation was entered March 15, 1907, and appellants have prosecuted an appeal to this court.

Retsher, Montgomery, Hart & Abbott, for appellants. George A. Mason and Frank Johnston, Jr. (Edward J. Frundage, Corp. Counsel, of counsel), for appellee.

VICKERS, J. (after stating the facts as above). One of the principal objections urged by appellants in this case is that the ordinance ordering the improvement in question is unreasonable and oppressive, and therefore void. There is no question as to the authority of the

courts to review the legislative acts of municipal councils to the extent of declaring their ordinances void for unreasonableness. *City of Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Tugman v. City of Chicago*, 78 Ill. 405; *Hawes v. City of Chicago*, 158 Ill. 653, 42 N. E. 873, 30 L. R. A. 225. This judicial power will, however, be exercised with great care and caution. This court has been called upon in numerous instances to pass upon the question of the reasonableness or unreasonableness of ordinances. A recent case is that of *City of Belleville v. Pfingsten*, 225 Ill. 293, 80 N. E. 266, where it is said that in such case "the court must have regard to all existing circumstances, contemporaneous conditions, objects sought to be obtained, and the necessity or want of necessity for its adoption. To justify the court in interfering on questions of this kind requires a clear and strong case; but it is the duty of the court, when such case is presented, to protect against arbitrary and oppressive ordinances." In that case a number of previous decisions are collected in which this question has been discussed and passed on by this court. From the facts and circumstances in the case at bar as disclosed by the record we are unable to say that such a clear and strong case is presented as to require the interference of the court to prevent the enforcement of the ordinance in question. There has been no unjust discrimination, no legal provisions have been violated, and the tax has been laid in accordance with the methods prescribed by law. The evidence shows that the street in question was last paved with wooden blocks a number of years ago, that such pavement is now useless, and that teams passing to and fro follow the pavement on the street car line. The testimony of a number of witnesses tends to show that the contemplated improvement will facilitate travel on the street, and in view of the heavy hauling thereon it is not unreasonable to pave Elston avenue with granite blocks, as provided for in the ordinance. It is true that witnesses who were tenants of appellants, occupying the property for which the objections have been filed, testified that their business would not be benefited by paving this street; but this cannot be accepted as conclusive evidence that the property would receive no benefit from the proposed improvement. This court cannot say that the ordinance in question is unreasonable and void, and there was no error in overruling appellants' objections in this regard.

It is further insisted by appellants that the court erred in apportioning the amount to be paid between the property owners and the public, and that the appellants were assessed more than their pro rata share and more than their property would be benefited. This question is not open to review in this court. *Graham v. City of Chicago*, 187 Ill. 411, 58 N. E. 393.

Appellants further contend that certain property not included in this assessment roll

will be benefited by this improvement and should have been assessed. When the superintendent of assessments made up the assessment roll in this case, the law presumes that he exercised a sound judgment and discretion in the matter, and this presumption will be indulged until the contrary is shown; also, when he omitted from the assessment certain property, it will be inferred, until the contrary is shown, that some good reason arising out of the character and situation of the property existed, and not that he acted negligently or improperly. Unless the superintendent of assessments acted so negligently and improperly in spreading the assessment that, in effect, his acts were fraudulent, the assessment will not be recast. *Allen v. City of Chicago*, 176 Ill. 113, 52 N. E. 33; *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752. In the case at bar there was no allegation of negligence or of fraud on the part of the superintendent of assessments and no evidence to that effect. The court committed no error in overruling this objection.

From the foregoing views, it follows that the findings of the court should be sustained, and therefore there was no error in refusing appellants' motion to amend them. The judgment of the county court of Cook county is affirmed.

Judgment affirmed.

(229 Ill. 526)

MEAD et al. v. TRUSTEES OF PRESBYTERIAN CHURCH et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WILLS—PROBATE—PROOF ON APPEAL.

On the hearing of an application for the probate of a will in a county court, the evidence in support of the will is confined to the testimony of the attesting witnesses, and the same rule is in force on appeal in the circuit court after probate in the county court, but, where probate has been refused and an appeal taken, resort may be had to any legitimate evidence to prove the will which is admissible to establish a will in chancery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 842-846.]

2. SAME—WEIGHT OF EVIDENCE.

Where an instrument offered for probate bears the genuine signature of the testator and is properly witnessed, it is entitled to probate if the attestation clause recites all the facts necessary to a legal execution of the will, though the subscribing witnesses are unable to recollect that all the formalities prescribed by the statute and recited in the attestation clause have been actually complied with.

3. SAME—ABSENCE OF ATTESTATION CLAUSE.

An instrument offered for probate as testator's will was in his handwriting, and signed by him, followed by the date and the names of two others, written one below the other, with the word "witness" in parenthesis after the first name and ditto marks under the word opposite the second. There was no attestation clause, and the witnesses, though testifying that their genuine signatures were attached to the instrument and that they signed at testator's request, were unable to recollect anything that was said at the time the instrument was signed. It contained no attestation clause, but was found among testator's private papers after his

death, and the objects of his bounty designated were persons and objects which had received his consideration during life. *Held*, that the instrument was entitled to probate as testator's will.

Appeal from Circuit Court, Winnebago County; A. H. Frost, Judge.

Proceedings for the probate of the will of Mead Holmes, deceased, to which Melville E. Mead and others filed objections. From an order of the county court refusing probate, the trustees of the Presbyterian Church of the United States of America and another appealed to the circuit court, where the will was admitted to probate, from which objectors appeal. *Affirmed*.

Fred E. Carpenter and E. D. Reynolds, for appellants. Robert Rew, E. P. Lathrop, and Robert Lathrop, for appellees.

HAND, C. J. Mead Holmes, a retired minister of the gospel, died at Rockford, Winnebago county, on June 18, 1906, seised and possessed of an estate valued at from \$40,000 to \$50,000, consisting of real and personal property. After the death of said Mead Holmes, there was found among his private papers an instrument in his own handwriting, which was signed by him and witnessed by two witnesses, purporting to be the will of said Mead Holmes, by the terms of which he gave absolutely to Mary Emilie Holmes, his daughter, certain personal and real property. He also gave \$300 to the Young Men's Christian Association of Rockford, Ill.; \$1,000 to the Presbyterian Theological Seminary of the Northwest, in connection with the General Assembly of the Presbyterian Church of the United States of America, and the balance of his estate he provided should be held by his daughter for certain charitable purposes specified in said instrument, and, in case of her death, the portion of his estate devoted to charity was to be administered by the Presbyterian Church of the United States of America, of which he was a member. The wife of Mead Holmes died prior to the date of the execution of said instrument, and Mary Emilie Holmes died about one year prior to the death of Mead Holmes, and at the time of the death of Mead Holmes he was unmarried and childless, and his surviving heirs consisted of distant relatives residing in states other than Illinois. The instrument was presented for probate to the county court of Winnebago county and probate thereof was refused, whereupon the Young Men's Christian Association of Rockford, Ill., and the trustees of the Presbyterian Church of the United States of America, prosecuted an appeal to the circuit court of said county, where the instrument was by that court admitted to probate as the last will of Mead Holmes, and the heirs of Mead Holmes have prosecuted a further appeal to this court.

On the trial in the circuit court it was established, beyond question, by witnesses other than the attesting witnesses, that Mead

Holmes was of sound mind and memory at the date of the execution of said instrument and at the date of his death, and that said instrument was in his own handwriting; that his genuine signature was attached thereto, and that the instrument was signed by C. T. Boswell and C. E. Paul, as witnesses to its execution. The date of the instrument and the signatures of Holmes, Boswell, and Paul to said instrument appear in the following form:

Mead Holmes [L. S.]

Rockford, Illinois,

June 24th, 1897.

C. T. Boswell (witness)

C. E. Paul

Witnesses.

It also appeared that the word "Witnesses," preceding the names of C. T. Boswell and C. E. Paul, was in the handwriting of Mead Holmes, and that the word "witness," after the name of C. T. Boswell, was in the handwriting of C. T. Boswell.

The witness Boswell was called and examined in open court, and testified that he was a druggist; that he had resided in Rockford for 23 years, where he was in business; that he knew Mead Holmes for many years prior to his death; that Mead Holmes lived a short distance from his drug store; that C. E. Paul, at the date of the instrument sought to be probated, was in his employ in his drug store; that his signature was attached to the instrument; that he had no doubt but that he signed said instrument as an attesting witness at the request of Mead Holmes and in the presence of Mead Holmes and C. E. Paul, but that he had no recollection of the transaction. The evidence of C. E. Paul was taken by deposition at Atlanta, Neb., where Paul then resided, and was read upon the hearing in the county court, and, by stipulation, upon the hearing in the circuit court. He testified his genuine signature was attached to the instrument shown him, which purported to be the will of Mead Holmes, and that he signed said instrument at the request of Mead Holmes, in the store of C. T. Boswell, but that he had no recollection of anything that was said at the time he signed the instrument, or whether Boswell was present at the time he signed the same or not. It is the rule in this state that upon a hearing in the county court upon the application for the probate of a will the evidence in support of the will is confined to the testimony of the attesting witnesses; and such is the rule, upon appeal, in the circuit court where the will was admitted to probate in the county court. Where, however, the probate of the will was rejected in the county court and an appeal has been prosecuted to the circuit court, on the trial in the circuit court on such appeal resort may be had to any legitimate evidence which may be resorted to to establish a will in chancery. *Crowley v. Crowley*, 80 Ill. 469; *Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1048, 45 L. E. A. 682;

Gould v. Chicago Theological Seminary, 189 Ill. 282, 59 N. E. 536. And it has also been held that, where the instrument offered for probate bears the genuine signature of the testator and is properly witnessed, it is entitled to be admitted to probate if the attestation clause recites all the facts necessary to a legal execution of the will, although the subscribing witnesses are unable to recollect that all the formalities prescribed by the statute and recited in the attestation clause were actually complied with. *Thompson v. Owen*, supra; *Gould v. Chicago Theological Seminary*, supra; *Hobart v. Hobart*, 154 Ill. 610, 39 N. E. 581, 45 Am. St. Rep. 151.

In *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810, which was approved in the *Thompson* and *Gould* Cases, supra, and where one of the attesting witnesses failed to remember and could not testify that all the formal requisites required by the statute to be observed had been complied with, the court said (page 542 of 41 Mich., page 811 of 2 N. W.): "But we know of no rule of law which makes the probate of a will depend upon the recollection or even the veracity of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud; but, if the forgetfulness or falsehood of a subscribing witness can invalidate a will, it would be easy, in many cases, to use such artifices or corruption as would render the best will nugatory. Their evidence is not conclusive either way, nor does the law presume that they are either more or less truthful than others." In the *Thompson* Case, supra, neither of the attesting witnesses could remember that he had witnessed the will, or that the testator had signed the will or acknowledged its execution in his presence. It was, however, held the will was entitled to be admitted to probate. The only substantial difference between this case and the *Thompson* Case is that in that case there was an attestation clause attached to the will which recited all the facts necessary to show a legal execution of the will, which is not the case here. In this case, however, the witness *Boswell* wrote immediately after his name the word "witness," which shows clearly he understood that he was witnessing the execution of the instrument which he had signed as a witness, and the marks, " , following the name of Paul, and appearing immediately underneath the word "witness," show that witness also understood he was signing as a witness to the execution of the instrument. It was not necessary that a formal attestation clause reciting all the facts necessary to a correct execution of the will be added to the instrument to make it a valid will. *More v. More*, 211 Ill. 268, 71 N. E. 988; *Calkins v. Calkins*, 216 Ill. 458, 75 N. E. 182, 1 L. R. A. (N. S.) 393, 108 Am. St. Rep. 233.

In *Orser v. Orser*, 24 N. Y. 51, the court said: "A will, duly attested upon its face,

the signatures to which are all genuine, may be admitted to probate although none of the subscribing witnesses are able to swear, from recollection, that the formalities required by the statute were complied with, and even although some of them swear positively that they were not, if the other evidence warrants the inference that they were." In the case of *In re Estate of Kohley*, 200 Ill. 189, 65 N. E. 699, a will was held by this court to be entitled to be admitted to probate, although the testimony of the attesting witnesses tended to show that the will had not been signed by the testatrix in the presence of the witnesses, or that she ever acknowledged the same to them to be her will. And in *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 40, 45 Am. Dec. 424, Chancellor Walworth said: "It is a very different question, however, whether, to sustain and establish the validity of a will, the courts should hold it to be necessary for the subscribing witnesses to recollect and testify to the fact that all the formalities prescribed in the statute were actually complied with, for, if this were required, very few devises of property would be supported unless the testimony of the witnesses was taken and perpetuated soon after wills attested by them were made. This, in many cases, would be wholly impracticable, as the testator frequently lives many years after he has executed his will. And, where there is good reason to suppose the will has been duly executed and that no fraud or want of testamentary capacity existed at the time it was made, justice to the dead as well as to the living requires that the declared wishes of the testator should not be defeated by the imperfect recollections of the attesting witnesses or by reason of their deaths or removal beyond the jurisdiction of the state. It is for this reason that the most liberal presumptions in favor of the due execution of wills are sanctioned by courts of justice, where, from lapse of time or otherwise, it may be impossible to give positive evidence on the subject."

In this case, while there was no attestation clause attached to the instrument reciting all the acts necessary to be done that the will might be legally executed, we think the evidence found in this record clearly supplies the presumption arising from the presence of an attestation clause, and that there can be no question in the unbiased mind but that the instrument admitted to probate was duly executed by *Mead Holmes* as and for his last will, in the presence of *Boswell* and *Paul*, who signed the same as attesting witnesses. The instrument was in the handwriting of *Mead Holmes*. It was therefore impossible that a spurious will was foisted upon him. It was found among his private papers after his death, duly signed and witnessed, which showed he considered it a valid will. The objects of his bounty designated in the instrument were persons and objects which had received his most tender consideration and thoughtful care in life, and there is nothing

lacking in the evidence to show a legal execution of the will, save that the attesting witnesses, by lapse of time, could not recollect the facts surrounding the execution of the instrument by Mead Holmes as his last will and testament. To lay down as a rule of law that the failure of the attesting witnesses to recollect all the facts surrounding the execution of a will would defeat its probate would be, in many instances, to defeat the probate of wills where there is no reasonable question but that they were executed by the testator or testatrix with all the formalities required by law, which is in conflict with the decisions of this and many other courts of last resort. *Hobart v. Hobart*, supra; *Thompson v. Owen*, supra; *Gould v. Chicago Theological Seminary*, supra; *Abbott v. Abbott*, supra; *Orser v. Orser*, supra; *Jauncey v. Thorne*, supra.

Finding no reversible error in this record, the judgment of the circuit court will be affirmed.

Judgment affirmed.

(229 Ill. 546.)

ERFORD v. CITY OF PEORIA.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. EVIDENCE—JUDICIAL NOTICE—LEGISLATIVE JOURNALS.

The Supreme Court cannot take judicial notice of the contents of the original journals of the House of Representatives and the Senate concerning the passage of statutes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 47.]

2. SAME—PRESUMPTIONS.

In the absence of proof to the contrary, it will be presumed that a law as certified to by the Secretary of State is in the same form that it was when it passed the Legislature.

3. STATUTES—TITLE—CHANGE—BURDEN OF PROOF.

Where an act was attacked on the ground that the title was changed after its passage by the Legislature and before it was signed by the Governor, the burden was on the party asserting such contention to prove the fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 382.]

4. EVIDENCE—DOCUMENTARY EVIDENCE.

Where a party claimed that the title of an act was changed after it left the Legislature and before it was signed by the Governor, he should have proved such fact by the original legislative journals.

5. STATUTES—INDEPENDENT AND AMENDATORY STATUTES—FORM.

Act May 13, 1905, § 1 (*Hurd's Rev. St. 1905*, c. 70, § 6), limiting actions for personal injuries against incorporated cities, villages, or towns to one year, and section 2 barring a recovery unless notice provided for is served on the city attorney and city clerk within six months from the date of the injury or the accrual of the cause of action, was an original independent act, and not an amendment of the general statute of limitations, though the effect of section 1 was to take actions for such injuries out of the operation of such general statute, and was therefore not in violation of Const. art. 4, § 13, providing that no law shall be amended by reference to its title only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 210.]

6. SAME—NEW LEGISLATION.

Where the terms of an act indicate an intention to create a law complete in itself, Const. art. 4, § 13, providing that no law shall be revised or amended by reference to its title only, is not violated, though the effect of such act may be to repeal by implication or modify prior existing laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 210.]

7. SAME—SPECIAL LEGISLATION.

Hurd's Rev. St. 1905, c. 70, § 7, requiring notice within six months as a condition to a right to recover for injuries against cities, towns, and villages, was not invalid as special legislation because it was applicable only to cities, towns, and villages, and not to other municipal corporations in the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 101-109.]

8. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—INJURIES TO TRAVELERS—NOTICE—COMMENCEMENT OF SUIT.

The commencement of an action against a city for injuries alleged to have been sustained because of a defect in a city street within six months after the injury occurred was not in itself a compliance with *Hurd's Rev. St. 1905*, c. 70, § 7, requiring service of notice in writing on the city within six months.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1699.]

Appeal from Circuit Court, Peoria County; N. E. Worthington, Judge.

Action by Simon H. Erford against the city of Peoria. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action on the case brought by appellant in the circuit court of Peoria county for injuries received by him while driving along one of appellee's streets on March 23, 1906. The suit was filed April 30, 1906, and appellee was served with summons on the 3d day of May, 1906. The declaration was filed May 4, 1906, and appellee filed its answer, by way of demurrer, May 15, 1906, which demurrer was on the 14th day of November overruled by the court, and on the same day appellee filed the general issue, and appellant added his similiter thereto. It is not contended that the declaration failed to show a right of action, nor is it contended that appellant failed to make out a good cause of action on the trial. The only contention in the case is that appellant in his declaration failed to aver that notice had been given the appellee, as provided in an act entitled "An act concerning suits at law for personal injuries and against cities, villages and towns," approved May 13, 1905 (*Hurd's Rev. St. 1905*, c. 70, § 6), and in force July 1, 1905, and that upon the trial of said cause no evidence was offered tending to show that any such notice as provided in said act of 1905 was given appellee by appellant. At the close of appellant's evidence the appellee moved the court to instruct the jury that there was not sufficient evidence to support a verdict, which motion the court sustained, and from the judgment based on a directed verdict appellant prosecutes an appeal direct to this court, for the reason that the constitutionality of a statute is involved.

Barnes & Boulware, for appellant. W. H. Moore, City Atty., for appellee.

VICKERS, J. (after stating the facts as above). The principal contention of appellant is that section 2 of an act concerning suits at law for personal injuries and against cities, villages, and towns is unconstitutional. Section 2 of said act (Hurd's Rev. St. 1905, p. 1154, c. 70, § 7) is as follows: "Any person who is about to bring any action or suit at law in any court against any incorporated city, village or town for damages on account of any personal injury shall, within six months from the date of injury, or when the cause of action accrued, either by himself, agent or attorney, file in the office of the city attorney (if there is a city attorney, and also in the office of the city clerk) a statement in writing, signed by such person, his agent or attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of person injured, the date, and about the hour of the accident, the place or location where such accident occurred and the name and address of the attending physician (if any)." Section 3 provides that, if the notice provided for in section 2 is not given as therein required, any such suit brought against any such city shall be dismissed, and the party suffering such dismissal shall be forever barred from suing on account of such injury. There was no averment of compliance with section 2 in the case at bar, and it is conceded that no attempt whatever was made to comply with said section before bringing this suit.

It is first insisted by appellant that the title of this act was changed after it passed the House of Representatives and the Senate and before it was signed by the Governor. It is stated by counsel for appellant in his brief that the word "and" was inserted in the title of the act, between the words "injuries" and "against." There is no evidence in the record of any such change having occurred in the title of the act. This court cannot take judicial notice of what the original journals of the House of Representatives and the Senate show, and if appellant desired to show that a change had been made in the title or body of the bill after it had been passed and before it was signed by the Governor he should have introduced the original journals to support his contention. In the absence of any proof to the contrary, we must presume that the law as certified to by the Secretary of State is in the same form that it was when it passed the Legislature.

It is next insisted by appellant that the act in question violates section 13 of article 4 of the Constitution, which provides that "no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act." Appellant's contention on this point cannot be sustained. Sec-

tion 2 above quoted is not an amendment to any previous statute, but is entirely new legislation. Section 1 of the act in question fixes one year as the limitation within which suits for personal injuries may be commenced against any incorporated city, village, or town, and provides that no suit or action at law shall be commenced on account of a personal injury against a city, village, or town after the expiration of one year from the time such injury was received or the cause of action accrued. Appellant's argument under this point applies only to said section 1, and the validity of that section is not directly involved in this case. But even if it were, appellant's position is not tenable. The only effect of section 1 on the general statute of limitations is to take actions for personal injuries against cities, villages, and towns out of the operation of the general statute and place them under the one-year limitation fixed by the said section 1, leaving the general statute of limitations in full force and effect as to all other persons or corporations who may be sued for personal injuries. Neither in the title nor the body of the act is there anything found to indicate that the act is amendatory of any existing law. Both the title and the terms of the act indicate an intention to create a law complete within itself, and when this is the case the constitutional provision above referred to is not violated, notwithstanding the effect of such act may be to repeal by implication or modify prior existing laws. *People v. Knopf*, 183 Ill. 410, 56 N. E. 155; *Badenoch v. City of Chicago*, 222 Ill. 71, 78 N. E. 81.

It is next insisted that the act in question violated the Constitution prohibiting special legislation; the contention being that the act applies to cities, villages, and towns, but does not apply to other municipal corporations. This position cannot be sustained. It is true that counties, townships, school districts, and other political divisions are excluded from the operation of the statute in question, but the act applies to all cities, villages, and towns in the state. The power of the Legislature to pass general laws applicable only to cities, villages, and towns of the state has never been questioned in this court, so far as we are advised. A law is general when it applies to all persons in the state similarly situated. *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610; *People v. Butler Street Foundry Co.*, 201 Ill. 236, 66 N. E. 349.

Finally, appellant insists that, if the act in question is constitutional, the bringing of the suit before the expiration of the six months was a sufficient compliance with the spirit of the statute, and that the statute ought to be held applicable only to cases where the suit was brought after six months after the injury and within one year. Such a construction of the act would in a great measure defeat the purpose of this law. If a party having a claim for personal injury may wait until the six months have about ex-

pired, and then sue without giving any notice, the law might as well be repealed. Statutes of this character are mandatory, and the giving of the notice is a condition precedent to the right to bring such suit, and the giving of the notice must be averred and proved by the plaintiff to avoid a dismissal of his suit. This construction is in harmony with the holdings in other states where similar statutes exist. See 15 Am. & Eng. Ency. of Law (2d Ed.) p. 483, and cases there cited; Elliott on Streets & Roads, § 642.

Finding no error in the record, the judgment below is affirmed.

Judgment affirmed.

(229 Ill. 341)

PEET v. PEET et al.

(Supreme Court of Illinois. June 23, 1907.)

1. WILLS—CONSTRUCTION—WHAT LAW GOVERNS.

The construction of a will with reference to real estate located in Illinois, including the determination of the testator's intention as to the disposition of such property, depends on the law of Illinois, and not that of the state where the will was made and testator resided.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 947-950.]

2. SAME.

In the construction of a will, the law of the state at the time of the execution of the will may be referred to to determine the intention of the testator, but the rights of the parties are to be determined under the laws that existed at the time of testator's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 951.]

3. SAME—AMBIGUOUS WORDS AND PHRASES.

If a will executed in a foreign country contains words or phrases having a local or domiciliary meaning different from the meaning of the words in the state where the will is sought to be established, with which the testator is shown or presumed to have been acquainted, extrinsic evidence of such domiciliary meaning may be heard to aid the court in construing the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1033-1039.]

4. CUSTOMS AND USAGES—EVIDENCE.

Parol evidence of a custom or usage may be received to explain the meaning of terms used in a written contract which would otherwise be ambiguous, and to explain but not to contradict an instrument, though no ambiguity exists on its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Customs and Usages, §§ 30-33.]

5. WILLS—CONSTRUCTION—INTENTION—PAROL EVIDENCE.

Statements of a testator, either before or after making his will, are inadmissible to prove what he intended by the language written.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1027, 1040.]

6. SAME—TESTAMENTARY CAPACITY.

On an issue as to testamentary capacity, testator's acts and declarations are admissible as original evidence, if not too remote from the time when the will was executed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 133, 134.]

7. APPEAL—REVIEW—ADMISSION OF EVIDENCE—PREJUDICE.

A decree will not be reversed because of erroneous admission or exclusion of evidence, if

on the whole record, a proper conclusion has been reached which is supported by sufficient competent evidence in the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4031, 4153, 4187, 4193.]

8. WILLS—CONSTRUCTION—PAROL EVIDENCE.

Hurd's Rev. St. 1905, c. 39, § 10, provides that if, after making a will, a child is born to testator, and no provision was made in the will for such child, the will shall not be revoked on that account; "but unless it shall appear by such will" that it was the intention of the testator to disinherit such child, the other legacies shall abate, etc. Held that, where a child was born after the execution of a will in which no reference was made to him, such section did not preclude the admission of parol evidence concerning the situation, property, etc., of the testator in order to enable the court to ascertain whether it was testator's intention to disinherit such after-born child.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1040, 1041.]

9. SAME—EVIDENCE OF INTENTION.

Testator died leaving a widow and two infant sons, the youngest of whom was born after the making of testator's will by which he bequeathed all his property, wherever situated, to his wife. The oldest son was a bright, intelligent boy, to whom testator was devotedly attached, and in whose company he spent a large part of his time. Testator owned an estate of heavily incumbered and unproductive lands, which required business ability and expedition in handling, which testator believed his wife possessed. Held, that the will disclosed an intention that neither son should take any interest in testator's estate, but that both should be cared for by their mother, and that the youngest son was therefore not entitled to an abatement of the devise to the widow under Hurd's Rev. St. 1905, c. 39, § 10.

Cartwright, Farmer, and Dunn, JJ., dissenting.

Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Bill for partition by Henry J. Peet, as guardian ad litem of Telfair B. Peet, a minor, against Jane Creighton Peet and others. From a judgment dismissing the bill, complainant appeals. Affirmed.

This is a bill for partition filed in the circuit court of Cook county by Henry J. Peet, who claims to be the owner of an undivided half of the premises sought to be partitioned. The other half interest was owned by William Creighton Peet, who died at his home in the city of New York July 23, 1906. William Creighton Peet left a widow, Jane Creighton Peet, and two sons, Creighton Peet and Telfair B. Peet, aged about 7 and 2½ years, respectively, at the time of their father's death. On May 28, 1902, William Creighton Peet made and executed a last will and testament, which, omitting the formal parts thereof, is as follows: "I give, devise and bequeath all my property, wherever situated, to my wife, Jane Creighton Peet." The youngest son of the testator, Telfair B. Peet, was born about 1½ years after the execution of the will. The other son, Creighton Peet, was about 3 years old at the date of the will. Jane Creighton Peet claims the entire half interest in the testator's land in question, while the guardian ad litem of Telfair B.

Peet claims that the devise under the will should be abated to raise for the after-born child such a portion of the testator's estate as he would have been entitled to receive if the testator had died intestate.

On the hearing before the master evidence was received, over the objection of Telfair B. Peet, that the testator resided with his family in the city of New York prior to his death; that he was very devoted to his family, and especially to Creighton, the older son, who is described as a very lovable and affectionate child, and the father's constant admiration of him was very noticeable; that the testator and his wife lived very happily together and were both very devoted to their children. It was proven that the testator had implicit confidence in the integrity and business ability of his wife. It was also testified to that the testator on one occasion expressed the belief that a man ought to leave all of his property to his wife; that he did not believe in leaving a young man a lot of money; that it was not fair to him; that it did not give him a chance to bring out what was in him, his own ingenuity; that after the execution of the will, and a few months after the birth of Telfair, the testator said he had made his will and left everything to his wife, as he had always intended. It was further shown that substantially all of the real estate belonging to the testator, including that involved in this suit, was heavily incumbered at the time the will was executed. Complainant, Henry J. Peet, the owner of one-half of the real estate involved in this proceeding, testified that this property was incumbered, as well as all of the residue of his brother's estate, for about one-third to one-half of its value, and that, in his opinion, if the testator's real estate was held until the youngest son became of age, it would mean bankruptcy to the estate.

The following from Heydecker's Gen. Laws N. Y. p. 4888, c. 53, § 49, was received in evidence: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement and neither provided for nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will."

George J. Peet, a brother of the testator and a lawyer, testifies that he was the legal adviser of the testator, and that he prepared and attended to the execution of the will. He testifies that he was the sole legal adviser of the testator, and that he never spoke to his brother regarding the statutory provisions in Illinois and New York, to the effect

that where a child is born after the testator has made his will such child shall be given a share of the testator's estate under certain circumstances, and the witness expresses a belief that the testator had no knowledge as to the existence of such statutes.

The circuit court found that Jane Creighton Peet was the owner in fee, under the will, of the real estate of which the testator died seised, and that Telfair B. Peet had no interest whatever in the premises. Telfair B. Peet, by his guardian ad litem, appeals to this court, and insists that the court erred in refusing to hold that Telfair B. Peet was the owner of an undivided one-fourth interest in the premises described in the bill.

De Forest M. Neice, for appellant. H. S. & F. S. Osborne (R. F. Pettibone and Harold S. Osborne, of counsel), for appellees.

VICKERS, J. (after stating the facts as above). Section 10 of chapter 39, Hurd's Rev. St. 1905, provides as follows: "If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate, and a marriage shall be deemed a revocation of a prior will."

The sole question for determination in this case is whether the devise under the will should be abated to raise a portion for appellant equal to that which he would have been entitled to receive had the testator died intestate. Appellant's contention may be reduced to two principal propositions: First, whether the testator intended by his will to disinherit his after-born child must be determined by the laws of the state of New York, where the testator was domiciled; second, under section 10 of chapter 39 of our statutes, above set out, no evidence outside of the will itself is admissible, and under said section and the words of the will appellant is entitled to a one-fourth interest in the real estate involved. If either of the foregoing propositions is sustained, then that the decree below is erroneous would seem to follow as a necessary conclusion. We will consider these two propositions in the order in which they are stated.

First. Appellant concedes that the devolution of real property is governed by the law of the place where the real estate is situated, but he insists that in determining the testator's intention the law of New York must govern. To say that the intention of the testator must be determined under the laws of his domicile is equivalent to saying that the

construction of a will is governed by the laws of the testator's domicile. There is no perceptible difference between the construction of a will and determining the intention of the testator, unless it may be said that ascertaining the intention of the testator is the object to be sought, and construction is the means of attaining that object. Whatever may be the rule with respect to movable property, we regard the law as firmly established in this state that all instruments affecting the title of real estate situated in this state must be governed, as to their execution, construction, and legal sufficiency, exclusively by the laws of Illinois, and not by the laws of a foreign country or sister state wherein the maker may reside at the time of their execution.

In *Redfield on Wills* (volume 1, p. 398), it is said: "It is scarcely necessary to state that in regard to real property the mode of execution, the construction, and the validity of a will must be governed exclusively by the *lex rei sitæ*. The descent of real estate, as well as the devise of it, is governed exclusively by the law of the place where the property is situated. It would not comport with the dignity, the independence, or the security of any independent state or nation that these incidents should be liable to be affected, in any manner, by the legislation or the decisions of the courts of any state or nation besides itself. This has been a universally recognized rule of the English law from the earliest time, and is so unquestionable that we should scarcely feel justified in occupying much space in reviewing the cases." In *City Ins. Co. v. Commercial Bank*, 68 Ill. 348, this court, on page 353, said: "Mr. Story concedes that the courts of England and the United States have arrived at opposite conclusions as to the effect of statutable transfers of movable property under the bankrupt or insolvent laws of the debtor's domicile, but he adds: 'All the authorities in both countries, so far as they go, recognize the principle, to its fullest extent, that real estate or immovable property is exclusively subject to the laws of the government within whose territory it is situated. Indeed, so firmly is this principle established that in cases of bankruptcy the real estate of the bankrupt situated in foreign countries is universally admitted not to pass under the assignment, although, as we have seen, there is great diversity of opinion as to movables.' Story on Conflict of Laws, § 428." See, also, *West v. Fitz*, 109 Ill. 425. In *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84, this court, on page 53 of 144 Ill., page 197 of 33 N. E. (19 L. R. A. 84), said: It is a general rule of the common law that the title to real property must be acquired and passed according to the *lex rei sitæ*. This rule not only applies to alienations and acquisitions made by the acts of the parties, but also to estates and rights acquired by operation of law. The descent and heirship of real estate are governed by the law of the country

where it is located. Story on Conflict of Laws, §§ 424, 448, 483, 509; *Stoltz v. Doering*, 112 Ill. 234. This principle, originally applicable as between countries entirely foreign to each other, also prevails as among the states of the American Union." In *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237, this court had before it a will executed in the state of North Carolina by Richard Smith. There were no witnesses to the will, and apparently the laws of North Carolina recognized the validity of holographic wills without attestation. The will, on its face, showed that it had been written by the testator in person, and attestation by witnesses was dispensed with because the law of that state recognized the validity of a will proven to be in the handwriting of the testator. The will affected the title to a large body of real estate in Illinois. In the course of the opinion in that case, on page 435 of 180 Ill., page 239 of 54 N. E., the following rule was laid down by this court: "The validity and construction, as well as the force and effect, of all instruments affecting the title to land, depend upon the law of the state where the land is situated. This rule includes wills, as well as deeds, contracts, or agreements; and it includes the form and mode of the execution of the will as well as the power of the testator to make the devise or disposition of property contained in the will. *West v. Fitz*, 109 Ill. 425; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *City Ins. Co. of Providence v. Commercial Bank of Bristol*, 68 Ill. 348; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195, 19 L. R. A. 84; *Ford v. Ford*, 70 Wis. 44, 33 N. W. 188, 5 Am. St. Rep. 117; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; *McCormick v. Sullivan*, 10 Wheat. (U. S.) 192, 6 L. Ed. 300; *Darby v. Mayer*, 10 Wheat. (U. S.) 465, 6 L. Ed. 367." It will be noted that in the cases above cited the construction of instruments affecting real estate, as well as their force and validity, is governed exclusively by the *lex rei sitæ*. Judicial construction is the process of applying natural methods of finding and weighing evidence to discover the fact of intention. To say that the intention of a maker of an instrument is to be determined by one law or set of rules, and that its construction is to be by another and different law or set of rules, is contradictory and absurd.

The only authorities in this state that appellant cites in support of his contention are *Carpenter v. Browning*, 98 Ill. 282, and *Freund v. Freund*, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283. Neither of these cases is in point. In the *Browning* Case the question presented was as to the effect of the married woman's act of 1861 upon a devise in trust for the use of a married woman, made prior to the act of 1861. In that case, after the act of 1861 was passed, the usee sought to compel the execution of the trust by compelling a conveyance to be made by the trust-

tee to the beneficiary. It was held that the married woman's act of 1861 did not execute the trust nor entitle the beneficiary to a conveyance where the will imposed active duties on the trustee. In disposing of that case the court held that the state of the law at the time of the execution of the will might be referred to for the purpose of arriving at the intention of the testator, and that the rights of the parties were to be determined under the law as it existed at the time of the testator's death. The case lends no support to appellant's contention that a law of a foreign country or sister state should govern this court in the construction to be given to the will now under consideration. *Freund v. Freund* involved the right of the insured, under a New York life insurance policy, to change the beneficiary without the consent of the company properly indorsed on the policy. Under the statute of New York a beneficiary could not be changed except by written indorsement upon the policy by the company. It was held that the assured was bound by the statute of New York. That case has no application whatever to the facts of the case in hand. The case does not relate to real estate or other property located in this state. The contract of insurance was executed in the state of New York, and, so far as the case shows, was to be wholly performed there, and, of course, was made and accepted in view of the statute relating to a change of beneficiaries.

The authorities relied on by appellant outside this state, so far as we have been able to examine them, seem to be referable rather to the doctrine, recognized in this state as well as in those jurisdictions wherein the cases are found, that in determining the true intent and meaning of a will the court will have recourse to the circumstances of the testator and of his family and affairs, and of other facts which it can be shown will in any way aid the court in the right interpretation of a testator's will. Proposition 5 of *Wigram's Rules*, p. 142, *Wigram on Wills*. Under this rule we have no doubt that if a will executed in a foreign country contains words or phrases which have a local or domiciliary meaning different from the meaning of the same words or phrases in this state, with which the testator is shown or presumed to have been acquainted, extrinsic evidence of such domiciliary meaning may be heard to enable the court to read the will with the same light under which it was written. In this view it can make no difference how such domiciliary meaning was established. It may be by the usage or custom of merchants or traders in the place where the instrument was executed, or may be a meaning established by statute or judicial decision. But, however established, the usage or law, and the meaning of the words thereunder, are proven, not to establish a rule of law binding on the court charged with the proper interpretation of the will, but simply as a fact

or circumstance proven to enable the court to arrive at a correct construction under the laws of the forum.

It is a well-established rule that parol evidence may be received of a usage or custom to explain the meaning of terms used in a written contract that would otherwise be ambiguous. Indeed, under the more recent authorities the rule seems to be established that such evidence is admissible to explain the meaning of, but not to contradict, the instrument, even though no ambiguity exists on the face of the instrument. *1 Elliott on Evidence*, § 607, and cases there cited. See, also, *2 Page on Contracts*, § 1108, and citations there made. As applied to the construction of instruments affecting the title to real estate, the above rule furnishes the only ground upon which a court of this state is warranted in hearing evidence as to the law of the state or government of the maker's domicile, and when, under these limitations and restrictions, it is heard, it is only to be considered as an extrinsic fact brought forward by extrinsic evidence to enable the court to properly interpret the true intention of the testator. While the language selected by courts and law writers in applying this rule has not always been entirely clear, yet, when the authorities are carefully considered and analyzed in the light of the facts involved, we do not believe a well-considered case can be found which holds that the law of the domicile of the maker of an instrument affecting the title of real estate, respecting the construction thereof, is binding on a court where the real estate is situated, when called on to construe and enforce such instrument. Our conclusion as to appellant's first proposition is that it cannot be sustained, and that the will is to be construed—that is, the intention of the testator must be determined—by the law of this state.

Second. Appellant's second proposition is that under section 10 of chapter 39 of our statutes no evidence outside the will itself is admissible, and that under said section and the words of the will appellant is entitled to a one-fourth interest in the real estate involved. In so far as the court below permitted parol evidence of the testator's statements, either before or after the making of the will, the ruling is clearly erroneous. The statements of a testator cannot be received to prove what is intended by the written words of the will. Where an issue is raised as to the testamentary capacity of the testator, then what he says and what he does, if not too remote from the time when the will was executed, becomes original evidence and is admissible under the well-established rules of evidence. The erroneous ruling of the court on the admission or exclusion of evidence will not require us to reverse the decree if upon the whole record a proper conclusion has been reached and there is competent evidence in the record sufficient to support the decree.

Appellant insists that section 10 of chapter 39 *ex vi termini* precludes the court from looking to anything except the words of the will itself. This argument is based upon the phrase, "unless it shall appear by such will that it was the intention of the testator to disinherit such child"; his contention being that the intention of the testator must be expressed in words in the will, and that it is not sufficient that such intention is disclosed by the application of the usual rules of interpretation, especially if, in the application of those rules, parol evidence must be resorted to. This section of the statute was not enacted for the purpose of working a change in the law relating to the construction of wills. Manifestly, it was never intended by the Legislature that wills to which this section applied should be construed by any different rule than other wills to which said section does not apply. In a legal sense, everything pertaining to a testamentary disposition of property must appear by the will, but it often becomes necessary to resort to extrinsic evidence to determine what persons or things do, in fact, appear by the will. The language of the will may be such that the court cannot determine with certainty what intention is expressed in the will, but when read in the light of surrounding circumstances the court can clearly see what before was not discernible. It was not discernible, not because it did not appear from the will, but because the reader did not have the aid of the lights furnished by the surrounding circumstances. By way of illustrating our meaning, take *Lord Cheney's Case*, 5 Rep. Ch. 69. There the testator had two sons, both baptized by the name of "John." He devised his lands to his son John, without in any way designating which one of them he referred to. When the testator used the name "John" he meant a particular son, but the question was: Which one did he mean? Upon resorting to extrinsic evidence it was shown that the elder John had been long absent and was supposed to be dead, while the younger John was known to be alive at the time the will was made. Now, in the light of these circumstances, it was readily decided that the younger should take the devise. Another illustration is afforded by the case of *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422. There the residuary clause devised all the remainder of the testator's lands "to the four boys." The testator had seven sons, but the parol proof showed that three of them were men, married, and had families of their own, while four of them were minors, residing with the testator. It was held that the testator intended the four minors to have the estate. In these and all like cases where a resort to parol evidence is allowable, it is not for the purpose of importing into the will a new intention not expressed in the will, but for the purpose of enabling the court to determine what the intention, in fact, is, as expressed by the words of the testator in the will.

We regard the case of *Hawbe v. Chicago & Western Indiana Railroad Co.*, 165 Ill. 561, 46 N. E. 240, as directly in point and conclusive against the contention of appellant on this question. Indeed, we do not see how it would be possible to sustain appellant's contention without overruling that case. There, as here, the will gave all of testator's property, real, personal, and mixed, of every kind whatsoever, to testator's wife. At the time the will was executed the testator had two children, and afterwards a third child was born. There was there, as here, no mention or reference to the children, born or unborn. Parol evidence was admitted there of the same general character that was heard in this case, and in answering the argument made against the admissibility of such evidence this court, on page 564 of 165 Ill., page 241 of 46 N. E., said: "But we do not think the evidence objected to had any tendency whatever to vary or change the intent of the testator as declared in the will. As we understand the record, the evidence was not offered for that purpose. The object of the evidence was to place before the court the circumstances attending the execution of the will in support of and in aid of the intention of the testator as declared in the will, and the court, in the exercise of its discretion, had the right to hear such evidence. In the discussion of this subject it is said in *Schouler on Wills* (section 579): 'But to aid the context of the instrument by extrinsic proof of the circumstances and situation of the testator when it was executed is constantly permitted at the court's discretion, and this constitutes a proper—indeed, often an indispensable—matter of inquiry when construing a will, for whatever a will may set forth on its face, its application is to persons and things external, and hence is admitted evidence, outside the instrument, of facts and circumstances which have any tendency to give effect and operation to the terms of the will, such as the names, descriptions, and designation of beneficiaries named in the will; the relation they occupied to the testator; whether the testator was married or single, and who were his family; what was the state of his property when he made his will, and when he died; and other like collateral circumstances. Such evidence, being explanatory and incidental, is admitted, not for the purpose of introducing new words of a new intention into the will, but so as to give an intelligent construction to the words actually used, consistent with the real state of the testator's family and property—in short, so as to enable the court to stand in the testator's place, and read it in the light of those surroundings under which it was written and executed'—citing *Little v. Giles*, 25 Neb. 313, 41 N. W. 186, and *Doe v. Hiscock*, 5 Mees. & W. 363." In commenting on the force of the fact that the testator had two children living at the time the will was

made which were in no way referred to or mentioned in the will, this court, in the same case above cited, on page 567 of 165 Ill., page 242 of 46 N. E., used the following language: "At the time the will was executed by the testator he had two children then living; one four and the other two years old. These children were excluded from taking any portion of the testator's estate by the will. Is it reasonable to believe that the testator intended to exclude these two infants and not at the same time exclude another child to be born within the next two months after the will was executed? It seems plain, if the testator had intended to make any distinction between his children then born or unborn, he would have inserted a provision in his will manifesting that intention. In order to disinherit appellant the testator was not required to state the fact in express terms in the will. It is enough that the intention appears from the will, upon consideration of all of its provisions."

The same reasoning applies with special force to the case at bar. Let us look at the circumstances. The testator had one child, a bright, intelligent, lovable son, three years old, bearing his father's name, Creighton, and the testimony shows that the testator was devotedly attached to this boy. The testator had retired from business and spent a large part of his time in the company of his son, Creighton. He owned an estate of heavily incumbered and unproductive lands, which required business ability and expedition in handling the same. The testator had a wife in whose business judgment and ability he had unlimited confidence, and he no doubt believed that her maternal devotion to her children could be relied upon to provide for them out of what might be saved of the estate better than the testator could in the embarrassed and entangled condition of affairs that surrounded the property at the time the will was executed. Surrounded by these circumstances, the testator made his will, employing for that purpose 16 words: "I give, devise and bequeath all my property, wherever situated, to my wife, Jane Creighton Peet." What did the testator mean by giving all his property to his wife? Did he mean that if afterwards a child should be born such child should have one-fourth of the property and the wife three-fourths, and the other child, Creighton, none? In our opinion he meant that his wife should have all of the property, to the exclusion of his children then born or to be thereafter born, and we are much influenced in reaching this conclusion by the circumstances surrounding the testator at the time the will was made, parol evidence of which, under the authority of the Hawhe Case, is clearly admissible in this state.

We freely concede that other courts in other jurisdictions have reached an opposite conclusion with respect to the admissibility of parol evidence under statutes bearing

more or less similarity to ours. Perhaps one of the strongest presentations of the opposing view is an opinion of the United States Circuit Court for the District of Nebraska, rendered by Mr. Justice Brewer, in the case of Chicago, Burlington & Quincy Railroad Co. v. Wasserman, 22 Fed. 872. In that case the learned judge felt himself compelled to decide against what he frankly confesses was the real intention of the testator, because, under his view, parol evidence could not aid the difficulty. A quotation from that case is here made merely for the purpose of showing that the rule there applied defeated the intention of the testator: "In this case the primary question I am reluctantly compelled to decide in favor of the complainant, Wasserman. I say reluctantly, for when a man, on the eve of death, having a child five years of age and living with a wife to be delivered of a second child within twenty days, makes a will giving all his property to his wife, I think the common voice will say that he intended no wrong to either the born or unborn child, but trusted to his wife, their mother, to do justice to each, and believed that she, with the property in her hands, could handle it more advantageously for herself and children than if interests in it were distributed. As a question of fact, independent of the statute, I have no doubt that Mr. Wasserman had no feeling either against the born or unborn child, but, having implicit faith in his wife, meant that she should take the entire property, and believed that out of that property and her future labors she would take care of his children. But the legal difficulty is this: The statute says it must be apparent from the will that the testator intended that the unborn child should not be specially provided for. How can any intention as to this child be gathered from the will alone? It simply gives everything to the wife, is silent as to children. If I could look beyond the will, my conclusion would be instant and unhesitating." Whatever weight this authority might have if this were a case of first impression with this court, it can have none now in the face of our own decision in the Hawhe Case, where the same authority was pressed upon our attention, and this court expressly refused to follow it. This court, on page 569 of 165 Ill., page 242 of 46 N. E., of the Hawhe Case, speaking of the Wasserman Case, said: "While the facts in that case are quite similar to the facts in this case, and the opinion delivered by the eminent jurist seems to sustain appellant's view of the law, we are not inclined to follow it." In the Wasserman Case are collected a number of decisions of other courts upon which appellant relies; but, if the Wasserman Case be rejected as not good law in this jurisdiction, it would seem scarcely necessary to examine in detail the cases upon which it rests.

The appellant relies with some apparent confidence upon *Lurie v. Radnitzer*, 163 Ill.

609, 46 N. E. 1116, 57 Am. St. Rep. 157, as laying down a different rule from that announced in the Hawhe Case. We do not regard these cases as in conflict. Indeed, the Hawhe Case is cited twice in the Radnitzer Case and relied on as an authority in support of the conclusion reached in the latter case. The cases are clearly distinguishable, and there is nothing said in the later case that in any way impairs the authority of the former.

There is nothing in the New York statute introduced in evidence by appellant, which, considered as a fact in connection with the other surrounding circumstances, will overcome the proofs properly before the court.

It results from what has been said that appellant's second proposition cannot be sustained.

The decree of the court below is right, and the same is affirmed.

Decree affirmed.

CARTWRIGHT, FARMER, and DUNN, JJ. (dissenting). The provision of the statute is that a child born to any testator after the making of a will shall not be disinherited unless it shall appear by such will that it was the intention of the testator to disinherit such child. It is not necessary that the testator should expressly declare such intention, but it is sufficient if the will fairly manifests it. In the absence of latent ambiguity, such as the cases referred to in the foregoing opinion, in one of which the testator had two sons named John, and in the other made a devise to "the four boys" when he had seven sons, the intention is to be gathered from the will itself. *Hayward v. Loper*, 147 Ill. 41, 35 N. E. 225. That rule was stated in *Hawhe v. Chicago & Western Indiana Railroad Co.*, 165 Ill. 561, 46 N. E. 240, as follows: "The law is well settled that extrinsic evidence cannot be resorted to to show the intention of the testator where there is no latent ambiguity in the will, but the intention is to be determined from the language used by the testator in the will itself." Evidence as to the circumstances surrounding a testator at the time the will is made is proper, as an aid to an intelligent construction of the language used, by enabling the court to stand in the testator's place and to read the will in the light of those surrounding circumstances; but, when that is done, it must appear by the will that it was the intention of the testator to disinherit an after-born child, if the will is to have that effect.

The only facts apparent in this case which have any bearing upon the question to be determined are that the testator had one child three years old, for whom he made no provision in the will, and that he had a wife, to whom he made a simple devise of all his property. By the will itself the testator manifested an intention to give all his property to his wife and to give nothing to the liv-

ing child; but, in our opinion, such facts are entirely insufficient to justify the conclusion reached in said opinion that it appears by the will that it was the intention of the testator to disinherit the child born 1½ years after the execution of the will. We do not regard the decision in the case of *Hawhe v. Chicago & Western Indiana Railroad Co.*, supra, either as conclusive of the question involved in this case, or as fairly tending to sustain the conclusion reached here. In that case the will was made on the afternoon preceding the death of the testator. By it he gave all his estate to his wife. He had two children when the will was executed, and a posthumous child was born about two months after the execution of the will and his death. He made no allusion whatever to his living children or to the one which was soon to be born, and in devising all his property to his wife he used language which the court regarded as very significant of an intention that no other person than his wife should, in any event, have any portion of his estate. It was said that the language used meant more than a simple devise; that language could not have been used which would more clearly express an intention that the wife, and she alone, should take and hold the testator's estate to the exclusion of all others; and that, if the testator had inserted a clause in his will that no other person should have any portion of his estate, such a provision would have excluded the two children then born and the one thereafter to be born, and yet such a provision would not have made the intention of the testator more definite than the language used. In this case the gift to the wife was an ordinary and simple devise, and one of the controlling reasons for the decision in the *Hawhe* Case is entirely wanting. The only other fact regarded as significant in determining the intention of the testator was that he had two children living and knew that another child was to be born within the next two months, and he made no mention of either. The living children were excluded from taking any portion of the estate, and it was not regarded as reasonable to believe that the testator intended to exclude them and not at the same time exclude the other child soon to be born. It is beyond question that the testator there had in mind both his living children and the one that would soon be born, and must have entertained an intention respecting the share which the child, when born, would take in his estate. It was therefore a fair inference that he had the same intention as to all. In this case the child was born 1½ year after the execution of the will, and as it had no existence when the will was made the testator could have had no intention respecting it, different from that which almost every testator might have in executing a will. Eliminating from the *Hawhe* Case the two facts above referred to, and which formed the basis of the decision, and there would be but little left. We can-

not conceive that the decision would have been the same in the absence of such facts.

In the later case of *Lurie v. Radnitzer*, 106 Ill. 609, 46 N. E. 1116, 57 Am. St. Rep. 157, the testator had a wife and three children, and a posthumous child was born about three months after his death. In his will he devised his entire estate to his wife and the three living children, giving two-fifths to the wife and one-fifth to each of the three children. In the draft of the will he made a devise to his child as yet unborn, and in another place made reference to that child, but before the execution of the will he erased both the devise and the reference. It was held that, although the testator gave his entire estate to the wife and living children and erased the devise to the unborn child, he did not thereby manifest an intention to disinherit such child. The decision was based on the ground that the will contained no negative expressions whatever concerning the unborn child, and the court said: "The mere fact that the testator knew that such child was likely to be born to him, and that he had such knowledge when he executed his will, would not be sufficient, under the statute, to deprive such child of his share in his father's estate." The statement made in this case that the testator, no doubt, believed that the maternal devotion of his wife to her children could be relied upon to provide for them, is not in harmony with what was there said concerning the intention of the testator, as follows: "Had it been his intention, as contended by appellants, that the provision in the will giving his wife two-fifths of his estate should inure also to the benefit of this child if born alive, we would expect to find something in the will to indicate such intention."

We are of the opinion that it does not appear by the will in question in this case that it was the intention of the testator to disinherit the child born 1½ years afterward, which had no existence at the time the will was made.

(229 Ill. 585)

TETER et al. v. LARSON et al. JONES v. SAME. COLBURN v. SAME. VAN REETH v. SAME.

(Supreme Court of Illinois. Oct. 23, 1907.)

APPEAL—DECISIONS REVIEWABLE—AMOUNT OR VALUE IN CONTROVERSY—AGGREGATE CLAIMS.

Where, in a suit brought under *Hurd's Rev. St. 1905, c. 32, § 25*, to enforce the liabilities of the stockholders of a corporation, from a decree that certain of them pay toward the satisfaction of the liabilities of the corporation in proportion to the amount of their unpaid-up stock, they appeal separately, and the sum each of the appealing stockholders will be compelled to pay in any event, as well as the claims of the creditors of the corporation who are parties to the appeal as against each of them, was less than \$1,000, the Supreme Court has no jurisdiction of the appeal; no certificate of importance having been secured in the Appellate Court.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 2, Appeal and Error, §§ 276-279.*]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; J. W. Mack, Judge.

Bill by C. W. Larson and another against Lucius Teter and others for the appointment of a receiver of a corporation of which defendants are stockholders, its dissolution, and for other relief. From a judgment of the Appellate Court affirming the decree of the circuit court for complainants against each of the defendants, defendants Lucius Teter and others prosecute separate appeals. Dismissed.

On June 23, 1902, C. W. Larson and Albert Hess, appellees, filed a bill in the circuit court of Cook county against the Continental Commercial Agency, an Illinois corporation, and certain of its stockholders, on behalf of themselves and all other creditors of said corporation who might choose to join with them, for the appointment of a receiver for said corporation, its dissolution, and for other relief. The bill alleges: That the Continental Commercial Agency was organized under the laws of the state of Illinois with a capital stock of \$100,000, divided into 1,000 shares of the par value of \$100 each, for the purpose of conducting a general collection agency business, with its principal office at Chicago, Ill., and that the said corporation, from the time of its organization, continued to conduct said business until November 1, 1901, when it became insolvent; that it was at that time indebted to various persons in a sum of money aggregating many thousand dollars in excess of its assets; that such indebtedness now remains wholly unpaid, and said corporation has ceased to do business; alleges that on November 9, 1901, complainant Larson obtained a judgment against said corporation for the sum of \$168 and costs, and the same remains unpaid; that complainant Hess on June 20, 1902, recovered a judgment in the circuit court of Cook county against said corporation for the sum of \$1,587.47; and that said judgment is now in full force and effect and remains unsatisfied. The bill further alleges: That W. S. Ivins and George W. Chamberlain on September 6, 1900, subscribed for and are now the holders of one share each of the stock of said corporation, and each of them is still indebted to said corporation for the full amount of his subscription for the said stock. That on the same day W. C. Anderson subscribed for 998 shares of the capital stock of said corporation, and no part of his subscription for said stock has been paid. That on or about September 6, 1900, the board of directors of said corporation held a meeting at its office in the city of Chicago, at which Anderson submitted the following proposition: "Chicago, Ill., Sept. 8, 1900. The Continental Commercial Agency, Chicago—Gentlemen: The undersigned respectfully represents that he has subscribed for nine hundred and ninety-eight (998) shares of stock of the Continental Com-

mercial Agency, of the par value of ninety-nine thousand eight hundred dollars (\$99,800). The undersigned further represents that he has for years made a special study of mercantile and collecting agency business and methods and thoroughly understands the most improved system now in use. The undersigned agrees to impart his knowledge aforesaid to the officers and agents of said Continental Commercial Agency, and agrees to accept said 998 shares of the capital stock of said Continental Commercial Agency, fully paid and non-assessable, in full satisfaction thereof. The undersigned further agrees to advance, in the nature of a loan, such sums of money, from time to time, as may be necessary to properly finance said Continental Commercial Agency and place it on a paying basis. All of which is respectfully submitted. W. C. Anderson." That at said meeting the said board of directors passed a resolution accepting the said proposition, and afterward, on September 15, 1900, the said stock was so issued to said Anderson. Alleges that Anderson had no knowledge to impart, and has imparted none of any value to the said corporation, in payment of said stock. That the resolution passed on September 6, 1900, was fraudulent and not based on any good and sufficient consideration. That on October 11, 1900, said Anderson transferred, by assignment in writing, 20 shares of the said stock to each of the following named defendants: William A. Jones, Theodore M. Luce, Waldo A. Williams, Hugh Montgomery, Lucius Teter, Edward Van Reeth, Alfred L. Fierlein, and Warren E. Colburn. That said stock was duly assigned and transferred on the books of said agency, and each of the foregoing defendants accepted the stock so transferred to him. That none of them were bona fide purchasers of said stock, and no money or other valuable consideration was ever paid by either of them for the same. That each of the above-named persons who was a subscriber to said stock or who became the owner of said stock by assignment should be compelled to pay a receiver appointed herein his pro rata share of the debts and liabilities of said corporation after exhausting the assets of said corporation, and if either or any of said subscribers, or their assignees, above named, shall not have property enough to pay their respective portions of said indebtedness, then the remaining solvent subscribers or assignees should be required to pay their pro rata shares of the amount necessary to satisfy the same. The bill makes the Continental Commercial Agency and the above-named subscribers and assignees defendants, and prays for the dissolution and winding up of the affairs of the said corporation, for the appointment of a receiver, and that said receiver may be directed to pay to said creditors the amounts due them, so far as the funds in his hands will apply; that after exhausting the assets of said corporation each of the above-named defendants may

be decreed to pay his pro rata share of said debts remaining unpaid, to the extent of the unpaid portion of stock so subscribed for or assigned to him.

A number of intervening petitions were filed by creditors who came in as co-complainants. Among these was Harry Gay, who was a stockholder. Hess, one of the complainants, was also a stockholder. The demurrers of defendants to the bill were overruled. Answers setting up various defenses were interposed by all the appellants and by others, and replications thereto were filed. The cause was referred to the master to take proofs and report his findings. The master took the proofs and found the facts as to the appellants to be substantially as charged by the bill. The master found that appellants Teter, Van Reeth, and Colburn were each liable for unpaid stock subscriptions jointly with W. C. Anderson to the extent of \$2,000, and that appellant Jones was jointly liable with said Anderson for stock subscription to the amount of \$2,000, less the sum of \$711.25, being the amount theretofore paid by Jones on judgments against him as a stockholder, and recommended that a decree be entered in accordance with his findings and conclusions, requiring each of the appellants and of certain others to pay such sum as would be his proper proportion of the sum necessary to meet the total liabilities of the corporation, which total liabilities the master fixed at approximately \$8,000. Objections filed to the master's report were overruled and refiled as exceptions. On July 25, 1905, the court overruled the exceptions and entered a decree substantially in accordance with the recommendations of the master. The decree finds, among other things: That an assessment of $8\frac{1}{4}$ per cent. of the par value of their stock should be levied against all of the stockholders of the Continental Commercial Agency who were liable for unpaid stock subscriptions to the capital stock of said agency and the money paid to Henry W. Leman, who had been appointed as the receiver, to be applied by him to the payment of claims of the various creditors and the costs of this proceeding; that upon this assessment Lucius Teter and W. C. Anderson are jointly liable for \$170; that W. C. Anderson and Warren E. Colburn are jointly liable for the same amount; that W. C. Anderson and William A. Jones are jointly liable for \$103.48, and W. C. Anderson and Edward Van Reeth are jointly liable for \$170. It was ordered and decreed by separate decretal orders contained in the same decree that each of the said persons pay to the said receiver the amount so assessed against each, respectively, and that executions issue, and various other amounts were decreed against various other stockholders. All the sums so decreed, aggregating approximately \$8,000, were to be applied by the receiver to the satisfaction of the liabilities of the corporation. The decree

states that no inquiry was made by the court as to the solvency of any of the defendants, and it is ordered and decreed that in the event any of the defendants against whom an assessment has been levied shall not have property enough to satisfy their respective portions of such debts, then a supplemental assessment shall be ordered from time to time, after due notice to the parties herein, in such a manner that the amounts of said debts remaining unpaid by reason of the insolvency of any of said defendants against whom the said first assessment is levied shall be divided among all the remaining solvent debtors in proportion to the amount of stock held by each. From the decree appellants herein, and others, prayed separate appeals to the Appellate Court for the First District. The cases were consolidated for hearing and assigned to the Branch Court, and from the judgment of that court, affirming the decree of the circuit court, Jones, Van Reeth, Colburn, and Teter have each prosecuted a separate appeal to this court. The cases have been consolidated in this court. Several errors have been assigned.

William E. O'Neill, Elmer Allen Kimball, and James Frake, for appellants. David K. Tone, Morse Ives, and J. L. Bennett, for appellees.

SCOTT, J. (after stating the facts as above). Neither of the appellants secured a certificate of importance in the Appellate Court. The suit was brought under section 25 of chapter 32, Hurd's Rev. St. 1905, to enforce the liability of stockholders in a corporation. The decree, in so far as it requires payment by stockholders, is, in effect, a separate decree as to each of the appellants—a fact which they have recognized by prosecuting separate appeals. The decree against each is for less than \$200. It is true that the circuit court retained jurisdiction of the cause so that it might, if necessary, hereafter render a further decree for the purpose of obtaining from solvent defendants such sums of money as might hereafter be found necessary to satisfy the debts and liabilities of the corporation in the event of the receiver being unable, on account of the insolvency of any of the defendants, to collect all the sums payment of which is required by the present decree. The decree expressly states, however, that the court has made no inquiry with reference to the solvency of any of the defendants, and it does not appear that either of the appellants will ever be called upon to pay any sum additional to that required by the decree appealed from. Each of the appellants contends that no stockholder's liability should be enforced against him, which amounts to saying that he should pay no part of the sum which he is required to pay by the present decree.

Harry Gay and Albert Hess each purchased 10 shares of stock from Anderson, and each

paid him \$1,000, the par value thereof, in actual cash. Gay and Hess were parties to this suit, and the court found that they were not liable as stockholders. Teter and Van Reeth insist that the court erred in so finding, for the reason that Anderson had not paid for the stock, and for the further reason that Gay and Hess had notice, or should have had notice, of that fact. If this error was well assigned, the only result would be that the decree of the circuit court should be modified so that each Gay and Hess should be required to pay an amount, in each instance, less than \$100 on account of his liability as a stockholder, the effect of which, so far as appellants are concerned, would be merely to reduce the decree against each a few dollars, as the total amount decreed against all of the defendants who were required to pay was approximately \$8,000.

Appellant Jones joins with Teter and Van Reeth in the view that Gay should have been held liable, and also urges that the court erred in holding that Hugh Montgomery was not a stockholder. The amount of stock which it is contended Montgomery owned is \$2,000, and, if he was liable at all, the decree against him would have been for a sum equal to the total amount which Teter and Van Reeth contended should have been adjudged against Gay and Hess. What has already been said in reference to the contention as to the two parties last mentioned applies with equal force to the alleged error regarding Montgomery's liability.

Of the total liabilities of the corporation as fixed by the decree, \$2,844.55 was found to be due said Gay, and \$1,745.74 was found to be due said Hess. Van Reeth and Teter contend that these amounts were improperly allowed. It is to be observed that neither the corporation, the receiver, nor any other person for the corporation, appeals. The only persons objecting to the allowance of these claims are two stockholders. The action of the court in decreeing the payment of money for the satisfaction of these claims against persons other than these two stockholders cannot be held erroneous where no complaint is made by such other persons. If the point made by Van Reeth and Teter in this regard is well taken, the only result would be to reduce somewhat the decrees against these two appellants, and to reduce the claim allowed Hess and the claim allowed Gay less than \$1,000 each. The decree as against persons not complaining because said amounts were awarded to Gay and Hess would not be affected.

As to each of the appellants the questions are, merely, shall he pay the amount decreed against him, which is much less than \$1,000, shall he pay a smaller amount, or shall he pay nothing at all? Upon no theory can it be held that \$1,000 is involved in the case against either appellant. It follows that this court is without jurisdiction. *Farwell v. Becker*,

129 Ill. 261, 21 N. E. 792, 6 L. R. A. 400, 6 Am. St. Rep. 267; Aultman & Taylor Co. v. Weir, 134 Ill. 137, 24 N. E. 771.

Each of the appeals will be dismissed.
Appeals dismissed.

(229 Ill. 512.)

PATTON et al. v. PEOPLE ex rel. SWEET.
(Supreme Court of Illinois. Oct. 23, 1907.)

1. DRAINAGE—STATUTES—MISTAKE—LEGISLATIVE INTENT—CONTROLLING EFFECT.

The farm drainage act of June 27, 1885 (Laws 1885, p. 106), was amended by Laws 1895, pp. 166, 167, by the addition of section 15a, providing for the election of drainage commissioners, and prescribing their oath, and section 15b, providing for the appointment of a treasurer by the commissioners. Act June 10, 1897 (Laws 1897, p. 207), purported to amend sections 76 and 89a of the farm drainage act as amended in 1895. Obviously a mistake was made as to the number of sections amended through the drafter of the amendment referring to paragraph numbers given by Hurd's Rev. St. 1895, to sections 2 and 15a of the drainage act as amended in 1895. Act May 10, 1901 (Laws 1901, p. 162), set out the mistake and repealed the June 10, 1897, amendment, and the title recited a purpose to re-enact section 76, and legalize districts organized under it, but the body of the act did not re-enact the section. *Held* that, regardless of the question whether section 76 was amended by the 1897 act, act May 11, 1901 (Laws 1901, p. 157), is not invalid on the ground that section 76 which it purports to amend was not in existence, since the legislative intent expressed in the 1901 acts to re-enact that section is clear, and hence an order creating a district thereunder entered December 10, 1904, is valid.

2. SAME.

Since the 1897 (Laws 1897, p. 207) act clearly attempted to amend section 15a of the drainage act as amended in 1885 (Laws 1885, p. 106, as amended by Laws 1895, pp. 166, 167), the legislative intent must be given effect though the section was referred to as section 89a. (Hurd's Rev. St. 1895, p. 629.)

3. STATUTES—TITLE—MISTAKE—EFFECT.

An amendatory act is not invalid for incorrectly referring to the date of approval of the amended act as June 26, 1885, where the enacting clause gives the correct date, June 27, 1885, and clearly shows the act amended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 205.]

Appeal from Circuit Court, Sangamon County; Robert B. Shirley, Judge.

Quo warranto by the people, on the relation of John B. Sweet, against William H. Patton and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

An information in the nature of a quo warranto was filed, on leave of court, by the state's attorney of Sangamon county on behalf of the people, upon the relation of John B. Sweet, at the May term, 1906, of the Sangamon county circuit court, requiring appellants to show by what authority they acted as drainage commissioners of Drainage District No. 1 of the town of Divernon, in said county. The information set up that appellants were the commissioners of highways of said town, and on December 10, 1904, made and entered of record in the clerk's office an order creating a drainage district within the boundaries of said town, which they designat-

ed as Drainage District No. 1; that said order was based solely upon authority supposed to be given by section 76 of the "act to provide for drainage for agricultural and sanitary purposes and to repeal certain acts therein named," approved June 27, 1885 (Sess. Laws 1885, p. 106); that on or before the filing of the petition for said district said section 76 of said act was repealed by the amendatory act of June 10, 1897 (Bradwell's Sess. Laws 1897, p. 157; Laws 1897, p. 207). It is further contended by counsel that said amendatory act last named was itself expressly repealed by the act of May 10, 1901 (Sess. Laws 1901, p. 162), and that the act of May 11, 1901 (Sess. Laws 1901, p. 157), was inoperative, ineffectual, and unconstitutional because (a) its title purported to amend section 76 of an act approved June 26, 1885, while its first section amended section 76 of an act approved June 27, 1885; (b) it purported to amend a section of the statute which had already been repealed, in effect, by the above act of June 10, 1897, and had been expressly repealed by said act of May 10, 1901. The information further alleged that even if said act had not been repealed, as aforesaid, still said appellants had been superseded in their office by Charles Browning, David T. Haire, and Henry C. Barnes, who were duly elected drainage commissioners for said district on the second Saturday of March, 1906. Appellants filed a demurrer to this petition, setting up, among other things, that said section 76 of said act of 1885, as amended by said act of May 11, 1901, was in full force and effect at the time of the organization of said district; that there was no law in force under which an election for drainage commissioners of said Drainage District No. 1 could be held on said second Saturday of March, 1906. On a hearing before the court the demurrer to the information was overruled, and appellants excepted to the ruling and elected to stand by the demurrer. The court thereupon held that appellants had usurped and unlawfully held and assumed office as such drainage commissioners, and ordered and adjudged that they be ousted therefrom and be absolutely excluded from exercising, using, or administering the said office. Appellants excepted to the order and judgment, and prayed an appeal to this court.

James M. Taylor and Leslie J. Taylor, for appellants. Connolly & Barnes (Frank L. Hatch, State's Atty., of counsel), for appellee.

CARTER, J. (after stating the facts as above). The main contention of appellee is that the act of May 11, 1901 (Sess. Laws 1901, p. 157), was not a valid enactment because it attempted to amend section 76 of said farm drainage act, and at that time there was no section 76 of said act. The first amendment to the farm drainage act of 1885 bearing on the question now under discussion was passed

by the Legislature in 1895, adding sections 15a (which provided for the election of drainage commissioners and prescribed their oath) and 15b (providing for the appointment of a treasurer by the drainage commissioners). Bradwell's Sess. Laws 1895, p. 120 (Laws 1895, pp. 166, 167). The next amendment was made June 10, 1897, and purported to amend sections 76 and 89a of said farm drainage act as amended by the last amendment of 1895. Bradwell's Sess. Laws 1897, p. 157 (Laws 1897, p. 207). It is apparent from the reading of this amendment, in connection with the act it purported to amend, that a mistake was made as to the number of the sections amended. Section 76 as it stood in the act at this time covered the subject of districts by user. The purported amendment of said section 76 referred in no way to districts by user, but to the appointment of a clerk by the drainage commissioners. Paragraph 76 of Hurd's Statutes of 1895 (page 626) is section 2 of the farm drainage act, and refers to the clerk of the drainage commissioners, as does this last amendment of section 76, passed June 10, 1897. In said farm drainage act there was no such section as 89a, although Hurd's Statutes of 1895 (page 629) headed section 15a of the amendment of 1895 as paragraph 89a. The drafter of this amendment clearly made a mistake in referring to the sections amended; evidently having before him Hurd's Statutes of 1895 and referring to the paragraph numbers given to the section by the annotator, instead of to the sections of the law itself. That the Legislature understood this to be the fact is shown by the act of May 10, 1901 (Sess. Laws 1901, p. 162), wherein the mistake is set out and said amendment of June 10, 1897, is repealed, and by the title of which said amendment it was proposed "to re-enact said section 76 and to legalize proceedings had and drainage districts organized under said section 76." In the body of the act, however, nothing is said about re-enacting section 76.

Assuming that section 76 was not re-enacted by this amendment of May 10, 1901 (Sess. Laws 1901, p. 162), then does it follow that the act of May 11, 1901 (Sess. Laws 1901, p. 157), which attempted to amend said section 76, is invalid because there was no section 76 of said act in existence? There is some conflict of authority on this question. The precise point here under discussion, so far as we are aware, has never been before this court for decision. A kindred question, as to the effect of a second amendment of an act which ignores a prior amendment, has been considered by this court in *Louisville & Nashville Railroad Co. v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962, and *Village of Melrose Park v. Dunnebecke*, 210 Ill. 422, 71 N. E. 431, and other cases referred to in these two decisions. In the latter case just cited there was an attempt to distinguish it from the earlier case of *Louisville & Nashville Railroad Co. v. City*

of East St. Louis, *supra*. Whatever conflict there may be in these two cases, we are of the opinion that the reasoning of the *Melrose Park Case*, *supra*, is more nearly in harmony with the weight of authority than is the earlier decision referred to, and supports appellants' position. The United States Court of Appeals, in *City of Beatrice v. Masslich*, 108 Fed. 743, 47 C. C. A. 637, stated: "The decided weight of authority and the better opinion is that an amendatory act is not invalid, though it purport to amend a statute which had previously been amended or for any reason been held invalid." In 1 *Lewis' Sutherland on Statutory Construction* (2d Ed.) § 233, the author states that this view of the United States Circuit Court of Appeals "is sustained by the decisions." In *Jones v. Commissioner*, 21 Mich. 236, Judge Cooley, answering in the opinion the argument that an amendatory act referring to a repealed or nonexistent act must be invalid, said: "This reasoning seems to us too refined for practical value. Under our Constitution the mode of amending a section of the statute is by enacting that the section in question 'shall read as follows.' The position of the section in the original statute is not changed, and there is no reason why an amendment of a subsequent section should not be made by reference to its original number in the statutes." The rule for the guidance of courts is to ascertain the intention of the Legislature, and not their mistakes, either as to law or fact. 1 *Lewis' Sutherland on Statutory Construction* (2d Ed.) § 233; *Commonwealth v. Kenneson*, 143 Mass. 418, 9 N. E. 761. The only question is: Has the Legislature expressed its purpose intelligibly and provided fully upon the subject? If it has, then the act is valid and must be upheld. *People v. Canvassers*, 143 N. Y. 84, 37 N. E. 649. See, also, to the same effect, *People v. Onahan*, 170 Ill. 449, 48 N. E. 1003. While said act of May 10, 1901 (Sess. Laws 1901, p. 162), did not provide in the body of the act for the re-enactment of said section 76, the intent of the Legislature to re-enact that section is plainly shown by the title. We said in *Baird v. Hutchinson*, 179 Ill. 435, 53 N. E. 567, that the meaning of the Legislature must be gathered from all they have said, as well from that which is ineffective as from that which is authorized by law; and it was there held that the unconstitutional part of the law might be considered in order to ascertain the intent of the Legislature in another part of the same law. 2 *Lewis' Sutherland on Statutory Construction* (2d Ed.) § 452.

It might well be urged that the act of June 10, 1897 (Bradwell's Sess. Laws 1897, p. 157), the subject-matter of the purported amendment not being germane to the subject-matter of said original section 76 and being plainly a mistake, as is heretofore shown, did not, in fact, amend said section 76 of said farm drainage act of June 27, 1885. 1 *Lewis'*

Sutherland on Statutory Construction (2d Ed.) § 241; 2 Lewis' Sutherland on Statutory Construction, § 410, and cases cited; *Olis v. People*, 196 Ill. 542, 63 N. E. 1053; *School Directors v. School Directors*, 73 Ill. 249. But, regardless of the question as to whether said section 76 was amended by said act of June 10, 1897, we are of the opinion that the intent of the Legislature by said act of May 10, 1901 (Sess. Laws 1901, p. 162), and said act of May 11, 1901 (Sess. Laws 1901, p. 157) is clear and unmistakable; that under the authorities heretofore cited said act of May 11, 1901, was valid and in full force and effect at the time said order of December 10, 1904, was made and entered for the creation of said Drainage District No. 1 of the said town of Divernon. Village of Melrose Park v. Dunnebecke, supra.

The title of said act of May 11, 1901, refers to the original farm drainage act as having been approved June 26, 1885, when, in fact, it was approved June 27, 1885. The enacting clause of the amendatory act of 1901 gives the correct date, and shows clearly what act was amended. *Barnes v. Drainage Com'rs*, 221 Ill. 627, 77 N. E. 1124.

The question as to whether appellants have been superseded as drainage commissioners for said district by the election of others has not been discussed in appellee's brief, but we assume that the argument in support of that contention is that section 15a of said amendment of June 21, 1895, is still in force. Said amendment of June 10, 1897, although it attempted to amend section 89a when there was no such section in the original act, was clearly an attempt to amend section 15a of the act as amended June 21, 1895. This being the clear intention of the Legislature, under the authorities we have heretofore cited section 89a of said amendment of June 10, 1897, must be construed as an amendment of said section 15a. *Illinois Central Railroad Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119. Section 89a was repealed by said act of May 10, 1901, and it necessarily follows that section 15a is not in existence, and there was no authority for the election of said Browning, Halre, and Barnes on said second Saturday of March, 1906. Moreover, it is clear that said act of May 11, 1901, provided specifically for the highway commissioners acting as drainage commissioners, and that the provisions of said section 15a as to said drainage commissioners would be so repugnant to said act of May 11, 1901, that both could not be in force. Therefore, under the authorities, said last named act would be understood as repealing said section 15a even if it had not theretofore been repealed. *English v. City of Danville*, 150 Ill. 92, 36 N. E. 994; *Board of Water Com'rs v. People*, 137 Ill. 660, 27 N. E. 698.

The legality of the organization of this district was raised in this court by writ of certiorari in the case of *Barnes v. Drainage*

Com'rs, supra; and, while the decision in that case may not be res judicata of the questions here involved, as contended for by appellants, it is quite evident that the points we have heretofore discussed were raised and considered in that case, and the decision, so far as it has any bearing, tends strongly to uphold the conclusion heretofore reached herein. The last sentence of the opinion in *Barnes v. Drainage Com'rs*, supra, stated: "The record shows that the district was legally organized." See, also, *People v. McDonald*, 208 Ill. 638, 70 N. E. 646.

What we have already said renders unnecessary any discussion of the other questions raised in the briefs.

The judgment of the circuit court will be reversed and the cause remanded, for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(229 Ill. 554)

SIMPSON v. HANSEL-ELCOCK FOUNDRY CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—PROXIMATE CAUSE.

In an action for injuries to an employé, the negligence of the foreman, if any, held not the proximate cause of the accident.

Error to Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Action by John Simpson against Hansel-Elcock Foundry Company. From a judgment for plaintiff, reversed by the Appellate Court, plaintiff brings error. Affirmed.

J. A. Bloomington, for plaintiff in error. Horton, Brown & Miller, for defendant in error.

DUNN, J. This was an action on the case brought by plaintiff in error to recover damages for a personal injury. The plaintiff recovered a judgment, which the Appellate Court, upon appeal, reversed without remanding the cause, on the ground that the court should have instructed the jury, as requested by the defendant, to find it not guilty. This writ of error is prosecuted to reverse that judgment of affirmance.

The plaintiff was a structural iron setter, working for the defendant in the erection of a building in Chicago. At the time of his injury a column had just been placed under a truss which supported the roof, and the foreman wanted it taken down. The column was an eight-inch I-beam, 16 feet long, weighing 18 pounds to the foot. The base rested on a concrete foundation, and at its top, where the truss rested, were certain lugs, one side of which was bolted to the head of the I-beam and the other extended at right angles, to be bolted to the truss. To take down the column from under the truss it was necessary to raise it above the lower chord of

the truss. This was done by passing a line around the head of the column and raising it off its foundation by a hoisting engine located about 100 feet away. Albert Hanson was in charge of the men doing the work and gave the signals to lower or raise the column. In case it was necessary to hoist the load, power was applied from the engine, and in case of lowering the load the man at the "nigger-head," which is a cylinder at the side of the engine around which the rope or line passes, released the line, thus allowing the load to descend. The column had been raised from its foundation and suspended with its head about a foot above the flange of the lower chord of the truss. The plaintiff in error and one Halverson, under the direction of the foreman, took hold of the column at the base and pulled it out so that it could be lowered. As the column descended it caught by the lug on its head upon the flange of the truss, thus allowing the line to become slack. The plaintiff in error and Halverson continued to pull the base of the column, the head slipped off the truss, and the column dropped a short distance, striking the plaintiff in error upon the foot. The negligence averred in the declaration was that the foreman "then and there ordered and signaled the hoisting engineer to operate said hoist, and by reason of his negligence in so doing, the plaintiff, who was exercising all due care and caution for his own safety, was suddenly struck by the said beam being lowered upon him," etc.

Simpson testified that he heard the foreman call to the man at the nigger-head, "Why don't you lower away?" and immediately afterwards the column came down on his foot.

It was very heavy, and it was necessary for him to apply all of his strength to it. He did not see how or where it caught, and practically all he knew was that it came down on his foot. Halverson testified that the column started to descend and then stopped. He could not see, and did not know, what caused it to stop, but he knew that it was caught somewhere. He and Simpson kept pulling at the base until it was loose. The slack in the rope permitted the beam to fall about one foot. Hanson, the foreman, testified that he did not notice right away that the column was caught, and it got a little more slack than was necessary. As soon as he saw it was caught he gave a signal to stop lowering. He gave no signal to go ahead until the column was released, and it was not two seconds after it was caught before the signal to stop was given. Johnson, the nigger-head operator, testified that Hanson gave him the signal to lower with his hand. He continued to lower until the strain got off the cable. He knew immediately that the column was caught and held the rope fast until it was released and the slack in the cable taken up, when he lowered it to the ground. During the time the column was

caught Hanson signaled to him to lower, but he did not obey the signal.

This is all of the evidence, and it does not tend to prove that the plaintiff was injured as a result of the foreman's negligence in signaling the engineer to operate the hoist. The fact that the foreman, after the column caught, signaled the nigger-head man to continue to lower, does not prove the charge in the declaration. The signal was not obeyed and did not cause the injury. Johnson had hold of the rope and could tell instantly, by the difference in pressure, when the column caught. He was in a better position to know this fact than the foreman, who was looking at the top of the beam. He held the rope until the column was released, and the signal had nothing to do with the injury. The court should have given the instruction to find the defendant not guilty, and the Appellate Court committed no error in so holding.

The judgment will be affirmed.

Judgment affirmed.

(229 Ill. 533)

MALONEY et al. v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CONSPIRACY—INDICTMENT—SUFFICIENCY OF ALLEGATIONS.

Under Cr. Code, § 46 (Hurd's Rev. St. 1905, c. 38), providing that if any two or more persons conspire or agree together to obtain money or other property by false pretenses, or to do any illegal act injurious to the public trade, health, morals, etc., they shall be guilty of a conspiracy, it is not sufficient to charge merely that the conspirators' act is illegal, but it is necessary to set forth the character of the illegal act as being injurious to the public trade, health, morals, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 94, 96.]

2. SAME.

An indictment for conspiracy, charging an illegal act injurious to the public morals, and then stating under a videlicet that the conspirators did maliciously threaten verbally one L. to accuse him of the infamous crime against nature, with intent to extort money from him, contrary to the statute, is not sufficient under Cr. Code, § 46 (Hurd's Rev. St. 1905, c. 38), which provides that the conspirators' act must be injurious to the public trade, health, morals, etc., since the act stated under the videlicet is repugnant to the preceding matter; it being not an offense against public morals to threaten verbally to accuse one of a crime, but an offense against public justice.

3. INDICTMENT—VIDELICET—REPUGNANCY.

If the statement laid under a videlicet is material, and enters into the substance of the description of the offense, and is impossible or inconsistent with the premises, neither clause can be rejected as surplusage, and the indictment is void.

Error to Appellate Court, First District, on Writ of Error to Criminal Court, Cook County; Lockwood Honore, Judge.

Michael J. Maloney and others were convicted of conspiracy. The Appellate Court affirmed the judgment, and defendants bring error. Reversed.

George H. Sugrue and S. F. Crews, for plaintiffs in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (Hobart P. Young and Roger Sherman, of counsel), for defendant in error.

VICKERS, J. Plaintiffs in error, Michael J. Maloney and Isaac Hartman, together with Harry S. Nye and Charles Mitchell, were indicted by the grand jury of Cook county, under section 46 of the Criminal Code (Hurd's Rev. St. 1905, c. 38), for conspiracy. The indictment, omitting the formal parts, charged that the parties named, "unlawfully, feloniously, fraudulently, maliciously, wrongfully, and wickedly did conspire, combine, confederate, and agree together and with each other to do an illegal act then and there injurious to the public morals, to wit, to maliciously threaten, verbally, one Lawrence Erhart to accuse him, the said Lawrence Erhart, of a crime, to wit, the infamous crime against nature, with intent to extort money from him, the said Lawrence Erhart, contrary to the statute, and against the peace and dignity of the same people of the state of Illinois." A motion to quash being overruled, defendants were put upon their trial, and Maloney, Nye, and Hartman were found guilty. Motions for a new trial and in arrest of judgment were overruled and judgment was pronounced on the verdict, sentencing Hartman and Maloney to the penitentiary. A writ of error was prosecuted by them to the Appellate Court for the First District, where the judgment of the trial court was affirmed. The present writ of error has been sued out to secure a review of the proceedings by this court.

The only question seriously insisted upon by plaintiffs in error is that the court erred in overruling the motion to quash the indictment. Section 46 of the Criminal Code provides: "If any two or more persons conspire or agree together * * * to obtain money or other property by false pretenses, or to do any illegal act injurious to the public trade, health, morals, police, or administration of public justice, * * * or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, whether as individuals or as the officers of any society or organization, and every person convicted of conspiracy at common law, shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding \$2,000, or both." It will be noted that plaintiffs in error are charged in the indictment with an illegal act injurious to the public morals, and the alleged illegal act is described under a videlicet as to "maliciously threaten, verbally, one Lawrence Erhart to accuse him, the said Lawrence Erhart, of a crime, to wit, the infamous crime against nature, with intent to extort money from him, the said Lawrence Erhart, contrary to the statute," etc. Section 47 of the Criminal Code recognizes the crime against nature as infamous, and provides that it

shall subject the offender to punishment by imprisonment in the penitentiary for a term of not more than ten years. Section 93 of the Criminal Code provides: "Whoever, either verbally or by written or printed communication, maliciously threatens to accuse another of a crime or misdemeanor, * * * with intent to extort money, * * * shall be fined in a sum not exceeding \$500 and imprisonment not exceeding six months."

It is conceded by defendant in error that a conspiracy formed for the purpose of extorting money from another by threatening to accuse such other person of a crime is not an illegal act *contra bonos mores*, but it is insisted that the phrase, "injurious to public morals," may be rejected as surplusage, and that the indictment would still contain all of the essential elements of a charge of conspiracy. We cannot assent to this view. An indictment charging a conspiracy to do an illegal act which in its nature could not be injurious to public trade, health, morals, police, or the administration of public justice, and not to commit any felony, would not be a conspiracy under our statute. The statute seems to be leveled at and limited to illegal acts which in their usual and ordinary tendencies are injurious to the public trade, health, morals, police, or the administration of public justice, and the character of the illegal act in this regard enters into the definition and qualifies the illegal act by limiting it to the classes of illegal acts mentioned in the statute. If defendant in error's position is sustained, then any illegal act which is prohibited by the statute may become, when two or more persons are charged together, the subject of an indictment for conspiracy and subject the offender to imprisonment in the penitentiary, or a fine of \$2,000, or both. Our statutes prohibit the obstruction of a public highway, carrying concealed weapons, killing game in certain seasons of the year, and many other things that might be mentioned. Such acts are illegal because prohibited by statute. The conviction of any such offenses is followed by the penalties severally fixed thereto by the statute, usually a fine. Can it be contended that if two or more persons combine and agree together to commit any of these or other like offenses they may be indicted for a conspiracy and imprisoned in the penitentiary under section 46 of the Criminal Code? Certainly not, unless it could be said that such illegal act also had the quality of being "injurious to the public trade, health, morals, police, or administration of public justice."

Since, as we have sought to show, it is not sufficient, under section 46, to charge merely that the act was illegal to accomplish which the alleged conspiracy was formed, but it is necessary to set forth in the indictment the particular character of the illegal act as being injurious to the public trade, health, morals, police, or administration of public justice, it therefore follows that where

a conspiracy to do an illegal act injurious to the public morals is charged, as in the case at bar, the words "injurious to the public morals," being essential to the definition and necessary to characterize the act charged, cannot be rejected as surplusage. The indictment in the case before us properly charges an illegal act "injurious to the public morals," and this is followed by an averment stated under a *videlicet* charging that the particular illegal act which was then and there injurious to the public morals was to "maliciously threaten, verbally, one Lawrence Erhart to accuse him * * * of the infamous crime against nature, with intent to extort money from him, * * * contrary to the form of the statute," etc. The act stated under the *videlicet* is repugnant to the preceding matter. To threaten verbally to accuse another of a crime is not an offense *contra bonos mores*, but is an offense, both at common law and under our statute, against public justice, and is so classified. Under the head of Offenses Against Public Morals, Bishop, in his work on Criminal Law, mentions keeping of bawdy houses; the public exhibiting or publishing of obscene pictures and writings; the public utterance of obscene words; the indecent and public exposure of one's person or the person of another; night walking; public selling and buying a wife; immoral public shows; and, more broadly, every public show and exhibition which outrages decency, shocks humanity or is contrary to good morals; cock fighting, gaming, and keeping of disorderly houses. And as corrupting to public morals and disturbing to the sensibilities are such acts as casting a human dead body into a river, and other offenses against sepulture. See 1 Bishop on Crim. Law, § 500. Speaking of acts calculated to corruptly divert the course of justice in our courts, Bishop, in his work on Criminal Law (volume 2, § 219), says: "A conspiracy to indict one falsely or to procure any process against one for the purpose of oppression or private ends, or in any way to fabricate or suppress testimony in a court of justice or to prevent a prosecution, is an indictable offense." There is in this indictment a contradiction and repugnancy between the clause which charges the particular act committed and the clause which alleges that the act was injurious to the public morals. Neither of these clauses can be rejected as surplusage. The rule on this subject is that if the statement laid under the *videlicet* is material and enters into the substance of the description of the offense, and is impossible or inconsistent with the premises, then the indictment is void. 1 Bishop on New Crim. Proc. § 406, and cases there cited.

In our opinion the indictment in this case cannot be sustained, and the court erred in overruling the motion to quash the same.

The judgment is reversed.

Judgment reversed.

(229 Ill. 376)

MILLER v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CRIMINAL LAW — APPEAL — EVIDENCE — REVIEW.

As the determination of the sufficiency of the evidence to sustain a conviction is for the jury, the Supreme Court will not interfere with a conviction for want of evidence, unless it is satisfied from a consideration of the whole testimony that there is a reasonable doubt of accused's guilt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

2. LARCENY — EVIDENCE.

Evidence of accused's guilt of the larceny charged *held* not such as to require reversal of the conviction on appeal.

3. INDICTMENT — JOINDER OF OFFENSES — CONVICTION.

Where an indictment in three counts charged both burglary and larceny, the charges, though joined in each count, were independent crimes, and accused could be convicted of either without being found guilty of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 526.]

4. LARCENY — INSTRUCTIONS.

Where an indictment joined burglary and larceny of a buggy, an instruction that if the jury believed that a "burglary was committed as alleged in the indictment," and that the buggy was still in defendant's possession recently after the commission of the offense, such fact not satisfactorily accounted for, was *prima facie* evidence that he committed the larceny and burglary, etc., was erroneous, for failure to connect the stealing of the buggy with the "burglary or larceny" charged in the indictment.

5. SAME — RECENT POSSESSION.

Recent possession of stolen property is *prima facie* evidence of guilt, and will warrant a conviction, unless attending circumstances or other evidence so far overcome the presumption as to raise a reasonable doubt of accused's guilt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, §§ 170-178.]

6. CRIMINAL LAW — INSTRUCTIONS — ASSUMED FACTS.

Where facts are controverted, and the evidence is conflicting, it is error for the court in its charge to assume certain facts to be true.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1754-1764.]

7. LARCENY — RECENT POSSESSION — PROVINCE OF COURT AND JURY.

In a prosecution for burglary and larceny, it was the province of the jury to pass on the sufficiency of the evidence offered as an explanation of defendant's alleged recent possession of the stolen property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 181.]

8. CRIMINAL LAW — INSTRUCTIONS — ASSUMED FACTS.

An instruction that defendant's possession of a buggy, alleged to have been stolen, recently after the commission of the offense, "unsatisfactorily accounted for," was *prima facie* evidence that defendant committed the offense was erroneous, as assuming that defendant's explanation of his possession was unsatisfactory.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1754-1764.]

9. SAME — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

An instruction that defendant's possession of a buggy, alleged to have been stolen, recently after the commission of the offense, "unsatisfactorily accounted for," was *prima facie*

evidence that defendant committed the larceny and burglary, and such evidence "if any" was sufficient to warrant a conviction, unless there appeared from the evidence a reasonable doubt of defendant's guilt, was erroneous, in that the use of the words "if any" could only mislead the jury as to the amount of evidence sufficient to warrant a conviction, and induce their reliance more on the testimony of the state as to recent possession and discredit defendant's explanation thereof.

10. LARCENY—RECENT POSSESSION—EXPLANATION—BURDEN OF PROOF.

The burden is on the defendant in a prosecution for larceny to satisfactorily explain the recent possession of stolen property, under the rule that, if from all the evidence there is a reasonable doubt of guilt, he must be acquitted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 129.]

11. CRIMINAL LAW—CREDIBILITY OF ACCUSED—INSTRUCTIONS.

Where an instruction did not seek to completely discredit accused's testimony, but submitted the fact of its contradiction to the jury, if he was contradicted, in connection with the other facts and circumstances in the record, and instructed them to give his testimony such weight and credit as they believed should be given, it was not objectionable for failure to charge that to consider his contradictory statements the jury must believe that he had not only willfully sworn falsely, but that he was contradicted on material points.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1895-1901.]

12. SAME—CHARACTER—WEIGHT.

While good character of accused may be shown in every criminal trial, the weight to which such evidence is entitled is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1722.]

13. SAME—INSTRUCTIONS—REQUESTS COVERED BY OTHER INSTRUCTIONS.

An instruction that the previous good character of accused was proper to be considered by the jury in connection with all the other evidence justified the refusal of a request to charge that previous good character of accused, if proved, was entitled to great weight in favor of his innocence, under the rule that it is not error to refuse requested instructions substantially covered by instructions given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

14. LARCENY—EVIDENCE—RELEVANCY.

Where, in a prosecution for burglary and larceny of a carriage, it was claimed that defendant stole the carriage and hauled it to his home hitched behind another vehicle, evidence that on the night of the offense a witness passed a team drawing two carriages, one behind the other, coming from the place where the buggy was taken toward defendant's home, but that witness could not tell who or how many persons were in the front carriage, was admissible.

Error to Circuit Court, Iroquois County; Frank L. Hooper, Judge.

William Miller was convicted of grand larceny, and he brings error. Reversed and remanded.

Oscar H. Wylie, Fleming R. Moore, and Nellie B. Keeslar, for plaintiff in error. W. H. Stead, Atty. Gen., and John P. Pallissard, for the People.

CARTER, J. Plaintiff in error was indicted for burglary and larceny by breaking and entering the building of one George Wilken,

with intent to steal, and stealing, a top buggy worth \$85, the property of Wilken. He was convicted of grand larceny at the March term of the Iroquois county circuit court and sentenced to the penitentiary. To review this finding, he brings this writ of error.

The testimony shows that on the night of May 24, 1906, the implement store of George Wilken, in the village of Danforth, in said county, was entered and a new rubber tired buggy, valued at about \$85, was stolen therefrom. The city marshal of Danforth testified that he was able the next day, because of a previous rain, to track the buggy as far as a church about a block and a half south of the store; that there were no horse tracks accompanying the buggy tracks from the store to the church; that at the church there were tracks of steel tired buggy wheels and a team of horses coming in and the same tracks leading out, followed by the tracks of a rubbed tired buggy; that he examined the hoof marks and found that they were small, and that the right-hand horse was shod in front and the other horse unshod; that on the Saturday after the buggy was taken he measured the tracks made by the horses of plaintiff in error, who had driven to this church in Danforth on Friday evening and tied his horses in the rear of the church, and that these tracks corresponded to those he had measured the day after the burglary, and that plaintiff in error's right-hand horse was shod in front and the other horse was not shod. The witness testified that he measured these tracks by means of small sticks, which he had destroyed. Wilken, the owner of the store, was away the afternoon previous to the burglary and left a mail carrier, one John Kennedy, in charge. Kennedy testified that plaintiff in error was in the store on the evening of May 24th, about 6 o'clock, and in the room from which the buggy was taken; that he inquired if Mr. Wilken had any twine, and incidentally mentioned that he had a buggy in Watseka getting it painted and retired and did not need another. Plaintiff in error denies that he was at Wilken's store on that afternoon or evening, and that he had this talk with Kennedy. Ralph Meinhardt testified that on the night of May 24th, about 1 o'clock, he drove past a team and top buggy, having another buggy tied behind, about a mile and a half south of Danforth. It was dark, and witness did not recognize the driver, the buggies, or the team. The team and buggies were going in the direction of Miller's home, away from Danforth. In the early part of December the plaintiff in error telephoned John Cromenecker, a constable living in Gilman, and said he understood he had a party desiring to purchase a buggy. Cromenecker replied that he had, and, as a result of their talk, within the next two or three days, Cromenecker, accompanied by one Lee, went to the farm where plaintiff in error lived, about four miles southeast of Dan-

forth and about four miles east of Gilman, where they were shown the buggy by the father of plaintiff in error, it then being in pieces and stowed in the loft or upper part of a corncrib. Plaintiff in error had told his father, if they came, to show the buggy to them. They went to the field where plaintiff in error was at work, and, after a short talk concerning the buggy, returned to Gilman. In the afternoon of the same day, in company with George Wilken and two others, Cromenecker went again to Miller's home. The buggy was taken from the loft of the crib and identified by Mr. Wilken as the one stolen from his store on May 24th. The stolen buggy was rubber tired, with a black top and red running gear, and originally it bore the name plate of the Harper Buggy Company, the manufacturers, but, when found in the possession of plaintiff in error, it had the plate of the Eckhart Carriage Company substituted. On each side of the buggy, below the seat, was a painted rose, which had been varnished or painted over, although on a careful examination the rose was still visible under the paint. The lower part of the side seat panel had been removed, some new mouldings put on, a medallion taken off, and the buggy changed in one or two other minor particulars, all these changes having evidently been made after it was stolen. It was testified that the number was on the inside of the seat and corresponded to the number in the invoice from the Harper Buggy Company. The buggy was identified by Wilken and the traveling salesman who sold it to him. A salesman for the Eckhart company testified that the vehicle was not of their make; that the serial numbers of the two companies ran entirely different.

Plaintiff in error testified that, in addition to working on his father's farm, he drove over the county selling stock food and farm medicines; that about May 26th, while out on that business, he met, at a watering trough near Onarga, a man who gave the name of Fred Richards (describing him with more or less particularity), who was driving a horse attached to a new top buggy; that he again met Richards at Gilman on Decoration day, and Richards wished to sell him a buggy for \$65; that he received two postal cards from the same man about the sale of the buggy, but could not find the cards after diligent search; that he saw Richards again at Gilman about June 19th, and after some dickering finally loaned him \$45 on the buggy, with the verbal understanding that, if the money was not paid in six weeks, the buggy should belong to plaintiff in error; that he fastened the buggy back of his own, and drove it to a barn which he rented in Gilman for the use of his medicine business, and afterwards, in the latter part of June, took it to his father's farm. The son of the owner of that barn testified that he went into the barn to get some fruit jars, about the

latter part of June or 1st of July, and saw there a buggy which corresponded in looks to the one stolen. Plaintiff in error testified that he used the buggy many times during the summer and fall with no attempt at concealment, driving, with a young lady friend, in it to church and to various picnics, socials, and celebrations; that early in December he took the buggy to a farm sale, where it was offered at auction, but the bids were so low that he caused it to be bid in on his own behalf and it was taken back home, and, in order to get it out of the way, was put, at his father's request, in the loft where it was found. His father corroborated him in this last statement, and the proof is clear that he attempted to sell the buggy at the farm sale in question and had it bid in. The father, a brother, and plaintiff in error all testified that he was at home during all the afternoon and evening of May 24th and slept there that night. A friend of the family also testified that he was at their home during the late afternoon and the whole of that evening, and plaintiff in error was there all the time. Several witnesses testified that plaintiff in error used the buggy, without any apparent effort at concealment, during the summer and fall. One witness testified that he had ridden in it with him to Danforth. In the locality where plaintiff in error testified this man Richards said he worked is situated a large canning factory, with a farm run in connection therewith, employing over 100 men. Several witnesses from that vicinity stated that they did not know any man by that name. The postman on the rural route testified that in June he had delivered two postal cards at the Miller farm, addressed to Will Miller, and that one was signed "Fred Richards" and the other "Fred," and both were in reference to the sale of a buggy. On the motion for new trial, plaintiff in error filed an affidavit which stated that since the trial he had found two witnesses who were living near Onarga, who would testify that they had met a man answering to the description of the one in question, between Watseka and Crescent City, in June, 1906; that the man gave his name as Richards; and that one of the said witnesses afterwards saw him at work at the canning factory at Onarga. Witnesses testified as to the good character of plaintiff in error, and the state's attorney admitted on the trial that such reputation had always been good prior to the occurrence in question.

It is insisted that the evidence is not sufficient to sustain a conviction. The determination of that question is for the jury, and it is only when this court is "satisfied, from a careful consideration of the whole testimony, that there is reasonable doubt of the guilt of the accused, that it will interfere with the verdict of the jury on the ground that the evidence does not support the verdict." *McCoy v. People*, 175 Ill. 224, 51 N.

IL 777; *Gilman v. People*, 173 Ill. 19, 52 N. E. 967; *Henry v. People*, 198 Ill. 162, 65 N. E. 120. While we are not prepared to say that this record would justify this court in setting aside the verdict because of lack of evidence, we think that it is so conflicting on many material points that the instructions should have stated the law applicable to the facts with accuracy. *Swan v. People*, 98 Ill. 610.

It is insisted that instruction 17 given for the people is erroneous. That instruction reads: "That if you believe, from all the evidence, beyond a reasonable doubt, that a burglary was committed as alleged in the indictment, and that the buggy introduced in evidence was stolen, and that shortly thereafter it was in the possession of the defendant, then that the possession of such buggy by the defendant recently after the commission of the offense, unsatisfactorily accounted for, is prima facie evidence that the defendant committed such larceny and burglary, and such evidence, if any, is sufficient to warrant a conviction of the defendant, unless there appears, from the facts and circumstances in evidence, a reasonable doubt of the defendant's guilt." The indictment in the first three counts charged both burglary and larceny, and, although those charges are joined together in one count, they are independent crimes. A person can be convicted of either crime without being found guilty of the other. *Lyons v. People*, 68 Ill. 271. Under the law, plaintiff in error might be guilty of burglary as charged in the indictment without being guilty of larceny. The first part of this instruction tells the jury as to their finding in case they believe, from the evidence, "that a burglary was committed as alleged in the indictment and that the buggy introduced in evidence was stolen," but does not say stolen "as charged in the indictment." The instruction is so worded that it does not in any way connect the stealing of the buggy with the burglary or larceny charged in the indictment, and might have been misleading in that regard. But it is much more seriously defective in other respects. By it the jury are instructed that if the crime was committed, and the stolen buggy was shortly thereafter found in the possession of defendant, "then that the possession of such buggy by the defendant recently after the commission of the offense, unsatisfactorily accounted for, is prima facie evidence that the defendant committed" the crime. Under the law of this state, the recent possession of stolen property is prima facie evidence of guilt, but the wording of this instruction might have led the jury to believe that the court assumed that the explanation of plaintiff in error as to how he came into possession of this property was unsatisfactory. Where facts are controverted and the evidence is conflicting, it is error for the court, in instructing the jury, to assume certain facts to be true. *Chambers v. People*,

105 Ill. 409; *Swigart v. Hawley*, 140 Ill. 186, 29 N. E. 883; *Cartier v. Troy Lumber Co.*, 138 Ill. 533, 28 N. E. 932, 14 L. R. A. 470; *Chittenden v. Evans*, 41 Ill. 251. It is the province of the jury, and not of the court, to pass on the sufficiency of the evidence offered as a satisfactory explanation of recent possession of such stolen property. *People v. Walters*, 76 Mich. 195, 42 N. W. 1105; *State v. Kimble*, 34 La. Ann. 392; *Hays v. State*, 30 Tex. App. 472, 17 S. W. 1063; 1 McClain on Crim. Law, 618. The instruction continues: "Such evidence, if any, is sufficient to warrant a conviction." The words "if any" have no proper meaning or place in the instruction at this point, and could only have a tendency to mislead the jury as to the amount of evidence sufficient to warrant a conviction. Fairly construed, the jury would draw the conclusion from them that, however slight the prima facie evidence as to the recent possession of the stolen property, if there was any such evidence, they would be justified in convicting the plaintiff in error thereunder. The theory of the state was that the plaintiff in error came into possession of the buggy the night it was stolen, but all the proof offered by the state on this was circumstantial, and plaintiff in error insists that much of it, especially as to the measuring of the horses' tracks, was very unreliable. The only proof on the part of the state that plaintiff in error was in possession of the buggy before the farm sale, early in the following December (outside of a witness who saw a buggy, claimed to be the one in question, the night of the burglary, and the witness who saw a buggy that resembled it, about July, in his mother's barn, in *Gilman*), was the statement of plaintiff in error himself, to the effect that he first saw the buggy a few days after the burglary and obtained possession of it by making a loan on June 19, nearly a month after it was stolen. In considering the evidence as to the exact time and manner he came into possession of the buggy, these words "if any" would naturally cause the jury to rely more upon the testimony of the state as to such recent possession and discredit the explanation of plaintiff in error.

Counsel for defendant in error cite in support of this instruction *Watts v. People*, 204 Ill. 233, 68 N. E. 563. The wording of the instruction in that case was entirely different from the one here, and, while the court held that it was a correct statement as an abstract principle of law, it also held, in view of the facts in that case, that it was error to give it. The people also rely upon the case of *Williams v. People*, 196 Ill. 173, 63 N. E. 681. There, also, the instruction was based on facts very different from those in this case, while its wording was materially different.

The decisions in the various states are not in harmony as to the weight that should be given to the recent possession of stolen prop-

erty. In this state such recent possession is sufficient to warrant conviction unless attending circumstances or other evidence so far overcomes the presumption as to raise a reasonable doubt of the guilt of the accused. *Smith v. People*, 103 Ill. 82; 1 *McClain* on Criminal Law, 616, 617. But this court has ruled many times that the burden is not upon the accused to satisfactorily explain the recent possession of stolen property; that if, from all the evidence, there is a reasonable doubt of the guilt of the accused, he must be acquitted. *Conkwright v. People*, 35 Ill. 204; *Comfort v. People*, 54 Ill. 404; *Hoge v. People*, 117 Ill. 35, 6 N. E. 796; *Briggs v. People*, 219 Ill. 330, 76 N. E. 499; *Watts v. People*, supra. See, also, *Appleton v. People*, 171 Ill. 473, 49 N. E. 708; *Wacaser v. People*, 134 Ill. 433, 25 N. E. 564, 23 Am. St. Rep. 683; *Alexander v. People*, 96 Ill. 96. The theory of the state as to the time when the plaintiff in error obtained possession of the buggy was strenuously denied by him, and evidence was introduced in support of this denial. Notwithstanding its last clause, this long and involved instruction may have led the jury to believe that the accused was compelled by law to assume the burden of explaining satisfactorily his possession of the buggy before he could be acquitted. The giving of this instruction was reversible error.

Complaint is also made of the eleventh instruction, given for the people, touching upon the credit that should be given plaintiff in error's testimony. The first two-thirds of this instruction is substantially the same as the first part of the one given on this subject in *Rider v. People*, 110 Ill. 11, but instead of concluding, as that instruction did, by further instructing the jury that if, after considering all the evidence, they find that the accused has willfully and corruptly testified falsely to any fact material to the issues, they may entirely disregard his testimony except as corroborated by other credible evidence, the present instruction concluded in these words: "And from that and all other facts and circumstances in evidence bearing upon the question it is for the jury to determine what weight and credit should be given his testimony." The argument is that the instruction should have stated that before taking into consideration his contradictory statements the jury must believe that he has not only sworn falsely willfully, but that he was contradicted on material points. The instruction here in question did not seek to completely discredit the defendant's testimony. Had it done so, then the qualification insisted upon should have been inserted; but the instruction as worded left it to the jury to take the fact of his contradiction into consideration, if he was contradicted, in connection with all the other facts and circumstances in the record, and then give his testimony such weight and credit as they believed should be given it. We think, under the reasoning of *Rider v. People*, supra, *Hirschman*

v. People, 101 Ill. 568, *Godair v. Ham Nat. Bank*, 225 Ill. 572, 80 N. E. 407, *Jennings v. People*, 189 Ill. 320, 59 N. E. 515, and *Chicago City Railway Co. v. Ryan*, 225 Ill. 287, 80 N. E. 116, there was no error in giving this instruction.

It is also urged that the court erred in refusing to give an instruction for the defendant which told the jury that, in cases depending upon circumstantial evidence alone, "previous good character on the part of the accused, if proved, is entitled to great weight in favor of his innocence." The jury were told in other instructions that previous good character was proper to be considered by them in connection with all the other evidence. Good character is permitted to be shown in every criminal trial, but it is for the jury to give it such weight as they think it entitled to. *Aneals v. People*, 134 Ill. 401, 25 N. E. 1022; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *Wharton on Crim. Evidence* (9th Ed.) § 60; *Jupitz v. People*, 34 Ill. 516; *Hirschman v. People*, supra; 5 Am. & Eng. Ency. of Law (2d Ed.) p. 868. The refusal of this instruction was not error.

Complaint is also made as to the refusal of the third instruction asked by plaintiff in error, which called attention to the fact that the owner of the buggy had offered a cash reward, and stated that if the jury found, from the evidence, that any witness "in behalf of the prosecution" had testified with the hope of this reward, they should take that fact into consideration in determining the credit to be given the testimony of such witness. Plaintiff in error's second instruction covered generally all the points touching upon the interests and motives of the witnesses that he was entitled to have given, and there was no error in the refusal of said instruction. *Hoch v. People*, 219 Ill. 265, 76 N. E. 356, 109 Am. St. Rep. 327; *Mash v. People*, 220 Ill. 86, 77 N. E. 92.

It is further urged that the court erred in admitting the testimony of *Ralph Meinhardt* that on the night of the crime he passed a team drawing two carriages—one behind the other—going from *Danforth*, where the buggy was taken, in the direction of *Miller's* home; that he could not tell who or how many persons were in the front carriage. In the admission of circumstantial evidence great latitude is allowed. The jury should have before them every fact which may enable them to come to a satisfactory conclusion, and much discretion is left to the trial court as to the admission or exclusion of such testimony. 3 *Ency. of Evidence*, 110-116, and cases there cited. We do not think there was error in admitting this testimony.

For the error committed in giving said seventeenth instruction for the people, as to the recent possession of stolen property, the judgment will be reversed and the cause remanded to the circuit court.

Reversed and remanded.

(22) Ill. 496)

VILLAGE OF MONTGOMERY v. ROBERTSON.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. TRIAL—TAKING CASE FROM JURY—HEARING.

In an action for negligence, where a peremptory instruction for defendant is asked, the testimony favorable to plaintiff is to be taken as true, and, if it fairly tends to prove any wrong or neglect of duty on the part of the defendant which caused the injury, the instruction should be refused; otherwise, it should be given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Negligence, § 402; vol. 37, Negligence, §§ 277, 278.]

2. MASTER AND SERVANT—WARNING AND INSTRUCTING SERVANTS—OBVIOUS DANGERS.

Whether a servant ever worked in a gravel pit is immaterial on the question of the duty of the master to warn against the danger of the bank caving when gravel is shoveled from the bottom, since there is no duty to warn a servant of dangers which are patent to ordinary intelligence, and the tenant is presumed to know the law of gravitation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 310-316½.]

3. SAME—DUTY TO PROVIDE SAFE PLACE FOR WORK WHEN CONDITIONS ARE CHANGING.

The general rule that a master must exercise reasonable care to furnish a safe place for his servant to work does not apply where the conditions are changing from time to time in the prosecution of the work; hence a master cannot be held to make a gravel pit safe for employes all the time where the natural support of the bank is being constantly removed, and when the changing conditions must be watched and provided against by the workmen themselves.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 179, 209.]

4. SAME—ACT OF FELLOW SERVANTS IN GRAVEL PIT.

Plaintiff, a servant, who worked in a gravel pit, asked the superintendent in regard to the safety of the place, and spoke of the teams being too near. The superintendent inspected the bank and assured him it was safe to work there, but conditions changed as the work continued. The bank caved, and plaintiff was caught between it and the wagon, and injured. The superintendent had said nothing as to how near teams should drive, and was not present at the time. *Held* that, if the wagon was drawn too near the bank, it was an act of a fellow servant, and the master was not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 491.]

5. SAME—NEGLIGENCE OF MASTER AS CAUSE OF INJURY.

In an action by a servant for personal injury received in a gravel pit, it appeared that plaintiff asked the superintendent as to the safety of the place where they were working, and complained of the projecting reach on a wagon. The superintendent had the top of the bank broken off, inspected it, and assured plaintiff that the place was safe. He also directed that the bank be kept broken down, and promised to see about the reach. The work continued, and the next day plaintiff was forced against the wagon with the projecting reach by the caving of the side of the pit, and was injured. Plaintiff did not attempt to go around the reach, and testified that he did not have time to get to it. *Held*, that a requested peremptory instruction for defendant should have been given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1050.]

Error to Appellate Court, Second District, on Appeal from Circuit Court, Kane County; Henry B. Willis, Judge.

Action by Robert Robertson against the village of Montgomery. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

U. J. Aldrich, Theodore Worcester, and F. W. Hurtsburg, for plaintiff in error. W. J. Tyers, E. M. Mognan, and Murphy & Alschuler, for defendant in error.

CARTWRIGHT, J. While defendant in error was in the employ of plaintiff in error as a laborer, shoveling gravel in a gravel pit, his leg was broken by the falling of a gravel bank. He sued his employer for resulting damages, and recovered a judgment in the circuit court of Kane county, which has been affirmed by the Appellate Court for the Second District.

The declaration is of great length, containing eight counts, but its charges may be summarized as follows: (1) That the gravel pit was a dangerous place to work, which was known to defendant and unknown to plaintiff; (2) that defendant failed to perform its duty to take reasonable care to provide plaintiff a reasonably safe place to work; (3) that plaintiff was directed by defendant's foreman to work in a dangerous place, the danger being known to defendant and unknown to plaintiff; (4) that, after discovering the danger, plaintiff reported it to defendant's foreman, and was ordered to continue work; (5) that a wagon used for hauling gravel had a reach extending four feet to the rear, which obstructed plaintiff's retreat when the gravel fell, and that plaintiff complained to defendant's foreman of the condition of the reach, and the foreman promised to have the reach removed or cut off, which promise was not fulfilled; (6) that plaintiff was inexperienced in such work and defendant failed to warn him of the existing danger; (7) that defendant did not properly remove earth from the top of the gravel pit; (8) that the defendant improperly placed the wagon which was being loaded by plaintiff in an unsafe condition with relation to the gravel pit.

The evidence was to the following effect: On September 8, 1904, plaintiff, a man of mature years, was employed by defendant, and he worked on the road about three days. After that he went to work shoveling gravel in a shallow gravel pit from September 12th to September 17th. Afterward he worked half a day on the road, and then went to work on Wednesday, by the direction of Tom Noteman, superintendent of streets of defendant, at the gravel pit where the accident occurred. It was an old gravel pit where gravel had been taken out long ago, and it had a face of perhaps 150 to 200 feet which was practically straight, except at one place where there was a curved section caused by removing gravel, which formed an indentation

in the bank variously estimated at from 8 to 15 feet and estimated to extend along the bank somewhere from 22 to 35 feet. The defendant prepared to take out gravel at that place on Wednesday and first scraped off the top soil with a scraper. Plaintiff at first helped to do that work, and then went down into the pit and shoveled dirt and gravel on wagons. Three teams owned by their drivers were hired for hauling the gravel, and the plaintiff and a man named De Witt were the shovelers. The teams were driven into the pit from the southeast and were turned at the western border of the curve, so as to place the wagons parallel with the bank and face towards the entrance. Each teamster assisted in loading his own wagon, and, after scraping off the top, plaintiff worked all the rest of the day, Wednesday, and all day Thursday, shoveling into wagons. The superintendent, who died before the trial, was at the pit on Wednesday and twice on Thursday, the last time about 2:30 or 3 o'clock Thursday afternoon. On Thursday morning he told plaintiff to take the crowbar and knock off the top of the bank at the corner. Plaintiff did so, and Noteman then took the crowbar and knocked off the rest of the bank, which consisted of clay at the top with a layer of fine gravel beneath and heavy coarse gravel below. On direct examination the plaintiff testified that on Thursday he asked Noteman if he thought it was safe for a man to work in the pit, and Noteman asked what was the matter; that plaintiff said it was fine gravel and so near the teams, and especially that one with the reach, and Noteman said he would see about the reach and plaintiff should go back to work; that Noteman never said whether it was safe to work there or not, and that plaintiff went back to work and worked the balance of the day. On cross-examination he testified that, when he asked Noteman if it was a safe place to work, Noteman said it was, and went up to the top of the bank and looked at it himself; that plaintiff did not believe the bank was liable to cave down; that he did not dream of any injury at all; that he asked Noteman to be certain that it was safe; and that, when Noteman looked, it was after the bank was broken off. As the shoveling advanced into the bank, it was necessary to break the top down, and Noteman directed them to keep the bank broken down and to keep it straight. The witnesses estimated the height of the bank from 8 or 9 to 12 or 14 feet. Noteman, the superintendent of streets, was not present after his second visit on Thursday. On Friday morning, in loading the second wagon, which was the one with the long reach, the gravel bank fell. The bank commenced to cave in front of the horses and the teamster climbed on the wagon and took hold of the lines. Plaintiff testified that he was at the center of the wagon and ran for the hind wheel and made a grab for it, and the gravel struck him and carried his leg through

the spokes of the wheel and broke the leg. He said the bank was straight when the caving took place; that the reach stuck out behind the wagon about four feet; that the dump boards extended back of the wheel eight or nine inches and the reach three feet beyond them; that the end of the reach was 2½ feet from the bank, and there was a space of 6 or 8 feet from the wagon to the bank. He also testified that, when the gravel started to fall, he made for the end of the wagon to get around, but the reach was in the way; that the reach was about 2 feet above the ground, and not higher than the hub of the wheel upon which he attempted to climb; and that he did not have time to get to the reach that extended back of the wagon. The owner of the wagon testified that the reach was 12 feet long and the dump boards were of the same length, and that the reach did not extend back of the wagon more than 2 feet and 4 inches. The other shoveler, De Witt, got on the other side of the wagon in some way, but he was not a witness and the manner in which he escaped was not explained. The evidence for the defendant was that, when the bank commenced to cave in front of the horses and continued to cave further back, some one called to look out, and they got out of the way, except the plaintiff, and that he stood by the wagon, against the wheel, with his hand on the wheel, looking toward the bank, until the gravel struck him. Plaintiff testified that he did not believe the bank was liable to cave when he spoke to Noteman, the superintendent, but that the gravel was so fine and they were so near the bank that he told Noteman they ought to have more room, and asked if Noteman thought it was safe to work so near the bank.

At the close of the evidence the defendant asked the court to instruct the jury to return a verdict of not guilty, and tendered an instruction to that effect, which was refused, and the refusal is assigned for error. In considering that assignment the testimony favorable to the plaintiff is to be taken as true, and, if such evidence fairly tended to prove any wrong or neglect of duty on the part of the defendant which caused the injury, the court was right in refusing to give the instruction. On the other hand, if the defendant was not at fault in any way, and did not fall in the performance of any duty which it owed to the plaintiff, and thereby cause his injury, it cannot be held liable for the resulting damages merely because it employed plaintiff to work in the pit, however unfortunate the accident to plaintiff may have been. It will at once be seen that there was no evidence tending to prove that the defendant did not properly remove the earth from the top of the gravel pit; nor that the defendant improperly placed the wagon in an unsafe condition with relation to the gravel pit, inasmuch as it neither directed nor controlled such location, which was under the con-

trol of the plaintiff and his fellow servants, who were engaged in loading the wagon; nor that the defendant failed in the performance of any duty to warn the plaintiff of the dangers incident to undermining the bank by shovelling gravel from the bottom. Whether a laborer has ever shoveled gravel or not is wholly immaterial on the question of the duty of a master to explain dangers and warn a servant against them. It requires no experience in a person of ordinary intelligence to understand the danger of shovelling loose gravel from the bottom of a bank. The plaintiff could not plead ignorance of the law of gravitation, and if he was, in fact, ignorant of the probable consequences of removing gravel and depriving the upper soil of its support, the defendant would have no reason to presume such ignorance or that he needed instruction on that subject. Any one who hires a laborer rightfully presumes that he understands the laws of nature, which operate with uniformity, and there is no duty to warn of dangers which are patent to ordinary intelligence. *Chicago & Alton Railway Co. v. Bell*, 209 Ill. 25, 70 N. E. 754. Plaintiff's testimony shows that he knew something of the danger from his account of the conversation with Noteman.

There is a general rule that a master must exercise reasonable care to furnish a reasonably safe place for his servant to work, but that rule is subject to limitations and exceptions. One exception universally recognized is that the general rule does not apply where the conditions are changing from time to time in the prosecution of the work. If the nature of the work is such as to produce changes and temporary conditions in the place where the work is performed, the rule does not require the master to keep the place reasonably safe under such changed conditions which the work renders necessary. *Thompson on Negligence*, § 3876. In such a case the master does not make or create the place or conditions, but they are created by the progress of the work and the workmen engaged in it. In this case the removal of the gravel created the attendant dangers, and, while a master might become liable for an injury on account of some other fault or neglect, he would not be made liable under the rule here invoked. A master cannot be held to make a gravel pit safe for employes from moment to moment, when the natural support of the bank is being constantly removed, and where the changing conditions must be watched and provided against by the laborers themselves.

It is urged, however, that Noteman assured plaintiff that the place was safe. Plaintiff testified that his one thought when he spoke to Noteman was that they ought to have more room between the wagon and the bank, which was a matter entirely under their control. If the wagon was driven nearer the bank than it ought to have been at the time of the accident, it was an act of a fellow-

servant, and not of the defendant, whose superintendent was not even present at the time. If what Noteman said was an assurance of safety at the time, there was no wrong in giving the assurance, since the bank was then entirely safe, and no accident occurred. Such an assurance could not continue indefinitely during the removal of the gravel. When the superintendent was there he had the bank broken down, and any assurance he might have given did not continue during subsequent changes, when a large amount of gravel was removed from the face of the bank. The only possible fault which the evidence tended to prove related to the length of the reach, and the evidence did not tend to prove that the reach was the cause of the accident. According to plaintiff's testimony, he never could have got around the wagon if the reach had not been there. There was a space of $2\frac{1}{2}$ feet between the end of the reach and the bank at the rear of the wagon, and the reach was not higher than the hub of the wheel which the plaintiff endeavored to climb. But, if the reach was high enough to constitute an obstruction, or even to delay the progress of plaintiff in escaping from the danger, it never did, in fact, delay him or obstruct him, because he did not get there, and testified that he did not have time to get to the reach.

In each of the cases upon which reliance is placed to sustain this judgment there was a different ground of liability. In the case of *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572, the foreman ordered the servant into a dangerous place against the objection of the servant, who was assured by the foreman that the bank was all right, and the servant, although fearing the danger, encountered it against his will, in obedience to the order. In this case there was no order of the foreman, who was not present and had not been after about 3 o'clock the previous day. In *City of La Salle v. Kostka*, 190 Ill. 130, 60 N. E. 72, the servant was not engaged in removing a wall or bank, but was ordered to work in a ditch which was unsafe for want of support and he had no knowledge of the danger or defect. And in *Western Stone Co. v. Muscial*, 196 Ill. 382, 63 N. E. 664, 89 Am. St. Rep. 325, the servant was injured in consequence of an order to work in a dangerous place where the duty to look out for the bank was imposed upon others, and a machine was provided to strip the bank and prevent its falling. In *Barnett & Record Co. v. Schlapka*, 208 Ill. 426, 70 N. E. 343, the servant was not engaged in removing the wall which fell upon him, and the distinction was there drawn between that case and cases where the safety of servants necessarily varies from time to time as the work progresses and the nature of the work renders the place dangerous. In that case a servant was required to work beside a wall in a tunnel, and was assured that the wall in the tunnel was solid.

We cannot find in the record of this case any evidence fairly tending to prove the cause of action, or which, standing alone and admitted to be true, was sufficient to sustain the verdict. We conclude that the court erred in refusing to give the instruction.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(230 Ill. 9)

CHICAGO & W. I. R. CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—PRELIMINARY PROCEEDINGS—DESCRIPTION.

An estimate stating that it includes labor, material, and other expenses, and then setting out only the items of the concrete gutter on cinders, the combined curb and gutter on cinders, the paving with its various parts, and the adjustment of sewers, without mentioning the grading done, is sufficient under the statute, which requires the estimate to be itemized to the satisfaction of the board of local improvements, since putting the materials in place must have included the necessary grading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 793, 794.]

2. SAME—ASSESSMENTS FOR BENEFITS—ANNULMENT.

Where judgment by default was had upon the original assessment against defendant's property, and thereafter the court, upon hearing objections of other property owners, ordered the assessment roll referred back to the commissioner with directions to recast it on the face thereof but none as to the manner of recasting, the commissioner had no right to file a new roll increasing the assessment on defendant's property, and under 4 Starr & C. Ann. St. 1902, c. 24, §§ 47, 52, pp. 179, 182, which provides for the modification, annulment or confirmation of assessments by the court or the commission under its direction, the court had no right to confirm the second assessment, made up in violation of its order and on the judgment of the commissioner.

Appeal from Cook County Court; W. H. Hinebaugh, Judge.

Application by the city of Chicago to the county court of Cook county for the confirmation of a special assessment against the property of the Chicago & Western Indiana Railroad Company for the paving of Lowe avenue. From an order confirming the assessment, defendant appeals. Reversed and remanded.

William L. Reed and E. P. H. West (William J. Henley, of counsel), for appellant. Charles H. Mitchell (James Hamilton Lewis, of counsel), for appellee.

DUNN, J. Application was made to the county court of Cook county for the confirmation of a special assessment against appellant's property for the paving of Lowe avenue. To the assessment roll originally filed, in which the amount of the assessment against appellant's property was \$7,371.40, appellant filed no objection. It was default-

ed, and judgment entered against it for the amount assessed. Afterward the court entered an order referring the roll back to the commissioner, with directions to recast it on the face thereof in red ink, but giving no directions as to the manner in which it should be done. Some weeks later a new roll was filed, assessing appellant's property \$10,456, to which the defendant filed objections. It also made a motion to strike the recast assessment roll from the files. This motion was overruled, as well as all of appellant's objections, and an order was made confirming the assessment against appellant's property, from which this appeal is prosecuted.

It is contended that the estimate of the cost of the improvement is not sufficient, because it does not include the grading. The estimate is as follows:

Granite concrete gutters on cinders, 100 lineal feet at 45c.....	\$ 45 00
Granite concrete combined curb and gutter on cinders, 5,270 lineal feet at 75c.....	3,952 50
Re-pressed vitrified paving brick on two inches of sand and six inches of Portland cement concrete, joints filled with Portland cement grout, surface dressed with one-half inch of sand, 8,240 sq. yards, at \$2.75	22,660 00
Adjustment of sewers, catch-basins and manholes, and constructing two new basins.....	1,342 50
Total	\$28,000 00

Appellant proved that the grade of the surface of Lowe avenue was practically the same as that of the pavement provided for by the ordinance, and that the cost of the grading necessary to put the street in condition to receive the pavement would be \$1,648. The statute requires the estimate to be itemized to the satisfaction of the board of local improvements, and this court has held that it must be itemized sufficiently to give the owners of property a general idea of what each of the substantial component elements of the improvement is estimated to cost. *Doran v. City of Murphysboro*, 225 Ill. 514, 80 N. E. 323; *Lyman v. Town of Cicero*, 222 Ill. 379, 78 N. E. 830; *City of Peoria v. Ohl*, 209 Ill. 52, 70 N. E. 632. The estimate divides the improvement into four substantial component elements: The concrete gutter on cinders, the combined curb and gutter on cinders, the paving with its various parts, and the adjustment of sewers, etc. We do not think the grading constitutes a substantially different component part of the improvement, which must be separately itemized. Grading or excavation is a part of each of the four items of the estimate. No part of the material therein specified can be applied to this improvement without the labor of putting it in place. The estimate is preceded by the statement that it includes "labor, material, and all other expenses." It must, therefore, have been based upon the various items of material in place in the

completed work, and must have included the necessary grading. The estimates in the cases of *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097, and *Connecticut Mutual Life Ins. Co. v. City of Chicago*, 217 Ill. 352, 75 N. E. 365, were substantially the same as the estimate in this case and were held sufficient. In *City of Chicago v. Singer*, 202 Ill. 75, 66 N. E. 874, the estimate stated that it included "labor, material, and all other expenses attending the same." The item therein of curbstones at 60 cents per lineal foot was held to include the labor, material, and all other expenses attendant upon putting the stone in place and filling back of it with earth, as required by the ordinance. We regard the estimate as sufficient.

An assessment roll was made and returned, to which various property owners other than appellant filed objections, upon the hearing of which the roll was referred back to the commissioner, with directions to recast the same on the face thereof in red ink, but without determining the manner in which it should be recast. The commissioner, instead of recasting the roll on its face, returned an entire new roll. The court overruled appellant's motion to strike this roll from the files, and sustained appellee's motion that the court adopt said recast assessment roll, and this action of the court is assigned as error. By sections 47 and 52 of the local improvement act (4 Starr & C. Ann. St. 1902, pp. 179, 182, c. 24) the court is authorized to inquire into the proceeding in a summary way; to revise and correct the assessment; to change or modify the distribution of the total cost between the public and property benefited, and also to change the manner of distribution among the parcels of private property, so as to produce a just and equitable assessment; to modify, alter, change, annul, or confirm any assessment returned; and to take all such proceedings and make all such orders as may be necessary to make a true and just assessment of the cost of such improvement according to the principles of the act. It may, if necessary to make a just and equitable assessment, annul the whole assessment. The assessment is to be made in the first place by the superintendent of special assessments. The court has no power to make an original assessment. After the roll has been returned to the court the superintendent of special assessments has no power to change an assessment except upon the order of the court. Power over the assessment is then vested in the court. Its power is judicial, and not arbitrary. The court may modify, alter, or change, the assessment in such manner as it deems right and render judgment accordingly. The court has the power to make the corrections or changes, or to determine, in general, the manner in which the changes shall be made, and refer the assessment roll to the superintendent of special assessments for revision and correction. If the court

does refer the roll to the superintendent of special assessments, it must determine, in general, the manner in which the corrections or changes shall be made; and, since the action of a court can only be shown by its record, the determination of the manner in which the changes shall be made must be incorporated in the record, otherwise neither the superintendent of special assessments nor the owners of property have any means of knowing what changes are required to be made. The property owner has no means of limiting the changes to those directed by the court, for he has no means of showing what they were. Nor has the court any means of knowing, if another judge than the one who made the order happens to be presiding. The changes are to be made in accordance with the manner which the court may have determined. The court has no authority to refer the roll back to the superintendent to make a new assessment according to his discretion. It has no authority to direct the roll to be recast by the superintendent in the exercise of his own judgment. The court may direct such changes to be made as it may see fit in its judgment and discretion, and the superintendent may make such changes under the order of the court; but he can make no others. He can make no changes on his own judgment. If the court directs the assessment to be recast, it must determine, in general, the manner in which it must be done. In this case a new assessment roll was returned, showing a reduced assessment on a very large number of property owners and a very much increased assessment on appellant's property. Whether this was in accordance with the manner determined, in general, by the court cannot be known. In fact, the court did not determine the manner; for its record falls to show that it did. The superintendent of special assessments had no right to make this additional assessment on appellant's property, except in accordance with the order of the court, and the record shows no such order.

Since the case of *Schemick v. City of Chicago*, 151 Ill. 336, 37 N. E. 888, in which it was said that it must be presumed that the court acted, in ordering the recasting of the assessment, within the power conferred, section 33 of the local improvement act there referred to has been replaced by section 47 of the act now in force, which requires the court, in referring the assessment roll to the superintendent of assessments for correction, to determine the manner in which the assessments shall be made. The court had no right to adopt the second assessment roll. The court has no right to make an original assessment. Upon a hearing it may, for sufficient cause shown, change an assessment; but it cannot do so arbitrarily. The original assessment roll had been returned. Appellant had made no objection, and had been defaulted. The court had no right to say it would arbitrarily raise the assessment \$3,000,

and require appellant to defend against that, instead of the one actually made against its property. This assessment roll was made without any authority of law.

The court should have sustained appellant's motion to strike the second assessment roll from the files. For its error in not doing so the judgment of confirmation is reversed, and the cause remanded.

Reversed and remanded.

(229 Ill. 481.)

CHICAGO UNION TRACTION CO. et al. v. ROBERTS.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CARRIERS—INJURIES TO PASSENGER—ACTION—PLEADING—VARIANCE.

In a personal injury action against a street railway company, evidence that the car jerked, and threw plaintiff against the seat and out, and that he struck something on the way to the ground, he thought the upright post of the end of the seat, was no variance from the declaration's allegation that he was thrown against the seats and other parts of the car.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1281.]

2. EVIDENCE—EXPERT OPINIONS—GROUND OF ADMISSION.

Expert witnesses may not be called upon to decide questions of fact; their opinions being admitted to enable juries to draw inferences which their want of knowledge would otherwise prevent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2308.]

3. SAME—MEDICAL OPINIONS.

Where, in a personal injury action, there was an issue whether plaintiff's condition was due to traumatism or other causes, a hypothetical question asked a physician, assuming that plaintiff was healthy and normal before the accident, that he received the injuries the physician saw, and that he was in the condition the physician saw from that time on, and asking for an opinion as to whether plaintiff's present condition was due to traumatism or other causes, was not objectionable as invading the jury's province.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2308.]

4. SAME—FORM OF ANSWER.

Where, in a personal injury action, there was an issue whether plaintiff's condition was due to traumatism, or other causes, it was immaterial whether an expert testified that the injury caused the condition, or that it might have caused it, since in any event the testimony was merely an opinion; it remaining for the jury to determine the fact.

5. SAME—BASIS.

An expert witness may answer a hypothetical question partly based upon testimony he has heard.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2366, 2367.]

6. APPEAL—REVIEW—OBJECTIONS NOT RESERVED.

An objection that the basis of a hypothetical question is improper cannot be urged on appeal, where no special objection was made below, but only a general objection that it called for incompetent testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1141.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; L. C. Ruth, Judge.

Action by David Roberts against the Chicago Union Traction Company and others to recover for personal injuries. A judgment for plaintiff was affirmed by the Appellate Court, and defendants appeal. Affirmed.

This was an action on the case in the circuit court of Cook county by appellee, David Roberts, against appellants, the Chicago Union Traction Company, West Chicago Street Railroad Company, and Chicago West Division Railway Company, to recover for personal injuries. About 7 o'clock on the morning of September 4, 1902, appellee was a passenger on the second car of a cable train, consisting of a grip car and two trailers. At a point on Milwaukee avenue between Girard street and Fontenoy court the grip struck an iron manhole cover in the track, causing a sudden stop of the train, throwing appellee from his seat and into the street, and injuring him. The amended declaration consisted of two counts; the first charging negligence, generally, in the control and operation of the car, railroad and tracks, and the second charging that appellants negligently permitted and suffered the track to be and remain in bad and unsafe repair and condition, by reason whereof the train came to a sudden stop, and the appellee was thrown with great force and violence against the seats and other parts of said car, and injured. Judgment was rendered against appellants for \$7,500, which has been affirmed by the Appellate Court for the First District, and a further appeal is prosecuted to this court.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellants. Richolson & Levy (C. Stuart Beattie, of counsel), for appellee.

DUNN, J. (after stating the facts as above). Counsel for appellants have wasted labor in discussing the evidence to the extent of nearly two-thirds of their printed argument. On the record no question is presented to this court as to the liability of appellants or the amount of the damages, unless error has intervened in receiving or rejecting evidence or in the instructions to the jury. It is claimed that there is a variance between the declaration and the proof, inasmuch as the declaration charges that the plaintiff was thrown against the seats and other parts of the car, while it is said that the evidence is that he shot directly from his seat to the pavement, without striking any part of the car. The plaintiff himself was the only witness who testified on this point, and he said that the car ran into something, jerked, and threw him against the seat and out; that he struck something on the way to the ground—he thought the upright post opposite him, at the end of the seat. This evidence was not variant from the declaration.

Dr. Golden, a physician who treated appellee on the day of his injury and for some

months thereafter, was examined as a witness, and testified at length as to the injuries from which appellee was suffering immediately after the accident and his symptoms and condition to the time of the trial. He was then asked a hypothetical question, assuming that appellee was a healthy, normal man previous to the accident, and that he was thrown and received the injuries which the witness saw, and was in the condition which the witness saw from that time on, and concluding with the inquiry what the witness' opinion would be as to whether the appellee's present condition was due to traumatism or to other causes. Appellants objected to the question on the ground that it invaded the province of the jury, but their objection was overruled, and the witness answered, "It was undoubtedly due to the injuries which he received." It is insisted that it was error to overrule the objection to this question. It is not controverted that appellee was thrown from the car by its sudden stoppage, and was injured. There was much evidence as to the extent of his injuries and as to the various ailments with which he has since been afflicted. He claims to have continually suffered, as a result of his injuries, from a complication of diseases which permanently disable him, while appellants insist that his injuries were comparatively slight and their effect was merely temporary. The question objected to did not concern the cause of appellee's injuries. It was in regard to the relation between his assumed injury and his condition as observed by the witness. It is not the province of an expert to act as judge or jury. He cannot be called upon to decide a question of fact. The object of a hypothetical question is to obtain the opinion, upon a subject not within the knowledge of men of ordinary experience, of one who by a previous course of habit or study has acquired a knowledge of that subject. The hypothetical statement of facts must be taken to be true. The opinion is permitted to be given to enable the jurors to draw the inferences from the evidence which their want of knowledge would otherwise prevent. In this case the question was whether the appellee's condition was due to traumatism or other causes. It was a question for the jury to determine, but it was impossible for them to answer without hearing the opinions of physicians. These opinions did not invade the province of the jury. *City of Chicago v. Bork*, 227 Ill. 60, 81 N. E. 27; *City of Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23; *City of Chicago v. Didier*, 227 Ill. 571, 81 N. E. 698. It is entirely immaterial whether the witness testified that the injury was the cause of the condition, or that the injury was sufficient to cause the condition or might have caused it. In any event, the testimony was merely the opinion of the witness, given as such, upon a state of facts assumed to be true. It still remained for the jury to determine the facts, and the opinion was never-

theless an opinion only, whether it states what did cause the condition or what might cause it. The question may be asked in either form. *City of Decatur v. Fisher*, 63 Ill. 241; *Camp Point Manf. Co. v. Ballou*, 71 Ill. 417; *Louisville, New Albany & Chicago Railway Co. v. Shires*, 108 Ill. 617; *Illinois Central Railroad Co. v. Latimer*, 128 Ill. 163, 21 N. E. 7; *City of Chicago v. Didier*, supra. The testimony here under discussion is not like that held incompetent in the case of *Illinois Central Railroad Co. v. Smith*, 208 Ill. 608, 70 N. E. 628, where the witnesses were asked, from their examination of the injured foot, to state how the injury must have been made. That evidence was held incompetent for three reasons: "First, that the matter involved no particular science, skill, or knowledge in order to formulate the opinion given; second, that the matter could have been concisely and lucidly described to the jury; and, third, that the testimony, though in form an opinion, was in reality the statement of the very fact the jury was to determine."

Dr. Price heard Dr. Golden's testimony and was afterward called as a witness. Having answered a hypothetical question, he was then asked whether, taking into account the testimony he had heard, along with the hypothetical question, the condition testified to was due to traumatism or disease and whether it was permanent. It is insisted that this question was incompetent, because based, in part, upon the testimony which Dr. Price had heard. The witness was not called upon to decide any controverted question, but was asked to assume the truth of the testimony he had heard. The question was competent, because it assumed the truth of the facts testified to and asked the opinion of the witness on that state of facts. *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *City of Chicago v. Didier*, supra. The objection to the question was the general one that it called for incompetent testimony. If it was thought the basis for the hypothetical question was improper, the objection should have been pointed out, so that the improper matter might have been eliminated. The special objection, not having been made on the trial, cannot be insisted upon here. *Elgin, Aurora & Southern Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436.

The remaining objections to evidence we have carefully considered in connection with the record and will not discuss in detail. We do not think any substantial error occurred in the rulings of the court in regard to the evidence.

The refusal of the third and fourth instructions was proper, in view of the sixteenth instruction, which took from the jury the consideration of the manner of construction of the manhole and manhole cover. There was no evidence in regard to doctors' bills or attorneys' fees, and the fifth and

sixth instructions were therefore rightly refused.

The judgment is affirmed.

Judgment affirmed.

(229 Ill. 606)

ILLINOIS CENT. R. CO. v. JENNINGS.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. APPEAL — OBJECTIONS IN INTERMEDIATE COURT.

Where the trial judge resigned before signing the bill of exceptions, which was thereafter signed by one of his associates, and not his successor, and the record shows that this irregularity was in no manner presented to the appellate court, a motion that questions arising upon the bill should not be considered on account of the irregularity in signing will not be entertained on appeal to the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4281.]

2. CARRIERS — CONTRIBUTORY NEGLIGENCE — ACTS BY DIRECTION OF CARRIER'S EMPLOYÉS.

Plaintiff's testimony that the conductor was in charge of the train, and was giving orders in connection therewith, and had authority over the train, and went with plaintiff to the engine, does not show authority on the part of the conductor to waive a written contract providing that plaintiff "shall, while the train is in motion, ride in the caboose attached to the train conveying the stock," since, to prove such a waiver, it rested on plaintiff to affirmatively show that it was within the apparent scope of the conductor's authority to waive the benefit of the contract, and that plaintiff did not know or have reasonable grounds to believe that the conductor was exceeding his authority.

3. SAME.

A conductor of a freight train does not, by virtue of his employment, have authority, either real or apparent, to permit passengers upon a train to ride upon the engine under any ordinary circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1357, 1360.]

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Marion County; William M. Farmer, Judge.

Action for personal injuries by Frank E. Jennings against the Illinois Central Railroad Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

W. W. Barr, R. J. Stephens, and F. M. Youngblood (J. M. Dickinson, of counsel), for appellant. C. E. Jennings, Frank F. Noleman, and W. F. Bundy, for appellee.

SCOTT, J. This is an appeal from a judgment of the Appellate Court for the Fourth District, affirming a judgment of the circuit court of Marion county, recovered by the appellee against appellant in an action on the case for personal injuries sustained by appellee while riding on one of appellant's freight trains. After the trial in the circuit court, and before the bill of exceptions was signed, the circuit judge before whom the case was tried resigned, and the bill of exceptions was thereafter signed by one of

his associates, and not by his successor; and appellee urges that questions which arise upon the bill of exceptions should not, for that reason, be considered. This matter should have been presented in the Appellate Court, by a motion to strike or otherwise. It does not appear by the abstract that this course was pursued, and for that reason the point will not be considered here.

This case was once before in this court, and was disposed of at the October term, 1905. The opinion then rendered is found in 217 Ill., at page 140, 75 N. E., at page 457. Following judgment by this court, the case was again tried in the circuit court upon the same pleadings, and the evidence upon the second trial in that court was substantially the same as upon the first trial, except with reference to one matter, which will hereinafter be discussed. The averments of the pleadings and the facts as shown by the evidence, with the exception just noted, may be ascertained by reference to the former opinion of this court. It is therefore unnecessary to restate them here. Upon the last trial in the circuit court each party offered additional evidence for the purpose of showing to the jury whether the conductor had authority, or apparent authority, to waive and modify the contract by virtue of which appellee was a passenger on the train, and which provided that he "shall, while the train is in motion, ride in the caboose attached to the train conveying the stock." Appellant offered evidence, which was not disputed, from which it appears that the conductor did not, in fact, as between himself and his employer, have the right to alter this contract or to waive the provision just quoted. Appellee, for the purpose of showing that the conductor had the apparent authority to permit or direct him to ride upon the engine notwithstanding the contract above quoted, testified as follows: "He was at the time conductor in charge of the train. He was giving orders in connection with the train. I went with him to the engine. I went, because he commanded me to go. He said we would ride on the engine to Pana. He was in charge of the train, and I did not know of anything else to do. He had authority over the train." At the close of all the evidence appellant moved the court to instruct the jury to return a verdict in its favor, and the denial of this motion is assigned as error.

When the case was first tried the court took from the jury the question of the conductor's authority, or apparent authority, to modify or change the contract, by instructing the jury that, if the conductor invited or requested the plaintiff to ride on the engine, the provision of the contract in regard to riding in the caboose while the train was in motion was thereby waived. The instructions to that effect were held to be erroneous by this court; but there was no holding, and no intimation in our opinion, as appel-

lee seems to think, that the evidence in the case was sufficient to sustain a verdict against the appellant, had it been returned by the jury under proper instructions. It was expressly pointed out that "it rested upon the plaintiff to affirmatively show that it was within the apparent scope of the authority of the conductor to waive the benefit of the contract, and that he [appellee] did not know or have reasonable grounds to believe that the conductor was exceeding his authority." Appellee's contract expressly obligated him, if he traveled upon the train, to ride in the caboose. Appellee's testimony to the effect that the conductor was in charge of the train, and was giving orders in connection with the train, and had authority over the train, does not tend to show that the conductor had apparent authority to alter the written contract, or waive the provision thereof by which appellee was required to ride in the caboose. This evidence of the appellee tends only to show that this conductor had the same apparent authority that every conductor has upon every train, and, if it could be said that it tended to show that the conductor had the right to alter or waive the provisions of the written contract, then, if the passenger did not know whether the conductor had authority to waive or alter the provisions of the contract, there would be no practical difference in the situation of the carrier in a case where the conductor did not, in fact, have authority to alter or waive the contract, and one in which he did have that authority, because, in every instance where he did not have the authority, indisputable evidence tending to show that he had apparent authority of that character could be introduced, by showing that he was engaged in the performance of the ordinary duties of a conductor, which, in practice, would leave the carrier in the same position as though the conductor, in fact, had the power to change or waive the contract.

A conductor of a freight train does not, by virtue of his employment, have authority, either real or apparent, to permit passengers upon a train to ride upon the engine under any ordinary circumstances. 4 Elliott on Railroads, §§ 1580, 1632; Thompson on Negligence, § 2943. In the existence of an emergency, as where, for instance, there was no caboose in the train, the rule might, perhaps, be otherwise. The language in Chicago & Alton Railroad Co. v. Michle, 83 Ill. 427, relied upon by appellee, was not necessary in the decision of that case; and the court, in using it, evidently did not have in mind a case where the passenger was bound by an express contract to ride only in the car provided for carrying passengers. There is no proof in the present record which tends to show that appellee was rightfully upon the engine, and, if he was not rightfully there, appellant owed him no duty, except to refrain from wantonly or willfully injuring

him. The jury should have been directed to return a verdict for the defendant.

The judgment of the Appellate Court and the judgment of the circuit court will be reversed, and the cause will be remanded.

Reversed and remanded.

FARMER, J., took no part in the decision of this case.

(229 Ill. 405)

EVANS-MONTAGUE COMMISSION CO. v. SPAULDING.

(Supreme Court of Illinois. Oct. 23, 1907.)

STIPULATION—EFFECT.

In a garnishment proceeding, a stipulation between plaintiff and defendant that a certain manuscript contained a transcript of the testimony of witnesses taken in another proceeding was ineffectual to establish the fact that such manuscript did contain a transcript of the evidence as against the garnishee not a party to the stipulation.

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, St. Clair County; B. R. Burroughs, Judge.

Action by the National Live Stock Bank of Chicago against H. B. Spaulding and the Evans-Montague Commission Company, garnishee. From the judgment the garnishee appeals. Reversed.

The National Live Stock Bank of Chicago, the beneficial appellee, brought suit in attachment in the circuit court of St. Clair county against H. B. Spaulding and summoned the Evans-Montague Commission Company, the appellant, as garnishee. Written interrogatories filed by the plaintiff were answered by the garnishee, and to the truthfulness of its answers plaintiff filed its denial. Spaulding was served by publication and defaulted, and judgment was entered against him in favor of plaintiff for the sum of \$14,543.19. A jury trial was had on the issues raised by the answers and denial filed thereto. At the close of all the evidence the garnishee moved the court for a peremptory instruction to the jury to find the issues in its favor. This motion was denied. A verdict was returned in favor of plaintiff and against the garnishee for \$7,250. The court, after overruling a motion for a new trial, entered judgment on the verdict. The garnishee appealed from the judgment of the circuit court to the Appellate Court for the Fourth District, and from the judgment of that court affirming the judgment of the circuit court this appeal is prosecuted.

On November 10, 1902, and for a number of years prior thereto, Spaulding was extensively engaged in the cattle business in Texas and Indian Territory. On that date he executed a chattel mortgage, covering 6,371 head of cattle of various ages, to the Strahorn-Hutton-Evans Commission Company to secure an indebtedness to it of \$164,433.76, as evidenced by a number of notes which

became due May 10, 1903. The brand owned by Spaulding was known as the "Lazy S" brand. About 2,800 of the mortgaged cattle were marked with that brand, and the remainder with other brands. They were all in Spaulding's Cloud Creek pasture, in Indian Territory. On October 23, 1903, the mortgage and notes secured by it were sold and assigned by the commission company to the National Live Stock Bank of Chicago. During the same month Spaulding sold to J. A. Todd 1,003 head of one and two year old cattle, all of which bore Spaulding's brand, and none of which seem to have been included in the Spaulding mortgage. They were rebranded by Todd, and thereafter kept in the Tom Flint pasture, about 12 or 14 miles from the Cloud Creek pasture, until December, 1904, when they were taken by Todd to Denison, Tex., to be fed for market. In November or December, 1903, Spaulding having become insolvent, the agent of the bank, a man by the name of Gray, foreclosed the mortgage. He could only find 3,438 head of cattle covered by the mortgage, the most of which were in the Cloud Creek pasture. He took possession of these cattle for the bank. They were sold and the proceeds thereof applied on the indebtedness to the bank, which has never been entirely satisfied. After the assignment of the mortgage and notes to the bank the commission company was dissolved, and Mr. Evans, who had been an officer of that company, organized the Evans-Montague Commission Company. Todd, having become indebted to the last-named commission company, executed to it a mortgage on a large number of cattle, including the cattle bought from Spaulding. In the latter part of March, 1905, he shipped to the company several consignments of cattle, among which were part of the cattle bought from Spaulding. As the cattle were sold Todd was credited by the company with the proceeds on his indebtedness. After the foreclosure of the Spaulding mortgage Gray continued his search for the missing Spaulding cattle and was at the National Stock Yards in East St. Louis after the Todd shipments arrived, and he, together with one E. H. Berry, a cattle inspector at the stock yards, discovered, as they testify, among the cattle shipped by Todd, 390 head of steers four years old or older bearing the Spaulding brand, 210 of which are claimed by the bank to be cattle then owned by Spaulding. These 210 cattle were sold, with the others, by the Evans-Montague Commission Company and the proceeds applied on Todd's indebtedness to it. The bank contends that the garnishee is liable to Spaulding for the amount realized from the sale of these 210 steers.

Appellant urges, among other alleged errors: (1) That the court erred in passing on objections to evidence; (2) that the court erred in refusing to direct a verdict for the garnishee at the close of all the evidence.

Victor Koerner and B. H. Canby, for appellant. Wise & McNulty (Preston C. West, of counsel), for appellee.

SCOTT, J. (after stating the facts as above). In this suit the National Live Stock Bank, the beneficial appellee, recovered a judgment against Spaulding, the nominal appellee here, by default. There was then a trial of the question whether the commission company, the garnishee, was indebted to Spaulding in any amount which could be reached by garnishee process, and that trial, as above stated, resulted in a judgment against the garnishee for \$7,250. The theory of the bank in this court is that among the cattle which Todd shipped to the garnishee were 210 steers four years old or over which did not belong to Todd, but which were the property of Spaulding; that the garnishee having sold these cattle and having the proceeds in its possession was liable for the same to Spaulding, and in this suit should be required to respond as garnishee. The sum for which the judgment was rendered was the amount realized from the sale of the 210 cattle. Appellant questions the action of the court in overruling its motion, made at the close of all the evidence, for an instruction directing the jury to return a verdict in its favor, and insists that there is no evidence tending to show that these cattle belonged to Spaulding at the time it received them.

Spaulding's chattel mortgage, now held by the bank, covered several hundred steers which would have been four years old and several hundred which would have been five years old in March, 1905, when Todd's shipments were received by appellant, all branded with the "Lazy S," and those representing the bank state that when the Spaulding mortgage was foreclosed many steers were not found. Appellant's contention is the 210 cattle in question were part of the two bunches, one containing 789 head and the other 214 head, aggregating 1,003 head of cattle, which Spaulding sold Todd in October, 1903. The bank endeavored to prove that among the cattle sold by Spaulding to Todd there were, at the most, but 180 that could have reached the age of four years by the latter part of March, 1905. When the Todd shipments were received in the yards at East St. Louis, Berry and Gray, who testified for the bank, stood opposite an open 12-foot gateway through which the cattle were driven and counted the steers which, in their judgment, were four years old or over, and found the number to be 390. The other cattle shipped by Todd were younger. Deducting from the 390 the 180 which the bank figures Todd may have then owned of that age of those which he purchased from Spaulding, leaves the 210 head for which the recovery was had in this suit and which the bank urges were the property of Spaulding when received by ap-

pellant. The entire 390 head had been in Todd's possession and were by him delivered to appellant, and from the testimony of Spaulding and Todd it would seem that all these steers were among the cattle purchased by Todd from Spaulding in October, 1903.

For the purpose of showing that there were but 180 cattle of this age among those which Todd had purchased from Spaulding, the bank introduced in evidence, over the objection of the garnishee, what purported to be transcripts of portions of the testimony of Spaulding and Todd taken in a bankruptcy proceeding brought by certain creditors of Spaulding in the Western district of Indian Territory at Muskogee, Ind. T., from which it appears that Todd testified, in speaking of the bunch of 789 cattle which he purchased from Spaulding, "If I am not mistaken they claimed 60 head two years old and the rest yearlings," and from which it appears that Spaulding made a statement not substantially different. Spaulding testified in open court, on the part of appellant, in the trial of the case at bar, that it was his understanding that of the other bunch of 214 head which he sold to Todd 120 were two years old and the remainder yearlings. When he was so on the stand in this case he stated that he could not tell how many of the 789 were two years old when they were sold. He was then asked, on cross-examination, if he had not in the bankruptcy proceeding testified that of the bunch of 789 head 60 were two year olds and the balance yearlings, and he replied that he had, but that his testimony in that regard was an estimate based on the statement made by the cowboys who had shipped the cattle from Texas prior to their sale to Todd. Cattle that at the time of the sale to Todd in October, 1903, were yearlings could not have been four years old in March, 1905, and cattle that were then two years old could not have been five years old in March, 1905, but might have been between four and five years of age at that time. Consequently, if in one lot purchased by Todd there were but 60 cattle that were then two years old, and in the other lot but 120 that were then two years old, and the remainder in both lots were yearlings, Todd, in March, 1905, could not have been the owner of more than 180 head of cattle four years old or over which he had obtained from Spaulding in the two lots purchased in October, 1903.

The alleged transcripts of parts of the testimony of Todd and Spaulding taken in the bankruptcy proceedings were admitted under stipulations. The stipulation as to the transcript of a part of the Todd testimony was entitled in the cause and then continued in this language: "It is hereby agreed by and between the parties to the above-entitled cause that the attached sheets numbered from 1 to 7, respectively, being from the testimony of J. A. Todd in the bankruptcy proceedings of National Live Stock Bank of Chi-

cago, Illinois, et al., against H. B. Spaulding, heretofore taken before the referee in bankruptcy for the Western district of the Indian Territory, at Muskogee, Ind. T., may be read in evidence at the trial of the above entitled cause in the circuit court of St. Clair county, Illinois, subject only to objections for relevancy, competency, and admissibility." The stipulation that accompanied the Spaulding transcript was of like tenor. Both stipulations were signed by attorneys for the bank and by attorneys for Spaulding. Neither was signed by or on behalf of the garnishee. When the transcripts were offered objection was made and several grounds of objection stated, one of which was that the garnishee was not a party to the stipulations. The objections were overruled, and the manuscripts accompanying the stipulations admitted in evidence.

Waiving all other objections, it is clear that Spaulding and the bank could not stipulate that certain manuscript contained a transcript of the testimony of witnesses taken in another proceeding and thereby establish the fact that such manuscript did contain a transcript of such evidence, as against the garnishee. If the evidence was otherwise proper, the garnishee had the right to have the fact that the testimony as recited in the transcript was actually given in the bankruptcy proceeding established by some lawful method. The stipulation of Spaulding and the bank did not lawfully establish that fact as against the garnishee, and the objection to the admission of the alleged transcripts should have been sustained. With such transcripts excluded there would be in the record absolutely no evidence tending to show that in the lot of cattle containing 789 head there were not steers which in March, 1905, would have been four years old or over, in sufficient numbers, when added to those of like age from the lot of 214, to aggregate the 390 head of cattle of that age which were found in the Todd shipments.

As the judgment must be reversed, and the cause remanded, we deem it proper to observe that it appears from the two instructions given at the request of the bank that it was the theory of the circuit court, and of the bank in that court, that if these 210 cattle were included in the mortgage held by the bank the bank was entitled to recover against the garnishee in this suit even if Spaulding had sold these cattle to Todd. Whether these cattle were included in that mortgage was in this suit wholly immaterial, so far as the alleged right of recovery was concerned. This was an ordinary attachment proceeding against a nonresident defendant in which appellant was garnishee. The question was whether it owed Spaulding money which could be reached by garnishee process. If these cattle were sold by Spaulding to Todd, and by Todd delivered to appellant, Spaulding would not have any right of action of any character against the appellant for the value of the cat-

tle, no matter whether they were or were not covered by the mortgage.

For the error in admitting alleged transcripts of the testimony said to have been taken in the bankruptcy proceeding, the judgment of the circuit court and the judgment of the Appellate Court will be reversed, and the cause will be remanded to the latter court.

Reversed and remanded.

(229 Ill. 621)

ELGIN, J. & E. RY. CO. v. LAWLOR.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. RAILROADS—ACCIDENT AT CROSSING—ACTION FOR INJURIES—QUESTIONS FOR JURY.

In an action against a railway company for injury to one struck by a train while driving across a track, *held*, under the evidence that the questions of negligence and contributory negligence were for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1152-1192.]

2. SAME—DUTY TO LOOK AND LISTEN.

Failure of one driving across railway tracks to look and listen is not negligence as a matter of law, since there may be circumstances excusing such failure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1169-1187.]

3. WITNESSES—IMPEACHMENT—EVIDENCE—ADMISSIBILITY.

Where, in an action against a railway company for injury to one struck by a train while driving across a track, his companion, as his witness, had been asked if he did not tell another he and plaintiff saw the train coming and heard the whistle, but could not stop the horse in time, the company could not ask such other person, as its witness, what plaintiff's companion said to him; its only right being to ask him whether the statements repeated to such companion were made.

4. APPEAL—HARMLESS ERROR—REMARKS OF COURT.

Where the court properly excluded a question for defendant, his improper suggestion that there was some question whether the evidence should go in as part of the res gestae was harmless to defendant, where the question was afterwards repeated and answered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4134.]

5. SAME—EXCEPTIONS—NECESSITY FOR TAKING.

The statement of a court in excluding testimony may not be complained of on appeal, where no exception was taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1499.]

6. TRIAL—CONDUCT OF COURT—AFFECTING WITNESS' CREDIBILITY.

It is improper for a court to say anything affecting a witness' credibility, but, where a witness became confused, the court's conduct in asking him if he was certain about his testimony, and in stating that it seemed incredible, was not error, where witness was not discredited, and upon reflection found he was mistaken and corrected his statement.

7. RAILROADS—CARE REQUIRED AT CROSSINGS.

Aside from statutory requirements, persons handling a train approaching crossings must use reasonable care, and what is such degree of care is a question of fact depending upon local conditions; one of the material conditions being the extent to which the crossing is used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 981, 1160.]

8. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Error in instructing that railway trains in approaching a public crossing in a thickly settled district must use a higher degree of care than in approaching public highways in a sparsely settled district, but not stating what precautions should be taken at either kind of crossing, or what the company ought to have done, was harmless.

9. EVIDENCE—WEIGHT—NUMBER OF WITNESSES.

Among the other things to be considered by a jury in determining the preponderance of testimony is the number of witnesses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2450-2452.]

10. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Error in omitting from an instruction on the things to be considered in determining the preponderance of evidence the element of number of witnesses is harmless, where the question of numbers is unimportant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3 Appeal and Error, § 4224.]

11. NEGLIGENCE—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for injury to one crossing a track and struck by a train, a correct instruction on plaintiff's duty was not rendered prejudicial because prefaced by the statement that he was not required to exercise an extraordinary degree of care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 382-399.]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Will County; A. O. Marshall, Judge.

Personal injury action by Michael Lawlor against the Elgin, Joliet & Eastern Railway Company. From a judgment of the appellate Court for the Second District, affirming a judgment for plaintiff, defendant appeals. Affirmed.

J. L. O'Donnell and T. F. Donovan (Knapp, Haynie & Campbell, of counsel), for appellant. Barr, Barr & Barr, for appellee.

CARTWRIGHT, J. The Elgin, Joliet & Eastern Railroad crosses a public highway known as East Cass street, in the town of Joliet, near the city limits of the city of Joliet. The highway runs somewhat north of east, and the railroad slightly west of north, so that they intersect at right angles. At or soon after six o'clock in the evening of September 22, 1904, the appellee, Michael Lawlor, was driving east on said highway with a horse and old open buggy, and a man named Frank Hurley was with him. There were three tracks at that place, and as appellee came toward the crossing an engine of the Michigan Central Railroad Company was pushing a train of 15 box cars of that road from the south on the east track, to deliver them at the yards of the appellant north of the crossing. The train crew were employees of the Michigan Central Railroad Company, and two of them were standing on the north end of the first car approaching the crossing. The west rail of the west track was about 40 feet west of the middle of the east track, and after coming to the west track there was no obstruction to the view

of the approaching train. The appellee drove across the west track and middle track, and as he came upon the east track the buggy was struck by the train. Appellee was thrown out and sustained a number of bruises, and the buggy was shattered. This suit was brought by him in the circuit court of Will county to recover damages for his injuries, and he charged appellant with negligence of the train crew in handling and driving the engine and cars and with neglect to ring a bell or blow a whistle, as required by the statute. The plea of appellant was the general issue, and upon a trial there was a verdict finding appellant guilty and assessing appellee's damages at \$1,650. The Appellate Court for the Second District affirmed the judgment.

It is first contended that the circuit court erred in refusing to direct a verdict of no. guilty at the request of the defendant. The question presented by that request was one of law, and we are of the opinion that the court did not err in refusing to declare, as a matter of law, that there was no evidence fairly tending to prove a neglect of the statutory duty charged in the declaration, or that the evidence proved plaintiff guilty of negligence as a conclusion of law. There was evidence for the defendant that plaintiff was intoxicated; that he was whipping his horse a block and a half from the crossing; that he dropped his whip in the road and went upon the crossing at a run or gallop or very fast trot; that he did not look either way or notice the approaching train; and that after the accident he made a statement showing that he could not hold the horse. This evidence was contradicted by testimony for the plaintiff that he had not drunk enough to affect him; that he drove upon the crossing at a moderate gait; that the day was cloudy, and it was getting dusk; that plaintiff heard engines up north and looked toward the north; that it did not occur to him that a train might be coming from the south; but that he looked in that direction also. There was also evidence tending to prove that no statutory signal was given, although the fact was disputed. Hurley said that he did not look for trains or pay any attention to them, but looked on his own side, which was the north. It is insisted that it would have been physically impossible for the plaintiff to look toward the approaching train and not see it. Whether that is so or not depends to some extent upon the degree of light at the time. In any event, a failure to look and listen cannot be said to be negligence as a matter of law, since there may be circumstances excusing such failure (*Chicago & Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15; *Chicago & Northwestern Railway Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071), and it is not denied that there may have been engines north of the crossing which attracted plaintiff's attention.

Much complaint is made of the conduct and remarks of the trial court in the presence of the jury. The attention of the witness Frank Hurley, testifying for the plaintiff, had been called to a conversation with Seneca Hammond, and he was asked if he did not say to Hammond, "We saw the train coming up the track and heard the train whistle, but couldn't stop the horse in time," and also that the plaintiff whipped the horse before he got on the track, and that was why he could not stop him. Hammond, being called as a witness for defendant, testified that he asked Hurley how it happened, and Hurley said they were driving so fast they could not stop. He was then asked what, if anything, Hurley said to him. On objection to the question the court said: "No, I don't think we can go into that; and another question is whether it should go in as a part of the *res gestæ*." The court was right in sustaining the objection, for the reason that defendant had no right to call for the conversation by asking what Hurley said to the witness. The only right of the defendant was to ask Hammond whether the statements repeated to Hurley were made, and the question would have been answered by yes or no; but the reason given by the court was not a good one, and what was said about the *res gestæ* was improper. After the ruling, however, the question was repeated and answered, the witness stating everything that Hurley said, and defendant had no cause of complaint. After the witness had given the conversation, counsel for the defendant asked this question: "Give the conversation between you and Mr Hurley." And the court said: "He has." There was no occasion to repeat the conversation, and no exception was taken to what the court said which is now complained of. Hammond made a statement in which he got the order of events confused, and the court asked him if he was certain about it, and stated that it did not seem credible. It is not proper for a court to say anything to affect the credibility of a witness with the jury, but the court intended nothing of the kind in this case, and the effect was not to discredit the witness, who, upon reflection, found that he was mistaken and corrected his statement. A doctor called by the plaintiff testified that the injuries of plaintiff were permanent, and that they were liable to lead to tuberculosis. On cross-examination it appeared that the opinion of the doctor was based, in part at least, upon his knowledge of the fact that brothers and sisters of the plaintiff had died from tuberculosis, and counsel for defendant thereupon moved to strike out all the testimony of the doctor that the injuries were permanent, and that plaintiff would have tuberculosis. The court overruled the objection because it was too broad and included testimony that was proper, but the court then ruled out all the testimony of the witness concerning tuberculosis. There are

some other objections to the conduct and remarks of the court which are of so little importance as not to require particular mention. There was nothing in either that was prejudicial to the defendant.

It is urged that the second, third, fourth, fifth and sixth instructions given at the request of the plaintiff were erroneous, and that the court erred in giving them. The second instruction was as follows: "You are instructed that railway trains approaching a public crossing in a thickly settled district are required to use a higher degree of care than they are required to observe in approaching public highways in a sparsely settled district." Aside from the requirements of the statute, persons handling trains approaching crossings are required to use reasonable care, and what is such degree of care is a question of fact, depending upon the local conditions. One of the numerous conditions which would be material for the consideration of the jury would be the extent to which the crossing is used. The question whether a crossing is much used by the public is proper to be considered, and in the case of *Overtown v. Chicago & Eastern Illinois Railroad Co.*, 181 Ill. 323, 54 N. E. 898, which is cited in support of the instruction, the fact was regarded as material. In that case the trial court refused to allow the plaintiff to prove that the crossing was in a thickly settled and populous part of Chicago, and that the street was constantly traveled over by large numbers of people. Even if the instruction had contained a proposition of law, it was abstract in form, and it was not the province of the jury to compare the duties of the defendant at this crossing with its duties at some other crossing. It did not undertake to inform the jury what precautions should be taken at either kind of crossing, or what the defendant ought to have done; and, while the court ought to have refused it, we do not see how it could have harmed the defendant.

The third instruction was as follows: "The jury are instructed that the preponderance of evidence in a case is not, necessarily, alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved in the trial, and from all the evidence, facts, and circumstances in evidence determine on which side is the weight or preponderance of the evidence." The objection to the instruction is that it told the jury what they were to consider in determining on which side the preponderance lay, but wholly omitted the number of witnesses,

which is one of the things the jury were bound to consider. The element of numbers should be considered by them with all the other things which are mentioned in the instruction. *Gage v. Eddy*, 179 Ill. 492, 53 N. E. 1008; *Chicago Union Traction Co. v. Hampe*, 228 Ill. 346, 81 N. E. 1027. The instruction did not tell the jury to disregard numbers, but it omitted to enumerate that element among other things to be taken into account. In defense of the instruction it is said that this court has approved the same instruction in other cases. In the case of *Meyer v. Mead*, 83 Ill. 19, an instruction was given stating that the preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to any fact or facts, but in determining where the preponderance is the jury must also take into consideration the opportunities or occasion of the witnesses seeing, knowing, or remembering what they testified to or about, and other things mentioned in the instruction. The objection was that the jury were told they need only consider the number of witnesses and also other matters pertaining to the witnesses; whereas, the facts and circumstances in the case must be considered as well as the number and credibility of the witnesses. That instruction advised the jury to consider the number of the witnesses and also the other things contained in it. The question here involved was not considered and could not have been. In *Chicago & Alton Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406, the instruction was as follows: "That the preponderance of evidence may not depend entirely upon the number of witnesses testifying on either side of the case." It was argued that the instruction practically told the jury that the greater number of witnesses is no better than the lesser number, but the court said that the instruction impliedly conceded that where other things were equal the greater number must control. In that case there was no recital of things to be considered, and an omission of the important element of numbers. In *West Chicago Street Railroad Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718, an instruction which was in substance the same as the one given in this case was objected to as telling the jury to disregard numbers in determining upon the preponderance of the evidence. It was said that the correctness of the instruction was sustained by the two cases just referred to, which, perhaps, was only correct in a limited sense; but it was said that if the instruction was defective it was cured by instruction No. 18, given for the appellant in that case, which told the jury that the number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of the evidence. The two instructions taken together correctly stated the law. We do not think it can be said that this court has given its

unqualified approval to this instruction, or that it might not be misleading in a case where the question of numbers was important, and no other instruction was given supplementing it. In this case we would not feel justified in reversing the judgment on account of it.

The fourth instruction correctly stated the law as to the degree of care required of the plaintiff, but it was prefaced by the statement that the law did not require of him the exercise of an extraordinary degree of care. The plaintiff was entitled to an instruction informing the jury of the degree of care required of him by the law, and the proper office of an instruction was completely filled by the latter part of the instruction in question. Generally, an enumeration of things which the law does not require, and which is in the nature of argument, is at least of doubtful propriety. It is true, however, that the law did not require of the plaintiff the exercise of an extraordinary degree of care, and the statement is not ground for reversing the judgment.

The fifth and sixth instructions are objected to as assuming facts, or telling the jury, by inference, that certain facts existed. They were accurate statements of the law, and we find in them no assumption of any matter of fact.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(229 Ill. 494)

KIERNAN v. BUSH TEMPLE OF MUSIC CO. et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. LANDLORD AND TENANT—LEASES—BUILDING ORDINANCES.

A lessee is presumed to have equal knowledge with his lessor of provisions of building ordinances in force when the lease is executed.

2. SAME—CONSTRUCTION.

Where the right to use movable scenery in a theater was determined under the ordinances of a city by the method of construction of the building and stage, and did not depend on whether the lessee's amusement license was first or second class, a covenant to furnish the lessee a first-class amusement license did not necessarily contemplate the use of movable scenery and bind the lessor to place the building in such condition that under the building ordinances movable scenery might be used.

3. SAME—BREACH OF CONTRACT BY LESSOR—REMEDY OF LESSEE.

Where the lessee of a theater was damaged by failure of the lessor to furnish him a first-class amusement license as provided by the lease, by reason whereof the theater was closed by the city, as not complying with its ordinances, the lessee's remedy was at law, and not by bill in equity to restrain the lessor from shutting off light and heat from the building on failure of the lessee to pay the rent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 476.]

4. SAME.

Where plaintiff leased a theater from defendant, the lease impliedly warranted the quiet enjoyment of the demised premises; but if,

under any circumstances, plaintiff could resort to equity to set off against the rent damages sustained by a violation of those covenants by one claiming under a superior right, the bill must show that his possession was disturbed by some one other than the public authorities of a city under their police power on account of the violation of the ordinances by the lessee.

5. SAME.

Where the police authorities closed a theater leased by defendants to complainant because he was using movable scenery in a building so constructed that such use was prohibited by the building ordinance, such disturbance was not a breach of the lessor's implied covenant for the quiet enjoyment of the premises by the lessee, and did not give the lessee any legal claim against the lessor for the rent paid in advance or for damages sustained.

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; J. W. Mack, Judge.

Bill by Thomas S. Kiernan against the Bush Temple of Music Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an appeal from the judgment of the Appellate Court affirming a decree of the circuit court in sustaining a demurrer to and dismissing the appellant's bill for want of equity.

The allegations of the bill necessary to an understanding of the questions herein involved are substantially as follows: On and prior to April 30, 1902, Mary J. Bush, B. Frank Bush, and William L. Bush, trustees and executors of the estate of William H. Bush, deceased, owned four lots in the city of Chicago. The title to three of them they obtained by virtue of the will of William H. Bush, deceased. The title to the other they obtained by purchase, as trustees. On the said 30th day of April, 1902, the premises were improved with a building called the "Bush Temple of Music," a part of which was adapted to theater purposes. The portion of the building thus arranged consisted of an auditorium, with its furniture, a stage, equipments therefor, and entrances to and exits from said auditorium and stage. On said April 30, 1902, said trustees above mentioned executed to the Bush Temple of Music Company, a corporation, a 99-year lease on the real estate and buildings thereon. On the 28th of October, 1902, the Bush Temple of Music Company leased to appellant "the auditorium and stage of the Bush Temple of Music of Chicago, lighted and heated, when needed, by the party of the second part (appellant) for evening and afternoon performances, for a term commencing November 24, 1902, and ending June 27, 1903, both inclusive, with the exception of Sundays during said term and Tuesdays and Fridays, up to seven o'clock p. m. (except when a holiday falls on either of said days), during said term, together with stock, scenery and equipment contained in said auditorium and stage, with a first-class amusement license extending during said term, and to furnish printed programs. No seat for any performance during

said term conducted by the party of the second part shall be sold for less than twenty-five cents (25c), and all plays produced by the party of the second part shall be of a high class and equal to those produced by any of the local stock companies in Chicago, and no burlesque, minstrel or vaudeville shows shall be produced during the term of this lease or any renewal thereof." The lease authorized appellant to erect upon the stage anything necessary for carrying on his business, and in the event anything so erected should have the effect of increasing the rate of insurance appellant was to pay the increased amount of insurance. The lease provided for a renewal by appellant for a term of two years, commencing the fourth week in August, 1903, and extending to the third week in June, 1905, for an annual rental of \$9,000. The lease was renewed at the expiration of the first term for two years. The renewal lease was substantially the same in its terms, so far as the questions here involved are concerned, as the original lease, except that it included Sundays, and the rent to be paid was \$14,000 per year, payable quarterly in advance.

The bill also alleges that appellant, during the entire period covered by his first lease, and up to March 14, 1904, of the period covered by the renewal, believed the Bush Temple of Music Company owned the premises and building, and paid all rent to it, and that on said day the attorney for appellees informed appellant the Bush Temple of Music Company had conveyed its interests to Mary Jane Bush, B. Frank Bush, and William L. Bush, trustees under the will of William H. Bush, deceased, and upon investigation the appellant found there had been recorded in the recorder's office, December 15, 1902, a quitclaim deed under date of September 30, 1902, purporting to convey from the Bush Temple of Music Company the premises to the parties above named. The bill further alleges that on the same day said attorney, as agent for Mary J. Bush, B. Frank Bush, and William L. Bush, and also for the Bush Temple of Music Company, informed appellant that such proceedings had been had as that the premises then belonged in fee to Mary J., B. Frank, and William L. Bush as individuals, and it is averred in the bill that the Bush Temple of Music Company owns no property or assets whatever, and has no interest in said auditorium and stage nor in the real estate or improvements thereon, and no interest in the lease or extension thereof.

The bill further alleges that just prior to January 2, 1904, the city of Chicago discovered that the premises leased to appellant had not been constructed in accordance with the requirements of certain ordinances of said city, which are made a part of the bill, and by virtue of its police powers, after notice to the Bush estate, closed the auditorium and theater. On the 18th and 25th days of January, 1904, the city council of the city of

Chicago passed ordinances amending ordinances theretofore passed relating to theaters and places of public amusement, and on the last-named date adopted an order or resolution that persons, firms, or corporations operating theaters who would agree to make such alterations as were necessary to comply with the ordinances not later than September 1, 1904, should be permitted to open and operate their theaters upon certain conditions therein described, upon giving bond to the city in the sum of \$25,000, conditioned for the performance of the requirements of the ordinances within the time named. On the 27th of January, 1904, the Bush Temple of Music Company, by B. F. Bush, president, addressed a communication "to the honorable theater commissioners, city," requesting an early inspection of the Bush Temple Theater, and stated it was desired to comply with the resolution of the council passed January 25th, and agreed to put the theater in such condition by September 1, 1904, as would comply with the ordinances. On February 6, 1904, Mary J., B. Frank and William L. Bush, as principals, and John Gerts, as surety, executed the bond required by the order or resolution of the council and on the same day the bond was approved and permission given to open the theater.

The bill alleges that appellees, upon the closing of the theater by the city, took possession of it for the purpose of putting it in such condition as to comply with the ordinances, and kept possession of it until the 10th day of February, 1904, when appellant was again let into possession to operate the theater, under the permission and authority of the city, until its ordinances were complied with. The bill further alleges that November 30, 1903, appellant paid the Bush Temple of Music Company \$3,500, which was to be paid by the terms of the lease for the second quarter of the year 1903 and 1904, and that he had paid all rent due prior thereto in accordance with the terms of said lease, and charges that appellees failed to furnish him a first-class amusement license, as they were required to do by the lease, for the period beginning January 2, 1904, up to the time of filing the bill, and that they had not complied with the terms of their bond before mentioned. The bill further charges that the Bush Temple of Music Company is under the complete control, management, and direction of Mary J., B. Frank and William L. Bush, who are the officers and directors of said corporation, and that said individuals are, and have been since the beginning of the controversy which resulted in this suit, represented by counsel, who appears for them in this court as their attorney; that said attorney, acting for appellees, informed appellant that it was their intention to not conform to the ordinances and the conditions of their bond; and that they would not make the changes and alterations in the demised premises necessary to comply with the ordi-

nances and the conditions of their said bond. The bill alleges that upon appellees filing the bond before mentioned the city assigned two firemen to attend performances given in the theater by appellant, but that appellees refused to pay for their services, and the city was threatening to revoke the permission under which the theater was being operated unless said firemen were immediately paid for their services.

The bill concludes as follows:

"(23) That notwithstanding the exclusion of your orator from the possession and use of said demised premises from the said 2d day of January, 1904, until the 10th day of February, 1904, and notwithstanding the said defendants have, and each of them has, failed to furnish your orator a first-class amusement license for said premises during the period aforesaid, and notwithstanding that your orator's damages, arising from the failure of your orator's lessor, under said demise, to observe, perform, fulfill, and keep the covenants and conditions in said demise contained on the lessor's part therein to be performed, observed, fulfilled, and kept, are largely in excess of rent claimed to be due, and notwithstanding the said defendants refuse to comply with the terms of said bond as to the payment of firemen and their intention not to make the necessary changes and additions required in said demised premises to make them conform to said ordinances, has demanded of your orator that your orator pay to the said Bush Temple of Music Company, without abatement of any kind, the full rent reserved in said lease, viz., the sum of thirty-five hundred dollars (\$3,500), for and in respect of the third quarterly installment of rent payable under said lease for the year 1903-04, and to enforce said payment the said defendants have caused the said defendant, the Bush Temple of Music Company, to serve upon your orator a notice in writing, which is in the words and figures following, namely: 'To Thomas S. Kiernan: You will please take notice that, unless you pay the rent due from you for the Bush Temple auditorium within five days from the service of this notice on you, your lease for said auditorium will be terminated. (Seal.) Bush Temple of Music Co., B. F. Bush, Pres. Chicago, Ill., March 19, 1904.' And the said defendants, by their aforesaid agent, for the purpose of compelling your orator to pay said sum of \$3,500 without any adjudication by any court of competent jurisdiction in the premises, have threatened that, unless the demand in said notice be complied with within the period therein mentioned the said Bush Temple of Music Company shall and will, on the expiration of said period, shut off the light and heat contracted and agreed in and by said lease to be furnished to the said demised premises during the term thereof and of the extension thereof, as aforesaid.

"(24) That the said defendant the Bush Temple of Music Company is wholly irre-

sponsible, and, if compelled to look to the said Bush Temple of Music Company in any other way than by way of recoupment or set-off against the rent payable under said lease and extension thereof for your orator's aforesaid damages, your orator will be absolutely without remedy to recover the same.

"(25) That if said defendants, or any of them, should execute the threat of the said defendant Henry S. Wilcox to shut off the light and heat from said demised premises, the effect thereof would be to completely destroy the business of your orator, which he has built up at a large expense in money and labor on his part, and would cause him irreparable damage.

"(26) That the rights of your orator will be unduly prejudiced, and your orator will be irreparably damaged, unless the said defendants, and each of them, their attorneys, agents, and servants, be immediately and without notice to them, or any of them, restrained and enjoined from attempting in any manner to forfeit said lease and extension thereof or to declare the same ended, without adjudication by a court of competent and final jurisdiction, upon due notice to your orator, authorizing the same, and until the further order of this court, after such adjudication, from shutting off from said demised premises light and heat, and from suffering or permitting the electric or heat plants which now do furnish and heretofore have furnished light and heat to said demised premises to suspend operation, and from in any manner interfering with, impeding, molesting, or hindering your orator in the prosecution of his business in the said demised premises, as provided in and by said demise."

The bill prayed: "(1) That the defendants, or such of them as are responsible under the lessor's covenants in the demise, specifically perform the covenant to furnish appellant with a first-class amusement license for the demised premises during the rest, residue, and remainder of the term; (2) that the defendants be decreed to comply with the conditions named in their bond given to the city within the period therein mentioned, and put the premises in such condition that a first-class amusement license may be issued; (3) that an account may be taken of the appellant's damages, and that the amount found due be decreed to be satisfied out of the rent reserved under the lease or other property of the trust; (4) that defendants be enjoined from forfeiting the lease and from cutting off light and heat, from impeding, molesting, or hindering appellant in the prosecution of his business in the demised premises."

By an amendment to his bill appellant charged that after the city closed the theater, as averred in the bill, B. Frank Bush obtained from the box office the license theretofore furnished by the Bush Temple of Music Company, which the original bill charged purported to be a first-class amusement license

for the operation of the theater, and that said license was not a first-class amusement license, but was a second-class amusement license, issued by the city October 20, 1903.

Section 99 of the ordinances of said city relating to the subject of theater and amusement licenses in force, as alleged in the bill, at that time, was as follows: "(99) Classification for license.—For the purpose of providing for the licensing and taxing of theatricals, shows, amusements and all public exhibitions for gain, in a just and equitable manner, the same are hereby divided into five classes, which shall be known as the first, second, third, fourth and fifth, as follows: (1) All entertainments of a dramatic or operatic character, including lectures, public readings or statuary, shall belong to and be known as entertainments of the first class; (2) concerts or other musical entertainments, panoramas, performances of any feats of jugglery, sleight-of-hand or necromancy, and exhibitions of any natural or artificial curiosities, shall belong to and be known as entertainments of the second class."

Another amendment specifies the items going to make up the total amount of damages appellant claims to have sustained by reason of the alleged failure of appellees to comply with the terms of the lease.

McArdle & McArdle, for appellant. Henry S. Wilcox (Jesse Wilcox, of counsel), for appellees.

FARMER, J. (after stating the facts as above). The theory of appellant's bill relating to the right claimed by the appellees to turn off the light and heat from the theater and determine the lease for nonpayment of rent, is that the lease bound the lessor to furnish appellant with an auditorium and stage so constructed that appellant would be authorized, under the ordinances of the city, to use movable scenery on the stage in giving performances. Section 164 of the building ordinances of the city is as follows: "Sec. 164. Buildings of class 4 embrace all buildings in which no movable scenery is used upon the stage thereof. Class 5 embraces all buildings in which movable scenery is used." Section 176 prescribes the floor level of the auditorium in buildings of both classes. Section 182 prescribes the construction of the stage upon which movable scenery is to be used. Section 184 provides for a flue pipe over the stage in buildings of class 5. Section 185 provides for an automatic sprinkler in buildings of class 5. There is no direct averment in the bill that the lessor knew or understood appellant desired or intended to use movable scenery on the stage, and that he was leasing it for that purpose and with that understanding. Counsel argue that as the lease was for an auditorium and stage, "together with stock, scenery and equipment contained in said audi-

torium and stage," and fixed the minimum price at which seats should be sold, stipulated that burlesque, minstrel, or vaudeville shows should not be given in the theater, and provided that all plays produced therein should be of a high class, equal to those produced by any other of the local stock companies of the city of Chicago, and required appellant to provide all scenic equipment, and furnished him a carpenter shop in which to produce it, and further bound the lessor to furnish appellant a first-class amusement license, it necessarily follows the use of movable scenery would be required and was contemplated by the parties to the lease, and that the covenants of said lease bound the lessor to furnish the appellant an auditorium and stage so constructed that under the ordinances appellant would be permitted to use movable scenery. Appellant contends that the lessor knew when and how the building, stage, and auditorium were erected and constructed, and that he had a right, in taking the lease, to assume that it was so constructed that he would be authorized to carry on and conduct such performances as were contemplated by a first-class amusement license, and with the use of movable scenery on the stage. There is no averment in the bill when the building and theater were constructed. The allegation is "that on said last-mentioned day, viz., the 30th of April, 1902, said premises were improved with a building called the Bush Temple of Music, * * * and part of said building was adapted to theater purposes." The ordinances of 1898, under which the bill alleges the theater was closed in January, 1904, were by section 176 made to apply only to buildings of "new construction or re-construction or alteration, or improvement of existing buildings." It is impossible to determine from the allegations of the bill when the building had been erected and the auditorium and stage constructed and equipped. If this had been done prior to 1898, then the ordinances of 1898 relating to such buildings would not apply. If it was constructed after 1898, appellant cannot be heard to say he did not know that there were ordinances prohibiting the use of movable scenery, for the reason that he was as much charged with knowledge of the ordinances as the owner of the building. There is no averment of the bill that appellant did not know how the auditorium and stage were constructed, or that the Bush Temple of Music Company made any false representations to him in that regard, upon which he relied and by reason of which he accepted the lease.

We have above set out the substance of the averments of the bill as to the leasing to and use by appellant of movable scenery, and we cannot agree with appellant that these averments must be construed to be allegations that the lease necessarily contemplated the use of movable scenery. The lease did not mention movable scenery, nor is there

anything contained in it from which it must necessarily be inferred that movable scenery was leased or contemplated being used. The covenant of the lessor to furnish appellant a first-class amusement license is of no value as an aid in determining the character of the scenery leased and to be used. Clauses 1 and 2 of section 99 of the ordinance above quoted are the provisions relating to the classification of entertainments as first and second class. It will be seen from this ordinance that appellant's right to use movable scenery did not depend upon whether his license was first-class or second-class. The kind of scenery he was authorized to use was determined by the construction of the auditorium and stage, and not from whether the license was first-class or second-class. It is not claimed by the bill that appellant's possession was disturbed on account of the class of his license. No license could have authorized him to carry on his business in a building not constructed and equipped in accordance with the requirements of the ordinances, and appellant's contention is that the city of Chicago took possession of the theater, under its police powers and by virtue of the ordinances, because the construction did not comply with said ordinances, and not because the lessor had furnished him with a second-class license. If appellant was damaged in any way on account of the failure of the lessor to furnish him a first-class amusement license, his remedy is at law. It must be conceded that the lease impliedly covenanted with appellant for the quiet enjoyment of the demised premises, but, if he could under any circumstances resort to a court of equity to set off against the rent damages sustained by reason of a violation of those covenants by some one claiming under a superior right, it would be necessary for the averments of the bill to show that his possession was disturbed by some one other than the public authorities of a city, under their police powers, on account of a violation of the ordinances by the lessee. We agree with the conclusion of the Appellate Court, stated in its opinion in the following language: "Section 176 of the building ordinance, by its terms, applies only to buildings constructed or repaired after the ordinance took effect. Sections 182, 184, and 185 contain no such provision, but by their terms apply to buildings theretofore as well as to those thereafter constructed. There is in the bill no allegation as to when the building in question was constructed, nor that the lessee did not know, when the lease was executed, that it was constructed after the building ordinance of 1893 took effect. The lessee, equally with the lessor, must be presumed to have known of the provisions of the building ordinance in force when the lease was executed. Whether the floor level of the auditorium was within the limits of the first story of the building, as required by section 176; whether the stage was constructed as required by section 182; whether

there was a flue pipe over the stage, as required by section 184; and whether the building was provided with automatic sprinklers, as required by section 186—were all matters that could be readily seen, and there is no averment in the bill that complainant did not know, when he executed the lease, the facts in relation to the construction of the building. No covenant on the part of the lessor can be implied that the lessee should be permitted to use the demised premises in violation of the building ordinance. Under the ordinances, set forth in the bill as exhibits thereto, if the closing of the theater of the complainant by the city of Chicago was rightful, it was rightful because the complainant had used and was using movable scenery in a building so constructed that the use of movable scenery therein was prohibited by the building ordinance, and gave the city authorities the right to close the theater. We do not think that the disturbance of the lessee's enjoyment of the demised premises thus occasioned can be held a breach of the lessor's implied covenant for the quiet enjoyment of the demised premises by the lessee, or that it gave to the lessee any legal claim against the lessor for the rent paid in advance, or for damages sustained by him by reason of the interruption of his business by such closing."

In our opinion the bill did not state a case authorizing the relief prayed in a court of equity, and the judgment of the Appellate Court, affirming the decree of the circuit court in sustaining the demurrer and dismissing the bill for the want of equity, is affirmed.

Judgment affirmed.

(229 Ill. 397.)

SUGAR v. FROEHLICH.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. SPECIFIC PERFORMANCE — CONDITIONS OF CONTRACT.

It being clear, from the contract of sale of lot 4 and from the testimony, that the vendor never intended to sell such lot unless lot 5 was sold at the same time, and that the vendee must have understood this when he signed the contract, and it not being clear that the vendee ever made any positive offer for lot 5, and there being no proof that any one else made any offer for it, and the vendee not offering to take it, but only asking specific performance as to lot 4, enforcement of it is properly denied him.

2. QUIETING TITLE—CLOUD ON TITLE.

A contract of sale of land, placed in escrow, having been recorded without consent of the parties, can be set aside as cloud on title; the vendee not being entitled to enforcement of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 18, 20.]

Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Suit by John Froehlich against Nate Sugar. Decree for complainant. Defendant appeals. Affirmed.

February 3, 1903, appellee filed a bill in the circuit court of Cook county seeking the annulment and cancellation of a certain

contract as a cloud upon his title to certain real estate. The contract provides that Nate Sugar agrees to purchase, at the price of \$12,500, lot 34, in block 3, Bauwan & Hoffman's subdivision, Chicago, "and John Froehlich agrees to sell said premises at said price, and to convey to said purchaser a good and merchantable title thereto by general warranty deed, but subject to (1) *existing leases, expiring May 1st*, the purchaser to be entitled to the rents from the delivery of the deed; (2) all taxes and assessments levied after the year 1901; (3) any unpaid special taxes or assessments levied for improvements not yet made. * * * Said purchaser has paid one hundred (\$100) dollars as earnest money, to be applied on such purchase when consummated, and agrees to pay, within five days after the title has been examined and found good or accepted by him, the further sum of twelve thousand four hundred (\$12,400) dollars at the office of Haberer & Snow Company, Chicago, provided a good and sufficient general warranty deed conveying to said purchaser a good and merchantable title to said premises (subject as aforesaid) shall then be ready for delivery. * * * *This contract is made subject to lot thirty-five (35) being sold and closed with the delivery of this deed.*" (The italics are ours.) Then follow provisions that a merchantable abstract shall be furnished; that it shall be examined and defects cured within 60 days, unless the purchaser elects to take title as it is and gives 10 days' notice of such election at the expiration of said 60 days, and in default of such notice the contract to become null and void; that, should the purchaser fail to perform promptly, the earnest money, at the option of the vendor, is to be forfeited as liquidated damages; that all notices must be given in writing, and that time is of the essence of the contract; that the said deed and earnest money should be held by Haberer & Snow Company for the mutual benefit of the parties, and in case of forfeiture the earnest money should be applied in payment of expenses and commissions, rendering overplus to vendor. The contract was dated June 19, 1902, and was signed by both parties. Appellee charges that July 8, 1902, said written agreement was filed for record by Haberer & Snow Company, or by appellant, without appellee's consent; that the sale of said lot 35 was made a condition precedent to the sale of lot 34, and that although reasonable time had elapsed for the sale of said lot 35, and reasonable efforts had been made to sell the same, it had not been sold; and that therefore appellee had elected to terminate the agreement, and so notified appellant and requested him to release the contract of record, but that appellant refused so to do, and that thereupon the appellee notified Haberer & Snow Company and appellant that he had elected to declare the contract terminated, and requested said firm to refund to Sugar his

earnest money. Appellant, besides answering filed a cross-bill, in which he set up said written agreement and charged that appellee had never, since the execution of said agreement, made any effort to sell said lot 35, and that appellee, before a reasonable time had elapsed, had repeatedly refused to accept a reasonable sum of money for said lot 35, notwithstanding it was offered by responsible parties, who were willing to carry out their said offer as to lot 35; that thereby appellee had waived and surrendered whatever rights, if any, he had under the clause, "subject to lot 35 being sold and closed with the delivery of this deed;" that said appellee had never furnished a merchantable abstract of title of said lot 34, as provided in the contract, or at any time executed or tendered a warranty deed; that appellant has at all times been willing, able, and ready to comply with all the terms and conditions of the agreement and to pay the balance of the money due. The prayer of the cross-bill is that appellee be decreed specifically to perform said agreement and make and deliver to appellant a general warranty deed of the premises. On the issues being joined, evidence was heard by the chancellor, and on March 12, 1907, a decree entered, finding, among other things, that appellee was the owner of said premises, and that the agreement had been entered into as set forth therein; that at the time it was entered into there was a five-year lease on lot 34, but that said lease was under the control of Froehlich, and that he was ready and willing, up to November 13, 1902, to execute the conditions of said contract on his part, but that during said time no buyer was produced by Haberer & Snow Company for said lot 35, and that on said November 13th, appellee by written notice canceled and terminated the contract; that between the date of the contract and said November 13, 1902, was a reasonable time for the performance of the terms and conditions of the said contract; that the contract should not have been filed for record without authority of appellee. The court thereupon decreed that said contract "be and the same is hereby set aside and declared null and void as against the complainant, John Froehlich, his heirs and assigns, as a cloud on the title of said complainant," and "that the cross-bill of the defendant be and the same is hereby dismissed for want of equity." Exceptions were taken to this decree, and appeal taken to this court.

Kickham Scanlan, for appellant. Ossian Cameron, for appellee.

CARTER, J. (after stating the facts as above). The evidence shows that lot 34, and lot 35 immediately adjoining it, on the date of the contract and for a long time prior thereto, were owned by appellee; that a frame building was on lot 34; that lot 35 was improved with a three-story brick build-

ing. Some time in the early part of 1902, appellee and his wife being in poor health, he was desirous of leaving Chicago for California for the winter and decided to sell these properties. George Haberer, who was in the real estate business, asked the privilege of selling them. Appellee testifies that previous to this he had been offered \$14,000 for lot 34, but did not want to sell that property alone, and he authorized Mr. Haberer to sell the two pieces together for \$30,000. After trying for some time to sell the two properties together, and being unsuccessful, in the early part of June, 1902, appellee authorized the sale of the lots separately, lot 34 for \$12,500 and lot 35 for \$18,500. The evidence tends to show that during all these negotiations appellee understood that the sale of both of these properties was to be closed up at the same time. Haberer made an agreement with appellant as to lot 34, and the contract was thereupon drawn up and presented to appellee. The provision as to the sale of lot 35 was not in the contract when first drafted, but was inserted at appellee's suggestion. The contract had been previously signed by appellant, but he consented to the change. The weight of the evidence is to the effect that appellee understood from Haberer at this time that lot 35 was already practically sold to one Misch, and that a contract would be entered into for that lot very soon thereafter. It also tends to show that appellant knew of this talk of negotiating a sale of the other property to Misch. At the time the contract was being drawn up there was a discussion between appellee and Haberer as to a lease on said lot 34 in favor of appellee's son-in-law. The evidence does not show clearly that appellant or Haberer then understood the length of time this lease still had to run. It is clear that appellee agreed, if both properties were sold in accordance with their then understanding, that he would take care of the lease. It will be noted that the contract states that the lease expires May 1st, without giving the year. It turned out after this contract was signed that Misch did not want lot 35, and, although Haberer made efforts to sell the property he did not succeed in finding a buyer. Appellant testified that in the latter part of July or the early part of August, 1902, he first saw appellee after the contract was signed, and he was then told that there was a three-year lease, and that the contract was made subject to the sale of both properties; that appellee thought it was a bad bargain, and wanted to cancel the contract; that after some talk appellee said he could have the property on condition that he let appellee's son-in-law occupy lot 34 three years after the coming May at \$55 a month; that he told appellee it was a "hold-up," and he would not stand for it; that, "rather than be held up that way," he would take the adjoining lot for \$18,500, but that appellee would not agree

to it. Appellee denies that appellant ever offered to take lot 35 at \$18,500, or at any price, during this or any talk he had with him, but claims that he (appellee) during more than one of these conversations told appellant that the understanding always was that the two properties were to be sold together and that Haberer had no right to sell one property alone; that this contract as to lot 34 was a "scheme" contract; that appellant told him that the contract was good for ten years, and he replied, "No," that was not the understanding. Appellee states that in order to settle the matter and avoid the worry to himself and his wife, and at her request, he did offer to close up the trade if appellant would take lot 34 alone, subject to the lease of his son-in-law at \$55 a month rental. They had several talks about the matter—appellee thinks four—one of them being at Haberer's office in his presence and that of the two lawyers; but the testimony as to what was said at these various conversations does not vary materially from what has already been stated.

It is contended by appellant that the lease to the son-in-law, which was produced at the trial, was entered into after the contract was signed, and was a scheme on the part of appellee to prevent the carrying out of the contract. The chancellor, who saw the witnesses and heard their testimony, was of the opinion that the lease was not a fraudulent one. We think the weight of the evidence upholds the chancellor's finding in this regard. Appellant and appellee had been friends for years before this contract was entered into. The evidence tends to show that they had an honest disagreement as to its meaning and execution. Their testimony as to their various conferences shows clearly that both of them during these conversations were often very angry and talked very warmly. It is not at all strange that their stories do not agree as to what was said at such times. A specific performance of contract will only be enforced where the terms are clear, certain, and unambiguous, either admitted by the pleadings, or proven with a reasonable degree of certainty by the evidence. Even in cases where all of these requirements are present, specific performance is not a matter of right, but rests in the sound discretion of the court, to be determined from all the facts and circumstances of the particular case. *Dreiske v. Eisendrath Co.*, 214 Ill. 199, 73 N. E. 379; 3 *Pomeroy's Eq. Jur.* (3d Ed.) § 1406. Specific performance is an equitable remedy, which compels such substantial performance of the contract as will do justice between the parties. Inflexible rules cannot be laid down for the exercise of the power of a court of equity in granting specific performance. *Evens v. Gerry*, 174 Ill. 595, 51 N. E. 615. Every case of specific performance necessarily depends in a large degree upon its own special circumstances. *Cohn v. Mitchell*, 115

Ill. 124, 3 N. E. 420. In such proceedings the inquiry must be whether in equity and good conscience the court should specifically enforce the contract, and the decision involves the hearing of evidence of extrinsic facts. It is never decreed as a matter of course, even when a legal contract is shown to exist. *Esper v. Wilson*, 190 Ill. 629, 60 N. E. 923. We cannot say from this record that the evidence is clear that the appellant ever made a positive offer for lot 35 of \$18,500, or of any other sum. Appellant in his cross-bill does not offer to take lot 35, and only asks specific performance as to lot 34. It is very clear, from the contract itself and from the testimony in this record, that appellee never intended to sell lot 34 unless lot 35 was sold at the same time. Appellant must have understood this when he signed the contract in question. There was no proof offered tending to show that any person other than appellant ever made an offer for lot 35. From all the proof in this case, taken in connection with the contract, we think the chancellor decided correctly that a court of equity ought not to require its enforcement.

In case a contract for the sale of land is placed in the hands of third persons to be held in escrow, it should not be placed of record without agreement of the parties; and, if it is recorded, a court of chancery can set it aside as a cloud upon the title of the owner. *Sea v. Morehouse*, 79 Ill. 216; *Lane v. Lesser*, 185 Ill. 567, 26 N. E. 522; *Larmon v. Jordan*, 56 Ill. 204. The circuit court properly sustained the demurrer to the cross-bill, and declared said contract null and void as a cloud on the title of appellee; and its decree will be affirmed.

Decree affirmed.

(229 Ill. 581)

HEARTT v. SHERMAN et al.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. CORPORATIONS—STOCKHOLDERS—WHO ARE.

Where one seeking to compel issuance to himself of corporate stock had been theretofore elected a director and treasurer of the corporation, to neither of which positions he was entitled unless a stockholder, and a stockholder had procured from him a proxy to vote his shares at a stockholders' meeting, and did vote the number of shares claimed, such acts were admissions that complainant was a stockholder to the extent claimed.

2. SAME—EVIDENCE—SUFFICIENCY.

Evidence in a suit to compel issuance of corporate stock to complainant held not to show that the contract was that complainant should have the stock without condition notwithstanding correspondence recognizing that complainant had an interest of some character in the stock and admissions that he was a stockholder, in that he was elected a director and treasurer and one of the defendants had procured from him a proxy to vote his stock and did vote the same.

3. CONTRACTS—WANT OF CONSIDERATION.

An executory contract without consideration cannot be enforced in a court either of law or equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 399-402.]

82 N.E.—27

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Bill by Edwin Heartt against Mark R. Sherman and others. From a judgment of the Appellate Court, affirming a decree of the superior court for defendants, complainant appeals. Affirmed.

Appellant filed a bill in chancery in the superior court of Cook county to compel the issue to himself of 200,000 shares of the capital stock of the National Gold & Silver Mining Company, one of the appellees. He alleged that in 1902 he entered into an agreement with the appellees Mark R. Sherman and Samuel W. Winn to obtain a charter for a mining company, to be known as the National Gold & Silver Mining Company, and in accordance with such agreement a charter was obtained from the state of South Dakota for such company. The capital stock was 3,000,000 shares of the par value of \$1 each, of which one half was set apart to be sold for the purpose of carrying on the work and developing the mine, and of the other half Sherman and Winn were each to have 500,000 shares, Maxson (who afterwards sold to Sherman) 300,000 shares, and appellant 200,000 shares. Sherman claimed it would be for the best interest of the corporation and all concerned that the stock should not then be issued. Sherman was elected president, Winn secretary, and appellant treasurer of the corporation, and after its organization the appellant went, as its manager, to Stein's Pass, N. M., where the company was engaged in the development of certain mining property, took charge of the mining plant, and conducted the business there until 1904, when he was asked by Sherman to resign his position as mining superintendent. At the stockholders' meeting in September, 1904, appellant was not again elected to the board of directors or to any office and was not allowed to vote any stock. After the meeting he demanded of Sherman the issue of his stock to the extent of 100,000 shares; it having been previously agreed that one-half of the shares to be issued to complainant should be reconveyed to Sherman. Sherman refused to issue the stock, claiming that appellant had no interest in the corporation. The answer of Sherman and Winn admits the incorporation of the mining company, but denies that it was in pursuance of any agreement with appellant, or that he had any interest therein, averring that he was merely a nominal director. It avers that Sherman and Winn, together with one Maxson, sold to the mining company their mines at Stein's Pass, N. M., in which appellant had no interest, for the entire capital stock of said company, one half of which was donated to the company as treasury stock, to be sold for the purpose of carrying on the work of mining and development, and the other half divided, 600,000 shares each to Sherman and Winn and

300,000 shares to Maxson. The answer denies that any agreement was made for the division of the stock as alleged in the bill, that appellant was ever a stockholder in the corporation, or that any consideration existed for the sale of any stock to him. It admits that appellant was employed as mine superintendent of the mining company, and avers that Sherman and Winn, voluntarily and without any consideration whatever, agreed that, in case the appellant worked at the mines faithfully and satisfactorily to both Sherman and Winn and got the company on a dividend paying basis, they would make him a gift of 200,000 shares of their personal stock, but that he was careless and incompetent and did not do his work properly and satisfactorily to either Sherman or Winn and did not put the company on a dividend paying basis. Upon hearing the bill was dismissed for want of equity. The decree has been affirmed by the Appellate Court, and an appeal is now prosecuted to this court.

M. L. Thackaberry, for appellant. Burt Kriete and Henry F. Hawkins, for appellees.

DUNN, J. (after stating the facts as above). That an understanding existed between appellant and Sherman and Winn that appellant had an interest in the mine all, in effect, agree. The only dispute is as to the character of the interest; appellant insisting that he had a valid contract for 200,000 shares of the capital stock, and appellees that his interest was a mere promise of a gift of the stock, contingent upon his services proving satisfactory to Sherman and Winn and upon his putting the company upon a dividend paying basis. It was to this issue that all the evidence was directed. The correspondence all recognizes fully appellant's interest in the stock of the corporation, but throws very little light upon its character—whether contingent, as claimed by appellees, or based upon a contract for the stock, as claimed by appellant. It is true that appellant was elected a director and treasurer of the company, and that he was not entitled to hold either of these positions unless he was a stockholder. Sherman also procured from appellant a proxy to vote his shares at a stockholders' meeting, and by virtue thereof did vote 200,000 shares. But it is admitted the stock was never issued. Appellant's election as director and treasurer and the voting of his stock were illegal, for he was never actually a stockholder. These acts, as well as parts of the correspondence, amount to admissions that appellant was a stockholder in the corporation to the extent of 200,000 shares. But it is clear that he was not such stockholder, and this evidence affords little indication of what his interest was or how it was acquired.

Appellant states in his bill that Sherman and Winn agreed that appellant should have \$200,000 of the stock without condition. This

is denied, and it devolved upon appellant to prove it. He testified to it. Sherman and Winn both denied it and testified to the conditional promise made, as alleged in their answer, without any consideration, after appellant had been employed as superintendent of the mine. While their acts of recognition of appellant as a stockholder, and the correspondence, tend to corroborate appellant to some extent, yet they are not, on the whole, inconsistent with the position and the testimony of Sherman and Winn. We do not think appellant proved the contract stated in his bill by a preponderance of the evidence. On the contrary, the preponderance is the other way.

The appellant had nothing to do with obtaining the charter of the company. So far as the evidence shows he had no interest in the mines which were transferred to the company in consideration of the issue of all its capital stock. He had, some months before the company was organized, gone to New Mexico, at Sherman's request, to examine the mines; but Sherman paid him for that. His employment as superintendent of the mines was an entirely separate matter and had nothing to do with the alleged contract for the stock. He neither gave nor agreed to give anything, neither did nor agreed to do anything as a consideration of the agreement he claims to have had for this stock. The bill contains no allegation of any consideration, and none is disclosed by the evidence. It is elementary that an executory contract without consideration cannot be enforced in a court of either law or equity.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(229 Ill. 496)

CARPENTER et al. v. SANGAMON LOAN & TRUST CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. WILLS — CONSTRUCTION — DEATH OF FIRST TAKER.

When a devise is made to one person in fee, and "in case of his death" to another in fee, the devise over is construed in general to refer only to a death occurring in the testator's lifetime; but, when the death of the first taker is coupled with other circumstances which may or may not take place, the devise over, unless controlled by other provisions of the will, takes effect on the death of the first taker, whether before or after the death of the testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1164.]

2. SAME—BASE FEE.

Testatrix devised the residue of her estate to her four children named, to be equally divided between them, and, if one or more should die without leaving a wife or husband or child or children, then to the survivor or survivors, and to their heirs and assigns. *Held*, that the death of the devisee referred to was the death either before or after that of the testatrix, so that the devisees took a base or determinable fee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1351-1354, 1514-1518.]

Appeal from Circuit Court, Sangamon County; James A. Creighton, Judge.

Suit by the Sangamon Loan & Trust Company against John Carpenter and others for partition. From a judgment for complainant, defendants Carpenter appeal. Reversed and remanded.

E. L. Chapin and Hamilton & Catron, for appellants. Brown, Wheeler, Brown & Hay, for appellee.

SCOTT, J. Margaret Carpenter died testate on April 12, 1883, a resident of Sangamon county, Ill., and possessed of lands located in that county. At the time of her death she was a widow, and left surviving as her only heirs her children, Samuel Carpenter, Catherine Wood, Elizabeth Cobbs, Margaret Browning, George Carpenter, John Carpenter, Sarah Jane Carpenter, and Mary Ellen Carpenter. Her will contains but four clauses. The first directs the payment of her debts and funeral expenses. The second gives to her daughter Elizabeth a legacy of \$1,000. The fourth nominates executors, and the third, the construction of which is involved in this litigation, reads as follows: "I will and bequeath to my beloved sons John Carpenter and George Carpenter, and my beloved daughters Sarah Jane Carpenter and Mary Ellen Carpenter, all the remainder of my estate, both personal and real, of whatever kind and wherever situated, of which I may die seized or possessed, to be equally divided between them, share and share alike, each one taking one-fourth; and if one or more of said devisees should die without leaving a wife or husband or child or children, then to the survivor or survivors of them, and to their heirs and assigns, and to their sole use and behoof forever." All the devisees named in the third clause were children of, and survived, the testatrix. George Carpenter died intestate on December 10, 1904, and did not leave wife or child, but left certain brothers and sisters and certain nephews and nieces, children of deceased brothers and sisters, as his only heirs at law. On March 27, 1906, his sister Margaret Browning died testate and devised the legal title of her real estate to the Sangamon Loan & Trust Company, and that company, on December 5, 1906, filed its bill for partition in the circuit court of Sangamon, seeking partition of certain real estate which passed under clause 3 of the will of Margaret Carpenter, on the theory that George Carpenter by that clause became seized in fee simple absolute of the undivided one-fourth thereof, and that upon his death intestate Margaret Browning inherited a portion of that undivided one-fourth. All the heirs at law of George Carpenter, deceased, and all others having or claiming to have any interest in the lands, were made defendants. John Carpenter and Sarah Jane Carpenter, two of the devisees named in clause

3, demurred to the bill, on the theory that the interest taken by George Carpenter under that clause was a base or qualified fee, and that upon his death, leaving no wife or child surviving, the one-fourth interest devised to him by that clause passed to the other three devisees named therein. The demurrer was overruled, and the defendants were ruled to answer. John Carpenter and Sarah Jane Carpenter were thereafter defaulted for want of answer. Certain of the other defendants answered, and the cause proceeded in the ordinary manner, and resulted in a decree for partition in accordance with the prayer of the bill. From that decree John Carpenter and Sarah Jane Carpenter have appealed to this court, and assign for error the action of the court in overruling their demurrer.

Is the death contemplated by the third clause a death occurring in the lifetime of the testatrix, or is it a death taking place at any time? If the death contemplated is one occurring only before the death of the testatrix, then George Carpenter took an absolute fee-simple title to the undivided one-fourth of the real estate devised by that clause, and the demurrer was properly overruled. If, on the other hand, the death contemplated is one occurring at any time, either before or after the death of the testatrix, then George Carpenter took only a base or qualified fee, determinable by his death without leaving wife or child, in which event the demurrer should have been sustained, and the decree of the circuit court should be reversed. The rule which we think controls is clearly stated in that portion of the opinion in the case of *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816, which reads as follows: "When, indeed, a devise is made to one person in fee, and 'in case of his death' to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring only to death in the testator's lifetime. 2 *Jarman on Wills*, c. 48; *Briggs v. Shaw*, 9 *Allen (Mass.)* 516; *Lord Cairns in O'Mahoney v. Burdett*, L. R. 7 H. L. 388, 395. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator. *O'Mahoney v. Burdett*, above cited; 2 *Jarman on Wills*, c. 49." In *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191, the court considered this question, which there arose upon the following language quoted from the will of Smith, to wit: "It is further my will, in case any of my sons to whom I have bequeathed property in this my last

will and testament should die without heirs of his body, the real estate I have bequeathed to him shall go to his surviving brothers or brother." This court stated that the question was whether the words, "should die without heirs of his body," etc., should be considered as meaning "should die within the lifetime of the testator, or simply should die at any time, without heirs of body." The court then made use of the following language: "There may be found cases seeming to sanction the construction of the first alternative; but the English rule now accepted is, when the death of the first taker is coupled with circumstances which may or may not take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect, according to the ordinary and literal meaning of the words, upon death, under the circumstances indicated, at any time, whether before or after the death of the testator. *O'Mahoney v. Burdett*, L. R. 7 H. L. Cases, 408, 12 Eng. R. (Moake's Notes) 22; *Ingram v. Soutten*, L. R. 7 H. L. 408, 12 Eng. R. (Moake's Notes) 40; *Olivant v. Wright*, 24 W. R. 84; *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816; 3 *Jarman on Wills* (Randolph & Talcott's Ed.) 640. See, also, note 'o,' on same page; *Crane v. Cowell*, 2 *Curtis* (U. S.) 178," *Fed. Cas. No. 3,353*—and held that the devise to each son, respectively, was a fee determinable upon the son dying without heirs of his body. To the same effect are the following cases: *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Lombard v. Witbeck*, 173 Ill. 396, 51 N. E. 61; *Bradsby v. Wallace*, 202 Ill. 239, 66 N. E. 1088.

Appellee seeks to sustain the action of the circuit court by the cases of *Arnold v. Alden*, 173 Ill. 229, 50 N. E. 704, *Fishback v. Joesting*, 183 Ill. 463, 56 N. E. 62, and *Kohtz v. Eldred*, 208 Ill. 60, 69 N. E. 900. The first two of these cases were discussed in *Bradsby v. Wallace*, supra, and they were there clearly distinguished from *Summers v. Smith*, supra, and the cases which follow that case. It is not necessary to repeat that discussion here. In *Kohtz v. Eldred*, supra, the court, in stating its conclusion, used this language: "From an examination of the entire will we are of the opinion that the language 'die leaving no issue surviving them,' used in the sixth paragraph of the will, refers to the death of said children, or either of them, during the lifetime of the testator." We think it appears therefrom that this last-cited case is not in the same class as *Summers v. Smith*, supra, and other similar cases, for the reason that the court evidently found in the will in the *Kohtz* Case language, other than the words of devise, from which it appeared that the death contemplated by the testator was one occurring during his lifetime.

Each party to the controversy relies upon the case of *King v. King*, 215 Ill. 100, 74

N. E. 89. We do not think that case aids either contention. The estate of the first taker there was determined to be a life estate, and not a fee, absolute or base, and the court found in the will aside from the words of devise, and in facts debors the will, aid in determining the time at which the death contemplated by the testator was to occur. This devise is not to one, and upon his death to another in fee, but the death, to make effective the devise over, must be the death of the first taker leaving no wife or child surviving; and the death of George Carpenter was one which might or might not be accompanied by these circumstances, when viewed from the standpoint of the testatrix at the time she made the will. For this reason, in the absence of words in any other provision of the will showing a different intent on the part of the testatrix, we are of the opinion that George Carpenter took only a base fee, which, upon his death without leaving wife or child, was determined by the executory devise over to the survivors of the devisees named in the third clause of the will, and to their heirs and assigns.

Accordingly the decree of the circuit court will be reversed, and the cause will be remanded, with directions to sustain the demurrer to the bill.

Reversed and remanded, with directions.

(229 Ill. 327)

PEOPLE ex rel. TALBOTT, County Treasurer, v. TOLEDO, P. & W. RY. CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

SCHOOLS AND SCHOOL DISTRICTS—TAXATION—LIMITATION OF INDEBTEDNESS.

A tax levied by a school district to pay warrants issued in excess of the amount of indebtedness allowed by Const. 1870, art. 9, § 12, limiting the indebtedness of a school district to five per centum of the value of taxable property therein, is void.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 43, *Schools and School Districts*, § 236.]

Error to Livingston County Court; C. F. H. Carrithers, Judge.

Application by the people, on the relation of Will L. Talbott, county treasurer, for judgment against the Toledo, Peoria & Western Railway Company for delinquent taxes. From a judgment denying the application, plaintiff brings error. Affirmed.

This was an application to the county court of Livingston county by plaintiff in error for judgment against the property of defendant in error for delinquent school taxes for the year 1905, levied by the board of education of school district 192 of said county. From the record it appears that in the spring of 1902 the school building in this district was totally destroyed by fire. Soon after this occurrence an election was held authorizing the board of education to erect a new school building and to issue bonds to the amount of \$25,000 to meet its cost. The contract was

let, and after the first story of the building had been completed an attempt was made to dispose of the bonds, when it was discovered that the district could legally issue bonds only to the amount of \$8,561.55. A second election was called, at which it was voted to issue bonds to the amount of \$8,500, and these bonds last mentioned were afterward issued and sold. The building was completed in 1903 at a cost of about \$25,000, and, after applying the proceeds from the sale of the bonds on this indebtedness, warrants drawing interest at the rate of 6 per centum per annum were issued by said board for \$17,750, the balance of the cost of construction, of amounts and on dates as follows, to wit: \$5,000 on August 5, 1903, \$4,250 on September 12, 1903, and \$8,500 on September 29, 1903. Prior to the time of the levy in question the principal of warrants to the amount of \$5,000, with interest thereon, had been paid by taxation, leaving warrants in the principal sum of \$12,750 still outstanding, which mature at the rate of \$2,000 a year. In 1905 a tax of 2½ per centum for school purposes and a tax of one-quarter of 1 per centum to apply on the bonded indebtedness were extended and are not here in question. In addition, the board of education certified and the county clerk extended a tax of 2½ per centum for building purposes, which was to be applied upon the indebtedness represented by the warrants above mentioned. The defendant in error refused to pay the tax last mentioned, which was levied for building purposes, and objected to judgment being entered for the same, for the reason that it was levied "for the purpose of paying indebtedness contracted in excess of the limit authorized by the Constitution of this state." The court sustained the objection and entered judgment denying the application. The relator brings the record here by writ of error.

R. S. McIlhuff and B. R. Thompson, for plaintiff in error. A. C. Norton, for defendant in error.

SCOTT, J. (after stating the facts as above). The board of education in 1903, in constructing a schoolhouse, used money, the proceeds of an issue of bonds amounting to \$8,500, which was within \$61.55 of the amount of indebtedness which it might lawfully incur under the Constitution. In addition to that, at the same time and for the same purpose it incurred an indebtedness of \$17,750, for which it issued warrants, bearing interest, payable at various times in the future. An amount far in excess of the \$61.55 for which it might lawfully have issued its warrants was paid by money arising from the levy of taxes prior to the levy for the taxes of the year 1905 now under consideration. The tax now in question was levied to apply upon the principal and interest of the remainder of the indebtedness for which warrants were originally issued. It is too plain

for argument that the indebtedness last mentioned was incurred in violation of that constitutional provision which forbids any school district becoming indebted "in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding 5 per centum on the value of the taxable property therein." Const. 1870, art. 9, § 12. This tax, levied to pay an indebtedness forbidden by the Constitution, is therefore invalid. *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781.

Plaintiff in error places great reliance upon the case of *People ex rel. v. Chicago & Texas Railroad Co.*, 223 Ill. 448, 79 N. E. 151. That case merely holds that when a school district has exhausted its ability to borrow money for the purpose of building a schoolhouse, and the building is incomplete after the expenditure of money so borrowed, "there is no doubt of the power of the board to levy up to the statutory limit for building purposes, and continue to do this from year to year until a sufficient amount of revenue is raised to complete the building"; that is, for the purpose of completing the building taxes may be levied each year, and the fund may be expended after the money is provided. That case does not hold or intimate that an indebtedness may be incurred in excess of the limit fixed by the Constitution for the purpose of completing the unfinished school building, and paid by taxes thereafter levied for building purposes.

The judgment of the county court will be affirmed.

Judgment affirmed.

(229 Ill. 128)

CITY OF GALENA et al. v. GALENA WATER CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. PLEADING—DEMURRER—CONSTRUCTION.

Where the first part of a demurrer to a complaint was in the usual form of a general demurrer praying judgment that plaintiffs be barred from maintaining their action, and thereafter followed 14 causes of demurrer, none going to the form of the declaration nor assigning in so many words a misjoinder of parties plaintiff, but they all related to the rights of plaintiffs to maintain the action, and some of them questioned the right of one of plaintiffs to maintain any action under the contract set out, it properly raised the question of the right of such latter plaintiff to maintain the action or to join with the other plaintiff as coplaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39. Pleading, §§ 513-516.]

2. PARTIES—PLAINTIFFS—PERSONS WHO MAY JOIN—ACTIONS ON CONTRACTS.

In an action by a city and the school directors of a school district therein against a water company to recover damages for the loss of a school building alleged to have resulted from the negligent breach of a contract to furnish proper water protection, etc., it was averred that the building was owned by the city, but was controlled and managed by the school directors of the district. *Held*, that there was an improper joinder of parties plaintiff which ques-

tion was properly raised by a general and special demurrer to the declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parties, §§ 145, 146.]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Jo Daviess County; R. S. Farrand, Judge.

Action by the city of Galena and another against the Galena Water Company. From a judgment of the Appellate Court, sustaining a judgment of the circuit court, sustaining a demurrer to the declaration, plaintiffs appeal. Affirmed.

This suit was brought by appellants, the city of Galena and the board of school directors of school district No. 120 of the county of Jo Daviess, against the Galena Water Company, appellee, to recover damages for the loss of a high school building by fire, which, it is alleged, resulted from the negligent breach of a contract entered into between the city of Galena, in 1886, and Henry S. Raymond, predecessor of the Galena Water Company. The substance of the declaration is correctly stated in the opinion of the Appellate Court in the following language: "The first count of the new declaration (which will herein be called the declaration) sets out a contract made in 1886 between the city of Galena and Henry S. Raymond, his successors and assigns, for the construction and operation by the latter of a system of waterworks in said city, in which contract is embodied an ordinance passed by the city of Galena, which Raymond therein agreed to fulfill and perform. The first section of the ordinance granted Raymond, his successors and assigns, the franchise for 30 years to maintain and operate, within and near the city of Galena, waterworks for supplying the city and inhabitants thereof with water for public and private uses. The second section provided: 'The water supplied by said works shall be good, clear water, of sufficient quantity for all domestic, fire and manufacturing purposes within said city and suitable for those purposes.' Section 3 provided for the capacity of pumping engines, and that they 'shall be so connected to the pipe system that the pressure may be changed from gravity to direct pumping within at least fifteen minutes.' It also provided: 'A standpipe shall be erected on accessible high ground, of sufficient elevation to give reliable pressure for the use of the water in extinguishing fires in the buildings upon the hills in said city as well as below.' Section 5 provided for the size and length of pipe to be laid throughout the city under the pipe system submitted with the ordinance and for the testing of said pipe to withstand a certain pressure, and provided that such pipe 'shall be of ample size to carry out the provisions of this agreement, and affording the city where said pipes are laid first-class protection from fires.' The ordinance provided that the city should rent a certain number of fire hydrants and pay certain annual rentals for the use thereof. The

declaration averred that Raymond constructed the waterworks and entered upon the performance of the conditions and obligations of said ordinance, and that afterwards his agreements and covenants were assumed by the Galena Waterworks Company, and that the city rented the hydrants and paid the annual rental as agreed. The first count then charged: That on or about April 11, 1904, a fire broke out in the uppermost part of a three-story brick building owned by said city of Galena and controlled and managed by said board of school directors and situated upon certain lots in said city; that the fire alarm was promptly given, and the water company notified of the location of the fire; that the fire companies of the city promptly responded and arrived promptly at said fire with their appliances, which were attached to the nearest fire hydrants, and were adequate and sufficient for the extinguishment of said fire and the hydrants near enough to said buildings to have afforded water adequate for the extinguishment of said fire if a sufficient quantity of water, as provided in section 3 of said ordinance, had been supplied, but that defendant persistently, carelessly, and negligently failed to supply said hydrants with a sufficient quantity of water for the extinguishment of said fire, in violation of its obligation under section 2 of said ordinance and contract; and that by reason of the tortious and negligent conduct of said water company to supply said hydrants with a sufficient quantity of water for the extinguishment of said fire it spread to the remaining portions of the building and destroyed it. The second, third, and fourth counts of the declaration each referred to the first count for the statement of the contract and ordinance and their provisions, and described in like manner the building and the fire and the giving of the fire alarm to the water company. The second count then alleged that the water company was notified by the chief of the fire department and by members of the board of school directors to change the pressure of the pipe system from gravity to direct pressure, and that if this had been done the fire could have been extinguished, but that the water company carelessly, negligently, and persistently, failed and refused to change the pressure from gravity to direct pressure within 15 minutes after being so notified, as it was bound to do by section 3 of said ordinance, and that as a result the building was destroyed by fire. The third count alleged, in addition: That the school building was situated upon one of the hills of said city; that the water company carelessly, willfully, and negligently failed and refused to erect a standpipe on accessible high ground of sufficient elevation to give reliable pressure for the use of water in extinguishing fires in buildings upon the hills of said city, as bound to do by section 3 of said ordinance; and that on account of such careless, willful, and

wanton neglect of the water company the building was destroyed by fire. The fourth count charged these facts, and that the hydrants were sufficiently near the building to have afforded water adequate for the extinguishment of the fire if the pipes of the water company running to said hydrants had been of ample size to have afforded said city first-class protection from fire, as the company was bound by said ordinance to furnish, but that the company refused and neglected to lay pipes of sufficient size to furnish water sufficient for the extinguishment of said fire, and because thereof the building was destroyed." To the declaration appellee interposed a general and special demurrer, which was sustained by the circuit court and a judgment rendered against appellants for costs. From that judgment appellants prosecuted an appeal to the Appellate Court for the Second District, where the judgment of the circuit court was affirmed, and appellants, having obtained a certificate of importance from the Appellate Court, have prosecuted a further appeal to this court.

M. J. Dillon, City Atty., and Jones & Kery, for appellants. Sheean & Sheean, for appellee.

FARMER, J. (after stating the facts as above). We understand appellants to contend that the demurrer was special, and that the right of the parties to join as plaintiffs was not one of the special grounds of demurrer. The first part of the demurrer was in the usual form of a general demurrer, and concludes by praying judgment that plaintiffs be barred from maintaining their action. Following that are 14 causes of demurrer. None of them go to the form of the declaration, and while none of the special causes assigned say, in so many words, that there was a misjoinder of parties plaintiff, they all relate to the right of the plaintiffs to maintain the action, and some of them question the right of the board of directors to maintain any action under the contract set out in the declaration. We think the demurrer properly raised the question of the right of the board of school directors to maintain the action or to join with the city of Galena as a plaintiff. The judgment of the Appellate Court, as shown by the opinion of that court, was based upon the proposition that appellants were improperly joined as coplaintiffs in the suit, and that this question was properly raised by the demurrer. The averment of the declaration as to title is that the building was owned by the city of Galena, but was controlled and managed by the school directors of district No. 120. It would seem, under that averment, that there is no room for argument as to the impropriety of joining both parties as coplaintiffs, and this question is properly raised by demurrer. 1 Chitty's Pl. 66; 1 Tidd's Pr. 694.

The principal portions of the very able briefs and arguments of counsel on both sides are devoted to the proposition whether the city of Galena has a right of action against the water company, under the circumstances set out in the declaration, for the destruction of property belonging to it, and we are earnestly asked to pass upon that question. It is conceded that, by the great weight of authority in this country, where a city contracts with a private party or corporation to construct and operate waterworks for the purpose of furnishing water to the city and its citizens, a property owner cannot hold the city or water company liable for loss by fire occasioned by the failure of the water company to furnish an adequate supply of water for fire protection. This question has never been passed upon by this court, but it has been before the highest judicial tribunals of a large number of other states in this country, and in all of them, except three, the rule above stated has been announced and adhered to. Kentucky, North Carolina, and Florida are the states holding a contrary view. Only one state, California (*Town of Ukiah City v. Ukiah Water & Improvement Co.*, 142 Cal. 173, 75 Pac. 773, 64 L. R. A. 233, 100 Am. St. Rep. 107), has passed upon the right of a city to maintain an action against a private party or corporation with whom it has contracted for the construction and operation of waterworks for the city and its inhabitants, to recover of the water company for a destruction of the city's property caused by a failure of the water company to furnish a sufficient supply of water. For these reasons we are requested by counsel on both sides to pass upon the question of the city's right of action. We do not consider that question properly before us, for in our view of the case the judgment of the Appellate Court must be affirmed no matter what conclusion we might reach as to whether the city, if it had sued alone, would have had a right of recovery under the averments of the declaration. However desirable it may be to the parties interested in this suit, or to the public, that this question should be settled by this court, it cannot be done in any proper way until presented in such manner that its determination is necessarily involved in a decision of the case before us. This court's time is too fully occupied in the determination of questions necessary to the decision of cases before it to give time to the investigation and discussion of questions which are not involved in a decision of a pending case; and especially so where the determination of such questions, no matter what we might hold the law to be thereon, could not be of any advantage or benefit to the parties in the particular case before us.

For the reasons indicated we are of opinion the judgment of the Appellate Court was right, and said judgment is affirmed.

Judgment affirmed.

(230 Ill. 26)

MARQUETTE CEMENT MFG. CO. v.
WILLIAMS.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERV-
ANT—FELLOW SERVANTS—SUPERIOR AND
INFERIOR SERVANTS.

Where a workman in a mill was instructed to stop an electric motor and fix it, and was assured that it would not start until fixed, and it was his duty to obey the instruction, such assurance was not that of a fellow servant, but of one having authority, even though the two men at times worked together as fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 471, 472.]

2. SAME—QUESTIONS FOR JURY.

In an action for injuries to a servant in obeying an order to stop and fix a motor, evidence examined, and *held* sufficient to take to the jury the question of the superior servant's authority to order the motor shut down.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1034, 1051-1067.]

3. SAME—CONTRIBUTORY NEGLIGENCE—QUES-
TIONS FOR JURY.

Whether or not a workman was negligent in adopting the method provided to shut down a motor which he was ordered to stop and fix *held* a question of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

4. APPEAL—ADMISSION OF EVIDENCE—HARM-
LESS ERROR.

In an action for injuries sustained in obeying the order of a superior servant, it was harmless error to admit the conclusion of plaintiff that the superior had exclusive control of the electrical department of defendant's works, after it had been shown that the superior was in such control, and that plaintiff was assisting him, and that he gave orders to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161-4165.]

5. MASTER AND SERVANT—INJURIES TO SERV-
ANT—ADMISSIBILITY OF EVIDENCE.

In an action for injuries sustained in obeying a superior servant's order to stop and fix a motor, a conversation between plaintiff and his superior regarding another motor, in which the superior stated that whenever plaintiff saw a motor in that condition he should stop it and fix it, was admissible, being a general direction from the superior to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 933-935.]

6. APPEAL—HARMLESS ERROR—EXCLUSION OF
EVIDENCE.

An incorrect ruling rejecting certain testimony is harmless, when the witness on re-examination made full explanation of the matter in question and all the corrections thereon he desired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4200-4203.]

7. MASTER AND SERVANT—INJURIES TO SERV-
ANT—FELLOW SERVANTS—INSTRUCTIONS.

In an action for injuries sustained in obeying the orders of a superior servant, an instruction that the superior and plaintiff were fellow servants was properly refused, where it had been shown that as to the transaction involved in the suit they were not fellow servants, even though they may have had duties and performed services which brought them into that relation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1162-1167.]

8. SAME.

In an action for injuries sustained in obeying the orders of a superior servant, an instruc-

tion that, if plaintiff and the superior were co-operating in the business in hand, they were fellow servants, was properly refused, where it had been shown that the superior with authority ordered plaintiff to stop and fix the motor, and then left, giving no assistance to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1162-1167.]

9. SAME.

Where a superior servant ordered a workman to stop and fix a motor, and then left, giving no assistance, and the workman was injured in obeying the order, it was proper to refuse a correct instruction for determining when the relation of fellow servants exists, since such an instruction would have been misleading.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1162-1167.]

Appeal from Circuit Court, La Salle County; R. M. Skinner, Judge.

Action for personal injuries by Grant Williams against the Marquette Cement Manufacturing Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff for \$7,500, defendant appeals. Affirmed.

McDougall, Chapman & Bayne and Duncan, Doyle & O'Connor, for appellant. Thomas Kennedy, Elmer E. Roberts, and Browne & Wiley, for appellee.

CARTWRIGHT, J. Appellee recovered a judgment for \$7,500 against appellant in the circuit court of La Salle county for the loss of his right hand while employed as an assistant to the electrician in charge of the electrical machinery in appellant's cement works. The Appellate Court for the Second District affirmed the judgment.

The cause was submitted to a jury upon counts of the declaration which alleged that the defendant had in its factory for manufacturing cement a certain motor, which furnished power to operate machinery; that the motor was so situated that its starting machinery was on a lower floor and not visible from the motor, and with no means of communication from the motor to the starting machinery or from the starting machinery to the motor; that the motor became out of condition and repair; that plaintiff was ordered by defendant's electrician, who had general charge and supervision over the motor, and who was not a fellow servant of the plaintiff, to stop the motor and repair it, and that plaintiff stopped the motor and proceeded with due care to repair it—and which charged that while he was doing so, and without any warning to him, the defendant negligently permitted the motor to be started, whereby his right hand and wrist were caught in the gearing and cogwheels and so crushed as to necessitate amputation. The greater part of the argument in support of the assignments of error is devoted to the proposition that the trial court erred in refusing to direct a verdict for defendant.

The facts material to the issue were but few, and the evidence relating to them was in narrow limits; but a bulky and cumber-

some record was made by lengthy descriptions of the method and processes of manufacturing cement, which had no relation to the controversy between the parties and which were repeated by different witnesses. We see no good reason for inflicting such immaterial matter upon the jury or the court. The evidence on the part of the plaintiff tended to prove the following material facts: There were a number of motors on the main floor of the cement factory, and one of them operated what was called a "pan conveyor" in the basement. The appliance for starting and stopping this motor was in the basement, where it could not be seen from the motor. To start and stop the motor it was necessary to go down in the basement and throw a switch, in order to let the current of electricity into the motor or shut it off. On June 30, 1903, in the forenoon, plaintiff went to this motor and saw that the brush was out of the brush holder, and the brush holder was dragging in the commutator, and the ring was stopped in the motor. In that condition the motor would soon burn up and destroy valuable machinery. Plaintiff then went to John Coleman, the foreman of the mill, and told him the condition of the motor; but Coleman refused to have the motor stopped to put it in order, on account of the work that was being done by it at that time. Plaintiff then went to Fred McNeil, the electrician in charge of the electrical department, and told him that if he did not go up there and attend to the motor it would be burned out in a few minutes. McNeil went with plaintiff and looked at the motor, and then had a talk with Coleman near by, after which he told the plaintiff to watch the motor a few minutes and then stop it, and he would see that no one would start the motor or interfere with the plaintiff until he had fixed it. McNeil then left, and plaintiff went down in the basement and stopped the motor by throwing the switch. William Crockett was in charge, under Coleman, the mill foreman, of the pan conveyor and the appliance for letting clinkers into the conveyor. Crockett had charge of the switch and starting block, and was standing near by. After the plaintiff stopped the motor he told Crockett that he was working on the motor and not to start it again until he told him. Plaintiff ran upstairs and to the motor, and commenced to make the necessary repairs. In doing so he reached his hand in to feel whether the oil plug was tight, or not, where it had been leaking oil, and some one started the motor, resulting in the injury.

One reason presented why the court ought to have given the instruction is that the negligence which caused the injury was the failure of McNeil to see that the motor was not started, and his negligence was that of a fellow servant. There is no evidence as to who started the motor, but Crockett said he did not do it. Whoever it was, there is no

claim that he was a fellow servant of the plaintiff, and under the circumstances the act was a wrongful and negligent one, and was an efficient cause of the injury. Crockett was not a fellow servant of the plaintiff, and was the person in the immediate charge of the pan conveyor and switch. He was notified that plaintiff was working on the motor and that it was not to be started until he was through. So far as McNeil was connected with the injury, the evidence did not tend to prove that he was a fellow servant with the plaintiff in reference to this matter. The injury did not result from the exercise of authority by McNeil over the plaintiff, but it was the duty of the plaintiff to follow the directions of McNeil as his superior, and the assurance of McNeil that the motor should not be started was not the act or assurance of a fellow servant, but was that of one having authority. While it appears that McNeil and the plaintiff may have worked together sometimes as fellow servants, they were not co-operating with each other in performing any act of service in relation to this motor. It is further urged that McNeil had no authority to order the motor shut down. The evidence for the plaintiff was that, after Coleman said he would not shut it down, McNeil talked with Coleman a few minutes and then told plaintiff to shut it down. Plaintiff testified that he did not hear the conversation, and that they were about 25 feet from him. The court could not say that plaintiff did not have good reason to believe McNeil was authorized at that time to have the motor stopped.

Another reason given for insisting that the court ought to have directed a verdict is that the plaintiff might have disconnected the wires from the motor, which would have rendered it dead, and that he chose a dangerous way of making the repairs. He could have unscrewed the nuts at the top of the motor and have taken out the wires, but there was evidence that that would have been a dangerous thing to do if the current had been turned on, as it was. Aside from that fact, the switch method had been provided for stopping the motor, and, when stopped, it could not be started except by the voluntary act of some person. The question whether or not the plaintiff was guilty of negligence in employing the method provided was a question of fact, and not of law. The court did not err in refusing to direct a verdict.

It is contended that the court erred in admitting improper evidence on the part of the plaintiff, and, first, that the plaintiff was allowed to give his conclusion that McNeil had exclusive control of the electrical department of defendant's works, and thereby to determine the principal fact in dispute. If the statement of the witness was in the nature of a conclusion, it worked no harm to the defendant, for the reason that the fact

was conclusively proved. The witness had already stated, without objection, that McNeil was in charge of and the boss of the electrical works. McNeil testified that he was in charge of the electrical equipment, consisting of motors, generators, wiring, lighting, etc.; that plaintiff had been assisting him five or six months, and that he gave orders and directions to the plaintiff. If plaintiff had not been permitted to give his conclusions, the jury could not have found differently on the question to which the conclusion related. Plaintiff was permitted to give a conversation between himself and McNeil in regard to a motor that got out of condition about a week before, in which McNeil told him that, whenever he saw a motor in that condition, he wanted him to stop it and fix it at once. The objection is that the conversation referred to another motor, and, while that is true, the conversation contained a general direction from McNeil to the plaintiff which it was proper to prove.

It is next claimed that the court erred in refusing to admit proper evidence offered by the defendant. McNeil, on his direct examination, testified that he did not tell the plaintiff to stay there a few minutes and shut the motor off, and he would see that nobody would start the motor or interfere with plaintiff. On cross-examination he was quite uncertain whether he gave plaintiff such an order or not, and on re-direct examination the same question asked on the direct examination was repeated to him. The court sustained an objection to the question, but allowed the plaintiff to again take up the same subject and go into the same matter again. After counsel for the plaintiff had examined the witness again on the subject, defendant's counsel took up the examination again and went over the same matter. Whether the ruling was strictly correct or not, the outcome was that the witness made a full explanation and all the corrections that he desired.

It is urged that the remarks and conduct of the counsel for plaintiff were so improper as to prejudice the jury and require a reversal of the judgment. There were, perhaps, some lapses from the conduct which is regarded as proper and is usually observed in courts of record; but we do not think that anything that was said or done would justify us in reversing the judgment.

The court gave a great many instructions at the request of the defendant but refused three on the subject of fellow servants; and it is insisted that the court erred in such refusal. The first of those instructions stated that McNeil and plaintiff were fellow servants, and the court was right in refusing to give it, for the reason that as to the transaction involved in the suit they were not fellow servants. Plaintiff and McNeil may have had duties and performed services which brought them into that relation, but in this transaction they did not sustain that

relation. The second instruction advised the jury that if plaintiff and McNeil were co-operating in the business in hand they were fellow servants, and it was properly refused, because there was no evidence to which it could be applied. The third instruction stated the rules which have been adopted for determining when the relation of fellow servants exists. While correct as a statement of the law, it would have been misleading in this case. McNeil was a superior servant, clothed with and exercising authority as to the shutting down and repair of the motor, and, although he and the plaintiff at times may have been fellow servants, that fact would not have authorized a finding for defendant, as directed by the instruction.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(230 Ill. 33)

SHERIDAN v. PRUDENTIAL INS. CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

APPEAL — INTERMEDIATE APPELLATE COURT — SCOPE OF REVIEW.

Where no propositions of law were submitted to the superior court on appeal from a justice's judgment, and no objections were taken to evidence, there was no question reviewable on appeal to the Supreme Court on certificate of importance granted by the Appellate Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1133, 1135.]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Action by Joseph I. Sheridan, as administrator of George De Quetterville, deceased, against the Prudential Insurance Company of America. A justice's judgment in favor of plaintiff was reversed on appeal to the superior court, from which an appeal was taken to the Appellate Court, where the judgment was affirmed, and a further appeal allowed on certificate of importance. Affirmed.

John F. Mahon, for appellant. Hoyne, O'Connor & Hoyne, for appellee.

SCOTT, J. This suit was brought before a justice of the peace of Cook county by Joseph I. Sheridan, administrator of the estate of George De Quetterville, deceased, appellant, against the Prudential Insurance Company of America, the appellee, upon a policy of insurance issued by the appellee upon the life of said deceased. The justice rendered judgment against appellee for \$85, that being the amount which appeared from the face of the policy to be due. The insurance company appealed to the superior court of Cook county, where the cause was submitted to the court without a jury upon an agreed state of facts. The finding of the superior court was in favor of the company, and a judgment was entered in conformity with such finding. Sheridan appealed to the

Appellate Court for the First District. The cause was assigned to the Branch Appellate Court, and that court affirmed the judgment of the superior court, but granted a certificate of importance, and appellant has prosecuted a further appeal to this court.

There were no written pleadings in the case; the hearing in the superior court having been upon an appeal from a justice of the peace. No objection was made in the superior court to the admission or exclusion of evidence; the cause having been submitted to that court for decision upon an agreed state of facts. No propositions of law were submitted to the superior court to be held as the law of the case. There is, therefore, no question presented upon this appeal which this court can review. *Mutual Protective League v. McKee*, 223 Ill. 364, 79 N. E. 25, and authorities there collated.

The judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

(196 Mass. 416)

GOYETTE v. KEENAN et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 16, 1907.)

1. EVIDENCE—RELEVANCY.

On an issue as to whether the description in a deed included a particular piece of land, a mortgage given by defendants to a third party five years prior to their execution of the deed was irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 141, 156.]

2. SAME—DECLARATIONS.

On an issue as to whether certain property was included in plaintiff's deed, declarations of the occupant concerning the property he occupied, not shown to have been made on the land in question, he being still alive, were inadmissible under Rev. Laws, c. 175, § 66, providing for the admission of certain declarations of deceased persons.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1135-1138.]

3. TRIAL—OFFER OF PROOF.

The exclusion of evidence is not error, in the absence of an offer to show what the evidence offered was intended to prove.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 113-118.]

4. BOUNDARIES—CALLS IN DEED.

A call in a deed for land formerly owned by another as a boundary gave a monument which would control a call for distance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 6, 12.]

5. DEEDS—CONSTRUCTION—PROPERTY CONVEYED.

Where the description of a deed called for land formerly belonging to B. as a monument, as stated in other deeds in the grantor's chain of title, the additional description of the land of B. as belonging "now or lately of one White" would not be construed to change the identity of the monument.

6. SAME—DESCRIPTION—QUESTION FOR JURY.

Where a deed from plaintiff's remote grantor to George A. White called for the land of James L. White as a monument, and plaintiff's deed described the line as running to land formerly belonging to B. "now or lately of one White," the jury was entitled to find that the

"one White" was James L. White, and not George A. White.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 343.]

Exceptions from Superior Court, Hampden County; Loranus E. Hitchcock, Judge.

Action by Arthur J. Goyette against Bartholomew Keenan and others, and his trustee, on the covenants in a deed. A judgment was rendered in favor of defendants, and plaintiff brings exceptions. Sustained.

H. A. Buzzell and Brooks & Hamilton, for plaintiff. J. B. Carroll and W. H. McClintock, for defendants.

SHELDON, J. 1. The mortgage deed given by the defendants to the Springfield Five Cents Savings Bank in 1898 rightly was excluded. It had no material bearing upon the issue tried in this case. The plaintiff's declaration and his whole case rested upon the claim that the defendants were not seized, of the land in dispute, described in his deed as "land formerly belonging to Henry Bliss, now or lately of one White," and so that this land did not pass to him. It seems to have been agreed by both parties that this land was held by White at the time that the plaintiff took his deed; and the real question was whether the description in that deed included this piece of land. Manifestly the description contained in the mortgage deed given to a third party five years earlier could throw no light upon this question.

2. The exclusion of the statements made by George A. White, offered "to show the character of his occupation of this tract in dispute, in connection with his acts of occupation," appears at first sight to present a more difficult question. *Gray v. Kelley*, 190 Mass. 184, 76 N. E. 724; *Holmes v. Turners Falls Lumber Co.*, 150 Mass. 535, 547, 549, 23 N. E. 305, 6 L. R. A. 283; *Flagg v. Mason*, 141 Mass. 64, 6 N. E. 702; *Niles v. Patch*, 13 Gray, 254. But White was not deceased, and his declarations could not have been admitted under Rev. Laws, c. 175, § 66. Nor was there any offer to show that these declarations were made upon the land in question, and they were not admissible upon that ground. *Long v. Colton*, 116 Mass. 414, 415, and cases there cited. And see, further, *O'Connell v. Cox*, 179 Mass. 250, 60 N. E. 580; *Peck v. Clark*, 142 Mass. 436, 8 N. E. 335. But the decisive reason against sustaining this exception is that there is nothing to show what the declarations offered were, and so it is impossible to say that the plaintiff was aggrieved by their exclusion. *Com. v. Smith*, 163 Mass. 411, 429, 40 N. E. 189; *Koplan v. Boston Gaslight Co.*, 177 Mass. 15, 25, 58 N. E. 183; *Robinson v. Old Colony St. Ry. Co.*, 180 Mass. 594, 597, 76 N. E. 190. It does not substantially appear, as it did in the case last cited, what answer was expected to the question which was excluded.

3. The ruling that the boundary in the plaintiff's deed, on land formerly belonging

to Bliss, now or lately to one White, gave a monument which would control the distance stated in the deed, was plainly correct. *Per-cival v. Chase*, 182 Mass. 371, 378, 65 N. E. 800, and cases there cited. But a verdict should not have been ordered for the defendant. The monument is stated, as in the other deeds, to be the land formerly belonging to Henry Bliss, and the additional description of it as belonging "now or lately to one White" could scarcely be taken to change the identity of the monument. Moreover, in the deed of Daniel Shea, the plaintiff's grantor, to George A. White, which conveyed the land now in dispute, the courses given, as appears upon the plan used at the trial and produced before us, bring the westerly boundary of that tract upon land of James L. White. It may well be doubted whether the "one White" mentioned in the plaintiff's deed must not be held as matter of law to be James L. White and not George A. White. At any rate, the jury could so find; and by reason of this error the order must be

Exceptions sustained.

(189 N. Y. 393)

OSBORNE v. AUBURN TELEPHONE CO.
(Court of Appeals of New York. Nov. 1, 1907.)

1. DEEDS—CONSTRUCTION—PROPERTY INCLUDED.

The owner of land, on which an avenue 100 links in width had been laid out, conveyed the property, one of the boundaries running to the center of the avenue and thence east along the center thereof to the east line of the property, the deed reserving "50 links in width the whole distance from east to west for a road and which now constitutes the north half of the avenue. the whole distance of" said property "which had been opened to the public." *Held*, that the conveyance operated to vest in the grantee the fee of the half of the avenue, subject to the easement of the public thereon for the purpose of a highway.

2. EMINENT DOMAIN—HIGHWAYS—OCCUPATION BY TELEGRAPH POLES—ADDITIONAL BURDEN.

The erection and maintaining of telephone and telegraph poles in a street, the fee of which belongs to abutting owners, is an additional burden on the fee, for which compensation must be made to the owners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 312.]

3. SAME—CONSTITUTIONAL LAW—TAKING PROPERTY WITHOUT COMPENSATION.

The fee to lands in a city is as sacred to the owner as in the country, and in either place he is protected by the constitutional provision that property shall not be taken for public purposes without compensation.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Eliza W. Osborne against the Auburn Telephone Company. Judgment for defendant (111 App. Div. 702, 97 N. Y. Supp. 874), and plaintiff appeals. Reversed.

John Van Sickle, for appellant. E. C. Aiken and Hull Greenfield, for respondent.

HAIGHT, J. This action was brought to enjoin and restrain the defendant from entering upon the lands of the plaintiff in Fitch avenue, for the purpose of digging holes and erecting telephone poles for the stringing of wires, and also for damages, which had been sustained, to the shade trees.

The defendant was a domestic corporation organized under the laws of the state of New York for the purpose of maintaining and operating a telephone exchange in the city of Auburn and vicinity, and had been granted a franchise by the city to use the streets for the erection of poles and the stringing of wires. The plaintiff was the owner of a parcel of land situate at the corner of Fitch avenue and South street, in that city. Formerly one Abijah Fitch was the owner of the lands on which Fitch avenue, 100 links in width, had been laid out, and on or about the 13th day of April, 1865, as the court has found, he conveyed to the plaintiff the lands described as follows: "All that tract of land in the city of Auburn, bounded and described as follows, beginning in the west line of South street at a point 20 rods south of the southeasterly corner of land now owned and occupied by William C. Beardsley, running thence westerly on the south line of land now owned by party of second part 76 rods and 6 links to the westerly line of the farm of the late Joseph C. Richardson, deceased, thence southerly 51½ links to the center of Fitch avenue; thence east along the center of said avenue 76 rods and 6 links to the west line of South street; thence north on the line of said South street to place of beginning, being 51½ links; reserving 50 links in width the whole distance from east to west for a road and which now constitutes the north half of Fitch avenue, the whole distance of said Richardson farm—which has been opened to the public." We here have first an absolute conveyance to the plaintiff of the fee of the north half of Fitch avenue, then follows a reservation for a road which had then been opened to the public. We think that this conveyance operated to vest in the plaintiff the fee, subject, however, to the easement of the public thereon for the purpose of a road or highway. *Myers v. Bell Telephone Co.*, 83 App. Div. 623, 82 N. Y. Supp. 83.

We are thus again presented with the question as to whether the erection and maintaining of telephone and telegraph poles in the street is an additional burden upon the fee in which compensation must be made to the owner. The answer to this question depends upon the further question as to whether the maintaining of telephone and telegraph poles for the purpose of stringing wires thereon is a street use and deemed to be within the grant of the lands for highway purposes. This question was distinctly answered in the negative in the case of *Eels v. American T. & T. Co.*, 143 N. Y. 133, 38 N.

E. 202, 25 L. R. A. 640, and again in *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672. In the latter case we called attention to the distinction between a municipal purpose and a street purpose, saying: "The primary object of highways is for the public travel by persons and animals, and by carriages or vehicles used for the transportation of persons and goods, other than by railroads. Sewers drain the surface water from the highways, and thus relieve them from impairment and destruction. In this respect sewers are for a street purpose. In addition, they may drain also the abutting property and houses and thus tend to promote the public health. In this respect they are for a municipal purpose. Water supplied by mains through the highways may be used for cleansing and sprinkling the streets. In this respect it is for a street purpose. It may be used by the abutting owners for cleansing and for domestic purposes, and may also be used for the extinguishment of fires. In this respect it is for a municipal purpose. Light is an aid to the public in the nighttime in traveling upon the highway. It is therefore used for a street purpose. All of the street purposes which we have referred to are clearly incident to the highway, and are deemed within the grant of lands for highway purposes whenever the necessity for these uses arises. Not so with telegraph and telephone wires. They in no way preserve or improve the streets or aid the public in traveling over them." When the streets have been appropriated for the construction of sewers, the laying of water mains or gas pipes for street purposes, such sewers, mains, and pipes may also be used by the public for municipal purposes. But the use of the street for municipal purposes or individual purposes, independent of its use for street purposes, is an additional burden upon the fee not included in the grant of the lands for highway purposes. We are aware that in recent years our highways and streets have been appropriated for municipal and individual uses in many instances. Subways, conduits, and pipe lines have been constructed for the transmission of electricity, steam and other products, for other than street purposes. Cities which own the fee in the streets may contract, lease or grant their use for public or municipal purposes not inconsistent with nor prejudicial to the public easement or use for street purposes. In such cases the fee having been transferred to the municipality, it can grant rights in the streets other than for street purposes which do not impair the public easement. We therefore, cannot recognize the uses to which highways have been subjected in recent years as changing the law or the property rights of individuals.

The learned Appellate Division appears to have entertained the view that there was a distinction between rural and urban property. It is undoubtedly true that the use of high-

ways is many times greater in cities than it is in country towns. We had occasion to consider this question to some extent in the case of *Palmer v. Larchmont Electric Co.*, supra, and, in addition to what we then said, we only wish to remark that the fee to lands in the city is as sacred to the owner as it is in the country, and that in either place he is protected by the constitutional provision, to the effect that property shall not be taken for public purposes without compensation.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, WERNER, and WILLARD BARTLETT, JJ., concur; HISCOCK, J., not voting.

Judgment reversed, etc.

(139 N. Y. 398)

MORTON et al. v. HORTON.

(Court of Appeals of New York. Nov. 1, 1907.)

TAXATION—SALE OF LAND—NOTICE OF SALE—PUBLICATION.

Tax-Law, Laws 1896, p. 833, c. 908, § 120, relating to sales of lands for taxes by the State Comptroller, provides that the publication of notice of sale shall be in the body of the newspaper, and not in the supplement. Section 151, relating to sales of lands by county treasurers, directs that the publication of notice shall be made in two newspapers designated for the publication of Session Laws, but makes no reference to the particular part of such newspapers in which the notice is to be published. Section 157 declares that the provisions of those portions of the statute relating to sales by the State Comptroller shall govern county treasurers in so far as it is not otherwise therein provided. *Held*, that a notice of tax sale of land by a county treasurer published in the supplement of a newspaper in the form of a separate sheet, and not in the regular edition, such sheet being folded and sent out with the regular edition, was a valid notice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1338.]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Henry G. Morton and another against William J. Horton, impleaded with others. From a judgment of the Appellate Division, Third Department (91 N. Y. Supp. 950, 101 App. Div. 322), affirming a judgment entered on a decision at Special Term for plaintiffs, defendant appeals. Reversed, and new trial granted.

Ledyard P. Hale, for appellant. Vasco P. Abbott, for respondents.

WERNER, J. This action was brought to procure the annulment of a tax sale upon the ground that it was illegal and void. The complaint assigns no specific ground of illegality, but the proof relied upon to support the general charge is that the notice of the tax sale was published in a so-called supplement of a newspaper, and not in the

body thereof. The learned trial court held that the publication was not sufficient, and that the sale was void. At the Appellate Division the judgment entered upon that decision was unanimously affirmed, and the case is now before us upon the narrow question whether a county treasurer's notice of sale of lands for unpaid taxes must be published in the body of a designated newspaper or whether publication may be made in a supplement thereof. Upon that question we feel constrained to differ from the courts below.

Section 120 of the tax law (Laws 1896, p. 833, c. 908), which relates to sales of lands by the State Comptroller for unpaid taxes, provides for a publication of the notices of such sales in two newspapers published in the county where the lands are situate and where the sale is to be made, or, if there are not two such newspapers in any such county, then in the two newspapers most generally circulated in such county. With respect to such sales by the Comptroller the explicit command of the statute is that the publication of the notices shall be "in the body of the newspapers and not in a supplement." Section 151 of the tax law, which relates to sales of lands by county treasurers for unpaid taxes, directs that the publication of the notices of sales shall be made in two newspapers designated for the publication of the session laws, and makes no reference to the particular part or parts of such newspapers in which such notices are to be published. This marked variance in these two sections of the same general statute we regard as significant of the legislative intent to exclude from the one what is expressed in the other. "*Expressio unius est exclusio alterius.*" Section 120 requires notices of sales by the Comptroller to be published in the body of the newspapers, and not in a supplement, while section 151, relating to notices of sales by county treasurers, contains no such provision. In the effort to harmonize the divergence of these two sections of the same statute, the learned courts below have referred to section 157 of the tax law, which declares that the provisions of those portions of the statute relating to sales of lands by the State Comptroller for unpaid taxes shall govern and control the action of county treasurers in making such sales, "in so far as it is not otherwise herein provided." It is suggested that, by the terms of this section the specific command of section 120, that notices of sales shall be published in the body of the designated newspapers, is made applicable to section 151, which is silent in that particular. That would doubtless be the necessary effect of section 157, if it were not for the restrictive and qualifying words "in so far as it is not otherwise herein provided." It is otherwise provided in section 151, for that section contains no reference to the particular part of a newspaper in which county treasurers' notices of sales

shall be published, although it is a part of the same statute which, in section 120, does make a specific direction in that behalf.

Stress is laid upon the argument that the direction to publish a Comptroller's notice of sale in the body of a designated newspaper was obviously intended to secure its publication in that part of a newspaper best calculated to bring the subject to the attention of the reading public; and that the same reason exists for a similar publication of a county treasurer's notice. A moment's reflection in the light of practical considerations must lead to the conclusion that the difference between the one method and the other is more fanciful than real. In the populous counties of the state sales of lands for unpaid taxes are so numerous that the published notices of sales fill many pages of a newspaper. It is common knowledge that in many counties the list of such notices is so long as to more than fill the pages ordinarily devoted to the publication of editorials, press dispatches, and news items. In such cases it would be a distinction without a difference to designate the part containing the notices of tax sales "the body of the newspaper," and the news section "a supplement" thereof, or vice versa. In either event, the result would be the same. The "body" of the newspaper would be regarded by the public as that portion containing the current news. All the rest would be "supplement." But if, despite these suggestions, it should still be thought there is in fact a substantial difference in the two methods of publication, the Legislature can easily remedy the difficulty by amending the statute so as to require county treasurers to publish their notices in the same manner as the Comptroller is required to publish the notices of sales made by him. That can be done without interference with vested rights. Any attempt by the courts to accomplish the same purpose would destroy many titles founded upon county treasurers' tax sales.

It is obvious, of course, that a compliance with the statute demands actual publication in the designated newspapers. It is not essential, however, that publication shall be in any particular part of such newspapers unless, as in section 120, the statute expressly commands it. It is enough if the publication is made in any part of a designated newspaper that is published, circulated, and distributed with the other parts, in the same form and manner and for the same general purpose of disseminating the intelligence contained therein. When that is done, it matters not whether the several parts of a newspaper are designated by pages, sections or names.

The application of these general observations to the concrete facts of the case at bar is a very brief and simple task. The lands described in the complaint are situate in the county of St. Lawrence. That is one of the counties in this state in which, by section

150 of the tax law, the county treasurer is the functionary who is directed to sell lands for unpaid taxes. The county treasurer of that county made the sale in question pursuant to a notice published in two newspapers, one of which was the Commercial Advertiser, designated for the publication of the session laws in that county. The learned trial court has found that this publication was made in the supplement part of the Commercial Advertiser, in the form of a separate sheet, and not in the regular edition; such sheet being folded and sent out with the regular edition of the paper. We think the fair import of this finding is that the so-called supplement was a part of the newspaper, of the same general form, printed upon the same kind of paper, and distributed to the same readers in the same manner as every other part of its regular edition. We are thus led to the conclusion that in the case at bar the requirements of the tax law were complied with, and in that view the judgment below is erroneous.

There should be a reversal and new trial granted, with costs to abide event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, and HISCOCK, JJ., concur.

Judgment reversed, etc.

(139 N. Y. 355.)

PEOPLE v. LADEW.*

(Court of Appeals of New York. Oct. 29, 1907.)

1. TAXATION—TAX SALES—DEED TO STATE—NOTICE TO REDEEM.

Laws 1855, p. 781, c. 427, provided for service of a written notice on the person occupying land sold for taxes by the grantee, or any person claiming under him, that the conveyance would become absolute within a specified time, unless the consideration, with the statutory percentage thereon, should be paid into the treasury for the benefit of such grantee. *Held*, that where land was actually occupied by defendant's predecessors in title at the time certain deeds were made to the state by virtue of sales of the land for taxes, but no notice to redeem was served on either of such occupants, the conveyances to the state were void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1407-1417.]

2. SAME—EVIDENCE OF SERVICE OF NOTICE—RECORD.

Laws 1855, p. 781, c. 427, require service of notice to redeem land sold to the state for taxes on the occupant, and authorize such occupant or any other person at any time within a period mentioned in the notice to redeem, by making the prescribed payment, declaring that no conveyance made pursuant to such act shall be recorded until the expiration of such notice, and that the evidence of the service of the notice shall be recorded with the conveyance. *Held* that, where land sold to the state for taxes is actually occupied at the time of the sale, the record of deeds from the Comptroller to the state without the record of the service of the notice is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1407-1424.]

*For opinion on motion for reargument, see 32 N.E. 1092.

3. SAME—CURATIVE ACTS.

Laws 1896, p. 841, c. 908, § 132, providing that a conveyance executed by the Comptroller which has been recorded in the office of the clerk of the county in which the lands conveyed are located for two years shall be conclusive evidence that the sale and proceedings prior thereto and all notices required to be given of the expiration of the time allowed to redeem were regular and regularly given, published, and served, did not cure the record of a conveyance to the state for nonpayment of taxes which was wholly void.

4. SAME—RIGHT TO ASSERT INVALIDITY.

Where land sold to the state for taxes was in the actual possession of defendant's immediate and remote grantors at the time Comptroller's deeds were executed and recorded, defendant could object to the state's title under such deeds on the ground that no notice to redeem had been served on such grantors, as required by Laws 1855, p. 781, c. 427.

Appeal from Supreme Court, Appellate Division, Third Department.

Action to recover real property by the people against Joseph H. Ladew. From a judgment of the Appellate Division affirming a judgment in favor of plaintiff on a referee's report (see 97 App. Div. 634, 89 N. Y. Supp. 1112; 108 App. Div. 356, 95 N. Y. Supp. 1151) defendant appeals. Reversed, and new trial granted.

Theodore H. Lord, for appellant. Clarence W. McKay, for respondent.

WILLARD BARTLETT, J. This is an action of ejectment, or, in the language of the Code of Civil Procedure, an action to recover real property. The property in controversy is an island about 15 acres in extent, known as "Osprey Island," situated in Raquette Lake in the Adirondack region. It is also known as Murray Island, having been the camping place of the Rev. W. H. H. Murray, sometimes called "Adirondack Murray." The plaintiff's title is based on three tax deeds dated in 1875, 1881, and 1884, and, respectively, recorded in 1877, 1882, and 1887. Each of these deeds was made by the State Comptroller for the time being, and purports to have been given as the result of a tax sale duly made under chapter 427, p. 781, Laws 1855, and the acts amending the same. That statute provided and the tax laws ever since have provided for the service of a written notice on the person occupying land thus sold for taxes, by the grantee or any person claiming under him, that the conveyances would become absolute within a specified time (then six months, now one year), unless the consideration money, together with a statutory percentage thereon should be paid into the treasury for the benefit of the grantee. It also expressly authorized the occupant or any other person, at any time within the period mentioned in such notice, to redeem the land by making the prescribed payment; and it further in terms provided that "no conveyance made in pursuance of this section [namely section 68] shall be recorded until the expiration of such notice and the evidence of the service of such notice shall be recorded with such conveyance." It

should be noted here that the referee expressly finds that no notice of the tax sales made by the Comptroller in 1871, 1877, and 1881 was served upon the occupant of Osprey or Murray Island, and that the deeds issued to the plaintiff upon the said sales were recorded without evidence of the service of such notice.

The defendant proved title to the island in question by adverse possession against the original owner. One Alva Dunning entered upon the island in 1869, and actually occupied it under claim of title continuously until he transferred it to Charles W. Durant by a deed dated December 22, 1881. Durant remained in possession until he conveyed the premises to the defendant Joseph H. Ladew by a deed dated May 11, 1891, at which time the defendant entered into possession, and he has ever since actually occupied the island. The referee held, in substance, that the defendant had established a title by adverse possession as against the original owner, but that nevertheless the plaintiff was entitled to succeed by virtue of the tax deeds. He conceded that the title of the plaintiff based upon these deeds was subject to jurisdictional defects which would invalidate it if the defendant was in a position to raise the question. He took the position, however, that the defendant was a mere stranger, claiming no interest derived from the purchaser at the tax sale or from the original owner; and he deemed his interest as an actual occupant of the land claiming title thereto at the time of the tax sales insufficient to give him any right to question the title asserted by the state or to question the sufficiency of the tax title by reason of the failure to give the notice to redeem which the statute required to be served upon an occupant of the lands. In my opinion this view is incorrect. At the time when the first tax deed was placed on record, Dunning was the actual occupant of the island, and at the times when the two later deeds were recorded Durant was an actual occupant. Unless the requirement of the statute is to be wholly ignored, Dunning was entitled to be served with a notice to redeem from the first sale, and Durant was entitled to be served with a notice to redeem from the two later sales. Furthermore, evidence of the service of such notice was expressly required to be recorded with the conveyances under the tax sale and the statute expressly prohibited the recording of the conveyances until the expiration of such notice. Therefore, in the case of occupied land, such as this was, the record, without evidence of service of the notice, was absolutely void. Hence it seems to me that the tax deeds from the Comptroller are to be regarded as though they had not been placed upon the record books at all.

The so-called curative acts (Laws 1885, p. 758, c. 448; Laws 1896, p. 793, c. 908) did not help the plaintiff out of this difficulty. Section 132 of the statute last cited, which is

substantially a re-enactment of the acts of 1885, does provide that a conveyance executed by the Comptroller which has for two years been recorded in the office of the clerk of the county in which the lands conveyed thereby are located shall be conclusive evidence that the sale and proceedings prior thereto and all notice required to be given previous to the expiration of the time allowed for redemption were regular and regularly given, published, and served. Even if we give to this provision the broadest possible effect, it plainly cannot apply to a record which was wholly void. In *Meigs v. Roberts*, 162 N. Y. 371, 56 N. E. 838, 76 Am. St. Rep. 322, it was held that the act of 1883, making the Comptroller's conveyance upon a tax sale conclusive evidence of the regularity of the proceedings, was primarily and essentially a statute of limitations, although in some aspects a curative statute. That was a suit in ejectment against the State Comptroller who had been in possession of the lands in controversy for two years prior to the commencement of the action. The plaintiff did not prove any actual possession in himself or in his grantors; and it was held that his right to maintain the suit was barred, after the expiration of two years from the time of the Comptroller's notice that the state had resumed possession of the lands. In that case Judge Cullen, writing for the court, declared that it was questionable whether as to an owner in actual possession of land the record of a hostile conveyance in the clerk's office was sufficient to set a statute of limitations running against him so as to destroy his title. The same doubt was expressed by Judge Peckham in *Joslyn v. Rockwell*, 128 N. Y. 334, 28 N. E. 604, in language which conveys the impression that, if the learned judge had been required then to solve that doubt, he would have held that the conveyance was ineffective. It is not necessary, however, to decide this question in disposing of the present appeal, if I am correct in the view which I have expressed, to the effect that the record of the tax deeds upon which the plaintiff relies in the present case was a nullity.

In his oral argument counsel for the respondent placed considerable reliance upon the case of *People v. Turner* (second appeal, 145 N. Y. 451, 40 N. E. 400), in which Judge Gray wrote for a unanimous court. The only part of the opinion which seems to me to have any bearing upon the present controversy is on page 461, where Judge Gray deals with the final point of the appellant that there was an actual occupancy of part of the lands, and as no notice was served on the occupant, no title was acquired under the same. Judge Gray disposed of this objection by showing that the finding of the referee before whom the case was tried really negatived any such actual occupancy of the lands as required service of a notice to redeem under the statute. This in no wise

conflicts with the view which I have taken as to the proper disposition of the case at bar.

For the foregoing reasons, I advise a reversal of the judgment and that a new trial be granted, costs to abide event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, and HISCOCK, JJ., concur. HAIGHT, J., absent.

Judgment reversed, etc.

(189 N. Y. 346.)

STRONGE v. SUPREME LODGE, K. P.

(Court of Appeals of New York. Oct. 15, 1907.)

1. TRIAL—RECEPTION OF EVIDENCE—LIMITING TO SPECIAL PURPOSE.

Where, in an action on a benefit certificate, defendant put in evidence without objection certain letters by insured, which denied plaintiff's claim that she acquired the certificate for value, but such documents were competent to prove other defenses, and were received after defendant's counsel had stated that it had no evidence to contradict the claim of plaintiff's designation as beneficiary for value, such evidence, which was hearsay and incompetent on such issue, would not be regarded as offered to contradict plaintiff's testimony that her designation as beneficiary was for value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 126-128.]

2. INSURANCE—BY-LAWS—CHANGE OF BENEFICIARY.

By-laws of a mutual benefit association provided that a change of beneficiary might be made at any time, and as often as desired, without the consent of existing beneficiaries, and, in case the member desired to change his beneficiary and was unable to surrender his original certificate, the board of control might issue a new certificate on proof of the facts and the execution of an indemnity bond. Held not to apply to a certificate in which plaintiff had for a valuable consideration been designated as beneficiary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1946-1949.]

3. SAME—RIGHT TO CHANGE.

Where a member of a mutual benefit association took out a certificate for plaintiff's benefit for a consideration, which was fully performed, the member could not destroy plaintiff's rights in the certificate by taking out a new certificate designating a new beneficiary, though the certificate first issued provided that the beneficiary therein designated should acquire no interest in the certificate nor in the indemnity fund until the benefit should have accrued by reason of the member's death without a change of beneficiary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1946-1949.]

4. SAME—RELATIONSHIP—WAIVER OF OBJECTIONS.

Where a benefit certificate disclosed that the beneficiary was insured's sister-in-law, the association, having issued a certificate to her and received payment of dues thereunder, could not assert that the beneficiary was not a proper person to be designated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1866.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Martha Stronge against the Su-

preme Lodge, Knights of Pythias. From a judgment in favor of the defendant, affirmed by the Appellate Division by a divided court (97 N. Y. Supp. 661, 111 App. Div. 87), plaintiff appeals. Reversed, and new trial granted.

S. Livingston Samuels, for appellant.
James C. De La Mare, for respondent.

HISCOCK, J. While the courts below have taken a different view, we regard the controlling question in this case the one whether a member of a mutual benefit association may so procure a beneficiary to be designated and a certificate to be issued to him for a valuable consideration that the member will by such latter circumstance be prevented from exercising the privilege ordinarily possessed in such an association of changing his beneficiary as often as desired. Our view is that he will be prevented from changing and canceling the designation of the beneficiary who has been made such for a valuable consideration.

The facts which present and lead to the consideration of this question are as follows: One Irvine was a member of the Endowment Rank, Knights of Pythias. He was living in New York, and was seriously sick. He made an agreement with his sister-in-law, the appellant, which is evidenced by the testimony of herself and her husband and by some other testimony, that if she and her husband would give up their home in New York and take a cottage in New Jersey and take him along, and if the appellant would nurse and take care of him while he chose to remain with them, he would make her the beneficiary in his certificate in the association in question. This arrangement was carried out, and, while Irvine desired to, he lived with his sister-in-law and was nursed and cared for by her. A few days after the agreement was made the certificate in suit was taken out, naming appellant as beneficiary, and was delivered to her and ever since has remained in her possession. Subsequently Irvine went to Texas, and thereafter attempted to cancel the designation of appellant as beneficiary and to substitute another person. The by-laws of the association provided that a change of beneficiary might be made at any time and as often as desired, the consent of existing beneficiaries not being required; also, in substance, that the application for change should be made to and passed upon by the "board of control," and "in case a member desiring to change his beneficiary should (shall) be unable to surrender the original certificate then in force by reason of any act or refusal of the beneficiary named therein or fraud or other cause, the board of control might (may) issue a new certificate on proof of the facts by affidavit of the member and the execution by him of such instruments of release or indemnity as should (shall) be deemed necessary." The certificate

issued to appellant provided "that the beneficiary herein designated shall acquire no interest whatever in the certificate nor in the indemnity fund until the benefit shall have lawfully accrued by reason of the death of said member, and no subsequent change in the beneficiary shall have been made." When Irvine attempted to cancel the designation of appellant and designate a new beneficiary, the latter refused to give up the certificate which had been delivered to her, and therefore the former was unable to comply with the regulations of the association by delivering the old certificate in connection with his application for a new one. He, however, submitted such letters and affidavits that in accordance with the by-laws he would naturally be entitled to a new certificate upon giving indemnity, and he was informed that, if he would forward a bond in an amount specified, his application for a new certificate would doubtless be passed upon favorably. He died, however, before complying with this requirement.

It has been claimed and thus far held in effect that Irvine had a perfect right to designate a new beneficiary, that he did all that was in his power to accomplish such new designation, and that he was prevented from complying with the requirement for a surrender of the old certificate by the wrongful refusal of the appellant to deliver the same up, and that within the principles of *Lahey v. Lahey*, 174 N. Y. 146, 68 N. E. 670, 21 L. R. A. 791, 95 Am. St. Rep. 554, such wrongful act of appellant should not be allowed to prevent the new designation, but that the same should be regarded as having been made. It is urged in behalf of the appellant in this connection that this case differs from the *Lahey* Case, in that Irvine had the right which the member there did not have, of securing a new designation in spite of the fact that he did not produce the old certificate by giving a bond of indemnity, and that, therefore, his application should not have the benefit of the principles which were applied in that case. It is also said that the person whom Irvine desired to designate in the place of appellant did not occupy such relationship to him as would permit her designation. Because of the view which we take upon the other question already mentioned, we shall assume, without now deciding, that Irvine desired to designate a proper person, and that what he did and attempted to do in the way of making such designation would have brought him within the principles of the *Lahey* Case if appellant's conduct in refusing to give up her certificate was without justification and wrongful. Of course, if it was not without justification and wrongful, then the fundamental fact is lacking which served as the basis for the *Lahey* decision, and so we come directly to the consideration of her conduct.

As we judge of the proceedings upon the trial, there was no dispute either in testi-

mony or argument that the contract claimed in behalf of appellant with Irvine was made. The case was apparently tried by the counsel for the respondent, as it has thus far been decided, upon the theory that such contract was immaterial. There was no cross-examination either of the appellant or of her husband upon this point. As already stated, their evidence was corroborated by other testimony and circumstances. It is true that respondent put in evidence without objection some letters by Irvine to the association which denied appellant's present claim that she acquired the certificate for value. These documents, however, were competent evidence under the other defenses urged by respondent, and they were received after the statement by its counsel that "We have no evidence to contradict it"; that is, the claim of a designation for value. The latter evidence, therefore, which was purely hearsay and incompetent upon this point, is not to be regarded as offered for the purpose of contradicting appellant's testimony. *Dayton v. Parke*, 142 N. Y. 391, 396, 397, 37 N. E. 642; *Lehman v. Frank*, 19 App. Div. 442, 444, 46 N. Y. Supp. 761. In fact, we do not understand it to be claimed upon this appeal that there was any issue of fact, and we think we are fully justified in regarding it as established as a matter of law that the contract claimed by appellant was made. *Hull v. Littauer*, 162 N. Y. 569, 572, 57 N. E. 102; *Second Nat. Bank of Morgantown v. Weston*, 172 N. Y. 250, 258, 64 N. E. 949.

Thus assuming that a contract was made by a member for a valuable consideration to take out a certificate for the benefit of appellant, it seems to us very clear that, after the certificate has been taken out and the consideration fully furnished by the beneficiary, the member will not be allowed to destroy the rights of his creditor by a new certificate naming a new beneficiary. We do not regard the by-laws and provisions of the certificate or the authorities called to our attention providing for and upholding the right of a member to change the designation of his beneficiary as often as desired without the consent of the latter as at all applicable to such a case as this. They relate to a case where, voluntarily and gratuitously, designation has been made of a beneficiary who, in the language of the certificate, has acquired "no interest whatever in the certificate nor in the indemnity fund." But can there be any doubt that a member of one of these associations might say to a person that, if the latter would loan him \$1,000, he, the member, would take out a certificate designating the creditor as beneficiary as security for such loan, such designation not to be canceled or changed without the consent of the creditor, and that this contract and agreement would estop and prevent the member from changing the designation, whatever might be the ordinary privileges and regulations as between him and the association

when no rights of a third party had intervened? While the agreement detailed by appellant is not in terms as complete as the one assumed, we think it is just as effective, because what the parties have omitted specifically to say as between themselves the law says for them. Irvine agreed that he would procure the certificate to be issued designating appellant as beneficiary if she and her husband would establish a new home, take him with them and care for and nurse him in his sickness. The appellant performed her part of the contract, and Irvine performed his so far as procuring the certificate to be issued was concerned, and the law now prohibits him from destroying the rights which appellant has acquired in the certificate for a valuable consideration. Independently, however, of any original reasoning which may be indulged in upon this proposition, the decisions already made seem clearly to establish the rights of appellant as claimed by her.

In *Conselyea v. Supreme Council Am. L. of H.*, 3 App. Div. 464, 38 N. Y. Supp. 248, affirmed, without opinion, 157 N. Y. 719, 53 N. E. 1124, it appeared that the certificate had been issued to the husband for the benefit of his wife, the plaintiff, as part of a separation agreement, the husband agreeing not to change the beneficiary named in the certificate, and the wife agreeing to maintain the insurance, which she subsequently did. In violation of his agreement, the husband endeavored to withdraw from the council and surrender his benefit certificate. It was held that this attempt was in violation of the laws of the council, but it was also held that the certificate had passed into the possession of the plaintiff under circumstances which vested the title thereto in her for value, and that her rights in and to the certificate having been secured for value she could not be deprived of them in the absence of any law of the order which, regardless of her equities and legal rights, would destroy the validity of the certificate.

In *Webster v. Welch*, 57 App. Div. 558, 68 N. Y. Supp. 55, a mutual benefit insurance company had issued a certificate upon the life of the deceased in favor of one of his daughters, naming her as the sole beneficiary under an agreement that she should care for her father during life, which agreement was carried out. Subsequently the deceased procured the issue of new certificates, which changed the designation of the beneficiary. It was held that the daughter acquired a vested interest in the certificate, and that she could not be deprived of that interest by subsequent changes procured by the member in derogation of her rights.

In *Smith v. National Benefit Society*, 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616, it was held that the provision of the statute (Laws 1883, p. 172, c. 175) providing for the incorporation of co-operative life insurance societies, which declares that membership in

such a society gives the member the right to make a change in his payee or beneficiary without the consent of such payee or beneficiary, applies simply when the original designation is in the nature of an inchoate or unexecuted gift, and does not prevent a contract between the member and the payee by which a vested right passes to the latter, and in such case, without his consent, the payee may not be changed. In that case the member made an agreement with his creditor, to the effect that he would secure his debt by an insurance on his life, and then became a benefit member of a corporation organized under the act above mentioned, and by the certificate issued to him the society agreed to pay the sum insured to the creditor, and it was held that the latter stood as an assignee of the policy and that the transfer was not revocable.

The case of *Lahey v. Lahey*, supra, especially relied upon by the respondent in this case as affirming the right of a member in a mutual benefit association to procure a new certificate and designate a new beneficiary after a former certificate has been issued and a former beneficiary has been designated, expressly recognizes the principle determined by the foregoing cases, and that a beneficiary may be so designated for a valuable consideration that his rights may not be subsequently cut off by a new designation. Judge Martin, writing for the court, says: "She [the respondent who was claiming a designation under much the same circumstances as apply to appellant], however, contends that the right to change the beneficiary in a certificate, like every other valuable right, may be sold or transferred, and when transferred for a valuable consideration the insured loses the right to transfer it to others. (Citing cases already cited.) In those cases it was held that the statute which gave to a member the right to make a change in the beneficiary without the consent of the latter applies only when the original designation is in the nature of an inchoate or unexecuted gift, and does not prevent a contract between the member and his beneficiary by which a vested right passes to the latter, and in such case, without his consent, the beneficiary may not be changed. The cases cited are clearly distinguishable from the case at bar, in that in the former the beneficiary became such for a valuable consideration and the association issued a certificate to such beneficiary, while in this case, although the court has found that the mother paid a valuable consideration for a transfer of the certificate or a portion of its benefits, still no certificate was ever issued to her, nor was the certificate which was issued and made payable to the plaintiff ever canceled, so that she ceased to be a beneficiary under it." We do not regard as well made the contention of respondent that appellant, as a sister-in-law of Irvine's, was not a proper person to be designated as beneficiary. The certificate upon its

face disclosed her relationship, and the association, having issued it to her and received payments of dues thereunder, is now in no position to assert any such defense as is suggested. Thus we conclude that not only was the refusal of appellant to surrender the old certificate not wrongful, so as to excuse the nonperformance by Irvine of certain acts otherwise essential to the issue of a new certificate, but Irvine was not entitled to have a new certificate issued as against appellant even if he had complied with respondent's regulations.

The judgment of the Appellate Division should be reversed and a new trial granted, with costs in both courts to abide event.

CULLEN, O. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, WERNER, and CHASE, JJ., concur.

Judgment reversed, etc.

(189 N. Y. 578)

ONTARIO BANK v. LOOMIS et al.

(Court of Appeals of New York. Nov. 1, 1907.)

1. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE.

Plaintiff bank had a lien on shingle logs and shingles for money advanced to P., to get out the logs, etc. P. sold shingles before manufacture to defendants, and received their note for \$1,000, as an advance payment. Plaintiff discounted the note with knowledge of all the facts, and refused to permit plaintiff to ship shingles when manufactured, except with a draft attached to the bill of lading. P., at the bank's suggestion, wrote defendants that while plaintiff would not permit shipment, except on a cash basis, he had no idea of asking defendants to pay the note without giving them shingles for the same, but that the proceeds of shipments must be applied as made, that the bank refused to permit shipments on time paper, etc. Defendants received shipments and paid sight drafts for an amount exceeding the amount of the note, which the bank did not credit on the note, but sued defendants thereon. Held, that the letters were admissible against the bank to show that P. was the bank's agent, and was acting within his authority when he procured defendant's consent to pay the drafts in cash on condition that the proceeds be applied on the note.

2. SAME.

It was immaterial that one shipment of shingles was not covered by the bank's lien, it having been made with the plaintiff's knowledge on defendant's contract, with a draft for the amount attached to a bill of lading, and the proceeds having been paid to the bank and credited to P.'s account.

Hiscock, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Ontario Bank against Judson W. Loomis and another. From a judgment of the Appellate Division (100 N. Y. Supp. 1133, 113 App. Div. 890) affirming a judgment on a verdict in favor of plaintiff, directed by the court, defendants appeal. Reversed.

O. M. Reilly, for appellants. Louis L. Waters, for respondent.

HAIGHT, J. This action was brought to recover the amount of a promissory note for \$1,000, dated Phoenix, N. Y., March 11, 1902, in which the defendants, four months after date, promised to pay to the order of Sam G. Parkin at the Phoenix Bank, Phoenix, N. Y., the sum mentioned. The note was indorsed by Parkin and delivered to the plaintiff. The defendants by their answer admitted the making of the note and the delivery of it to the payee therein named, and that it had been presented for payment, which was refused, but alleged that the note was without consideration; that the plaintiff was not a bona fide holder for value; that the note had been delivered to Parkin as an advance payment on shingles purchased of him which were to be delivered in the future, and for the purpose of aiding him in meeting the expenses of their manufacture, all of which the plaintiff had notice at the time the note was delivered to its manager; that the plaintiff was a party in interest, and held the note as collateral security; that it had caused sight drafts to be drawn upon the defendant amounting to more than \$1,000, which drafts had been honored and paid by the defendant to the plaintiff, with the understanding that such payment should apply upon the note. Upon the trial, at the close of the evidence, the plaintiff's attorney moved for a direction of a verdict for the amount of the note and interest. The defendants' attorney asked to go to the jury upon all the evidence in the case. This was denied, the plaintiff's motion was granted, and the verdict directed, to which an exception was taken by the defendants.

On the 5th day of March, 1902, Parkin entered into a contract in writing with the defendants, by which he agreed to sell and they to purchase a quantity of shingles, to be delivered in cars at the rate of two cars per month, commencing with April, until the whole amount contracted for should be delivered. On March 11th, at the request of Parkin, the defendants delivered to him the note in question as an advance payment upon the shingles and for the purpose of aiding him in meeting the expenses of their manufacture. Parkin thereupon indorsed the note and took it to the plaintiff bank for discount, at the same time informing the manager as to the nature of his contract with the defendants and the purpose for which the note had been delivered to him. Parkin, as he testified, had been doing business with the bank for a number of years, that he was at that time indebted to the bank and there had not been a time within five years when he had not been indebted to it. The manager of the bank testified that the note was delivered to him, and he had it discounted on the 25th of March, 1902, and passed the proceeds to the credit of Parkin on the books of the bank. He further testified that he knew that the note was given for shingles the first time that he ever saw it. He also knew that Parkin had

not delivered the shingles, and knew that it was a long time after that before any delivery was made. He knew this before he discounted the note. He was so informed by Parkin. Parkin had told him when he presented the note for the first time that it was an advance payment on shingles. He further testified: "I knew about the time that he first commenced to ship shingles to the defendant. I can't tell you the date. Approximately I should suppose it would be some time in June after the opening of navigation; logs are cut and come down when the streams open. I also wished him [Parkin] to state to the defendants that the only condition that the shingles should be shipped to the defendants on was that there should be a sight draft attached to the bill of lading which they should honor. * * * These shingles belonged to Mr. Parkin. We could dictate to him how he should sell the shingles in making advances to Mr. Parkin to take out shingles. We refused to make any advances on account of the sale of shingles unless there was bill of lading and a draft accompanying the shingles. The bank had a lien upon shingles which Parkin had. I wish to be understood this way. Under our lien, we are authorized to dictate to whom he may sell if we wish to exercise that, so that we had an interest in these shingles to the extent of our lien. Our lien covered these shingles that were shipped to the defendants. Those shingles referred to in the bill of lading. We had an interest in those and an interest to the extent of our lien, so that we had a right to dictate to Mr. Parkin whether he should ship those shingles or not. * * * I informed Parkin that the defendants could not have any shingles unless they paid the cash. I did not indorse any of the proceeds of these drafts which you have shown me on this note in question. I knew at the time I got the avails of the first draft that that was for shingles shipped to the defendants. I knew that the note Parkin brought to the bank was for shingles." It further appeared that from time to time shingles were shipped to the defendants with sight drafts attached to the bill of lading, which were honored by the defendants and paid to the plaintiff, amounting to more than the amount for which the note was given; that after the talk with Parkin, testified to by the manager of the plaintiff, Parkin wrote the defendants a letter which the defendants offered to read in evidence, but was excluded on objection of the plaintiff. In the letter Parkin stated that the bank was not satisfied to let him ship any shingles to them except on a cash basis; that the manager had no idea of asking them to pay the \$1,000 note without giving them the shingles for the same; but he says the proceeds of shipment must be applied as made, and asked if it would be satisfactory to them to pay cash for the shingles as the cars arrive and have the \$1,000 note returned. Another letter, under date of May 5, 1902, was

also written by Parkin to the defendants, in which he stated, among other things, that the manager of the bank refused to allow him to ship shingles on time paper; that he would not expect you to pay the note without getting shingles for the same, but that he would not allow me to ship the \$1,000 worth of shingles without the cash when the bank had advanced the money to take out the logs. He then closed by stating: "You see the position of the matter, and the only way I can handle it is to go ahead, fill your orders or contract and apply proceeds on the note. If you want any further satisfaction regarding the note, or if you doubt my statement, I would refer you to the manager of the Ontario Bank here, who will satisfy you on the question." And again, in postscript, he states: "As soon as I have made shipments sufficient to cover the note, I will get it and send it to you." This letter, under like objection, was also excluded.

We think that the court erred in the excluding of these letters and in the directing of a verdict for the plaintiff. It is true that these letters contain irrelevant matter not pertinent to the issue or binding upon the plaintiff. But, as to the substance of the letters, to which attention has been called, it appears to us that they were both relevant and competent. The shingles which the defendants had contracted to purchase of Parkin were his, but held by him subject to a lien for advances made by the plaintiff. The bank by virtue of its lien, as its manager claimed, could control the shipping and delivery of the shingles. It, with Parkin, had an interest in the property. When, therefore, Parkin informed the manager of the contract made with the defendants, and the manager instructed him to communicate to the defendants the conditions upon which he would permit the shingles to be shipped, the jury might have found that he constituted Parkin the agent of the bank to procure the consent of the defendants to pay the sight drafts in cash upon the arrival of the shingles, and, in thus making the arrangement, disclosed in the two letters referred to, he was acting within the scope of his authority, and that the understanding and agreement was that the payments made by the defendants upon the sight drafts accompanying the bills of lading were to be applied by the plaintiff upon the defendants' note in suit, and that, therefore, the plaintiff had no cause of action.

Something has been said to the effect that one of the shipments of shingles was not covered by the plaintiff's lien. It is not apparent to us, however, how this could change the situation, for, as we understand the evidence, the shipment was made with the plaintiff's knowledge upon the defendants' contract, with a draft for the amount attached to the bill of lading, the proceeds of which went to the plaintiff and was credited upon Parkin's account.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, WERNER, and WILLARD BARTLETT, JJ., concur. HISCOCK, J., dissents.

Judgment reversed, etc.

(189 N. Y. 570)

In re DARLING.

(Court of Appeals of New York. Oct. 31, 1907.)

1. ELECTIONS—NOMINATIONS—CERTIFICATES—TIME OF FILING—ACCIDENTS AND MISTAKES.

Though the statute fixing the time for filing nomination certificates is mandatory, the Supreme Court in either branch is authorized by Laws 1896, p. 922, c. 909, § 56, in its discretion, to relieve from accidents and mistakes causing delay in such filing, if the delay is not due to the negligence or fault of the convention making the nomination, or of the party to whom the filing of the certificate is intrusted, and the application is made without laches, and the granting thereof will not cause confusion in preparing the ballots.

2. APPEAL—EXERCISE OF DISCRETION—REVIEW.

A reasonable exercise of the Supreme Court's discretion to relieve from the effect of a failure to file nomination certificates within the time prescribed will not be interfered with on appeal.

Vann and Willard Bartlett, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Application by Joseph F. Darling to review certain proceedings for the filing of certificates of nomination. From an order refusing the relief asked, affirmed by the Appellate Division (106 N. Y. Supp. 430), petitioner appeals. Affirmed.

PER CURIAM. Though we regard the statutory requirement as to the time when certificates of nomination should be filed as mandatory, a majority of the court are of the opinion that there may occur accidents and mistakes, causing delay in such filing, from the effect of which the Supreme Court in either branch may, under section 56 of the election law (Laws 1896, p. 922, c. 909), relieve, provided it finds that the delay has not been due to the negligence or fault of the convention making the nomination, or of the party to whom the filing of the certificate was intrusted. But the question in each case whether there has been excusable default or misfortune depends upon the particular facts, and the determination of the question rests in the Supreme Court. In this case, if the Appellate Division of the Supreme Court had deemed it a proper exercise of discretion, the majority of this court think it would have had power to relieve the petitioner, provided, of course, that there were no laches in making the application, and the granting of the application

would not involve confusion in preparing the election ballots. But these matters were in the discretion of the Supreme Court, and with that discretion, reasonably exercised, we feel we have no power to interfere.

CULLEN, C. J., and O'BRIEN and CHASE, JJ., concur.

GRAY, J. I concur in the affirmance of the order upon the ground that the provision of the statute is mandatory with respect to the filing of the certificate, and that the relief which may be granted under section 56 of the statute is appropriate only where a certificate has in fact been filed which is defective in some particulars. I agree, however, that, if the power exists to relieve from a failure to file the certificate, it is one to be exercised in the sound discretion of the Supreme Court, with which discretion this court should not interfere.

VANN and WILLARD BARTLETT, JJ. (dissenting). We are of the opinion that upon the undisputed facts in this case a question of law is presented which can be reviewed by this court, and that upon these facts it was not only within the power, but it was the duty, of the Supreme Court to grant the relief sought by the appellant.

WERNER, J., absent.

Order affirmed.

(189 N. Y. 447)

MORGAN et al. v. MUTUAL BENEFIT LIFE INS. CO.

(Court of Appeals of New York. Nov. 1, 1907.)

1. INSURANCE—LIFE—BENEFICIARY'S INTEREST.

Where decedent obtained insurance upon her husband's life, payable to herself, or to his children, should she die before him, her interest in the policy was contingent upon her surviving her husband.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Insurance, § 1463.]

2. PROCESS—VACATION—WHO MAY MOVE.

In an action to determine rights in a life insurance policy assigned to plaintiffs' testator as collateral security for premiums paid to establish an equitable lien for the amount so paid, and to collect the amount of the policy, the beneficiaries are proper and necessary parties, and defendant insurer may therefore move to vacate an order for service upon them by publication.

3. SAME—PUBLICATION SERVICE—SUBJECT OF ACTION—"PERSONAL PROPERTY."

Where a foreign insurance company doing business in the state under the laws thereof issued a policy to a resident, who, with the company's consent, assigned it to another resident as collateral security for advanced premiums, and the assignee died a resident of the state, and his trustees held the policy as an asset of his estate, the subject-matter of an action by the trustees against the company and the beneficiaries to recover the amount of premiums advanced is "personal property" within the state, within Code Civ. Proc. § 438, subd. 5, author-

izing the service of summons on a nonresident defendant by publication, where the complaint demands judgment that defendant be excluded from an interest in personal property within the state, and the nonresident beneficiaries may be served by publication.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Susan Morgan and others, trustees, against the Mutual Benefit Life Insurance Company. From an order of the Appellate Division of the Supreme Court in the Fourth Department (104 N. Y. Supp. 185, 119 App. Div. 645) affirming an order denying a motion to vacate an order directing the service of summons on certain defendants by publication, defendant company appeals, and a question of law is certified by the Appellate Division. Order affirmed, and question answered.

In 1866 one Elizabeth A. Morgan made application in this state to the defendant insurance company for a policy of insurance upon the life of her husband, Orson A. Morgan. The application was accepted, and the policy of insurance was delivered to her in this state. The said policy is payable to said Elizabeth A. Morgan, or assigns, and it is therein further provided that, if she should die before Orson A. Morgan, the amount of the insurance shall be payable to his children or to their guardian, if under age. Both Mr. and Mrs. Morgan became unable to pay the premiums on said policy, and on or about the 23d day of March, 1871, they requested the plaintiffs' testator, who was then living, to pay said premiums and preserve and keep said policy in force. The said insurance policy and the moneys due and to grow due thereon was thereupon assigned by Elizabeth A. Morgan, with the knowledge and consent of her husband, to the plaintiffs' testator in writing, to hold until he should receive full payment of all sums that he should pay for premiums thereon, and a copy thereof was delivered to and accepted by the insurance company. Thereafter the plaintiffs' testator each and every year until his death on April 9, 1890, paid the premiums on said policy, and after the death of plaintiffs' testator these plaintiffs, as executors and as trustees, paid the premiums thereon until the death of the person whose life was insured. After the assignment of said policy, no premium was ever paid thereon by Mr. or Mrs. Morgan or by his children. The premiums paid on said policy by the plaintiffs and their testator amount to more than the full sum now payable thereon. Elizabeth A. Morgan died in 1904, and Orson A. Morgan in 1905. After the death of Orson A. Morgan, due proofs of loss were filed with the company by the plaintiff, and also by the heirs at law of Orson A. Morgan. All of said heirs at law reside without the state of New York. Elizabeth A. Morgan and Orson A. Morgan were each at the time of the execution and delivery of said policy and at the time of the assignment

thereof residents of the state of New York. The plaintiffs reside and the said testator in his lifetime and at all the times herein mentioned resided in the state of New York, and the policy of insurance since its delivery has always remained in the state of New York. Since the assignment of said policy it remained continuously in the possession of the plaintiffs' testator until his death, and since his death it has been in the possession of the plaintiffs. The defendant insurance company is a foreign corporation, having its principal office and place of business in the state of New Jersey. It is authorized to do business within the state of New York pursuant to statutes in this state made and provided. On October 6, 1905, this action was commenced against the said insurance company and said heirs at law for the purpose of ascertaining and determining the interests of the parties to the action in said policy of insurance, and to establish an equitable lien by the plaintiffs upon said policy and the moneys due thereon to the extent of the moneys paid by them and by their testator upon said policy, and for the collection of said policy against the insurance company.

The defendant insurance company duly appeared in the action. Thereafter, upon application of the plaintiffs, an order was granted directing the service of the summons upon said heirs at law by publication, and service has been made on them pursuant to said order, but they have not appeared in the action. The defendant insurance company answered the plaintiffs' complaint, and admitted that it issued said policy as in the complaint alleged and that the amount of said policy as stated in the complaint was then owing by it; but it further alleged that in the month of November, 1905, the said heirs at law commenced an action against it in the superior court of the county of San Francisco in the state of California, and therein demanded judgment against it for the amount of said policy and interest, and that the policy of insurance mentioned in the said action so brought in California was the same policy of insurance and the claim thereon was the same claim mentioned and referred to in this action, and it submitted its rights to the protection of the court. Thereafter said insurance company moved upon the papers upon which the order of publication was granted that said order of publication be set aside and canceled upon the ground that the court had no jurisdiction to direct publication of the summons against the defendants, said nonresident heirs at law in this action. The motion was denied, and an appeal was taken therefrom to the Appellate Division, where the order was affirmed, but leave was granted to the defendant insurance company to appeal to this court and said Appellate Division certified that a question of law had arisen which should be determined by this court, as follows, to wit: "Was there jurisdiction to make the order made in this action enter-

ed in the Erie county clerk's office on the 4th day of June, 1906?"

Louis L. Babcock and Chauncey J. Hamlin, for appellant. Joseph H. Morey and Norris Morey, for respondents.

CHASE, J. (after stating the facts as above). The interest of the plaintiffs' assignor, Elizabeth A. Morgan, in the policy of insurance, was contingent upon her surviving her husband. *Bradshaw v. Mutual Life Ins. Co.*, 187 N. Y. 347, 80 N. E. 203. As she did not survive her husband, the plaintiffs seek in this action to charge said policy and the proceeds thereof with the amount paid by them and their intestate for premiums thereon. 3 *Pomeroy's Equity Jurisprudence*, § 1243; 25 *Cyc.* 774, 775; 19 *Am. & Eng. Ency. of Law*, p. 90; *Mandeville v. Kent*, 88 Hun, 132, 34 N. Y. Supp. 622; *Brick v. Campbell*, 122 N. Y. 337, 25 N. E. 493, 10 L. R. A. 259; *Conn. Mutual Life Ins. Co. v. Burroughs*, 34 Conn. 305, 91 *Am. Dec.* 725; *Lane v. N. Y. Life Ins. Co.*, 56 Hun, 92, 9 N. Y. Supp. 52. The defendants other than the insurance company are proper and necessary parties to this action. *Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471, 65 N. E. 281; *Mahr v. Norwich U. F. Ins. Society*, 127 N. Y. 452, 28 N. E. 391. The defendant insurance company, therefore, had a standing in court to move to vacate the order of publication. *Brandow v. Vroman*, 29 App. Div. 597, 51 N. Y. Supp. 943. This is not disputed by the plaintiffs.

Service of a summons upon nonresidents of the state of New York may be made as provided by section 438 of the Code of Civil Procedure. It is therein provided as follows: "An order directing the service of a summons upon a defendant, without the state, or by publication, may be made in either of the following cases: * * * (5) Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property. * * *". The term "personal property" is defined by statute. Section 4 of the statutory construction law (chapter 677, p. 1486, Laws 1892) provides as follows: "The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property; or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership. The term chatte's includes goods and chattels." *Rev. St. p. 4, c. 1, tit. 7, § 33; Code Proc. § 463; Code Civ. Proc. (1880) §*

3343, subd. 7. It is not necessary to consider to what extent, if any, the Legislature simply by statutory definition or provision can treat intangible personal property as within this state and subject it to the jurisdiction of our courts as against persons not served with process within our territorial limits, because in this case not only are the plaintiffs as claimants residents of this state, but the debtor and the debt as well as the written instrument by which the debt was created, acknowledged, and evidenced are in contemplation of law within this state.

A foreign insurance company is not allowed to do business in this state until it submits itself fully to the jurisdiction of our courts. It must obtain from our superintendent of insurance a certificate authorizing it to do business in this state. It is subject to examination by the insurance department of this state, and it is required to deposit with the superintendent of insurance of this state or with the Auditor, Comptroller, or general fiscal officer of the state by whose laws it is incorporated, stocks and bonds as provided by our statutes to the same amount as required by domestic insurance corporations, which stocks and bonds are held in trust for the benefit of all the policy holders of the corporation. A foreign insurance corporation is also required to appoint our superintendent of insurance its attorney in this state upon whom all lawful process in any action or proceeding against the corporation can be served. The authority of such foreign insurance corporation must be revoked in case it applies to remove into the United States court any action brought against it in a court of this state. Our statutes expressly provide that an action against a foreign corporation may be maintained by a resident of the state or by a domestic corporation for any cause of action. Such an action may be maintained in this state by another foreign corporation or by a nonresident when the action is brought to recover damages for the breach of a contract made within this state.

The presence of the insurance company in this state is not temporary, but continuous. It is legally and actually here, not only because process has been served upon it and it has appeared in the action, but it is here pursuant to the provisions of our statutes by authority of which it is doing business and maintaining offices in this state. The contract of insurance was made by it with a resident of this state through its agents so located and doing business here. Every transaction relating to the contract, its assignment, and the payment of premiums thereon has occurred here. The policy of insurance and the claim against the insurance company for the amount payable on the policy of insurance are in the control of our court, and any judgment that may be rendered in the action can be enforced and made effectual in this state. As to such a claim, the insurance company should be treated as a domestic insurance

company and as domiciled in this state. The situs of the debt would consequently be here, and the action is one to define and enforce an interest in specific personal property within the state within the meaning of the Code provision quoted. Whenever a question as to the situs of a similar claim against an insurance company doing business in a state pursuant to the statutes thereof has been directly involved in this court or in the federal courts, and it has been sought to uphold the situs of the claim in the state where the contract was made, it has been sustained.

In *Martine v. International Life Insurance Society*, 53 N. Y. 339, 13 Am. Rep. 520, an action was brought upon a policy of life insurance. The defendant was a foreign corporation. The court say: "The defendant sought and obtained the privilege of establishing and carrying on its business here under the regulations fixed by the statutes of this state. It established a permanent general agency, and conducted its business here as a distinct organization, and was permitted by law to do this in the same manner as domestic institutions." * * * As to the business transacted here, the company must be regarded as domiciled by the residence of its general agent and its local organization. * * *

In *New England Mutual Life Insurance Company v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 384, 28 L. Ed. 379, the plaintiff corporation was organized in the state of Massachusetts. It issued a policy of insurance to the defendant's intestate in Michigan. The defendant's intestate died in the state of New York. The defendant subsequently moved to Illinois, and there obtained letters of administration upon the estate of the intestate, his deceased wife. The plaintiff was doing business in Illinois, and had an agent appointed there pursuant to statute of that state on whom process could be served. The court, referring to the statutes of Illinois requiring every life insurance company not organized in Illinois to appoint in writing a resident attorney upon whom all lawful process against the company might be served with like effect as if the company existed in Illinois, say: "In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois and a general agent there and a resident attorney there for the service of process and can be compelled to pay its debts there by judicial process and has issued a policy payable on debt to an administrator, the corporation must be regarded as having a domicile there in the sense of the rule that the debt on the policy is assets at its domicile so as to uphold the grant of letters of administration there."

In *Sulz v. Mutual R. F. L. Association*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379, the plaintiff as administratrix of her deceased husband commenced an action against the insurance company to recover on a policy of

insurance on the life of her deceased husband. The policy was issued payable at the home office of the insurance company in New York. At that time the plaintiff and her husband resided in this state. Subsequently the insured went to the state of Washington and took the policy of insurance with him, leaving the plaintiff in this state. After his death in California leaving the policy of insurance in the state of Washington, an administrator was appointed in Washington, and he there commenced an action against the insurance company on the policy of insurance. The plaintiff was appointed administratrix in this state and subsequently commenced the action here. The insurance company had an attorney in Washington upon whom pursuant to the statutes of that state process could be served. This court, commenting upon the opinion in *New England Life Insurance Company v. Woodworth*, supra, and referring to the opinion, say: "The United States Supreme Court held that a company may be regarded as present in and an inhabitant of the state where it has an agent upon whom pursuant to the laws of that state process may be served, and that an administrator is duly appointed in such state when the policy is brought within the state prior to such appointment, although the person insured died outside the limits of the state and not a citizen thereof. As the company is to be regarded as an inhabitant of the state where its agent is thus served with process, the court held that the principle that a simple contract debt followed the person of a debtor was not invaded because the debtor was present in the state of Illinois when the suit was commenced by the husband as his wife's administrator, being at the same time the beneficiary under the policy. Under such facts, the policy was assets in the state where it was when the administrator was appointed." This court called attention to the fact that the action was properly commenced in the state of Washington prior to the commencement of the action in this state, and further say: "We think the courts of the foreign state have obtained jurisdiction, and therefore could give a full and complete discharge to the company if it paid upon a judgment obtained in such action, and we ought not to permit a second action in the courts of this state upon the same policy. In such a case as this we think that the principle of comity between the states calls for the refusal on the part of the courts of this state to entertain jurisdiction."

In the recent case of *Matter of Gordon*, 186 N. Y. 471, 79 N. E. 722, it was sought to impose a transfer tax upon the proceeds of a life insurance policy issued to a resident of the state of New Jersey by the *Equitable Life Assurance Society*, a New York corporation having its principal office here. The society is doing business in the state of New Jersey, where it had designated a certain official to receive service of process with the same effect as if personally served upon the

company in this state. Such designation was made as a condition of doing business in that state. The policy of insurance was payable to the insured, his executors, administrators, or assigns at the office of the society in New York. It was kept by the insured in the state of New Jersey, where the premiums were paid. The person insured died in New Jersey, and the claim on the policy of insurance passed under his will, which was probated in that state. It is provided by our statutes that a tax shall be paid on the transfer by will or intestate law "of property within the state," even if the "decedent was a nonresident of the state at the time of his death." This court, referring to the assurance society doing business in the state of New Jersey pursuant to the statutes of that state and of the other circumstances connected therewith and detailed, say: "It would seem as though all of these circumstances were amply sufficient to fix the situs of this contract of insurance and of the claims arising thereunder in New Jersey and that fairly and reasonably they should be regarded as property within that state, rather than within the state of New York."

The decisions in *New England Mutual Life Insurance Co. v. Woodworth*, supra, and in *Sulz v. M. R. F. L. Association*, supra, are referred to and approved, and the court further say: "The policy throughout the different states of compelling an insurance company seeking to do business in one of them to submit to the jurisdiction of its courts, by provision for a substituted service upon some person, has been widespread, deliberate, and very exacting. It was intended to obviate the possibility that an individual procuring insurance at the place of his domicile should be compelled for enforcement of his contract to go to some distant forum and become subject to the embarrassments and burdens which might result therefrom. It was designed to give to the insured or his representatives or assigns full opportunity to enforce the contract of insurance at the place where it was accepted, and to give to the state wherein he resided just as complete jurisdiction over the insurer as was possessed by the state wherein it was organized. We feel that we are entirely justified in the view that this class of legislation was distinctly intended to abrogate that very idea that the insured could only obtain redress by resorting to the laws of the state wherein the insurance company had its organization and principal place of business, which is made the basis of taxation in the decisions cited." See, also, *Harris v. Balk*, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023; *Louisville & Nashville R. Co. v. Deer*, 200 U. S. 176, 26 Sup. Ct. 207, 50 L. Ed. 426; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; *India Rubber Co. v. Katz*, 65 App. Div. 349, 72 N. Y. Supp. 658; *Olshei v. Penn. R. R. Co.*, 117 App. Div. 110, 102 N. Y. Supp. 368.

The appellant relies principally upon statements taken from the opinions in *Plimpton v. Bigelow*, 93 N. Y. 592; *Douglass v. Phoenix Insurance Company*, 138 N. Y. 209, 33 N. E. 938, 20 L. R. A. 118, 34 Am. St. Rep. 448; *Carr v. Corcoran*, 44 App. Div. 97, 60 N. Y. Supp. 763; *National Broadway Bank v. Sampson*, 179 N. Y. 213, 71 N. E. 768, 66 L. R. A. 606, 103 Am. St. Rep. 851; *Von Hesse v. Mackaye*, 55 Hun. 365, 8 N. Y. Supp. 894. In *Plimpton v. Bigelow* both the plaintiff and defendant were nonresidents of this state. The action was brought upon promissory notes. The plaintiff procured an order for the service of a summons upon the defendant by publication, and also a warrant of attachment against his property. The sheriff undertook to execute the warrant of attachment by levying upon certain shares of stock owned by the defendant in a Pennsylvania corporation. The stock certificates were in the possession of the defendant in Pennsylvania, and the only service of the warrant of attachment consisted in leaving copies of the papers with the secretary of the corporation in the state of New York. In *Douglass v. Phoenix Insurance Company* the action was brought upon a policy of fire insurance issued in this state by the defendant, a domestic corporation. The policy was executed to a resident of this state covering property in this state. The property insured was destroyed by fire, and the plaintiff brought this action on the policy. The defendant set up in its answer that the debt owing by the defendant to the plaintiff had, prior to the commencement of this action, been attached in the state of Massachusetts in an action brought against the parties in this action and the insurance company to recover a debt owing by the plaintiff to the attaching creditors, and that said Massachusetts action was still pending. In *Carr v. Corcoran* a resident of the state of Ohio brought an action in this state against a resident of the state of Pennsylvania, and attempted to attach alleged indebtedness of the defendant by a resident of the state of Pennsylvania temporarily in this state. In *National Broadway Bank v. Sampson* the suit was in aid of an attachment claimed to have been levied in this state upon a debt owing by a Massachusetts limited partnership to a Massachusetts corporation. The warrant of attachment was not served upon all the partners. In *Von Hesse v. Mackaye* the action was brought to recover the possession of railroad bonds that were not actually within reach of the court. The facts in each of the cases last mentioned are entirely different from the facts in the case now under consideration, and any statements in the opinions in such cases that are or seem to be opposed to the other authorities cited or to the conclusion reached herein were obiter and not binding upon the court.

The order appealed from should be af-

med, with costs, and the question certified us answered in the affirmative.

CULLEN, C. J., and O'BRIEN, EDWARD BARTLETT, HAIGHT, VANN, and HIS-CK, JJ., concur.

Order affirmed.

(N. Y. 428)

In re LONG ISLAND R. CO. et al.
 Court of Appeals of New York. Nov. 1, 1907.)
RAILROADS—RIGHTS IN STREET—RAILROAD'S INTEREST—EXTENT.

Where an agreement for the improvement a street, confirmed by Laws 1855, p. 854, c. 5, provided that a railroad company should have the exclusive right to a 30-foot strip therefor for railroad tracks and turnouts, and running of locomotives and cars thereon, without interruption, but did not provide in what title the railroad company should be in the strip, it only acquired a perpetual right of way, which was all that was necessary to satisfy its use under the rule that only such powers and privileges are presumed to be granted a railroad company as are expressly authorized or are necessary to accomplish the general purpose intended.

Ed. Note.—For cases in point, see Cent. Dig. § 41, Railroads, § 195.]

STREET RAILROADS—USE OF STREET—STATUTES—CONSTRUCTION.

An agreement for the improvement of a street confirmed by Laws 1855, p. 854, c. 475, conferred on a railroad company an exclusive right in a 30-foot strip in the center of the street. After this Laws 1897, p. 763, c. 499, was passed, which required the railroad company to depress its tracks in a portion of the street, and to elevate them over other portions, declaring that the street should be so changed that railroad tracks should no longer rest on the surface, but that the same should be unobstructed. *Held*, that the railroad company, having complied with the act 1897, was not thereafter authorized without the consent of the street owners or the Appellate Division and the local authorities to construct a street surface railroad along such 30-foot strip, under Laws 1899, p. 1028, c. 497, providing that, whenever the right of way, grade, or tracks of any street railroad company in any street in any city of the first class were required to be changed by elevating or depressing them, such alterations should not curtail the railroad's right to maintain a surface passenger railway within the limits of the right of way so depressed or elevated with necessary turnouts, etc., under the constitutional provision that no law should authorize the construction or operation of a street railroad, except on condition of the consent of the property owners, or, in lieu thereof, of the Appellate Division, and of the local authorities.

SAME—NEW ROADS.

Laws 1899, c. 497, in effect authorized the construction of a new railroad where none existed before, which could only be accomplished by compliance with the constitutional provision requiring consent of adjoining owners, or, in lieu thereof the consent of the Appellate Division, and of the local authorities in charge of the street.

Ed. Note.—For cases in point, see Cent. Dig. § 44, Street Railroads, § 7.]

Appeal from Supreme Court, Appellate Division, Second Department.

Application of the Long Island Railroad Company, as lessee of the Nassau Electric Railroad Company and another, for the con-

struction of an electric railroad on portions of Atlantic avenue, in the borough of Brooklyn, city of New York. An application to the Appellate Division was granted and newspapers for publication designated (100 N. Y. Supp. 1126, 115 App. Div. 887), after which petitioner's motion for the appointment of commissioners was denied by the Appellate Division, and the proceedings dismissed solely on the ground that petitioners were not possessed of the legal right to construct and operate the roads contemplated (102 N. Y. Supp. 1141, 116 App. Div. 928), from which petitioners appeal. Affirmed.

Atlantic avenue is a street 120 feet wide, running from the East river easterly to the present limits of the borough of Brooklyn, about 7 miles easterly of the old city line. At the junction of Atlantic and Flatbush avenues a steam railroad, owned by the Nassau Electric Railroad Company but leased and operated by the Long Island Railroad Company, commences, and, extending through Atlantic avenue, continues on to Jamaica. Prior to 1897 the railroad was on the surface of the avenue, but after the passage of the Atlantic avenue improvement act in that year (Laws 1897, p. 763, c. 499) the tracks were placed partially in a subway and partially upon an elevated structure connected at three points by inclined planes resting on abutments of masonry, the existence of which makes it impossible to operate a surface road without encroaching upon the roadway of Atlantic avenue on either side of the abutment. The westerly part of the present right of way of the railroad companies originally belonged to the Brooklyn & Jamaica Railroad Company, which was organized by special charter in 1832. Laws 1832, p. 453, c. 256. After the road was built, it was leased under authority conferred by chapter 94, p. 136, of Laws 1836, to the Long Island Railroad Company, which had been incorporated in 1834. Laws 1834, p. 231, c. 178. The right to alter, modify, or repeal each of the three acts last named was expressly reserved by the Legislature. The rights of the Brooklyn & Jamaica Railroad Company passed through foreclosure proceedings to the Atlantic Avenue Railroad Company, and from the latter to the Nassau Electric Railroad Company, one of the appellants. After the foreclosure a new lease was given to the Long Island Railroad Company.

Prior to 1850 Atlantic street was opened from Flatbush avenue to Bedford avenue, and a portion of the right of way of the Brooklyn & Jamaica Railroad Company was taken for the purpose. From Franklin avenue eastward no portion of the railroad property or right of way was touched. The original right of way of the Brooklyn & Jamaica Railroad Company went over Atlantic street, and easterly of Flatbush avenue, over the present Atlantic avenue, until it reached a point in the neighborhood of Franklin avenue where it

passed northward on a right of way about 50 feet wide, practically parallel to Atlantic avenue, extending to the city line as it formerly existed. This right of way, easterly of Franklin avenue and in front of the property of the respondents, was about 100 feet north of the present northerly line of Atlantic avenue, which at this point was at one time known as Schuyler street. In 1855 a tripartite agreement was made between the two railroads first above-mentioned and the city of Brooklyn, the first division of which relates to that part of Atlantic avenue which lies west of Franklin avenue, and the second, referred to in the opinion, to that part extending from the westerly line of Franklin avenue to the easterly line of the city as it existed at the date of the agreement. Atlantic avenue, as distinguished from Atlantic street and Schuyler street, was created by the tripartite agreement and an act of the Legislature confirming the same, known as chapter 475, p. 854, Laws 1855. In 1897 the Atlantic avenue improvement act was passed (Laws 1897, p. 763, c. 490), under which the steam railroad tracks were removed from the surface of Atlantic avenue and placed partially under ground and partially overhead. Under the act last named and an act passed in 1899 (Laws 1899, p. 1028, c. 497), the petitioning railroads claim the right to construct and operate a trolley line on the surface of Atlantic avenue where the steam railroad formerly stood. Such line has already been constructed, except as to certain turnouts and sidings. This proceeding was commenced by an application made by the railroad companies to the Appellate Division for the appointment of commissioners to determine whether the necessary turnouts and sidings should be constructed to enable the trolley line to pass around the three structures by which the tracks laid beneath the surface of Atlantic avenue are carried over an inclined plane to the elevated road built above the surface thereof.

The application was denied, and the petitioning railroads appeal.

George W. Wingate, for appellants. Adrian T. Kiernan, Robert Stewart, Charles B. Hobbs, and Walter E. Warner, for respondents.

VANN, J. (after stating the facts as above). The project of the petitioning railroads was resisted by landowners whose premises abut upon that part of Atlantic avenue which lies substantially between Bedford and Nostrand avenues. The original right of way of the appellants never covered any part of Atlantic avenue in front of the lands of the respondents. In that locality all the rights which the railroad companies ever had to the so-called "thirty-foot strip," which embraces their present right of way, came through a tripartite agreement, dated April 10, 1855, executed by the Brooklyn & Jamaica Rail-

road Company as party of the first part, the Long Island Railroad Company as party of the second part, and the City of Brooklyn as party of the third part. That instrument provided for making an avenue 120 feet wide, from Flatbush avenue to the city line, out of portions of the old Atlantic street, the railroad strip west of Classon avenue, the proposed but unopened Schuyler street, and additional land to be condemned by the city on the north side, east of Classon avenue. It contains many mutual stipulations, and, among others, the following: The parties of the first and second parts agreed to convey to the party of the third part, if authorized by the Legislature, "the strip of land fifty feet in width now owned by the party of the first part and occupied by the railroad tracks, extending from the westerly side of Franklin avenue to the easterly line of the present city limits, provided, however, and upon this express condition, that the parties of the first and second part shall forever have the exclusive right to use and occupy a strip or space of the width of thirty feet in the center of said Atlantic avenue as so extended and in the center of Schuyler street, as thus widened, from the intersection of Atlantic avenue to the easterly line of the city as thus widened, for the purpose of railroad tracks and turnouts and the running of locomotives and cars thereon without interruption or molestation." Upon "the cession and conveyance" aforesaid, and when Atlantic avenue should have been laid out and graded, the party of the second part agreed "to remove the rails from the strip of land so to be ceded and to lay the necessary tracks in that portion of Atlantic avenue so extended and in Schuyler street as so widened." No part of the agreement was to be binding upon any party until the Legislature authorized the three corporations to carry it into effect. Adequate authority was given by chapter 475, p. 854, Laws 1855, by which the tripartite agreement was "ratified and confirmed, together with all the causes and covenants therein contained." The statute further provided that the city should hold the strip of land to be conveyed to it "in fee simple absolute, subject only to the terms of such agreement and the provisions of" the act. Chapter 220, p. 425, Laws 1853, which led to the tripartite agreement, was repealed "so far as the same is inconsistent with this present act * * * and," as the statute continued, "after the said avenue and street shall be actually laid out, extended and widened, as hereinbefore provided, and the report of said commissioners finally confirmed, the street now known as Atlantic street in said city, together with said avenue as so extended, and Schuyler street as so widened, shall be known and distinguished by the name of Atlantic avenue." There was nothing in the act which provided in terms what title the railroad company should take to the "thirty-foot" strip, not yet acquired, but which was

to be acquired by the city and which the company was to have the exclusive and permanent right to use and occupy for railroad purposes, not by way of reservation, but by grant or license from the city. The companies and the city complied with the provisions of this agreement, and the object of the various acts and instruments was thus accomplished. All the land east of Classon avenue, which, for a distance of about 5 miles and for the entire width of 120 feet, was converted into an extension of Atlantic avenue, was at the date of the agreement farming lands owned by private individuals. This and was acquired by the city by purchase and condemnation pursuant to the statute, including the lands in front of the abutting owners, who now resist the application of the companies and whose rights alone are involved in the present controversy. The final result was a grand avenue, 120 feet wide, with a "thirty-foot" strip in the center for the use of the railroads, and a driveway 45 feet in width on either side thereof for the use of the public generally.

It is apparent from reading the tripartite agreement in connection with the act of 1853 that it was the intention of the Legislature to confer upon the corporations concerned adequate power to part with and acquire such property rights as were necessary to carry into effect the scheme in contemplation. The land was appropriated by the state to a public use, with the right on the part of both city and railroad to take and hold such interests as the Legislature deemed necessary to effect the widening and extension of Atlantic avenue. The powers granted to the railroad companies, however, were in derogation of common right, and, according to the settled rule in such cases, included no privilege except those expressly authorized, or such as were necessary to accomplish the general purpose of the Legislature. That purpose was to widen and extend Atlantic avenue by, among other things, appropriating land for the benefit of the city, and permitting the city to give the railroad companies and the latter to accept a right of way over a part thereof, in accordance with an agreement already made between them supported by a full consideration. The companies did not need the fee to the "thirty-foot" strip. A perpetual easement or right of way was all that was necessary to satisfy every use then in view. The rule of limitation already mentioned therefore would confine the title to an easement, unless the language of the Legislature, which adopts the words of the tripartite agreement, clearly calls for a fee. "A doubt as to the extent of the power, after all reasonable inferences in its favor, * * * should be solved adversely to the claim of power." *Latter of N. Y. & Harlem R. R. Co. v. Kip*, 6 N. Y. 546, 552, 7 Am. Rep. 385. The language of the contract, carried forward into the statute, gives to the railroad companies

"the exclusive right to use and occupy the thirty-foot strip forever for the purpose of railroad tracks and turnouts and running locomotives and cars thereon without interruption or molestation." This does not "clearly" describe a title in fee, but with greater clearness describes an easement, which was all the railroads needed, and, according to the principle of strict interpretation governing the subject, was all they took. The Legislature did not intend to create nor permit the parties interested to create two streets named Atlantic avenue, each 45 feet wide, separated by a parcel of land belonging to the railroad companies in fee and forming no part of the public highway. The intention of both contract and statute was to create a noble avenue 120 feet wide, subject to an easement for railroad purposes over the central portion. Such land as was to be acquired by the city from individual owners and incorporated into the avenue, including all that upon which the lands of the respondents abut, was not to be acquired for railroad purposes, but for highway purposes; and, when acquired, it was by virtue of the tripartite agreement and the statute made subject to a right of way over a part thereof for the use of the railroads. While it is true that the commissioners appointed in the proceeding to open Atlantic avenue east of Franklin street were bound to include, and are presumed to have included, in their award to parties whose land was taken, all damages to the abutting premises caused by the use of the "thirty-foot" strip for the railroad purposes in contemplation, still an appraisal of such damages was required whether a fee or an easement was to be given to the railroads, and whether the use was for both highway and railroad purposes or railroad purposes only. The anomaly of a statute authorizing a city to condemn land solely for railroad purposes, or for the exclusive purpose of conveying it to a railroad company in fee, is avoided by the more reasonable construction that the city was authorized to condemn for highway purposes, with the statutory as well as contractual obligation to give the railroad company a right of way for its railroad. The Legislature authorized the appropriation of land in order to widen and extend a street, not to change the location of a railroad. A street purpose was its primary object in taking the land, and the railroad purpose was secondary and incidental. This accords with the title of the act in question, "authorizing the common council of the city of Brooklyn to widen and extend Atlantic avenue and to widen Schuyler street in the city of Brooklyn, and to ratify and confirm an agreement therein mentioned between the said city and the Long Island Railroad Company and the Brooklyn and Jamaica Railroad Company." The title that the railroads took to the "thirty-foot" strip west of Bedford avenue rests upon facts differing from those governing the subject

east of that avenue, and that question is not directly before us.

Atlantic avenue, as thus widened and extended, has existed for more than 40 years, but during most of that period it has had an uneasy history. Legislation of various kinds has rested upon it like a shadow. The right of the railroads to use steam as a motive power was first suspended and then restored. Laws 1859, p. 1109, c. 484; Laws 1876, p. 166, c. 187. Substantial iron fences to shut the "thirty-foot" strip off from the rest of the avenue were at one time required, as well as gates at many of the street crossings. Owing to the extension of the city and the enormous increase in its population, the railroad was no longer welcome in the center of the avenue, and there was much opposition to steam as the motive power after its use was restored. All parties seem to concede that, as the result of years of agitation, an act was passed in 1896 "to authorize the appointment of a commission to examine into and report a plan for the relief and improvement of Atlantic Avenue in the city of Brooklyn." Laws 1896, p. 433, c. 394. This act required five commissioners, when appointed by the mayor, to "inquire into the condition of Atlantic avenue in said city with reference to the railroads operated thereon," and to "formulate a plan for the relief of said avenue and the improvement of the same." The plan was to be reported to the mayor, who was required to "cause a bill to be prepared to carry out said plans and recommendations and" to "present the same to the Legislature at its meeting in the year 1897."

This was followed the next year by a statute known as the "Atlantic avenue improvement act." Laws 1897, p. 763, c. 499. The primary command of this act was to so change the grade of the railroad tracks on the "thirty-foot" strip as to elevate and depress the same so that they should no longer rest on the surface of the street. This was to be done by depressing the grade in some places "so that the existing surface railroad tracks shall be below the surface of Atlantic avenue at such depth as to allow the complete restoration of the surface of said Atlantic avenue, free from steam railroad tracks, fences, gates, signal posts or other appurtenances of such steam railroad now existing thereon." In other places "the said right of way and railroad tracks" were to be "used and operated in an open cut, with proper retaining walls and of width not greater than the present right of way in possession of said railroad companies the grade of said tracks and right of way rising gradually until they reach" a point named, and from that point "the said railroad tracks shall be removed from the surface as now operated, and raised by convenient grades on suitable and sufficient structures * * * not less than fourteen feet above the street surface. * * * The said railroad tracks shall run on an elevated steel structure over

the right of way of said railroad companies as now in possession at such grade elevation that they shall cross over all intervening streets and avenues at such grade as to leave the same unobstructed on the surface, and open to the free passage of pedestrians and vehicles with a clear height at each crossing of not less than fourteen feet." In other words, the statute provided that the railroad tracks as they were when the act went into effect should be physically removed from the surface of Atlantic avenue and placed at some points 16 feet below the surface, and at others upon elevated tracks at least 14 feet above the surface, with an open cut to make the transition from the underground to the elevated structure. The companies were authorized to erect stations and platforms on either side of the railroad at any points along the tracks as depressed to take the place of those existing on the surface. It was required that such stations should be below the surface of the street, and that the use thereof when constructed should "in no way interfere with the grade of Atlantic avenue, or the free use of said avenue by the public, save so far as the same may be affected by the supports for stations along the elevated structures hereinabove provided for." The act further provided for a board whose duty it was to direct and superintend the construction of said improvement by the company, and the expense, not exceeding \$1,250,000 on the part of the city, was to be borne one half by the city and the other half by the railroad corporation. The expense of erecting the stations, however, was not to be included in the cost of the improvement.

It was also enacted that "said depressed right of way and tracks and the elevated portions of said railroad * * * shall be employed for the uses and purposes of the said The Long Island Railroad Company to the same extent and as fully and completely as the railroad at present constructed which is operated by the said company." The operation of passenger trains was to be by some power other than steam, except that steam locomotives might be used to move freight trains, and in cases of emergency passenger trains also. The final command of the Legislature as addressed to the railroads was as follows: "When completed, the Long Island Railroad Company, as the lessee of the said Atlantic Avenue Railroad Company of Brooklyn, its successors or assigns, are authorized and directed to run their trains over the said improvement * * *, as constructed and authorized by law."

In view of the situation when the act was passed, and the language used by the Legislature, it seems clear that the intention was to remove all railroad tracks from the surface of Atlantic avenue. While the term "steam railroad" appears in both title and text, that was merely a description of the obstacle to be done away with, and no permission to put another in its place was given

directly or indirectly. "The existing surface railroad tracks" were to be "removed from the surface as now operated" and put below or raised above the level of the street. The improvement was to leave the avenue "unobstructed on the surface and open to the free passage of pedestrians and vehicles." There was to be a "complete restoration of the surface of Atlantic avenue." The depression was to be at a safe distance, not less than 16 feet, below the surface, and the elevation at a safe distance, not less than 14 feet above, sufficient in each case to permit the untrammelled use of the avenue for highway purposes. The surface of the street was to be free from the railroad, its tracks, fences, gates, signal posts, and the like. The situation was to be completely changed. The old things were to pass away, and the avenue was no longer to be a surface railroad street. The improvement was made and paid for as required by the act. The double tracks authorized by the charters of the railroad companies were removed bodily from the surface of the avenue, and placed above or below throughout its entire length. The railroads accepted the change, and thus surrendered possession of the surface of Atlantic avenue. All trains are now run upon tracks which have been moved away from their former location as completely as if they had been transferred into another street.

The railroad companies, however, claim the right to lay new tracks on the surface of the avenue in order to operate a trolley line thereon, alleging that it is needed as a "feeder" to the other line. To quite an extent this would restore the evil which, after prolonged discussion, with much difficulty and great expense, was removed by the express command of the Legislature. They found their claim on a general act passed in 1899, entitled "An act to regulate the use of lands forming part of the right of way of any railroad company, the road of which has been removed from the surface in, or adjacent to streets and highways in all cities of the first class in this state." Laws 1899, p. 1028, c. 497. It provides that "whenever the right of way, grade or tracks of any steam railroad company in or adjacent to any street or highway in any city of the first class are required by law to be changed or altered by elevating or depressing the same for the purpose of discontinuing the use of steam power upon the surface of such highway or street, such alteration or change of grade shall not be deemed to curtail or affect any right which such railroad company or its lessees or assigns may have to maintain and operate a surface passenger railway within the limits of the right of way so depressed or elevated, and over and under the railroad tracks so depressed or elevated, with all turnouts, sidings and tracks necessary to secure the continuous connection and operation of such surface railroad." At the three points of transition between the depressed and elevat-

ed tracks, the companies allege that, in order to secure a continuous connection and operation of their proposed trolley line, it is necessary to occupy portions of Atlantic avenue outside of the "thirty-foot" strip for the distance of about one mile in the aggregate. As they were unable to obtain the consent of the majority of the owners of property abutting on said turnouts, they made the application now before us to the Appellate Division of the Supreme Court. That application was denied, but the learned court did not favor the parties or ourselves with their reasons for this important decision, affecting many interests, both public and private.

The respondents claim that if the acts of 1897 and 1899, when read together, authorize the construction of a trolley road on the surface of Atlantic avenue, they violate the Constitution of the state by permitting the construction and operation of a street railroad, without the consent of the requisite number of abutting owners and of the local authorities in charge of the street, neither of which the appellants have. *Matter of Third Avenue R. R. Co.*, 121 N. Y. 536, 541, 24 N. E. 951, 9 L. R. A. 124. The Constitution provides that the Legislature shall not pass a private or local bill "granting to any corporation, association or individual the right to lay down railroad tracks," or "granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever." The Legislature, however, may "pass general laws providing for" these cases and for all others "which in its judgment may be provided for by general laws." The power even to pass general laws relating to the cases named are subject to the limitation that "no law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad, be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court in the department in which it is proposed to be constructed, may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners." The consent of the property owners, or, if that cannot be had, the consent of the Appellate Division, is not enough, for the consent also of the local authorities is an absolute prerequisite to the construction or operation of a street railroad. If the railroad that was removed from the surface of Atlantic avenue and the new line proposed to be constructed where the old line stood are

two railroads, each physically independent of the other, although owned in common, it is obvious that the Legislature had no power to authorize the construction or operation of the latter, for it is restrained by the Constitution from granting a franchise to lay down railroad tracks. It is necessary, therefore, to see what was the purpose and effect of the two acts.

The learned counsel for the appellant claims that the purpose of the act of 1899 was "to put to rest any question that the Atlantic avenue improvement act had affected the right of the petitioning companies to use their right of way over the depressed or under the elevated railroad for railroad purposes"; that it embraced "the grant of a franchise in the adjoining portion of a highway to construct such turnouts as might be necessary to make such tracks a continuous line"; that the operation of the proposed trolley upon the surface of the old right of way is not a new railroad; and that "the act of 1899 was constitutional and repealed all restrictions upon the use of this strip by the Long Island Railroad for an electric surface passenger line, if any such was contained in the Atlantic avenue improvement act."

The claim that the special charters of the Brooklyn and Jamaica and the Long Island Railroad companies, by authorizing "a railroad with a single or double track, and with such appendages as may be deemed necessary for the convenient use of the same" (Laws 1832, p. 453, c. 256, and Laws 1834, p. 231, c. 178), permitted the use of a trolley line before the constitutional provision above quoted was adopted, is involved in the primary and controlling question whether the proposed trolley line is a new road or merely an appendage or part of an old road, such as the addition of a third rail might be. Perhaps a more accurate statement of the question would be to ask whether the effect of both acts is to put two railroads in a street where there was but one before. Were it not for the limitation in the charters of the companies, there would be some reason for holding that even a third track should not be regarded as a new road. Such a track would have so intimate and inseparable a connection with the road as to give color to the claim that it was a part thereof. Such, however, is not the situation presented by this appeal. Here we have two roads, not of the same kind or on the same level. One is wholly an underground or elevated road for through travel, reaching far into the country and with no surface grade until the city boundary is passed, while the other is an ordinary street railroad, built on the surface, for local traffic within the limits of the city. Each road is an independent entity, existing by itself, operated by its own method, with its own tracks, signals, and appliances, which are used exclusively by itself. Each may be separately owned, sold, mortgaged, and man-

aged. Neither has any physical connection with the other. Annihilate either and the other continues to exist in the same condition as before, with every power and capacity unimpaired. Neither trains nor cars can be transferred from one to the other. They need not be of the same gauge, although doubtless they are. A surface railroad is separate and distinct from an underground or overhead railroad, even when directly over the one or under the other. Neither is part of the other, but each is an entirety in itself. The subject is so controlled by perception and cognition as to make rules of logic difficult of application. Describe the roads, and two different things appear before the mind, as distinct as the right hand from the left, the one a surface railroad and the other an underground or overhead railroad, and neither belonging to or connected with the other.

We think that the effect of the two statutes was to authorize two roads in Atlantic avenue where only one existed before, and the last to be constructed is a street railroad, to which the Constitution so pointedly applies. The appellants have no right to construct or operate a trolley line on the surface of Atlantic avenue past the property of the respondents, and therefore the application to appoint commissioners to determine whether sidings and turnouts should be constructed in aid thereof was properly denied.

The order appealed from should be affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HISCOCK, and CHASE, JJ., concur. O'BRIEN and HAIGHT, JJ., dissent.

Order affirmed.

(189 N. Y. 402)

MISHKIND-FEINBERG REALTY CO. v. SIDORSKY.

(Court of Appeals of New York. Nov. 1, 1907.)

1. PROCESS—SUBSTITUTED SERVICE—MORTGAGE FORECLOSURE PROCEEDINGS—DEFECTS—AMENDMENT.

In mortgage foreclosure proceedings, in order to bring in a nonresident subsequent mortgagee, an order was framed under Code Civ. Proc. § 440, which provides for service on nonresident defendants, and directs that the summons and "copy of the complaint" and order be served without the state personally upon the defendant. The order complied with the terms of the statute, except that by a clerical error, in place of "copy of the complaint," "notice of object of action" was substituted, though, in fact, a copy of the complaint was attached to the order. After sale on foreclosure, the order was amended nunc pro tunc to conform to the statute. *Held*, that in view of Code Civ. Proc. §§ 419, 423, 438-440, 479, relating to service of process, the order was irregular only and the subsequent amendment cured the irregularity, so that the rights of the subsequent nonresident mortgagee were fully cut off.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 249.]

2. EVIDENCE—PRESUMPTIONS—MAIL MATTER—SERVICE OF PROCESS.

It is presumed that papers to be served on a nonresident defendant contained in a securely inclosed postpaid wrapper, properly directed to the correct address of the nonresident defendant, were received by such defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 92.]

Appeal from Supreme Court, Appellate Division, First Department.

Submission of controversy between the Mishkind-Feinberg Realty Company and Louis Sidorsky. From a judgment of the Appellate Division in favor of defendant (see 98 N. Y. Supp. 496, 111 App. Div. 578), plaintiff appeals. Affirmed.

See 100 N. Y. Supp. 714, 115 App. Div. 115.

Louis Julian, for appellant. J. A. Seldman, for respondent.

CHASE, J. A controversy exists between the parties to this action as to whether the title to certain real property is marketable. The only question relating thereto discussed in this court is as to whether the interest of one Rabinovitch, a mortgagee of said real property, was cut off by a judgment and sale in an action to foreclose a prior mortgage thereon. She was made a party defendant to the action, and, being a nonresident of the state, an application was made for an order directing the service of a summons upon her without the state or by publication. An order was granted which directed the service of the summons upon her "by publication thereof, in two newspapers, namely, in the New York Times, published in the Borough of Manhattan, N. Y., and the New York Law Journal, published in the Borough of Manhattan, N. Y., once a week for six successive weeks, or at the option of the plaintiff by service of said summons and notice of object of action, and a copy of this order without the state upon the defendant, Mary Rabinovitch, personally; that on or before the day of the first publication as aforesaid plaintiff deposit in the general post office in the borough of Manhattan, city, county, and state of New York, a copy of the summons and notice of object of action hereto annexed and of this order contained in a securely inclosed, postpaid wrapper, directed to the said Mary Rabinovitch, at No. 12 Fair street, Paterson, N. J." The order was thereafter amended by changing the name of one of the papers in which the summons was to be published.

The order and amended order conform to the directions therefor prescribed by section 440 of the Code of Civil Procedure, except that the words "notice of object of action" were used therein in place of the word "complaint." No question is raised as to the sufficiency of the papers upon which the order was founded to give the judge jurisdiction to grant the same. The order, among other things, recites that it is based upon a verified

complaint "hereto annexed." A notice of object of action was not annexed to the order, and the words "notice of object of action hereto annexed" were used in the order by mistake and clerical error when the words "complaint hereto annexed" were intended to be used therein. The summons was duly published pursuant to the order, together with a notice directed to said Rabinovitch, as follows: "The foregoing summons is served upon you by publication pursuant to an order of the Honorable P. Henry Dugro, a justice of the Supreme Court of the state of New York, dated the 29th day of January, 1901, and filed with the complaint in the office of the clerk of the county of New York upon the 5th day of February, 1901, at the courthouse in the borough of Manhattan, N. Y." The summons, a notice of object of action, the order and amended order of publication, the complaint, and the affidavits upon which the order of publication was granted were duly served upon said Rabinovitch by mail. By the judgment and sale in the foreclosure action the interest of said Rabinovitch in the real property in question was foreclosed and barred if the court had jurisdiction of her as a defendant.

An action is commenced by the service of a summons (Code Civ. Proc. § 416), and by it a defendant is notified that his rights are challenged. Service of the summons—that is, notice of the commencement of the action and an opportunity by a defendant to appear and defend his rights and interests—are the important prerequisites to jurisdiction by a court. Our Code of Civil Procedure prescribes how notice must be given, and a substantial compliance with such notice is necessary. Unimportant and unessential variations from the form of notice prescribed not affecting the substantial rights of the defendant are irregularities which may be cured by amendment pursuant to the general authority of the court to amend a process, pleading, or other proceeding in furtherance of justice. *Loring v. Binney*, 38 Hun, 152; *Stuyvesant v. Weil*, 167 N. Y. 421, 60 N. E. 738, 53 L. R. A. 562; *Brooke v. Saylor*, 44 Hun, 554; *Van Wyck v. Hardy*, 4 Abb. Dec. 496; *Von Rhade v. Von Rhade*, 2 Thompson & Cook, 491; *Morrison v. National Rubber Co.*, 13 Civ. Proc. 233; *McCoun v. N. Y. C. & H. R. R. Co.*, 50 N. Y. 176; *McCully v. Heller*, 66 How. Prac. 468. Where personal service is made within the state, it is not necessary to serve the complaint with the summons, but a copy of the complaint may be served with the summons if desired. Section 419. Where a personal claim is not made against a defendant, a notice of the object of the action may be served with the summons in place of the complaint. Section 423. In case a copy of the complaint is not delivered to a defendant at the time of the delivery of a copy of the summons to him, either within or without the state, he may obtain a copy of the complaint on demand. Section 479.

Where a defendant is a nonresident of the state and a sufficient cause of action is shown against him, an order may be made directing the service of a summons upon him without the state or by publication. Sections 438-440. When the service is made by publication, the summons only is published, with a notice stating when and where the complaint is filed (section 442), and, where the service is made without the state pursuant to the order, a notice must be served with the summons stating when and where the complaint is filed in the form prescribed by section 443. The summons is always of prime importance. It is the effective paper upon which jurisdiction is founded.

As we have seen, the order required that the summons be published as directed by the statute, and the publication of the summons and notice necessary to give the court jurisdiction of the person of Rabinovitch was actually made. The notice of object of action is but an abbreviated complaint. It sets forth the general object of the action and a brief description of the property affected by it. The notice published with the summons stated when and where the complaint was filed, and the complaint itself as well as the statement thereof in the notice of object of action, and all the papers required by statute and by the order were actually served upon Rabinovitch. It is to be presumed that the papers mailed to Rabinovitch were received by her. She was therefore fairly and fully apprised that she was a party to the action, and that her interest in the property would be cut off by the judgment to be obtained in the action and the sale thereunder. If the order as made had been literally complied with, actual notice to her of the action and its object would have been complete, but no one thing required by a literal compliance with the statute to give notice to her was omitted.

After the sale on proof that the order included a direction to mail to the defendant a copy of the notice of object of action instead of the complaint, and that it was so included by inadvertence and clerical error, an order was made as of the date of the original order nunc pro tunc, striking out the words "notice of object of action," and in place thereof inserting the word "complaint." The Supreme Court has very broad powers, either before or after judgment in furtherance of justice to amend any process, pleading, or proceeding. Section 723. It would be difficult to use more comprehensive language than is used in that section. The correction of the clerical error in the order was not harmful to Rabinovitch, but was in furtherance of justice. To deny power in the court in this case to make such an order would subordinate substance to form. The statutory provisions relating to the commencement of an action are intended for the protection of the rights of the persons who are named as defendants therein. What-

ever the statute requires that in any way tends to aid a defendant in the protection of his rights is necessary to be complied with to give the court jurisdiction. Where it is clear that a deviation from the statute is unimportant and unsubstantial, and that the defendant has not been prejudiced thereby, it is within the power of the court to amend the process or proceeding. The order in this case was not void, but irregular, and the irregularity has been cured.

The judgment should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, and HISCOCK, JJ., concur. VANN, J., absent.

Judgment affirmed.

(169 Ind. 280)

SMITH et al. v. STATE ex rel. BOARD OF COM'RS OF KOSCIUSKO COUNTY.
(No. 21,071.)

(Supreme Court of Indiana. Nov. 1, 1907.)

1. SHERIFFS — COMPENSATION — FEES — STATUTES.

Acts 1895, p. 352, c. 145, § 122 (Burns' Ann. St. 1901, § 6528), providing that sheriffs shall, in behalf of their respective counties, tax and charge the fees provided by law for services performed by them, and that the amounts so charged shall be designated "sheriff's costs," but they shall in no sense belong to the sheriff, but shall belong to and be the property of the county, etc., *held*, that fees received from the county by the sheriff for committing to and discharging persons from jail belong to the county, and should be paid into the county treasury.

2. SAME—GIVING ELECTION NOTICES.

Acts 1895, p. 322, c. 145, § 21 (Burns' Ann. St. 1901, § 6426), provides that county officers named therein shall be entitled to receive for their services the compensation specified in the act, etc., and shall receive no other compensation therefor. Section 122 (Burns' Ann. St. 1901, § 6528) provides that sheriffs shall in behalf of their respective counties tax and charge the fees provided by law for services performed by them, and that the fees so charged shall be designated "sheriff's costs," but they shall in no sense belong to the sheriff, but shall belong to and be the property of the county, etc. Section 136 (Burns' Ann. St. 1901, § 6540) provides that nothing therein contained shall be so construed in any event as to allow any of the officers therein named the salaries therein provided and also the fees required to be taxed, except as otherwise specified. *Held*, that fees for giving election notices under Burns' Ann. St. 1901, § 6191, belonged to the county, and not to the sheriff.

Appeal from Circuit Court, Kosciusko County; L. W. Royse, Judge.

Action by the state, on the relation of the board of commissioners of Kosciusko county, against Oliver P. Smith and others. Judgment for relator, and defendant appeals. Affirmed.

See 81 N. E. 1179.

Frazer, Biggs & Frazer, for appellant. Cook & Graham, for appellees.

PER CURIAM. Action by relator on the bond of Smith, formerly sheriff of said

county, and his sureties, to recover the amount alleged to have been received by said Smith, as sheriff of said county, for giving election notices under section 6191, Burns' Ann. St. 1901, since the taking effect of the act approved March 11, 1895 (Acts 1895, pp. 319-358, c. 145), being sections 6405-6541, Burns' Ann. St. 1901, fixing the compensation of public officers. Demurrer for want of facts was overruled to the breach alleged. Appellant Smith, the principal in the bond sued upon, filed an answer of set-off, to which a demurrer for want of facts was sustained by the court. Trial of said cause resulted in a finding and judgment on said bond in favor of appellee. The errors assigned call in question the action of the court (1) in overruling the demurrer to the breach of the bond alleged; and (2) in sustaining the demurrer to said answer of set-off.

The question presented by the second error assigned is: Do the fees commonly denominated the "in and out fees," received from the county by the sheriff for committing to and discharging persons from jail, under section 122 of said act of 1895 (Acts 1895, p. 352, c. 145), being section 6528, Burns' Ann. St. 1901, belong to the sheriff, or are they the property of the county which he is required to pay into the county treasury? If such fees were the property of the county which the sheriff was required to pay into the county treasury, the court did not err in sustaining the demurrer to Smith's answer of set-off. The Appellate Court held in *Starr v. Board, etc.*, 39 Ind. App. —, 79 N. E. 390, that such fees were the property of the county under the said act approved March 11, 1895, supra, which the sheriff was required to pay into the county treasury. The Appellate Court overruled a petition for a rehearing, and thereupon said appellant, Starr, filed a petition to transfer the same to this court under the second clause of section 1337j, Burns' Ann. St. 1901, on the grounds, (1) that said holding contravened a ruling precedent of this court; (2) that a new question of law was directly involved, and was decided erroneously. This court denied said petition, thereby approving the conclusion reached by said Appellate Court in holding that said "in and out fees" were the property of the county which the sheriff was required to pay into the county treasury. *Board, etc., v. Given* (Ind. Sup.) 80 N. E. 963, 969. It follows that the court did not err in sustaining the demurrer to Smith's answer of set-off.

The question presented by the first assignment of error is: Did the amounts received by appellant Smith as sheriff from the relator for giving such election notices belong to him, or were the same the property of the county, which he was required to pay into the county treasury? If the same belonged to him, this case must be reversed but, if the same were the property of the county which said Smith was required to pay into the

county treasury, the judgment must be affirmed. Section 21 of said act of 1895, being section 6426, Burns' Ann. St. 1901, provides that "the county officers named herein shall be entitled to receive for their services, the compensation specified in this act, which compensation is graded in proportion to the population and the necessary services required in each of said several counties, subject to the conditions herein prescribed, and they shall receive no other compensation whatever." Section 122 of said act, being section 6528, Burns' Ann. St. 1901, provides that "the sheriffs of the various counties of this state shall, on behalf of their respective counties, tax and charge the fees provided by law on account of services performed by such officers; the fees and amounts so charged shall be designated 'Sheriff's Costs,' but they shall, in no sense, belong to and be the property of the sheriff, but shall belong to and be the property of the county, except that in execution of all processes issued from any other county than that of his residence, the sheriff shall be entitled to charge and collect the same fees for like services in similar cases, and which shall be his own." Section 138 of said act, being section 6540, Burns' Ann. St. 1901, provides that "nothing herein contained shall be so construed in any event as to allow any of the officers herein named the salaries herein provided and also the fees required to be taxed except as otherwise specified." Under these sections of the act of 1895, it has been held by this court that all "fees" to be taxed and charged for the services of a public officer under said act belong, not to the officer, but to the county, and must, when collected by said officer, be paid into the county treasury unless said act expressly provides that the same shall belong to such officer. *Seller v. State ex rel.*, 160 Ind. 605, 620, 621, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448; *State ex rel. v. Flynn*, 161 Ind. 554, 581, 582, 69 N. E. 159; *Board v. Given* (Ind. Sup.) 80 N. E. 965, 968-970. This court in *Seller v. State ex rel.*, 160 Ind. 619, 65 N. E. 927, quoted with approval the following from *Cowdin v. Huff*, 10 Ind. 83: "There are now, and were at the adoption of our Constitution, at least three modes in use of compensating persons engaged in public service, viz., fees, salaries, and wages. These modes are all different each from the other, and the difference between them has been immemorably well understood. Fees are compensations for particular acts or services; as the fees of clerks, sheriffs, lawyers, physicians, etc. Wages are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc. Salaries are the per annum compensation to men in official and some other situations." It is evident that the sheriff in giving notice of elections under section 6191, supra, was engaged in the performance of particular acts which involved going from place to

place in such county, and giving and serving notice and not service by the day or week, and it follows, therefore, that the compensation therefor, like compensation for service of process, miles traveled in serving the same, or to post notices for the sale of real estate, and "in and out fees," falls within the meaning of the word "fees" as used in said act of 1895.

In Board, etc., v. Given, supra, this court said: "In the appeal of the State ex rel. v. Flynn, 161 Ind. 554, 581, 69 N. E. 159, in speaking in regard to the fees to be charged and accounted for under the statute of 1895, by the clerk of the circuit court, we said: 'Of course, it must be conceded, and cannot be successfully denied, that the clerk under the requirements of the act of 1895 must charge and tax on behalf of the county, and account to the latter as therein provided for, all fees which arise out of official services performed by him for any person or for the county or any other municipality. The mere fact that the fees which the law exacts shall be charged and taxed by the officer are to be paid by the county does not exempt him from reporting them at his quarterly settlement if collected, and returning or paying the money into the county treasury as provided by section 124 of the statute in controversy. It is the fees that are required to be charged or taxed by law which by the legislative mandate, as declared in section 136 of said act of 1895, are in no event to be allowed to the officers named in the salary act of 1895 in addition to their salaries "except as otherwise specified."'" What is said in said quotation applies with equal force to sheriffs under said act of 1895. It is true that said fees for giving election notices are allowed and paid by the county out of the county treasury under section 122 of said act, being section 6528, supra, but, as said act does not provide that such fees are the property of the sheriff, they under the rule declared above upon the authority of *Seller v. State ex rel.*, supra, *State ex rel. v. Flynn*, supra, and *Board, etc., v. Given*, supra, belong to the county.

It follows that the court did not err in overruling the demurrer to the breach of the bond alleged.

Judgment affirmed.

(169 Ind. 279)

STATE ex rel. COLUMBUS ST. RY. &
LIGHT CO. v. DEUPREE.¹
(No. 6,513.)

(Supreme Court of Indiana. Nov. 8, 1907.)

1. COURTS—APPELLATE COURT—TRANSFER TO SUPREME COURT.

Burns' Ann. St. 1901, § 1337j, provides that "the jurisdiction of the Appellate Court shall be final, except under the following conditions" (setting out three subdivisions under which the Supreme Court may obtain jurisdiction). The second of the subdivisions, after providing for the filing of a petition to transfer, directs that upon the filing of the application

the clerk shall not certify to the lower court the opinion and judgment " * * * of the Appellate Court unless and until the Supreme Court denies the application." Held, that it was the legislative contemplation that the Supreme Court should not assume jurisdiction over a cause which had not originated in a trial court, and hence a proceeding for mandamus originating in the Appellate Court cannot be transferred to the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1303.]

2. SAME — FINALITY OF DETERMINATION — MANDAMUS.

A writ of mandamus issued by the Appellate Court compelling a trial judge to correct and sign a bill of exceptions is not a final disposition of the case such as is transferable to the Supreme Court.

Mandamus by the state, on the relation of the Columbus Street Railway & Light Company, to compel William E. Deupree, as judge of the Brown circuit court, to correct and sign the bill of exceptions. Writ allowed. Petition to transfer to Supreme Court under Burns' Ann. St. 1901, § 1337j. Dismissed.

See 81 N. E. 678.

Francis T. Hood and James F. Cox, for appellant. Clarence E. Custer and L. Ert. Slack, for appellee.

GILLETT, J. This was a proceeding instituted in the Appellate Court by the Columbus Street Railway & Light Company to compel Hon. William E. Deupree, as judge of the Brown circuit court, to sign a bill of exceptions in a cause pending on appeal in said court. Such proceedings were had that a peremptory writ issued from said court commanding said judge to correct and sign the bill of exceptions. An opinion was rendered in said matter, and, after respondent's petition for a rehearing had been overruled, and within 30 days thereafter, he filed in this court his petition to transfer, under subdivision 2, § 1337j, Burns' Ann. St. 1901. The section of the statute referred to provides that "the jurisdiction of the Appellate Court shall be final, except under the following conditions" (then follow three subdivisions under which this court may obtain jurisdiction). The second of said subdivisions, after providing for the filing of a petition to transfer, directs that, "upon the filing of such application, the clerk shall not certify to the lower court the opinion and judgment of said division of the Appellate Court, unless and until the Supreme Court denies the application." The language quoted shows beyond a peradventure that it was the legislative contemplation that this court should not assume jurisdiction over any cause which had not originated in a trial court, and it may also be laid down, on general principles governing appellate jurisdiction, that we are not authorized to transfer a cause which has not been finally disposed of by the Appellate Court. The order in question, especially in view of its relation to the principal cause, was merely interlocutory in its character, and was entered by said court in the exercise of

¹ Rehearing denied.

s undoubted appellate jurisdiction to obtain proper bill of exceptions in the principal case. As expressed in *State ex rel. v. Todd*, Ohio, 351, the issuing of the writ of mandamus in cases of this character is an incident of the jurisdiction of supervising courts.

It is laid down in *Powell's Appellate Procedure*, § 57, that: "When the court has exhausted its endeavors to have the bill of exception correctly returned, the court will still do what is in its power to obtain the ends of justice. If the court has been unable to obtain the bill duly signed, either because the judge absolutely refuses or some accident which has prevented it, the court usually endeavors to accomplish the object in some other way." It is evident that the jurisdiction of the Appellate Court in this matter is not at an end. The mere fact that an opinion has been rendered, as an expression of the views of the court, cannot change the character of the order. It is as much interlocutory as could be an order of certiorari directed to the clerk of the court below to certify a portion of the record which had been omitted. Besides, the principal cause is in the Appellate Court, and it must be permitted to retain jurisdiction thereof, together with all that pertains to it, to the end that it may properly dispose of the principal controversy. The petition to transfer is dismissed.

39 Ind. 223)

McCLEARY et al. v. BABCOCK et al. (No. 20,917.)

Supreme Court of Indiana. Oct. 30, 1907.)

PLEADING—JOINT AND SEVERAL DEMURRER.

Where each of several defendants filed a demurrer, alleging that "the defendant and each of them separately demurs to the plaintiff's complaint" for each of the following reasons, etc., the demurrer was several, and not joint.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 1, 39, Pleading, § 484.]

TOWNS—TAXATION—AID TO RAILROADS—INJUNCTION—PARTIES.

In a suit to enjoin the levy of a tax by a township in aid of an interurban railway company on the ground that the act authorizing it is unconstitutional, the railway company and the township were proper, if not necessary, parties.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 1, 45, Towns, § 104.]

WORDS AND PHRASES—"AMEND."

The word "amend" is synonymous with correct, reform, and rectify. It means a correction of errors, an improvement or rectification, and necessarily implies something on which the correction, alteration, and improvement can operate. It indicates a change or modification for the better.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, pp. 368-370; vol. 8, pp. 73, 7574.]

SAME—"SUPPLEMENT."

The term "supplement" signifies something additional, something added to supply what is wanting. It is that which supplies a deficiency, is to or completes, or extends, that which is ready in existence, without changing or modifying the original.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, p. 6798.]

5. STATUTES—AMENDATORY AND SUPPLEMENTAL ACTS.

Act May 12, 1869 (Laws 1869, p. 92, c. 44), is entitled "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies"; and it and subsequent amendatory acts authorize the granting of such aid. *Held*, that Acts 1903, p. 233, c. 134, declaring that wherever the word "railroad" occurs in either section of the act of May 12, 1869, or in any section of any subsequent act amendatory or supplemental thereto, the same shall include street railroads, suburban street railroads or interurban street railroads, is a supplemental and not an amendatory act, and is therefore not void for failure to set forth in full any part of the act of 1869, as required in case of amendments by Const. art. 4, § 21.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 44, Statutes, § 209.]

6. CONSTITUTIONAL LAW—CONSTRUCTION OF CONSTITUTION—LEGISLATIVE CONSTRUCTION—SUPPLEMENTAL LEGISLATION.

Supplemental legislation, though not expressly authorized by the Constitution, having been long acquiesced in, will be sustained, under the rule that in matters of legislation a court will grant weight to the Assembly's own interpretation of such power as manifested by continued and repeated exercise.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 10, Constitutional Law, § 15.]

7. STATUTES—SUPPLEMENTAL ACT—RELATION TO ORIGINAL ACT—TITLE.

Where a subsequent act was passed supplementing a prior act, the supplemental matter must be germane to the subject as expressed in the title of the original act, so that, if the supplemental matter was contained in the original act, it would be clearly embraced within the title.

8. CONSTITUTIONAL LAW—STATUTES—CONSTRUCTION IN FAVOR OF VALIDITY—SUBJECT AND TITLE OF ACTS.

Where a statute is objected to because the subject-matter is not within the title, the court will give the title the broadest meaning to uphold the law, and, if the language is susceptible of two constructions, one inimical and the other in support of the act, the latter will be adopted.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 10, Constitutional Law, § 46.]

9. RAILROADS—WHAT CONSTITUTES A RAILROAD.

Technically a railroad is a way or road on which rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. The term is generic, and embraces all species of road constructed by corporations of a quasi public character. Whether a road is a railroad depends on the mode of construction and chartered use and not on the motive power; it being declared in the original act for the incorporation of railroads (1 Rev. St. 1852, p. 409, c. 83; section 5153, cl. 8, Burns' Ann. St. 1901) that they should have power to convey persons and property by steam, animal, or any mechanical power or any combination of them.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 41, Railroads, § 2.]

10. STATUTES—SUPPLEMENTAL ACT—TITLE.

Act May 12, 1869 (Laws 1869, p. 92, c. 44), was entitled an act to authorize aid to the construction of "railroads" by counties and towns, etc. Act March 9, 1903 (Acts 1903, p. 233, c. 134), provided that wherever the word "railroad" occurred in either section of the act of 1869 or any section of any subsequent act amendatory or supplemental to the act of 1869 the same should extend to every kind of street railroad, suburban street railroad, or interurban street railroad by whatever power its vehicles

were transported. *Held*, that the word "railroad" in the act of 1869 was not limited to steam railroads, so that the act of 1903 was not objectionable as not germane to the title of the act of 1869.

11. SAME—STATUTORY RULES OF CONSTRUCTION.

When a statute provides a rule of construction for prior statutes, and is not in terms amendatory thereof, but is covered by the title of the original act, it is not within Const. art. 4, § 21, providing that in case of an amendment the amendatory act shall set forth the section or act amended in full.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 198.]

12. SAME.

While it is not ordinarily the function of the Legislature to interpret statutes, and such interpretation is not binding on the courts as to past transactions, it will be followed by all departments of the government as to future transactions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 257, 258.]

13. SAME—CONTRADICTIONARY INTERPRETATIONS.

Where a legislative construction of a prior statute is contradictory to the terms of the act construed, the construing statute must be taken as a new enactment changing the prior law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 257, 258.]

14. SAME—DECLARATORY STATUTES.

A statute declaratory of a former one has the same effect on the construction of such former act in the absence of intervening rights as if the declaratory act had been embodied in the original act at the time of its passage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 257, 258.]

15. SAME—EXTENSION OF STATUTES.

Where a statute deals with a genus, and the thing which afterwards comes into existence is a species thereof, the language of the statute will generally be extended to a new species, though it was not known and could not have been contemplated by the Legislature when the act was passed.

Appeal from Circuit Court, Kosciusko County; Vinson Carter, Special Judge.

Action by Joseph McCleary and others against James Babcock, as treasurer of Kosciusko county, and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Walter Olds, Stookey, Anglin & Foster, and Sam. O. Pickens, for appellants. Frazer, Biggs & Frazer, R. J. Loveland, and Jno. D. Widaman, for appellees.

HADLEY, C. J. The principal question in this appeal involves the construction of the statutes of the state concerning the voting of aid to interurban railroads incorporated under the street railway act. In July, 1904, a petition signed by more than 25 resident taxpayers and voters of Wayne township, Kosciusko county, was filed with the board of county commissioners, praying said board to order an election for the purpose of voting upon the question of donating to the appellee, the Winona Interurban Railway Company, a corporation organized under the statutes for the incorporation of street railway companies, \$25,000, as aid to the

appellee in the construction of its railroad through the township. The prayer was granted, and the election held, which resulted favorably to the donation. The board of commissioners ordered the levy to be made, and the same was placed upon the tax duplicates of Wayne township for collection, and said duplicates placed in the hands of appellee Babcock, as treasurer of the county, for collection against appellants, who were taxpayers of said township. Whereupon this action was commenced by appellant for himself and 85 others to enjoin the collection of the tax. The complaint is in one paragraph. To the complaint each of the defendants filed a demurrer in these words: "The defendants and each of them separately demur to the plaintiff's complaint herein for each of the following reasons. * * *" The court sustained the demurrer of each of the defendants, and the plaintiff declining to plead further, judgment was rendered against him.

The complaint is based upon the theory that there is no valid law of this state authorizing the levying of a tax in aid of interurban railroads, and that the tax complained of is therefore illegal and void. And in his contention it is conceded by appellant that if the act approved March 9, 1903 (Acts 1903, p. 233, c. 134) is a valid act, the statute in controversy has legal sanction, and the complaint is insufficient on demurrer. The demurrer in form is several, and not joint, as to the demurrants, as questioned by appellant. Furthermore, there is no doubt but the action may be well brought as to some, and not as to others, of the defendants, but the defendants were all made parties on the plaintiff's (appellant's) own motion, and the railway company, being the sole beneficiary of the tax, and Wayne township the civil body having voted the tax, and both being in danger of having the tax and its benefits swept away by plaintiff's suit, are proper, if not necessary and indispensable, parties. And, if it shall turn out that the supplemental act of 1903 is constitutional and the complaint without foundation, then it can make no difference to appellant whether or not the railroad or township were proper parties to his suit.

Then, is the act of 1903 constitutional? It is claimed that the act is in derogation of the Constitution of Indiana in two particulars: First, because it has no enacting clause, as required by section 1, art. 4; and, second, if intended as an amendment to the act of 1869, it is void for failure to set forth in full the section as amended in accordance with section 21, art. 4. It is sufficient to say, once for all, that the said act of 1903 has an enacting clause in the precise language of the Constitution, and hence the act is not obnoxious to section 1, art. 4. The first legislation authorizing the voting of aid to railroads was approved May 12, 1865, and entitled "An act to authorize aid to the

construction of railroads by counties and townships taking stock in, and making donations to railroad companies." Laws 1869, p. 92, c. 44. The act of 1903, in controversy, has a title covering more than two printed pages, and begins thus: "An act supplemental to an act entitled 'An act to authorize aid to the construction of railroads by counties and townships taking stock in, and making donations to railroad companies, approved May 12, 1869; also supplemental to an act entitled,' etc.; and in like manner proceeding to recite that said proposed act was supplemental to all the acts, either original, supplemental, or amendatory, affecting the original act of 1869, setting each act forth specifically by title and date of approval, all of which occupy so much space that we do not feel justified in quoting. The enacting section, in substance, is as follows: "Be it enacted by the General Assembly of the state of Indiana that wherever the word 'railroad' occurs in either section of the act of May 12, 1869, or in any section of any subsequent act, amendatory, or supplemental to said act of 1869, here setting forth such acts by title and date of approval, the same shall be extended to and held to include every kind of street railroad, suburban street railroad, or interurban street railroad * * * by whatever power its vehicles are to be or are transported." It will be observed that the new act makes no change in any existing statute relating to the subject of giving aid to railroads. Its passage did not affect the force and vigor of any previous legislative provision relating to the subject. If the act of 1869, and all subsequent, supplemental, and amendatory legislation, applied solely to what are commonly called "steam roads," as contended by appellant, that could make no difference to them, for every such company may yet proceed in every particular the same as if the act of 1903 had not been passed. It is plain that the act of 1903 is not, in effect, an amendatory act. To amend a statute is to alter it, to annul or remove that which is faulty and substitute that which will improve it. An amendment means to "change or modify in any way for the better." Webster's Int. Dict.; *Diamond v. Williamsburg Ins. Co.*, 4 Daly (N. Y.) 494, 500. The word "amend" is synonymous with "correct, reform, rectify." It means a correction of errors, an improvement, a reformation. It necessarily implies something upon which the correction, alteration, and improvement can operate. Something to be reformed, corrected, or improved. In *re Pa. Tel. Co.*, 2 Chest. Co. Rep. (Pa.) 129, 131. A supplemental act has quite a different meaning. "It signifies something additional, something added to supply what is wanting." Webster's Int. Dict. It is that which supplies a deficiency, adds to, or completes, or extends that which is already in existence, without changing or modifying the original. *State v. Wyandot Co.*, 16 Ohio Cir. Ct. R. 218, 221,

9 O. C. D. 90; *Rahway Savings Inst. v. City of Rahway*, 53 N. J. Law, 48, 20 Atl. 756. Since the adoption of the Constitution of 1852, it has been the custom of the General Assembly to pass remedial laws of the character of the one under consideration. A few instances from among a large number must suffice. In 1853 (Acts 1853, p. 107, c. 87) there was passed a similar act to permit railroad companies to file a certified copy in lieu of original articles of incorporation with the Secretary of State. In 1863 (Acts 1863, p. 48, c. 42) a supplemental act was passed making certain directors of corporations, existing by virtue of previous laws, liable for declaring dividends in certain cases. In 1865 (Acts 1865, p. 114, c. 19) a supplemental law was enacted extending to life insurance companies certain privileges conferred on fire insurance companies by previous laws. At the same session (Acts 1865, p. 120, c. 26) another supplemental act was passed, which provided that the provisions of the act should apply to, and embrace all sales of railroads, under judicial decree, at any time made, whether said sales may have occurred before or after the passage of the act. In 1889 (Acts 1889, p. 38, c. 28) such an act was passed declaratory of the meaning of certain mining terms appearing in statutes of former dates. In 1891 (Acts 1891, p. 423, c. 193) another such act was adopted supplemental to all the acts then in force, concerning the organization of manufacturing and mining companies, extending to stockyard companies, organized under former statutes, certain additional rights and powers. For further list, see *State v. Gerhardt*, 145 Ind. 439, 455, 44 N. E. 469, 33 L. R. A. 313.

There is no express provision of the Constitution for supplemental legislation, so called, but it has been so long indulged by the General Assembly, and so long acquiesced in, and unquestioned by the people, that the important rights that have accrued and become settled by such legislation during the past half century should not now be disturbed, nor the legislative power to pass such laws be considered an open question. It should be further said, however, that courts in considering questions relating to the constitutional power of the General Assembly in matters of legislation give great weight to the Assembly's own interpretation of such power, as the same is manifested by its continued and repeated exercise for a long period. *State v. Gerhardt*, 145 Ind. 439, 457, 44 N. E. 469, 33 L. R. A. 313, and authorities collated; *City of Terre Haute v. Railroad Co.*, 149 Ind. 174, 183-186, 46 N. E. 77, 37 L. R. A. 189. It is well established, however, that supplemental matter must be germane to the subject, as expressed in the title of the original act; that is, the new supplemental matter must be of a character which, if contained in the original act, would be clearly embraced within its title. Invoking the rule, appellant

contends that the act of March 9, 1903, is not germane to the subject-matter and title of the act of 1869, and subsequent, amendatory, and supplemental acts, as enumerated in the title of the act of 1903, his insistence being that the two statutes relate to corporations organized for different and distinct purposes. We must examine the question under the guidance of the well-established rule of construction, that to sustain legislative action courts will liberally construe the title to the act, and accord to the words employed their fullest and broadest meaning to uphold the law; and, if the language is susceptible of two constructions, one inimical, and the other in support of the act, the latter will be adopted. This rule is clearly stated in *Hargis v. Board*, 165 Ind. 194, 195, 73 N. E. 915; *Board v. Albright* (this term) 81 N. E. 578. Technically a railroad is a way or road upon which iron rails are laid for wheels to run on, for the conveyance of heavy loads and vehicles. *Dinsmore v. Racine M. R. Co.*, 12 Wis. 649. The term "railroad" as employed in our general legislation relates to institutions of a quasi public character, to highways or roads constructed by the authority of the state, with fixed metallic rails upon which public carriers may propel their carriages, or cars, speedily in the transportation of passengers and freights. Any way or road having these characteristics is a railroad. It is the mode of construction and chartered use, and not the motive power, that determines the character of a railroad. It is declared in the original act providing for the incorporation of railroads that they shall have power to convey on their railroads, persons, and property, by steam, animal, or any mechanical power, or any combination of them. 1 Rev. St. 1852, p. 409, c. 83; section 5153, cl. 8, *Burns' Ann. St.* 1901. The term "railroad" is generic, and embraces all species of road constructed and chartered with the above-mentioned attributes. *Rapalje & Lawrence Law Dict.* p. 1061; 1 *Wood's Railway Law*, p. 1; *Fulton v. Short Route, etc., Co.*, 85 Ky. 640, 4 S. W. 332, 7 Am. St. Rep. 619; *Bloxham v. Consumer's etc., R. R. Co.*, 36 Fla. 519, 18 South. 444, 29 L. R. A. 507, 51 Am. St. Rep. 44. One may be operated with heavy and infrequent trains, another with single and frequent cars. The real difference is only a matter of degree. At the time of the passage of the act of 1869 there was in use at least two kinds or species of railroad, viz., the great lines of state and interstate roads, operated by steam power, and the city street or horse railroad, similarly constructed and operated, both common carriers, and both dispensing in large measures like conveniences and benefits to the general public. That the Legislature has regarded all kinds of railroads as belonging to the same genus is manifest from the recent numerous statutes wherein under the term "railroad" expressed in the title legislation has been accomplished affecting steam, electric, interurban, suburban, and street railroads. Such

was the case in the following acts: "An act to amend section 1 of an act entitled 'An act to authorize "railroad" companies to consolidate their stock,'" etc. Acts 1897, p. 283, c. 183. "An act concerning the location and construction of 'railroads' upon grounds owned by the state." Acts 1903, p. 216, c. 119. "An act authorizing 'railroad companies' authorized under the general railroad law, and operating, or intending to operate as interurban, electric, or street railways, to avail themselves of certain privileges," etc. Acts 1903, p. 271, c. 150. "An act providing for the creation of a 'railroad' commission—prescribing certain duties and obligations of 'railroad' companies." Acts 1905, p. 83, c. 53.

The title of act 1901, p. 121, c. 81, is "An act supplemental to an act entitled 'An act concerning taxation,'" etc. Under this title the act provides "that the word 'railroad' wherever it occurs in an act entitled 'An act concerning taxation,' * * * shall, from and after the taking effect of this act, be considered for all purposes of taxation, as including every kind of street railroad, suburban railroad, or interurban railroad company, or corporation," etc. We direct special attention to some previous enactments as being the same in principle as the act under consideration. For instance, Acts 1865, p. 114, c. 19, under the title of "An act supplemental to an act entitled 'An act for the incorporation of insurance companies, defining their powers and describing their duties,' approved June 17, 1852," provides for the incorporation of mutual life insurance companies "upon the same conditions, and subject to the same duties and liabilities now regulating fire insurance companies so far as the same may be applicable." Acts 1891, p. 423, c. 193, under the title "An act supplemental to the acts now in force concerning the organization of manufacturing and mining companies," giving to stockyard companies the right to construct railroads, lighting plants, gas, and waterworks, sewers, etc., and "to exercise for such purpose all powers conferred on such companies, by the act of Dec. 21, 1865," etc. The principle involved in the case at bar is well illustrated in the case of *Barton v. McWhinney*, 85 Ind. 481. An act was passed in 1875, section 2 of which reads as follows: "Hereafter the general laws of the state and amendments thereto, approved Dec. 2, 1872, for the uniform assessment of taxes, shall apply to all cities and towns not having special charters, so far as the same shall be applicable." In the case referred to the statute was assailed as in violation of section 21, art. 4, of the Constitution, for failure to set out the amended section. The court in upholding the statute said (page 488): "We do not consider the act of 1895 obnoxious to the Constitution. If section 2 had been embodied in the act of 1872, its validity could not have been assailed; and it is no less valid where it is found. It is not a revision of any act, nor an amendment of any act or section of an act. If, by

implication, it repeals or modifies the provisions of any other law, it is not therefore unconstitutional." We have seen that new matter, which, if it had been embodied in the original act, it would have been embraced within the subject expressed in the title, may be subsequently incorporated into such original act by a supplemental or amendatory act; and this may be done without title, beyond a statement clearly identifying the original act to which the new proposition is to become supplemental, since the validity of the new matter must be determined by the title of the original act. *Brandon v. State*, 16 Ind. 197; *Shoemaker v. Smith*, 37 Ind. 122; *Bell v. Maish*, 137 Ind. 226, 38 N. E. 358, 1118. The act in controversy is constitutional under another canon of construction, namely, that when a statute provides a rule of construction for prior statutes, and which is not in terms amendatory, it does not fall within the requirements of section 21, art. 4, Const., if covered by the title of the original act. As was said by this court in *Dequindre v. Williams*, 31 Ind. 444, 450: "It is not ordinarily the function of the Legislature to interpret statutes, nor is such interpretation binding upon the courts as to past transactions. But as to matters occurring thereafter such legislation guides all departments of the government. *Sedgw. on Constitution*. If a legislative construction be plainly contradictory to the terms of the act construed, it must nevertheless be taken as a new enactment, changing the old law." To the same effect, see *State ex rel. Michenor v. Harrison*, 116 Ind. 300, 307, 19 N. E. 146; *Chicago, etc., R. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924. In the *Michenor Case*, it is further stated, at page 307 of 116 Ind., page 149 of 19 N. E.: "And it has been held that a statute declaratory of a former one has the same effect upon the construction of such former act, in the absence of intervening rights, as if the declaratory act had been embodied in the original act at the time of its passage"—citing *Endlich, Inter. St. § 365*; *Smith v. State*, 28 Ind. 321; *Jones v. Surprise*, 4 New Eng. Rep. 292, 294. Acts 1853, p. 107, c. 87, Acts 1865, p. 120, c. 26, Acts 1889, p. 38, c. 28, Acts 1901, p. 121, c. 81, are all statutes of this class, the validity of which has never been called in question. The act of 1889, under the title of "An act declaratory of the meaning of the word 'mining,' as used in chapter 35 of the Revised Statutes of Indiana, now in force," declares "that it was the intent and meaning of the word 'mining,' as used in said chapter, to include the drilling, boring, and operating wells for petroleum and natural gas." In Acts 1901, p. 121, c. 81, under the title of "An act supplemental to an act entitled 'An act concerning taxation,' etc., it is enacted "that the word 'railroad' wherever it occurs in the act concerning taxation, approved March 6, 1891, shall be considered as including every kind of street railroad, suburban railroad, or interurban railroad."

Appellee insists that if the act of March 9, 1903, had not been passed, interurban and suburban railroad companies would have had the right to accept aid from counties and townships under the act of May 12, 1869, even though such railroads were in 1869 wholly unknown. Under the view we have taken of the act of March 9, 1903, the question here propounded becomes immaterial, and we do not decide it, though we concede that there is at least ground for the contention arising under the rule that general statutes give way, or open up, to special statutes upon the same subject. The principle is well illustrated by Maxwell on *Inter. of St.* (2d Ed.) p. 93, as quoted in *Daniels v. State*, 150 Ind. 354, 50 N. E. 74: "The language of a statute is generally extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. This occurs when the act deals with a genus, and the thing which afterwards comes into existence is a species of it."

Our conclusion is that the act of March 9, 1903, is constitutional and valid, and that the judgment of the court below should be affirmed.

Judgment affirmed.

(169 Ind. 269)

COUCH et al. v. STATE ex rel. BROWN.
(No. 20,963.)

(Supreme Court of Indiana. Nov. 7, 1907.)

1. MANDAMUS—SUBJECT OF RELIEF—SUIT FOR POSSESSION OF OFFICE.

Though mandamus will not lie to settle a doubtful claim to an office, or to have the title thereto adjudicated as between adverse claimants, quo warranto being the proper remedy, yet, where relator is shown to hold a prima facie and uncontested title to an office, mandamus will lie to put him in possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 161-169.]

2. OFFICERS—DUTY TO SURRENDER TO SUCCESSOR.

A public officer at the expiration of his term when a certificate of election has been issued to another, who has qualified thereunder, should surrender the office to his successor; and, if he desires to contest the successor's eligibility, election, or qualification, he may do so by proceeding in the manner prescribed by law for determining contested claims to office.

3. MANDAMUS—PROPER PARTIES.

Where defendant occupied an office to which relator was entitled, and codefendants co-operated with him in withholding possession from relator, and codefendants could give efficacy to relator's official credentials, alternative mandamus to compel surrender of the office properly issued against codefendants, as well as against defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 293.]

4. SAME.

A proceeding to compel town officers to surrender to relator possession of an office which they withhold from him was properly brought against them individually; it being unnecessary to sue the town or the president and board of trustees, where the complaint alleged

the relation of the officers to the town and to the office in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 292, 293.]

5. APPEAL—HARMLESS ERROR.

Any error in striking out part of the answer was cured by the court hearing evidence upon the facts therein alleged, under a general denial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4110-4114.]

6. MANDAMUS—SUIT FOR POSSESSION OF OFFICE—QUESTIONS DETERMINABLE.

In a proceeding to compel town officers to surrender to relator possession of the office of trustee of a ward for which he has qualified, questions whether the incumbent's term ceased upon relator's election and qualification or continued until the later date when relator demanded the office and whether relator forfeited the office, ipso facto, by removing from the ward or thereby furnished ground upon which the board of trustees might properly declare a vacancy, cannot be decided, since a disputed title and right of possession to an office cannot be adjudicated in a mandamus proceeding; the only question determinable being as to the prima facie right to possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 381-383.]

Appeal from Circuit Court, Jefferson County; Hiram Francisco, Judge.

Mandamus proceeding by state of Indiana, on the relation of William Brown, against John G. Couch and others. From a judgment for relator, defendants appeal. Affirmed.

W. F. Fridley and Geo. B. Hall, for appellants.

MONTGOMERY, J. An alternative writ of mandamus was issued by the Switzerland circuit court upon the application of relator, requiring appellant and others to show cause why they should not surrender to him possession of the office of the trustee of the Fifth Ward of the town of Patriot. Appellants' motions to quash and demurrers to the writ were overruled, issues of fact were joined, and the cause transferred to the court below. A trial by the court was had, a special finding made, and judgment rendered in favor of the relator. Errors have been assigned upon the overruling of appellants' motions to quash, and demurrers to the writ, and upon the several conclusions of law stated.

It appears from the allegations of the alternative writ that on November 7, 1905, a general election of municipal officers was held in the town of Patriot, and relator and appellant, Rush Platt, were opposing and the only candidates for the office of trustee of the Fifth Ward of said town; that relator was a resident of the ward and in all respects, particularly averred, legally qualified to hold said office; that he received the highest number of votes, and was by the election board duly declared elected as such trustee for the term beginning on the first Monday of May, 1906, and ending on the first Monday of January, 1910; that a certificate of his election was signed and issued to him by the election board, and

on November 10, 1905, he subscribed and took the oath of office, which was indorsed upon the back of such certificate; that on the first Monday of May, 1906, the board of trustees of said town was convened in session according to law, and comprised the following members: John G. Couch, Frank McHuron, Harvey Elliott, Henry Schroeder, and the relator—and while so convened relator presented his certificate of election and official oath to Rosman I. White, the town clerk of said town, and requested the same to be filed, and to the members of said board and demanded possession of said office, but Couch and Schroeder, together with appellant, Rush Platt, who was then and there present, and who had been trustee from said ward for the term immediately preceding, over the votes and protests of Elliott and McHuron, refused to permit him to take said office or to participate in the proceedings of the board, and said clerk refused to receive and file such election certificate and oath, and said Platt continued in possession of said office, and refused to surrender the same or anything connected therewith.

It is contended that appellants' motion to quash, and demurrer to the, alternative writ, should have been sustained for the reason that the relator had a complete remedy at law. The doctrine that a writ of mandamus is not proper and will not be granted, where the applicant has another adequate remedy, has been frequently declared by this court. State ex rel. v. Real Estate, etc., Ass'n et al., 151 Ind. 502, 51 N. E. 1061; Wampler v. State ex rel., 148 Ind. 557, 47 N. E. 1068, 38 L. R. A. 829; State ex rel. v. Board, etc., 131 Ind. 90, 30 N. E. 892; Harrison School Tp. v. McGregor, 96 Ind. 185; State ex rel. v. Board, etc., 25 Ind. 210; Board, etc., v. Hicks, 2 Ind. 527. Appellants' application of this principle to the case at bar proceeds upon the assumption that this is an action to try the title to an office. This assumption is erroneous; and it must be observed and borne in mind that no adversary claims to the right of possession or title to the office named appears from the complaint. The complaint proceeds upon the theory that relator was duly elected, commissioned, and qualified as trustee from the Fifth Ward, and that appellants arbitrarily refused to receive and honor his certificate of election, or admit him to membership upon the board of trustees. It is clearly shown that relator was clothed with a prima facie title to the office, and the right to enjoy the privileges and exercise the functions thereof. It is true that a writ of mandamus cannot be rightfully invoked to settle a doubtful claim to an office, or to have the title thereto adjudicated as between adverse claimants, and in such case an information in the nature of quo warranto affords the proper remedy. Hoy v. State ex rel. (Ind. Sup.) 81 N. E. 509, 511. But, where the relator is shown to hold a prima facie and uncontested title to an office, a writ of mandate may be issued to put him in possession of the office. City of Madison

v. Korbly, 32 Ind. 74; McGee v. State ex rel., 108 Ind. 444, 3 N. E. 139; Mannix v. State ex rel., 115 Ind. 245, 17 N. E. 565; Swindell v. State ex rel., 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50; State ex rel. v. City of Noblesville, 157 Ind. 31, 60 N. E. 704.

It is the duty of an incumbent of a public office at the expiration of his term, when a certificate of election has been issued to another who has qualified thereunder, to surrender the office to his successor; and, should he then desire to contest the eligibility, election, or qualification of the person so holding the certificate, he may do so by proceeding in the manner prescribed by the law for determining contested claims to office. State ex rel. v. Johnson, 30 Fla. 433, 11 South. 845, 18 L. R. A. 410; Stevens v. Carter, 27 Or. 553, 40 Pac. 1074, 31 L. R. A. 342; State v. Archibald, 5 N. D. 383, 68 N. W. 234-244; Cruse v. State, 52 Neb. 831, 832, 73 N. W. 212. The alternative writ required appellants to surrender to the relator the possession of the office to which his certificate of election entitled him. It is argued that the writ was too broad, and that Schroeder and Couch did not hold possession, or have control, of the office. The charge is that Rush Platt was in attendance upon this meeting of the board of trustees and occupying the position to which relator was entitled, and that they co-operated with him in withholding from relator the privilege of exercising the functions of his office. The power was certainly lodged in them to give efficacy to his official credentials and to admit him to membership in their body, and in our opinion they were properly joined with appellant Platt in this proceeding.

Counsel next assert that the proceeding is against appellants in their individual capacity, and contend that it should have been brought against the municipal corporation, or the president and board of trustees of the town. We cannot concur in this claim. The complaint alleges the official relation of appellants to the town and to the office in question, and, as we have already seen, appellants were proper parties defendant. In order to enable the court to enforce its mandate, or administer the proper penalty for disobedience, it is necessary that the officials be proceeded against personally. State ex rel. v. Real Estate, etc., Ass'n., 151 Ind. 502, 505, 515, E. 1061. No complaint was made in the demurrer or motion to quash of the nonjoinder of any other party. It follows that there was no error in overruling the motion to quash and the demurrers to the writ.

The assignment that the court erred in striking out part of the second paragraph of appellants' answer has been expressly waived, since the court heard evidence upon the facts therein alleged, under the answer of general denial. It appears from the special finding of facts that on the 17th of March, 1906, relator with his family removed from the Fifth Ward to another ward of the town

of Patriot, where he continued to reside until the trial of the cause. This fact formed the substantive allegation of the second paragraph of answer, and is the basis of the controversy between the parties. It is manifest that the questions whether Platt's term ceased upon the first Monday of January, 1906, upon the election and qualification of his successor or continued until May 7th when the office was demanded, and whether the relator forfeited his office, ipso facto, by his removal from the ward, or furnished ground upon which the board of trustees might properly declare a vacancy, cannot be decided in this proceeding. The cases cited above clearly settle the proposition that a disputed title and right of possession to an office cannot be adjudicated in a proceeding of mandamus, and such an issue cannot be presented in an affirmative paragraph of answer. The Supreme Court of South Dakota has aptly stated the principle as follows: "The only question to be tried in such a proceeding is the prima facie right to the possession of the office, and the jurisdiction of the court to determine that question cannot be affected by an attempt to raise issues by the answer, not material to the determination of such prima facie right." State ex rel. v. Kipp, 10 S. D. 495, 498, 74 N. W. 440.

The special finding fully sustained all the allegations of the complaint, and the conclusions of law were in accord with the facts so found.

The judgment is affirmed.

(169 Ind. 265)

STATE v. GOODWIN. (No. 21,029.)

(Supreme Court of Indiana. Nov. 5, 1907.)

1. STATUTES—CONSTRUCTION—PENAL STATUTES.

While the rule of strict construction applies generally to criminal statutes, the excessively strict construction that formerly prevailed has been so modified as to look to the legislative intent when plainly manifested; courts, on the one hand, refusing to hold those not clearly brought within the scope of the statute, and, on the other hand, refusing, by radical refinement or unreasonable, incongruous construction, to discharge those plainly within its scope.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 322, 323.]

2. HIGHWAYS—WARNING TO MOTOR VEHICLES—STATUTORY PROVISIONS—CONSTRUCTION—"DRIVING."

Under Acts 1905, p. 202, c. 123, § 5, providing that any person operating a motor vehicle upon meeting any person driving a horse on any public highway shall upon signal by putting up the hand from "any such person or persons so driving any horse," etc., immediately bring his motor vehicle to a stop, the signal need not be given by the person who holds the lines, but may be given by any occupant of the vehicle, the word "driving" not being limited to the mere physical act of managing or directing the horse.

3. INFORMATION—SUFFICIENCY—SURPLUSAGE.

In a prosecution for failure to stop an automobile on a public highway when signaled to do so by a person driving a horse, etc., where it appeared that J. and R. were riding in a buggy

together, that R. was driving, and that J. gave a signal to defendant to stop, an averment in the affidavit that the signal given by J. was for and on behalf of R. should be regarded as surplusage.

Appeal from Circuit Court, De Kalb County; F. M. Powers, Special Judge.

Samuel Goodwin was charged with refusing to stop his automobile on the public highway when signaled to do so. From an order sustaining a motion to quash the affidavit, the state appeals. Reversed, with instructions.

Charles S. Smith, Pros. Atty., and James Bingham, Atty. Gen., for the State. Geo. W. Crooks and J. E. Pomeroy, for appellee.

HADLEY, C. J. A prosecution was lodged against appellee for an alleged refusal to stop his automobile on the public highway when signaled to do so by the prosecuting witness. The prosecution was based upon the act of March 6, 1905 (Acts 1905, p. 202, c. 123), so much of section 5 of the said act as is material in the case is as follows: "Any person, or persons, operating a motor vehicle shall, upon meeting any person, or persons, riding, leading, or driving a horse, horses, or other draft animals, or other farm animals, on any public highway, upon request or signal by putting up the hand from any such person, or persons, so riding, leading or driving any horse, horses, or other draft animals, or other farm animals (if of sufficient light for such signal to be perceptible), immediately bring his motor vehicle to a stop, and remain stationary so long as may be reasonable to allow such horse, horses, or other draft animals, or other farm animals, to pass." The affidavit charges, in substance, that Rosa and Josie Case, while driving in a buggy on a certain public highway, met the defendant (appellee) traveling in the opposite direction in an automobile; that Rosa was directing the horse and Josie was sitting by her side in the buggy; that, the horse becoming frightened at the automobile, both of Rosa's hands became so engaged in holding and directing said horse that she was unable to raise one of them to signal the defendant to stop, without relaxing her hold on the lines, and thereby losing her control of said horse, whereupon Josie, for and on behalf of Rosa, and with the latter's knowledge and consent, raised her hand and signaled the defendant to stop, which he failed and refused to do, though there was sufficient light for him to see such signal.

The question for decision is: To constitute an offense, does the statute require the danger signal to be given by the driver or manager of the horse in person, or may it be given by another occupant of the vehicle, authorized to act for the driver? Or is it sufficient for any occupant of the vehicle, upon his own initiative, to give the signal? While the rule of strict construction applies generally to the interpretation of criminal

statutes, the excessively strict construction that formerly prevailed has in recent years been so modified as to look within the bounds of reason and common sense to the legislative intent when plainly manifested, or expressed, in the enactment. Courts, on the one hand, refusing to hold those not clearly brought within the scope of the statute, and, on the other hand, equally refusing, by radical refinement, or unreasonable or incongruous construction, to discharge those plainly within its scope. *Gillett, Cr. Law*, §§ 19, 20; *Daniels v. State*, 150 Ind. 343, 352, 50 N. E. 74, and authorities cited; *State v. Roby*, 142 Ind. 168, 41 N. E. 145, 83 L. R. A. 213, 51 Am. St. Rep. 174; *Fahnestock v. State*, 102 Ind. 156, 162, 1 N. E. 372. It is obvious that the legislative purpose in enacting the law under consideration was to provide protection to travelers on the public highway by vehicle from the dangers incident to the animal attached to such vehicle becoming frightened at the approach of an automobile. There could have been no reason for the lawmakers to have designed a greater protection for the driver, or director of the animal, than for other occupants of the vehicle who would be equally exposed. We are therefore unable to give the statute the narrow and severe construction contended for by the appellee, and which seems to have been placed upon it by the court below.

"Driving" in its popular sense means more than mere managing or directing a horse. It has, at least, a dual signification. When it is said a party goes out "driving" or "boating," it is not usually understood that each member of the party performs the physical act of driving the horse, or of rowing the boat. The Standard Dictionary defines the word "drive" thus: "To ride in a vehicle drawn by horses, or other animals, or to direct or control the animals that draw it." A driving party may be referred to collectively. By eliminating the singular number "person" from the statute, we have the following as applicable to this case: Any person or persons operating a motor vehicle shall, upon meeting any persons driving a horse on any public highway, upon request, or signal, by putting up the hand from any such persons so driving any horse (if in sufficient light to be perceptible), immediately bring the motor vehicle to a stop, and remain stationary so long as may be reasonable to allow such horse to pass. Here we have it in plain English that any person operating an automobile on the highway, if he meets persons driving a horse, shall stop the automobile upon receiving a signal "by putting up the hand from any such persons so driving," etc. Even a strict construction would require us to hold that any occupant of the vehicle may give the signal. A contrary construction would be without the letter, as well as without the spirit, of the statute. It would seem highly unreasonable, if not absurd, to so interpret the law as to exoner-

ate the driver of an automobile who refuses to heed a signal of distress on the ground that it was not given by the driver in person. Such a rendering would give immunity in many aggravated cases the statute is especially aimed at, namely, where the driver becomes so engrossed by his efforts to restrain the frightened animal, as to be unable to give it, as alleged in this case. It is hardly too much to say that it was the legislative view that when a driver of an automobile is appealed to to stop, when approaching a vehicle drawn by a frightened animal, if his sense of moral or social duty is not strong enough to induce him to do so, the rigor of the law should be interposed. The averment of the affidavit that the signal was given by Josie Case, for and on behalf of Rosa Case, should be regarded as surplusage.

The judgment is reversed, with instructions to overrule the motion to quash the affidavit.

GILLET, J., was absent.

(163 Ind. 204)

MAK-SAW-BA CLUB v. COFFIN, Com'r,
et al. (No. 20,818.)

(Supreme Court of Indiana. Oct. 29, 1907.)

1. APPEAL—QUESTIONS REVIEWABLE—FINAL JUDGMENT.

Where the construction commissioner, appointed in proceedings for a public ditch, files a report showing completion of the ditch as ordered by the court, that some of the assessments were uncollected, and that there were costs and expenses remaining unpaid, and recommends the acceptance of the drains, and requests a continuance of the cause for a final report, so that he, as such commissioner, may complete the collection and make the disbursements as required by law, and a landowner files exceptions, going to the question of the ditch, and the court makes a special finding on the question, and thereafter the landowner files a motion for new trial, and the commissioner's attorneys file a petition for allowance of attorney's fees in the litigation over the report, and the court overrules the motion for new trial, and by its order declares the drain completed according to law, and a judgment is rendered for costs against the landowner in favor of the commissioners—there is not a final judgment from which Burns' Ann. St. 1901, § 644, gives the right of appeal; it merely settling something preliminary to final judgment, and it being conjecturable that there may be further questions as to compensation of the commissioner.

2. SAME—RECORD.

The record must affirmatively show a final judgment to authorize an appeal under the general statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2286.]

3. SAME—JUDGMENT FOR PAYMENT OF COSTS.

An order, though embracing a judgment for costs, is not one for the payment of money, within the statute allowing appeals from interlocutory orders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 350, 480, 481.]

4. SAME—FINAL JUDGMENT.

An order merely because embracing a judgment for costs is not a final judgment, as respects the question of right of appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 350, 480, 481.]

Appeal from Circuit Court, Starke County; Jno. C. Nye, Judge.

William H. Coffin, as construction commissioner for a public ditch, filed a report. The Mak-Saw-Ba Club filed exceptions, on which there were certain proceedings and an order made, and it appeals. Dismissed.

Osborn, McVey & Osborn, for appellant.
H. R. Robbins, W. C. Pentecost, and T. B. Howard, for appellees.

JORDAN, J. Appellee Coffin, as commissioner, charged with the construction of the public ditch herein involved, filed an amended report, showing the completion of said ditch as ordered by the court. By his report he further showed that some of the assessments were uncollected, and that there were costs and expenses remaining unpaid. Said commissioner reported and recommended the acceptance of the drain, and requested that the court continue the cause for a final report, so that he, as such commissioner, might be able to complete the collection, and make the disbursements as required by law. Appellant, a landowner affected by the construction of said ditch, filed exceptions to the report, going to the question of the completion of the drain, and after a hearing by the court, pursuant to request, it made and entered a special finding upon the questions thus drawn into controversy. October 9, 1905, appellant filed its motion for new trial, and on the same day appellee's attorneys filed their petition for an allowance of attorney's fees in the litigation over said report. January 29, 1906, the court overruled the motion for a new trial, and by its order the drain was "declared completed according to law," and a judgment was rendered for costs against appellant in favor of appellee, as commissioner, "to which judgment," as the record states, "the Mak-Saw-Ba Club objects and excepts, and prays an appeal to the Supreme Court." Time was then given for a bill of exceptions, and a bond was suggested and approved. Immediately following this, according to the record, appellant moved the court to strike out the petition of said attorneys, and thereupon the petition was withdrawn. As the next step, and as a part of the same entry, appellee Coffin filed his petition for an allowance of attorney's fees in said litigation. Appellant moved to strike out this petition, but its motion was overruled, and a trial of said question followed, resulting in the making of an order for such allowance. To the making of this portion of the order appellant objected and excepted and asked time for a bill of exceptions, but it did not pray appeal or suggest a bond. Within the time fixed for the filing of a bond, as provided for in the previous part of said order, appellant filed its bond, reciting that it had appealed from the judgment against it for costs. Appellant's assignments of error go to the question of the

acceptance of said drain as completed and the allowance of said attorney's fees.

The threshold question in this case is in regard to our jurisdiction. As this was a proceeding in the circuit court, under the statute relating to the construction of public drains, we assume that it is governed as to the procedure by the Civil Code. *Campbell v. Fichter* (Ind. Sup.) 81 N. E. 661, and cases cited. The authority to appeal is statutory. *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443. Section 644, Burns' Ann. St. 1901, gives the right of appeal from final judgments, and we have no jurisdiction in any other case unless it falls within Acts 1905, p. 490, c. 161; section 658, Burns' Ann. St. Supp. 1905, concerning appeals from certain interlocutory orders. We need not inquire whether that part of the order providing for the payment of attorney's fees authorized an appeal under the latter statute, because, as to the portion of the order or judgment mentioned, appellant did not follow the provisions of the Code concerning the taking of interlocutory appeals. *Natcher v. Natcher*, 153 Ind. 368, 55 N. E. 86. We are therefore remitted to the question as to whether the order from which this appeal is prosecuted, regarded as a whole, was a final judgment. As far back as *Metcalf's Case*, 11 Coke Rep. 68, "It was resolved that no writ of error lies until the last judgment." The general rule is that a final judgment must leave the case disposed of as to all of the parties, and, as far as is within the power of the court, put an end to the controversy. *Terre Haute, etc., R. Co. v. Indianapolis, etc., Co.* (Ind. Sup.) 78 N. E. 661, and authorities cited; 2 Ency. of Pl. & Pr. p. 61. There are colorable, if not real, exceptions to the rule, but, as it is founded on the policy of the law to prevent unnecessary appeals, he who asserts that his case is within an exception must show a solid reason for so treating it. *Western Union Tel. Co. v. Locke*, 107 Ind. 9, 7 N. E. 579; 1 Freeman on Judgments (4th Ed.) § 33; Elliott, App. Proc. § 84. In the section last cited the authors say of the rule: "Its scope is comprehensive, and few exceptions break its force or narrow its operation." No question becomes res adjudicata until it is settled by a final judgment. 1 Freeman on Judgments (4th Ed.) § 251. The effect of such a judgment is to bring forward, for the purpose of an appeal, all merely interlocutory orders concerning which steps have been duly taken to reserve the questions, but, except as provided by statute, appeals from such orders are denied. One reason for this is that, so long as a cause is in fieri, intermediate orders are subject to modification or rescission by the court. (*Boonville National Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529; Elliott App. Proc. § 83; 15 Ency. of Pl. & Pr. 352; 23 Cyc. 905), and a further reason is that public policy would be contravened,

to say nothing of the statute, by permitting piecemeal appeals. In fact, this court has repeatedly recognized and enforced the rule that it will not decide a cause by piecemeal or in fragments. *Abshire v. Williamson*, 149 Ind. 248, 48 N. E. 1027, and authorities there cited.

In *Western Union Telegraph Co. v. Locke*, supra, this court quoted with apparent approval the following declaration of Judge Freeman: "The general rule recognized by the courts of the United States, and by the courts of most, if not all, the states, is that no judgment or decree will be regarded as final unless all the issues of law and of fact necessary to be determined were determined, and the case completely disposed of so far as the court had power to dispose of it." Elliott's App. Proc. § 83; 2 Ency. of Pl. & Pr. p. 254; *Galentine v. Brubaker*, 147 Ind. 458, 46 N. E. 903; *Newark, etc., Plank Road Co. v. Elmer*, 9 N. J. Eq. 754. In this latter case the court held that, if a decree or judgment leaves important questions for further adjudication, it is not final. In Elliott's Appellate Procedure, § 83, it is said: "No order is final in such a sense as to constitute a final judgment, unless it disposes of the main case so far as there is power in the trial court to decide upon the questions presented by the issues, no matter how clearly and decisively the order may indicate what the ultimate judgment will be. Until there is an ultimate judgment, the case is not finally disposed of inasmuch as the trial court may change its rulings, * * * or make some such order, notwithstanding the fact that in other rulings it may have clearly manifested a purpose to carry its rulings into the ultimate judgment or decree. A decretal order, although interlocutory in its nature, may, of course, be carried forward and embodied in a final decree and thus become an essential part of that decree, but until it is so embodied in the final decree no appeal will lie. The rule that, no matter how decisive may seem the ruling of the trial court, it is not a final judgment, is well illustrated by the cases in which rulings were made denying a motion for a judgment on a special verdict or on the answers of a jury to special interrogatories, for such a ruling is seemingly as clearly indicative of what the final judgment will be, as it is possible for any order to be, except, of course, the ultimate judgment itself." In *Pfeiffer v. Crane*, 89 Ind. 485, a final judgment was thus defined and differentiated from an interlocutory order: "A final judgment is the ultimate determination of the court upon the whole controversy in the action. An order of the court, made in the progress of the cause, requiring something to be done or observed, but not determining the controversy, is an interlocutory order, and is sometimes called an interlocutory judgment." It was said by the Supreme Court of the United States, in

ostwick v. Brinkerhoff, 106 U. S. 3, 27 L. d. 73, that "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction of appeals or writs of error, must terminate the litigation between the parties on the merits of the case, so that, there should be an affirmance here, the court below would have nothing to do but execute the judgment or decree which had been rendered."

In getting at the status of this proceeding the time in question, attention should be given to the case of Perkins v. Hayward, 124 d. 445, 24 N. E. 1033. It was there pointed out that, so far as establishing the work as public drain is concerned, the order upon that subject constitutes the final judgment, and that thereafter the cause is upon the docket for the purpose of carrying out the provisions of such judgment. We may therefore infer that from the time that the construction commissioner is appointed until he is discharged his relation to the court is in the nature of a trusteeship, and that the carrying out or into effect the undertaking for which he was appointed, and the making of an account of his trusteeship, constitute the general subject-matter with which the court and the parties are concerned. Entertaining this view, we may look to the authorities to determine what constitutes a final adjudication in analogous cases. However, in this connection we may, as preliminary, in order to prevent any misunderstanding, state that the provision of the decedent's estate act concerning appeals is broader than the Civil Code. Section 2609, Burns' Ann. St. 1901; Taylor v. Burk, 91 Ind. 252. In Goodwin v. Goodwin, 48 Ind. 584, it was said: "There is no statute authorizing an appeal from an order or action of the court in allowing or refusing a partial settlement of an estate." This was held in Cravens v. Chambers, 55 Ind. 481, that an assignee could not appeal from an order sustaining exceptions to his current report. In Thiebaud v. Dufour, 57 Ind. 598, the court held that the trustee of an express trust under a will could not appeal from an order refusing to approve such a report. There was a like holding, in the case of a guardian, in Pfeiffer v. Crane, 89 Ind. 485. In the case of Angevine v. Ward, 66 Ind. 460, is even stronger, since it involved the overruling of exceptions to a guardian's report in final settlement. In dismissing the appeal the court said concerning the order complained of:

"We are of opinion that it was not in proper sense an order of final settlement of the guardianship, and that it did not, in all effect, discharge the appellee from such guardianship. By its terms further duties were devolved upon the appellee. If no further order had been made in the premises, the guardianship is still open and under the

control of the court below." There are authorities in other states to the effect that allowances of credits claimed by such officers are nonappealable where they are subject to be reopened on final hearing. See Baker v. Schoeneman, 41 Mo. 391; In re Rose, 80 Cal. 166, 22 Pac. 86; Scott v. Kennedy, 51 Ky. 510. It was decided in Tatem v. Gilpin, 1 Del. Ch. 13, that an order made upon a point whereby a right was established was not appealable where it was only preparatory to a final order. We may here observe that Judge Freeman, in attempting to classify the orders which may be mistaken for final judgments or decrees, mentions as belonging to one of such classes orders, "which, while they determine the rights of the parties either in respect to the whole controversy or some branch of it, merely ascertain and settle something without which the court could not proceed to a final adjudication, and the settlement of which is obviously but preliminary to a final judgment or decree." 1 Freeman on Judgments (4th Ed.) § 29. The order made by the court below is of this character.

As a further reason for holding that the order in question is interlocutory, it may be said, as the authorities herein cited affirm, that an order which does not dispose of all of the issues or questions before the court or of those which it is essential to determine before the court can be said to have disposed of the whole controversy as to the rights of the parties is clearly nonappealable. Western Union Tel. Co. v. Locke, 107 Ind. 9, 7 N. E. 579; Champ v. Kendrick, 130 Ind. 549, 30 N. E. 787; Terre Haute, etc., R. Co. v. Indianapolis, etc., Co. (Ind. Sup.) 78 N. E. 661; Keystone Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32, 33 L. Ed. 275; Chittenden v. Missionary Society, 8 How. Prac. 327.

The order in question does not undertake to fix the compensation of the commissioner or his allowance for subsequent expenses, and we may well conjecture that, upon the coming in of the final report, there will be demands of this character made, and possibly exceptions filed thereto, with the possibility of another appeal if such claims are allowed. The rule is that a record must affirmatively show a final judgment to authorize an appeal under the general statute. Reese v. Beck, 9 Ind. 238. We note the fact that the order appealed from embraced a judgment for costs. Such an order, however, is not one for the payment of money within the statute allowing appeals from interlocutory orders. Hamrick v. Danville, etc., Co., 30 Ind. 147. Neither can an appeal be taken from such an order on the mere theory that it is final judgment. Costs are regarded as but an incident of a suit, and the fact that they are awarded cannot serve to render a judgment final, so as to bring it within the revisory power of an appellate tribunal, in

the absence of a determination of the principal controversy in its entirety. *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 732; 2 Cyc. 503; Century Digest, tit. "Appeal and Error," § 481. The correctness of the judgment for costs is in no wise questioned by the assignments of error in this appeal, and it stands as a mere incident of an order which is subject to revision, and, besides, in the nature of things, it does not dispose of the subject-matter of the proceeding. We cannot therefore, under the circumstances, accord to the judgment for costs the effect of a final judgment. An order denying a motion to retax costs in the case is not appealable. An appeal in such a case lies only upon the final judgment in the particular cause. *State ex rel. v. Millis*, 19 Mont. 444, 48 Pac. 773.

The rendition of interlocutory judgments for costs is a common incident of proceedings in court (see section 605, Burns' Ann. St. 1901), and, if an appeal were authorized from every order to which a judgment or costs is appended, it would operate to split up and multiply appeals. The question before us was decided in *Hamrick v. Danville Co.*, supra; the court there holding that a judgment for costs rendered during the pendency of the proceedings was not a final judgment, and was not an appealable order within the statute authorizing appeals from interlocutory orders in certain cases.

Appellant's counsel rely on *Racer v. Wingate*, 138 Ind. 114, 36 N. E. 538, as authority for the prosecution of an appeal from the order of the court below. The order which was appealed from in the case referred to provided that the drainage commissioner "be and hereby is relieved from all further responsibility relative to the construction of said ditch." Such an order more nearly approached a final order than is found in the proceedings of the court in this case, but, in any event, the *Racer* Case cannot be regarded as a precedent in favor of our jurisdiction, because the court there stated that the sole question in that case related to the propriety of entering the order, thus showing affirmatively that the question as to whether the order was interlocutory did not receive any consideration by the court. So far as the order or judgment in question left undetermined or unsettled for further adjudication attorney's fees and allowances to the commissioner, or other important matters in the case, it was not final so as to authorize an appeal, and an appeal therefrom is a fair illustration of appeals taken in piecemeal.

The conclusions which we have reached must lead to a dismissal of the appeal in this cause. Appellee's motion to dismiss the appeal is therefore sustained on the ground that the order or judgment from which it is prosecuted is not final.

The appeal is therefore dismissed, at the cost of appellant.

(165 Ind. 223)

STATE ex rel. MUTUAL PROTECTIVE LEAGUE v. BIGLER (No. 20,825.)

(Supreme Court of Indiana. Oct. 30, 1907.)

MANDAMUS—COMPELLING GRANTING OF LICENSE TO BENEFICIAL ASSOCIATION—CLEAN HANDS.

Where a foreign fraternal beneficiary association is violating Burns' Ann. St. 1901, § 5050a, requiring that fraternal beneficiary associations shall have a lodge system, with ritualistic form of work, and section 5050k, providing that such associations shall not employ paid agents in soliciting members, which latter provision is also in the act under which the association was incorporated, mandamus will not lie to compel the granting of a license to it to do business in the state, notwithstanding it had been doing business in the state before the act was passed, and section 5050b authorizes such an association to continue such business, provided it comply with the provisions of the act as to making annual reports to the State Auditor; it being necessary that a relator in mandamus come into court with clean hands.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Mandamus, on the relation of the Mutual Protective League, against Warren Bigler, Auditor of State. Writ denied, and relator appeals. Affirmed.

P. W. Bartholomew and W. A. Northcott, for appellant. James Bingham, Atty. Gen., for appellee.

GILLETT, J. This was a proceeding by way of mandate to compel the Auditor of State to license relator to do business in this state as a fraternal, beneficiary association, for the year then next ensuing. Issues were joined, and, after a hearing, the peremptory writ was denied.

It appears from the evidence that the relator is chartered as a fraternal, beneficiary association under the laws of Illinois, and that it was doing business in this state at the time of the enactment of the act of March 1, 1899. Acts 1899, p. 177, c. 117; section 5050a et seq., Burns' Ann. St. 1901. The testimony of the president of relator showed that it had established what it termed an "emergency council" in the state of Illinois; that this council had about 300 members, a majority of whom were members who had moved away from their home councils; that relator employed agents, or, as they were termed, "deputies," some of whom were paid a salary and others a commission, to establish new councils; that where a deputy had gotten a number of persons together, and some of them failed to be initiated, while others desired to, and there was reason to believe that at some time a council might be organized at that place, the association regarded it for the good of the order to receive the latter, and to enroll them in some established council, either one near by or in the emergency council referred to; that, in that event, the deputy would give the applicant the unwritten work, including the signs, pass-

words, etc. When asked whether this would be done in a corn field or barn, the witness answered: "Any place that was secret." So far as indicated by its by-laws, it would seem that the beneficial, or, perhaps, it might be termed the insurance, feature of relator's organization, is the leading one. The witness referred to testified that a deputy who was working on a salary was expected to do a certain amount of business, or his services would be discontinued.

By section 5050a, supra, it is required that fraternal, beneficiary associations "shall have a lodge system, with ritualistic form of work." "Such associations," the section declares, "shall be governed by this act, and shall be exempt from the provisions of the insurance laws of this state." Section 5050b authorizes associations incorporated in another state, falling within the description set forth in the prior section, which were doing business in the state at the time of the enactment of the statute, to continue such business, provided that they comply with the provisions of the act concerning the making of annual reports to the Auditor of State and designate him as a person upon whom process may be served. By sections 5050d and 5050f, which apply to associations of the character of relator, provision is made for the licensing of such associations to do business in this state from year to year. Section 5050k, which follows sections making provision for the incorporation of fraternal, beneficiary associations in this state, provides: "Such associations shall not employ paid agents in soliciting or procuring members except in the organization or building up of subordinate bodies or granting members inducements to procure new members." It appears from the evidence offered by relator that there is a like provision in the act under which relator is incorporated. It is quite clear to us that relator has been guilty of a violation of both the letter and the spirit of section 5050a, supra, which requires that such associations shall have a lodge system, with ritualistic form of work. It is unnecessary for the purposes of this case to attempt a differentiation of ordinary insurance and the benefits granted by fraternal organizations. It suffices now to state that it was evidently the legislative contemplation that the spirit of fraternity among the members of such associations afforded such a check in the administration of their beneficiary funds as to warrant the establishment of such associations without surrounding them with all of the safeguards which have been thrown about the business of insurance, in which the parties deal at arm's length. In other words, the provision of the statute concerning the maintenance of the lodge system with ritualistic form of work is a condition of the grant of power, and is one which such an association is not at liberty to disobey. Upon this point, we are of opinion that the provision of the stat-

ute should be rigidly adhered to, for in matter of substance it is the fraternal feature of these associations which constitutes one of the leading distinctions between them and mutual insurance companies. The course pursued by relator would in some degree tend to break down an intended legislative check upon the safeguarding of its funds, and, if winked at, would afford a constant temptation to associations of like character to honor the statute in the breach rather than in its observance.

It also appears to us that in another particular relator is calling on the court to admit it to do business in contravention of the domestic policy of this state, and also, if we may regard the evidence offered by its counsel, in contravention of its own charter restrictions. We refer to the employment of agents who, as stated above, are permitted to enroll members who have no substantial relation to the association as a fraternity. Whether associations of this character, which are organized under the law of another state, but which were doing business here when the statute was passed, are to be regarded as foreign corporations, or, by virtue of the statute, as domestic corporations quoad hoc, yet the legislative comity which the statute expresses in authorizing them to do business in this state is not without restriction, and should be limited by construction, so that an association may not, by the taking up of a local habitation, pursue a course which would at once be to do what is prohibited to local associations of like character and to violate the law of its own existence. In discussing the doctrine of comity, as applied to foreign corporations, Judge Thompson says: "Without attempting to enumerate in a single section all the cases to which this comity does not extend, it may be observed, in the first place, that it does not extend so far as to concede to foreign corporations the powers which their own charters do not permit them to exercise, nor so far as to permit a foreign corporation to exercise powers within the state which a domestic corporation of the same kind is not permitted to exercise under the Constitution, laws, or policy of the state." 19 Cyc. 1224. And see Nathan v. Lee, 152 Ind. 232, 52 N. E. 987, 43 L. R. A. 820. The course pursued by relator is especially pernicious in its tendency, since the partial abandonment of the lodge feature and the employment of paid agents are brought into conjunction, thus putting agents under the temptation to solicit individuals nominally to join the association on account of the death benefits paid by it, instead of devoting their efforts to the building up of a system of lodges.

Counsel for appellant contend that, as relator had made its report according to law, it was the duty of the Auditor of State to issue a license; that he had no power to enter into an inquiry as to the manner in which relator had done business. This ap-

pears to us to be a moot question, in view of the fact that relator is seeking by mandate to enforce the granting of a license. The writ will not issue to promote a wrong, or to compel a compliance with the strict letter of the statute in disregard of its spirit. *Western Union Tel. Co. v. State ex rel.*, 165 Ind. 492, 76 N. E. 100, 3 L. R. A. (N. S.) 153; *Funk v. State ex rel.*, 166 Ind. 455, 77 N. E. 854; *People ex rel. v. Board*, 137 N. Y. 201, 33 N. E. 145. As was said in the case last cited: "The relator must come into court with clean hands." When relator has purged itself of that which is objectionable in its manner of doing business, it will be time enough to seek the aid of the courts.

Judgment affirmed.

(170 Ind. 144)

STATE ex rel. WALKER v. WAGNER. (No. 21,041.)¹

(Supreme Court of Indiana. Nov. 6, 1907.)

1. MUNICIPAL CORPORATION—CITY COUNCIL—VACANCIES—MODE OF FILING.

As *Burns' Ann. St. Supp.* 1905, § 3469, conferring on the council of cities of the fifth class power to fill vacancies in that body, does not, in terms, prescribe the manner by which such right shall be exercised, vacancies may be filled by ballot, viva voce vote, or by the adoption of a motion or resolution declaring that the person therein named be appointed.

2. SAME—APPOINTMENT TO OFFICE—NATURE OF ACT.

Though the appointment to office in a municipal corporation is an executive act, power to appoint need not be vested in the executive officer of the city, but may be vested in the city council.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 36, *Municipal Corporations*, § 305.]

3. SAME—APPOINTMENT BY RESOLUTION—MAYOR—VETO POWER.

Burns' Ann. St. Supp. 1905, § 3476, relating to cities of the fifth class, provides that no ordinance, order, or resolution of the council shall become a law or operative until approved in writing by the mayor or passed over his veto, that, if he approve the ordinance, order, or resolution, he shall sign it, and it shall thereupon become a law, and in all cases of non-approval the ordinance, order, or resolution shall not become a law unless it shall be passed again by a two-thirds vote of the council members elect. *Held*, that the resolution referred to in such section is one which, on being passed and approved by the mayor, or passed over his veto, will become a "law," and that the section does not confer on the mayor power to veto a resolution appointing relator to fill a vacancy in the city council.

Appeal from Circuit Court, Shelby County; William Sparks, Judge.

Information, in the nature of quo warranto, on the relation of Harry H. Walker, against William H. Wagner. From a judgment for defendant, relator appeals. Reversed and remanded, with instructions.

John F. Walker, Ursus E. Tindall, K. M. Hord, and Ed. K. Adams, for appellant. A. E. Lisher and Carter & Morrison, for appellee.

¹ Rehearing denied.

MONKS, J. The relator filed an information in the nature of a quo warranto for the purpose of ousting appellee from the office of councilman from the Fourth Ward of the city of Shelbyville and obtaining possession thereof himself. A demurrer for want of facts was sustained to the information, and, relator refusing to amend, final judgment was rendered in favor of the appellee.

The action of the court in sustaining said demurrer is called in question by the assignment of errors. It appears from the information, among other things, that under the provisions of section 45 of the act of 1905 (*Acts* 1905, p. 242, c. 129), being section 3469, *Burns' Ann. St. Supp.* 1905, the common council of the city of Shelbyville, a city of the fifth class, adopted a resolution appointing the relator a councilman from the Fourth Ward of said city to fill a vacancy in that office caused by the resignation of the councilman from that ward. The mayor of said city, assuming that he had the power to veto the resolution by the adoption of which said appointment was made, vetoed the same, and the common council of said city at its next meeting adopted a resolution appointing appellee to fill said vacancy. Appellee by virtue of said appointment took possession of and entered upon the discharge of the duties of said office. Section 45 of the act of 1905 (*Acts* 1905, p. 242, c. 129), being section 3469, *Burns' Ann. St. Supp.* 1905, conferred upon the common council of said city the power to fill said vacancy. If the mayor of said city had the power to veto the relator's appointment to said office, the demurrer to the information was properly sustained and the judgment must be affirmed, but, if he did not have that power, the judgment must be reversed.

The veto power is conferred upon the mayor by section 52 of the act of 1905 (*Acts* 1905, pp. 245, 246, c. 129), being section 3476, *Burns' Ann. St. Supp.* 1905, which provides that "no ordinance, order or resolution of the council shall become law, or operative until it had been signed by the presiding officer thereof, and approved in writing by the mayor, or passed over his veto as herein-after provided. * * * Every ordinance, order or resolution of the common council shall, immediately upon its passage, enrollment, attestation and signature by the clerk and presiding officer, be presented by the city clerk to the mayor, and a record of the time of such presentation made by the clerk. If the mayor approve such ordinance, order or resolution, he shall enter his approval thereon and sign the same, and the ordinance, order or resolution shall become a law. If he do not approve the ordinance, order or resolution he shall return it to the clerk, with his objection in writing, within ten days after receiving it and the clerk shall present the same to the common council at its next meeting, * * * and in all cases of disap-

proval by the mayor such ordinance, order or resolution shall not become a law, unless at its next regular or special meeting after the time named for the mayor's action, the council shall again pass the same—by a two-thirds vote of all the members-elect." As the law does not in terms prescribe the method or manner by which the common council shall fill a vacancy in the office of councilman, the method or manner of the appointment is not material, but the same may be made by ballot or viva voce vote, or by the adoption of a motion or resolution declaring the person therein named be appointed to fill the vacancy. *State ex rel. Morris v. McFarland*, 149 Ind. 266, 270, 49 N. E. 5, 39 L. R. A. 282, and cases cited; 2 *Abbott's Municipal Corporations*, § 510. Appellee concedes that if the council had elected the relator by any one of the methods mentioned, except by resolution, the mayor would have had no power to approve or disapprove its action, but that having chosen the relator by resolution, and the mayor having vetoed the same, the relator was not elected because the resolution was not passed over his veto by "a two-thirds vote of all the councilmen-elect"—citing *People ex rel. Ennis v. Schroeder*, 76 N. Y. 160; *Kindermann v. West Bay City*, 117 Mich. 516, 76 N. W. 10. It will be observed that section 52 (3476), *supra*, which confers the veto power upon the mayor, provides that "no ordinance, order or resolution of the common council shall become a law or operative until * * * approved in writing by the mayor or passed over his veto. * * * If the mayor approve such ordinance, order or resolution he shall enter his approval thereon and sign the same, and the ordinance, order or resolution shall become a law, * * * and in all cases of disapproval by the mayor such ordinance, order or resolution shall not become a law, unless * * * the council shall again pass the same by a two-thirds vote by all the members-elect." It is evident, we think, from the language used, that the Legislature intended to confer upon the mayor the power to veto, not appointments to office, but such acts of the common council as usually, in such bodies, take the form of resolution, order, or ordinance. While the appointment to office is not a legislative function, yet the power to name the persons or body who shall make the appointment is legislative. *City of Terre Haute v. Evansville, etc., R. R. Co.*, 149 Ind. 174, 183, 184, 46 N. E. 77, 37 L. R. A. 189, and cases cited. Ordinarily an appointment to public office is in its nature an executive act. 2 *Am. & Eng. Ency. of Law* (2d Ed.) 475, and note 4; *State v. Barbour*, 53 Conn. 76, 22 Atl. 686, 55 Am. Rep. 65, 68, and cases cited; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 361, 362, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143; *State v. Hyde*, 121 Ind. 20, 30-34, 22 N. E. 644, and cases cited. Although the appointment to office is in its nature an executive act, it does not follow that the

power to make appointments to city and town offices must be vested in the executive officer of such municipal corporation. The provisions of the state Constitution in regard to the distribution of power do not apply to municipal governments and officers. *Baltimore & Ohio R. R. Co. v. Town of Whiting*, 161 Ind. 228, 233-238, 68 N. E. 266.

It will be found from an examination of the authorities cited in this opinion that it has been uniformly held that the Legislature may vest the power of appointment to office in the department of the government of cities or town which is authorized to exercise legislative power, as the authority granted to the common council to fill vacancies in the office of councilman is in its nature executive, and the mayor's power to veto does not apply to such appointments. *Haight v. Love*, 39 N. J. Law, 19, 21, and cases cited; *Erwin v. Mayor of Jersey City*, 60 N. J. Law, 141, 145-147, 37 Atl. 132, 64 Am. St. Rep. 584, 587-589; *State ex rel. McDermott v. Miller*, 45 N. J. Law, 251, 255-256; *Matter of North v. Cary*, 4 *Thomp. & C. (N. Y.)* 357, 362-363; *Achley's Case*, 4 *Abb. Prac. (N. Y.)* 35; *Rich v. McLauren, etc., et al.*, 83 Miss. 95, 35 South. 337; *State ex rel. Sullivan v. Longdon*, 68 Conn. 519, 521-522, 37 Atl. 383. As was said in *Haight v. Love*, 39 N. J. Law, 20: "The justice of this conclusion is seen also in considering the inaptitude of the word 'resolution' to signify the election of an officer. While, indeed, an officer may be chosen by resolution, such a mode is rarely adopted. Usually a vote by ballot or viva voce indicates the choice. And, though it is quite clear that the Legislature did not intend to make the mayor's power dependent on the form in which the boards acted (*State et al. v. City of Dover*, 61 N. J. Law, 404, 39 Atl. 675, and cases cited), it is almost equally sure that they did not mean to extend his power beyond such action as usually, in organized assemblies, takes the form of resolution or ordinance." In *Erwin v. Mayor of Jersey City*, *supra*, the mayor of the city was given authority to veto the "acts" of any board of the city, and it was required that copies of all resolutions and "other matters" shall be furnished the mayor for consideration, and the board was empowered to pass any vetoed "resolution or other matter" over the mayor's objections by a two-thirds vote. It was insisted in that case that a resolution appointing to office was subject to the mayor's veto. The court says: "If a literal construction be given to the provisions of the section thus appealed to, it is obvious that the business of any municipal board will not only be hampered and delayed, but practically be rendered impossible to be performed. Resolution to approve minutes, to lay on the table, to postpone, to adjourn, and numberless others, are resolutions expressing acts of such board. If all such acts are to be presented to the mayor, and only to be effective upon his approval or their passage over his

veto, the business of the board could not be done. It is so incredible that the legislative intent was to produce such a result that a restricted construction of these provisions, consistent with their practical operation, should be adopted if possible. A question identical with that thus presented was considered by the Supreme Court in *Haight v. Love*, 39 N. J. Law, 14. By the provision of a section of a former charter of Jersey City, the mayor was given power to veto the 'action' of any municipal board, and all ordinances and resolutions were required to be sent to him for consideration. If any were vetoed, it was provided that the action resolved upon or ordained should be void, unless such board should sustain it by a two-thirds vote at its next regular meeting. The point presented in the case was whether the appointment, by the board of finance, of a city collector was required to be presented to the mayor for his approval. The opinion of the court as delivered by Mr. Justice Dixon, who justly pointed out the impracticability of a literal construction of those provisions, and who concluded that the actions which the mayor might approve or veto must belong to the class of acts usually performed by such bodies by resolutions or ordinances, viz., acts of a legislative character. As appointments to office were not of that character and were not usually made by resolution, but rather by ballot or viva voce, the legislation then under consideration was construed as inapplicable to acts of such boards appointing to office, and it was held that such acts did not require the approval of the mayor. With the views expressed in that case I am in entire accord, and I think them applicable to the statutory provisions now under consideration. The absurd result of a literal construction of those provisions tends to induce the belief that such construction was not within the legislative intent, and the fact that it is required that the mayor is to be informed of 'resolutions and other matters' for consideration in respect to his approval or veto, justifies the conclusion that the 'acts' which are thus to be submitted to him for approval are only such as are usually performed by such bodies by resolution or other similar evidences of action. 'Other matters' is a phrase not very aptly chosen, but, in my judgment, it can only mean matters of a similar character to resolutions, of which I know none but ordinances. The result is that the power to appoint a corporation attorney, if only apparent, was conferred upon the board of finance, and their appointment did not require the mayor's approval."

In *Matter of North v. Carey*, supra, the court says: "I conclude that the appointment of North was not affected by the veto of the mayor. The veto power is conferred upon the mayor by section 1, tit. 4, of the charter (Laws 1869, p. 2332, c. 912), and the provision upon that subject is as follows: 'He shall have the power to veto any resolu-

tion or ordinance of the common council.' It is not pretended but that North received the number of votes of the members of the common council required for his appointment. The proceeding at which the veto was aimed was an appointment to office, and not a resolution or ordinance adopted in the transaction of the ordinary business of the common council. This distinction can be more readily conceived than accurately described. When we speak of an appointment to office, a very different idea is conveyed to the mind than when the mere adoption of a resolution or ordinance by a public body is spoken of. It is proper for us to inquire again what was the intention of the Legislature in this particular. Was it the design to confer upon the mayor such control over appointments to office made by the common council as would necessarily follow if the veto power was possessed by the mayor to the extent claimed by him? If he possesses the power to the extent claimed, then the mayor may by veto necessitate a vote of two-thirds of all the members of the common council to make a valid appointment to office. Section 1 of title 4 of the charter, after conferring the veto power upon the mayor, proceeds as follows: 'The common council may at their next regular meeting proceed to reconsider the same; if two-thirds of all the members elected then agree to pass the same, it shall take effect as a law.' The language thus employed seems inappropriate, when applied to an appointment to office, but quite proper when applied to an ordinary resolution or ordinance. But, aside from the technical language employed, it seems quite clear from the charter and the nature of the proceeding that no such power was intended to be conferred upon the mayor. The result would be, possibly and even probably, to deprive a party of an office, by such indirect means, by requiring a two-thirds vote to overcome the veto of the mayor, when only a majority vote would make the appointment in the first instance. The adjudications to which we have referred justify a construction which seems in accordance with the intention of the lawmakers in framing the charter." In *Achley's Case*, supra, it was claimed on the argument that, notwithstanding the appointment was given exclusively to the common council, and that the mayor was not a member thereof, yet the action of the common council was subject to his approval or rejection, as the two boards had communicated to each other their action upon this subject in the form of a resolution, and as section 12 of the charter of 1830 requires that any act, ordinance, or resolution which shall have passed the two boards of the common council, before it shall take effect, shall be presented to the mayor for his approval. If he approve, he shall sign it. If he disapprove, he shall return it, within 10 days, to the board in which it originated,

with his objections. The court says: "It is apparent from these provisions of the charter that the action of the mayor is confined to such matters as shall have passed both boards, and which, with or without his sanction, would 'take effect as an act or law of the corporation.' We have seen that he law conferring power of appointment of commissioners of deeds devolved its exercise upon the common council, and not upon the corporation of the city. The act or resolution of appointment became an act of the common council, and not an act or resolution of the corporation, and it is only in reference to the latter that the co-operation of the mayor is invoked. The mayor, as the executive of the corporation, its chief officer, has properly confided to him a supervision of any act, ordinance, or resolution which is to take effect as an act or law of the corporation; but it does not follow from this that such supervision or control exists as to executive duties devolved by law upon the common council. It was conceded in the argument that if the common council had met in a joint meeting of the two boards, and made these appointments, the mayor would have had no authority or right to have interfered. I cannot see that the form of communication which the two boards have adopted to communicate to each other their determination in reference to these appointments changes or affects, in the least, the powers or rights of any of the departments of the city government. The boards might have communicated with each other by letter, committees, or messengers. What the law requires is that a majority of each should concur in an appointment; and, when such concurrence is ascertained, the appointment becomes absolute, irrevocable, and complete for the term of the appointee. The boards, having adopted the form of a resolution for the purpose of more easily or conveniently communicating with each other, cannot in any way alter or affect the legality of their proceedings, and render inchoate or ineffectual what would otherwise be complete and final."

In *People ex rel. Ennis v. Schroeder*, 76 N. Y. 160, cited by appellee, the mayor was authorized to veto every ordinance or resolution adopted by the board of aldermen. The board of aldermen adopted a resolution confirming the appointment of a clerk by a justice of the peace. The court held that said board could only express its assent to the appointment by resolution or ordinance, and that, therefore, the same was subject to the mayor's veto. It is evident that this case is not in point here, for the reason, as we have shown, that in this state the appointment of a councilman may be made by other methods than by resolution or ordinance. *Kindermann v. West Bay City*, 117 Mich. 516, 76 N. W. 10, cited by appellee to sustain his contention, is not in point because the veto in that case was sustained on the ground

that it was aimed at the resolution to provide for the office and not at his election.

It is clear that the mere fact that the relator was appointed by resolution, instead of by motion, ballot or viva voce vote of the council, did not empower the mayor to veto the same.

It follows that the court erred in sustaining the demurrer to the information. Judgment reversed, with instructions to overrule the demurrer to the information and for further proceedings not inconsistent with this opinion.

(41 Ind. App. 460)

WENDEL v. CLEVELAND, C. C. & ST. L. RY. CO. (No. 6,137.)¹

(Appellate Court of Indiana, Division No. 2, Nov. 8, 1907.)

1. TRIAL — SPECIAL INTERROGATORIES AND FINDINGS — FINDINGS INCONSISTENT WITH GENERAL VERDICT.

Answers to interrogatories can override the general verdict only when both cannot stand and the antagonism must be apparent on the face of the record, and incapable of being removed by any evidence legitimately admissible in the issues; all inferences, intendments, and presumptions being indulged in support of the general verdict and none in aid of contradictory answers to interrogatories.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

2. SAME.

In an action for the death of plaintiff's son, who was killed at a railway crossing, the finding in the general verdict that the son was not guilty of contributory negligence was not overcome by the answers to special interrogatories showing that he could, had he looked, have seen the approaching train when he was 25 feet from the track, and the train 500 feet away, it appearing that he stopped, looked, and listened when 50 feet from the track and saw and heard no train; that he was driving a team attached to a wagon with a hayrack on, so that his horses' heads were several feet in front of him; that only three or four seconds elapsed from his first opportunity to see the train until he was struck, and that the approach to the track was very narrow and steep on both sides.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

3. APPEAL — MANDATE — STATUTES — DISCRETION OF COURT.

Under Burns' Ann. St. 1901, § 672, providing that, when a judgment is reversed, the court shall either remand the case with instructions for a new trial or with particular instructions relative to the judgment to be rendered, and modifications thereof as the justice in the case requires, the question of which method should be pursued is left to the sound discretion of the Appellate Court.

4. SAME—GRANTING NEW TRIAL.

In an action for the death of one killed at a railroad crossing, where the general verdict found that decedent was not guilty of contributory negligence, the answers to special interrogatories showing that he could, had he looked, have seen the train when he was 25 feet from the track and the train 500 feet away, left the question of contributory negligence sufficiently uncertain to require the Appellate Court in the exercise of its discretion, on reversing the case for error in rendering judgment for defendant on the answers to the interrogatories notwithstanding the general verdict, to remand the case for a new trial, instead of directing judgment on the general verdict.

¹ Rehearing denied.

Appeal from Circuit Court, Shelby County; Will M. Sparks, Judge.

Action by John Wendel against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company to recover for the death of plaintiff's minor son. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Wilson & Harrison, for appellant. Carter & Morrison, for appellee.

RABB, J. The appellant sued appellee to recover damages for the death of his minor son, charged in the complaint to have been killed in a collision with a fast train on appellee's road, brought about through the negligence of appellee. It is charged in the complaint that the deceased was traveling along a public highway, on an empty hay wagon 18 feet long, drawn by two horses; that the highway intersected the appellee's road at an acute angle; that a fence and cattle guard on one side of the highway, and a deep ditch on the other, reduced the width of the highway at and near the intersection with the railroad to such an extent that there was not room to turn a wagon drawn by two horses; that the approach to the railroad was up an embankment from 5 to 10 feet high; that the deceased was familiar with the train signals; that his sight, hearing, and intelligence were good; that he was a skillful and prudent driver; that for a quarter of a mile before reaching the crossing he approached the same in a slow gait, constantly looking and listening for the approach of trains on the railroad; that when within 50 feet of the track he stopped and looked in both directions, and listened for trains, and, seeing nothing and hearing nothing indicating the approach of a train, he started to drive up the embankment on the top of which was the railroad track, at all times looking and listening for a train; that at the same time appellee's train was approaching the crossing, coming downgrade with full steam shut off, at the rate of 75 miles per hour, and without sounding the statutory signals; that, on account of the condition of the weather and the noise made by the wagon, the deceased was unable to see or hear the approaching train until his team was on the crossing, when he could neither back his team nor turn around; that the team became frightened at the train and swung around to the east, on the crossing, and deceased was struck by the train. A jury trial was had and general verdict returned in favor of appellant, and with it answers to certain interrogatories propounded to the jury. The court, on appellee's motion, rendered judgment in its favor on the answers to the interrogatories notwithstanding the general verdict, over the objection and exception of appellant, and this ruling presents the sole question arising in this case.

The only facts found by the jury that

could be fairly claimed tend to antagonize the general verdict of the jury is their answer to the somewhat involved and obscure interrogatory 23, which, in connection with the answers to other interrogatories, it is asserted show that the dead boy could, by looking, have seen the approach of the train when he was between 24 and 25 feet from the railroad track, and the train 500 feet from the crossing. Interrogatories Nos. 23 and 27, with their answers, read as follows: No. 23: "When the plaintiff's son was one foot south of the line of the telegraph poles, measured from the south side of the poles, how far up the railroad right of way towards Indianapolis could he have seen, had he then looked, the approaching train that struck him? Ans. 500 ft." No. 27: "Was not the line of the telegraph poles about 20 feet from the north rail of defendant's track? Ans. Yes; about 26 ft." It is true an answer to interrogatory No. 14 shows that the boy at the time of the accident had on a cap pulled down over his ears, but this fact is unimportant. There is no finding that the cap in any manner interfered with the boy's hearing, and we are not to infer against the general verdict that it did. The rule is that all inferences, intendments, and presumptions are to be indulged in support of the general verdict, and none in aid of contradictory answers to interrogatories. *Stevens v. City of Logansport*, 76 Ind. 498; *Ohio, etc., Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64; *Smith v. Michigan Central, etc.*, 35 Ind. App. 197, 73 N. E. 928; *Ridgeway v. Dearing*, 42 Ind. 157; *McCallister v. Mount*, 73 Ind. 559; *Pittsburg, etc., Co. v. Martin*, 82 Ind. 476. The answers to interrogatories can override the general verdict only when they both cannot stand, and the antagonism must be apparent on the face of the record, and incapable of being removed by any evidence legitimately admissible within the issues. Does the fact that the deceased could, had he looked, have seen the approaching train that struck and killed him when he was 25 feet from the railroad, and the train 500 feet away, so antagonize the general verdict?

Appellee has cited a long list of cases in support of the judgment below, but one of which seems to have involved any question arising on a judgment on the answers to interrogatories. In the case of *Chicago, etc. Co. v. Reed*, 29 Ind. App. 98, 63 N. E. 878, the answers to interrogatories found that the plaintiff, driving a gentle horse on a clear day, could have seen the train that struck her had she looked when she was 50 feet from the track. In all the other cases cited the question arose either on a special verdict on the evidence, or on instructions given or refused by the court. In favor of the general verdict, the court must presume in this case that the deceased could, by looking and listening, neither hear nor see the train that killed him until he was within 25 feet of the track; that he stopped his team when 50 feet

the track, and looked and listened for approaching train, and heard and saw; that he kept looking and listening for approaching trains as he drew near the track. Hay wagon was 18 feet long. How far advance of the front of the wagon his eyes' heads would be is not shown; but it is to be presumed that they were 10 or 12 feet from the front end of the wagon. The boy may have found that the wagon was seated at the rear end of the wagon, and 20 feet from his horses' heads, so that when he reached a point where he could, had he looked, he would have almost reached the track.

The jury may have found that the boy did not see the train the instant he reached the point where it would have been visible, but that he looked. It was his duty to look both ways, and he could not look both ways at the same time. He may first have turned his attention in the opposite direction, and he would not be guilty of negligence if his gaze was diverted for a few seconds in the opposite direction from which the train was approaching. If such was the case, his team would have been on the track before he saw the approaching train that struck him. And it may be that the jury found, and the evidence showed, that in that condition he was unable to control his horses. It may have appeared under the circumstances as the jury found them to exist that it was the wisest and most prudent course the boy could have taken to undertake to drive his team over the track, rather than back out. It may have been the only thing the unfortunate lad could do. His situation was very different from that of a pedestrian, or one who had absolute dominion over the motive power drawing him. Here he had a team of horses hitched to an unwieldy wagon, to which, surprised in a place of danger by a rapidly moving train, and of whose speed he was not aware. If the train had been traveling at the ordinary rate of a passenger train, he could have safely crossed. Under the facts inferable from the general verdict, those returned in answers to interrogatories, but three or four seconds elapsed between the boy's first knowledge of the train, his first opportunity to know of its presence, and the time he was struck on the crossing. When he stopped 50 feet from the crossing, and looked and listened for the approaching train, and heard and saw none, he had a right to assume that none was near, and it was not negligence on his part to proceed to cross upon the crossing without again stopping to look and listen. Nor would it be negligence on his part to fail to see the approaching train the very instant he reached the point where he might have observed it had he been looking in the direction from which it was approaching. The facts found in the answers to interrogatories are not sufficient to charge him with contributory negligence, and the court erred in sustaining

appellee's motion for a judgment in its favor on the answers, and for this error the judgment must be reversed.

A question arises as to the proper mandate to be given the court below upon the reversal of the judgment in this court. It is insisted by appellant that this court should direct the court below to render judgment on the general verdict in his favor, while the appellee contends that the mandate should require the granting of a new trial. The statute prescribes the duty of the Appellate Court upon reversal. When the judgment is reversed, in whole or in part, the Supreme Court (or Appellate Court) shall remand the cause to the court below, with instructions for a new trial, where the justice of the case requires it, but, if no new trial is required, with particular instructions relative to the judgment to be rendered and modifications thereof. Section 672, Burns' Ann. St. 1901. From the very nature of things, each appeal must be disposed of on its own particular facts. If the justice of the case, as disclosed by the record, requires a new trial, a new trial will be granted; otherwise such judgment will be directed as the case requires. This is necessarily left to the sound discretion of this court. *Sinker-Davis Co. v. Green*, 113 Ind. 264, 15 N. E. 266; *Buchanan v. Milligan*, 108 Ind. 433, 9 N. E. 385; *Murdock v. Cox*, 118 Ind. 266, 20 N. E. 786; *Elliott's App. Proc.* § 568.

The facts stated in the answers to interrogatories, while insufficient to justify a judgment in favor of the appellee, we think leave the question of contributory negligence in such uncertainty as to require this court, in the exercise of its discretion, to direct a new trial of the cause.

Judgment reversed and new trial ordered.

(41 Ind. App. 156)

GIPE v. PITTSBURGH, C., C. & ST. L. RY. CO. et al. (No. 5,864.)¹

(Appellate Court of Indiana. Oct. 30, 1907.)

1. APPEAL—LAW OF THE CASE.

A decision on a former appeal is the law of the case as to all questions then decided, so far as the facts remain the same; the court on a subsequent appeal being entitled to look to the report of the former appeal to determine to what extent the rule applies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4358.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRACTS LIMITING LIABILITY—RAILROAD RELIEF DEPARTMENT—ELECTION OF REMEDIES.

Where decedent, a railroad employé, was a member of a railroad's benefit department, one of the rules of which was that an acceptance of benefits should be a defense to an action against the company for injuries or death of the member, decedent's widow as his administratrix was entitled either to receive the benefits under decedent's certificate or pursue her remedy at law for his wrongful death, and the acceptance of one remedy constituted an election which precluded resort to the other.

¹ Rehearing denied. Transfer to Supreme Court denied.

3. DEATH—RIGHT OF ACTION—DEFENSES—RELEASE—VALIDITY—FRAUD.

Where a widow entitled either to receive the proceeds of her husband's benefit certificate in a railroad's mutual relief department, or to sue for his wrongful death, elected to accept the former, and executed an absolute release of both rights, on receiving the proceeds of the certificate, the release should be upheld, unless its execution was induced by false representations by the railroad's agent of a past or existing material fact on which the widow relied, and was thereby misled into a settlement she would not otherwise have accepted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 27.]

4. FRAUD—PRESUMPTION—BURDEN OF PROOF.

Fraud is not presumed, but must be established by the party asserting it, in the same manner as any other essential fact in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 46.]

5. TRIAL—DIRECTION OF VERDICT—SCINTILLA OF EVIDENCE.

The rule that, where there is a scintilla of evidence, the trial court must submit the case to the jury, does not prevail in Indiana; the rule here being that if the evidence is of such a character as to make it clear that a verdict, if returned for the party on whom the burden of the issue rests, cannot stand, it is the court's duty to direct a verdict for the opposite party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332, 333.]

6. FRAUD—FRAUDULENT REPRESENTATIONS—LEGAL EFFECT OF INSTRUMENT.

The rule that a party who has been induced to execute an agreement by the fraudulent representations of the other party may set up such representations in bar of an action on the agreement does not apply where the representations, though false, relate to the legal effect of the instrument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 11.]

7. RELEASE—FRAUD—REPRESENTATIONS.

Plaintiff, after the death of her husband, who was a member of a railroad's relief department, applied to draw his wages, which she was not permitted to do until she was appointed administratrix. She then went to the office of the relief department to draw the benefit to which she was entitled under regulations, declaring that participation therein should relieve the railroad company from all liability for damages resulting from decedent's death. She first signed a release in her individual name, and when she was required also to sign as administratrix inquired "Why," and was informed by the agent in charge that it was a mere matter of form that she was required to sign both as widow and as administratrix, and that everything was "all right." She then signed as administratrix after informing the agent that she did not know what they would want to do in the future with reference to decedent's death. Plaintiff was a woman of ordinary sagacity and ability, and was able to read and learn that the legal effect of the paper was to release the railroad company from liability for her husband's death. *Held*, that the statement of the agent did not amount to legal fraud justifying a vacation of the release in so far as it barred the widow's right as administratrix to sue for her husband's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 32.]

Appeal from Circuit Court, Hamilton County; Saml. R. Artman, Special Judge.

Action by Flora J. Gipe, as administratrix, etc., against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and an-

other. From a judgment for defendants and from an order denying plaintiff's motion for a new trial, she appeals. Affirmed.

W. J. Beckett and Elliot, Elliott & Littleton, for appellant. John L. Rupe and Shirts & Fertig, for appellees.

MYERS, J. This action was originally commenced by appellant against appellee and the Pennsylvania Company to recover damages for the negligent killing of her decedent. On a former trial the action was dismissed as to the Pennsylvania Company, and judgment rendered against appellee. On appeal to the Supreme Court that judgment was reversed (*Pittsburgh, etc., Ry. Co. v. Gipe, Adm'rs*, 160 Ind. 360, 65 N. E. 1034), and the cause returned for a new trial. A substituted amended complaint, an answer in three paragraphs, the first a general denial, and a reply in two paragraphs, one in denial, to the affirmative paragraphs of answer, formed the issues. Trial by jury. On motion of appellee, and over the objections and exceptions of appellant, the court instructed the jury to return a verdict in its favor, which was accordingly done, and judgment rendered on the verdict. Appellant's motion for a new trial was overruled, and this ruling is assigned as error.

The complaint is founded upon the Employer's liability act. Section 7083, subd. 4, Burns' Ann. St. 1901; Acts 1893, p. 294, c. 130. The injury is averred to have been caused by the negligence of a person in the service of appellee who had charge of a locomotive engine upon its railway. The facts disclosed by the answers in the record on this appeal are substantially set forth in the opinion of the court on the former appeal, and the law as then declared upon all questions decided is the law of the case throughout all subsequent stages (*Rosenthal v. Rambo*, 165 Ind. 584, 76 N. E. 404, 3 L. R. A. (N. S.) 678; *James v. Lake Erie, etc., Ry. Co.*, 148 Ind. 615, 48 N. E. 222; *Halstead v. Sigler*, 35 Ind. App. 419, 74 N. E. 257), "but the decision on the former appeal is the law of the case only in so far as the facts remain the same" (*Eckert v. Blinkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; *State ex rel. v. Christian*, 18 Ind. App. 11, 47 N. E. 395; *Midland Steel Co. v. Citizens' National Bank*, 34 Ind. App. 107, 115, 72 N. E. 290), and the court may look to the record on a former appeal for the purpose of determining to what extent the rule applies (*Westfall v. Wait*, 165 Ind. 353, 359, 73 N. E. 1089).

Looking to the record on the former appeal, the reply was in three paragraphs—the first a general denial; second, no consideration for the settlement and release mentioned in the second paragraph of answer; the third was addressed to that part of the second paragraph of answer, which alleged a settlement and release of her claim as administratrix against this appellee, for the reason that there was no consideration of

nature for such release and settlement per said claim as such administratrix.

first paragraph of reply now before us addressed to the second and third paragraphs of answer, and seeks to avoid the use mentioned in the answers, upon the ground that it was procured from appellant appellee through fraud and misrepresentations; that no part of said \$750 was received by appellant, but was received by Flora J. Gipe as her own individual property and so on, and that the release by her as administratrix, under the facts, made appellee liable as a party to a devastavit. On the former appeal, it was held that "the mere receipt of the money in both capacities did per se involve a waste of the trust," as she would be bound to account for the money received on the probate side of the court, therefore appellee was not a party to a devastavit.

The only question in this case not decided by the former appeal is presented by the exception taken to the action of the court in giving to the jury a pre-emptory instruction in favor of appellee, and by appellant assigned as a reason for a new trial. The question arises upon the evidence. It is the contention of appellant that she was induced to execute the release through the fraudulent representations of appellee, and the evidence supporting this contention should have been submitted to the judgment of the jury. The evidence most favorable to appellant in this regard is as follows: At the time the release was signed, three persons were present, namely, Mr. Eddy, representing appellee, Warren T. Gipe, the appellant, and her brother-in-law.

Warren T. Gipe. In support of the case, Mrs. Gipe testified that she was the administratrix prosecuting this action for the benefit of her children. That she first met Mr. Eddy after her husband's death at the house in Indianapolis January 11, 1898. That Mr. Eddy said she would have to be appointed administratrix before she could receive her husband's wages. That she was appointed, and, in company with her brother-in-law and Mr. Eddy, went to the bank, where she was paid the wages due. That Mr. Eddy said the voucher had not come for the full money, and that he would notify her brother-in-law when it came. That he did notify Mr. Gipe, and he came for me and went to Mr. Eddy's office in the Union Station at Indianapolis. "Mr. Eddy said the papers had come for the \$750, and I signed my name, 'Flora J. Gipe,' and he said I would have to sign it as 'Flora J. Gipe, Administratrix,' and I asked why. He said that was my name to get my money, and I said I did not want to do anything that would injure my children, and he said what did I mean by that? I said I did not know what they would want to do in the near future on the behalf of their father. He said that was just the form to get my \$750. I said the \$750

was mine, as I was his widow. He said that was a form that they would have to go through to get the \$750." That she received the money and used it to pay on her property. Nothing was said about the \$750 settling any claim as administratrix for the children. Practically the same conversation was related by Warren T. Gipe, and, in addition, she said to him, "'How about that Warren?' [referring to what she should do about signing the release.] I said: 'I don't know anything about it.'" Eddy said: "It was just a matter of form, and you must sign as widow and then as administratrix. Everything is all right." There is no relation of trust or confidence in this case. The parties were dealing at arms' length. There is nothing to indicate that appellant was not a woman of at least ordinary sagacity, or that she was not fully competent to understand and take care of her interests. She knew that she must sign the release as administratrix in order to get the \$750. It is not claimed that any representations made by appellee's agent prevented appellant from reading the paper signed by her, or that she was thereby prevented from being fully apprised of its legal effect or that she relied upon such statements, nor does it appear that she was deceived by the wording of the instrument, or that she did not understand its contents. It is apparent from her evidence that she had in mind a probable suit against the company for damages, and the probable effect of signing the instrument as administratrix was not overlooked or unconsidered by her. Two methods of settlement were in fact open to her: (1) The right to the immediate benefits from the certificate in the voluntary relief fund department; and (2) the right to pursue her remedy at law. The acceptance of one precluded her right to the other. *Baltimore, etc., R. Co. v. Ray*, 36 Ind. App. 430, 73 N. E. 942; *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345, 53 N. E. 290, 44 L. R. A. 638. It was a subject the parties might legally compromise and settle. *Pittsburgh, etc., R. Co. v. Gipe*, supra. The release on its face shows a settlement in compliance with the agreement in the application for membership in said relief department. This release should be upheld unless its execution was induced, as charged in the reply, by false representations of a past or existing material fact, which was relied on by appellant, and whereby she was misled into a settlement she would not otherwise have accepted. *Bennett v. McIntire*, 121 Ind. 231, 234, 23 N. E. 78, 6 L. R. A. 736. Fraud is never presumed. *Phelps v. Smith*, 116 Ind. 387, 17 N. E. 602, 19 N. E. 156. It is a question of fact to be determined by the trial court or the jury which hears the evidence (*Tyler v. Davis*, 37 Ind. App. 557, 75 N. E. 3), the burden resting on the party asserting it, and is established as any other essential fact in the case (*National State Bank v. Vigo*

County National Bank, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; Personette v. Cronkhite, 140 Ind. 586, 40 N. E. 59).

On the question we are now considering, the burden of the issue was upon appellant, and, regarding the right of the trial court to direct a verdict, in *Westfall v. Wait*, 165 Ind. 353, 358, 73 N. E. 1089, it is said "if the evidence was of such a character as to make it clear to the court that a verdict, if returned for appellant, on whom the burden of the issue rested, could not stand, then it became the duty of the court to direct a verdict for appellees, and there could be no error in so doing"—citing cases. See, also, *Goode v. Elwood Lodge, etc.*, 160 Ind. 251, 256, 66 N. E. 742; *Williams v. Resener*, 25 Ind. App. 132, 56 N. E. 857; *Burns v. Smith*, 29 Ind. App. 181, 64 N. E. 94, 94 Am. St. Rep. 268. In respect to the right of the trial judge to direct a verdict against the party on whom the burden rests, the court in *Dunnington v. Syfers*, 157 Ind. 458, 462, 62 N. E. 29, said: "The rule to the effect that, where there is a 'scintilla' of evidence the trial court must permit the case to be submitted to the jury for their determination, does not prevail in this state." *Oleson v. Lake Shore, etc.*, R. Co., 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149; *Meyer v. Manhattan Ins. Co.*, 144 Ind. 439, 43 N. E. 448; *Diezl v. Hammond Co.*, 156 Ind. 583, 60 N. E. 353, 51 L. R. A. 722. In the case at bar we have the statements of appellee's agent that the instrument presented to appellant for signature "was just a mere form to get the \$750," or "was a form that they would have to go through to get the \$750," "everything is all right," to support the claim of fraud. Three rational inferences only could have been drawn from Eddy's statements: (1) His opinion as to the legal effect of the instrument; or (2) a statement of a fact regarding a form of release the company required to be signed before paying the money; and (3) "everything is all right," meaning that the release would not affect the rights of the children, and was a form necessary to get the money. Admitting that the first and third inferences were misrepresentations as to the legal effect of the instrument, they would not amount to a legal fraud. *Burt v. Bowles*, 69 Ind. 1; *Fry v. Day*, 97 Ind. 348; *Mullen v. Beech Grove Driving Park*, 64 Ind. 202, 207. In *Clem v. New Castle, etc.*, R. R. Co., 9 Ind. 488, 489, 68 Am. Dec. 653, it is said, "as a general rule, a party who has been induced to execute an agreement, by reason of the fraudulent representations of the other party, may set up such representations in bar of an action on the agreement. But this rule is subject to various exceptions; and one of them occurs when the representations, though false, relate to the legal effect of the instrument sued on. Every person is presumed to know the contents of the agreement which he signs, and has therefore no right to rely on the statements of the other party as to its

legal effect." As to the second inference, if the company had actually adopted the form of release presented to appellant to sign, and there is nothing to the contrary, such representation was not untrue, and consequently not fraudulent. Therefore, applying the settled rules of law in this state to the evidence claimed to support the allegations of fraud, in our opinion the trial court did not err in directing a verdict for appellee.

Judgment affirmed.

COMSTOCK, C. J., and ROBY, RABB, and HADLEY, JJ., concur. WATSON, P. J., absent.

(40 Ind. App. 457)

SOUTHERN RY. CO. v. BULLEIT. (No. 6,154.)

(Appellate Court of Indiana, Division No. 2, Oct. 31, 1907.)

1. JUDGMENT—CONFORMITY TO PLEADINGS AND PROOFS—AMOUNT DEMANDED.

Under *Burns' Ann. St.* 1901, § 388, providing that the relief granted cannot exceed the relief demanded if there be no answer, where plaintiff, suing for personal injuries, claims \$50 for medicine and doctor's bills and an answer is filed, he is not limited to the amount prayed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 443, 444.]

2. APPEAL—REVIEW—AMENDMENT CONSIDERED AS MADE.

Where plaintiff suing for personal injury claims but \$50 for medicine and doctor's bills, and an answer is filed, and the jury awards \$300 for such purposes, the amount demanded should be deemed amended on appeal, since it might have been so amended in the lower court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 3621, 3622.]

3. TRIAL—ARGUMENT OF COUNSEL—APPEALS TO SYMPATHY.

In an action for personal injuries, the statement, "Give him \$2,000. The defendant will make that much money in the time you are signing your verdict," made by plaintiff's counsel in the concluding argument, was inexcusable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 303-307.]

4. SAME—ACTION OF COURT—WITHDRAWAL OF OBJECTIONABLE MATTER.

Where, in an action for personal injuries, plaintiff's counsel in his argument to the jury said, "Give him \$2,000. The defendant will make that much money in the time you are signing your verdict," and thereupon the court, upon motion, directed the jury not to consider the statement, it was not error thereafter to overrule a motion to take the case from the jury because of the statement, since its withdrawal and the direction of the court to disregard it will be presumed to have been properly heeded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 316.]

Appeal from Circuit Court, Floyd County; Wm. C. Utz, Judge.

Action by Francis A. Bulleit against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. P. Humphrey, Jno. D. Welman, and C. L. Jewett, for appellant. Stotsenburg & Weathers and E. H. Breeden, for appellee.

COMSTOCK, C. J. While a passenger upon appellant's train, appellee received personal injuries for which he seeks to recover damages. It is alleged that his injuries are permanent, and were caused by a collision between a passenger and freight train running in opposite directions upon appellant's road. The force of the collision threw appellee against the arm of the seat of the car, bruising and injuring his head and ear. The cause was put at issue by a general denial. Two thousand dollars damages were claimed. The jury returned a verdict, and judgment was rendered for \$1,800.

The action of the court in overruling appellant's motion for a new trial is assigned as error. Appellant discusses the third, eighth, and ninth reasons for a new trial. They are as follows: In his complaint appellee claims \$50 for medicines and medical and surgical attention. In answer to the interrogatory, it appears that the jury included in the general verdict the sum of \$300 for medicine, medical and surgical attention. In behalf of the appellant, it is contended that the amount which appellee could recover for these items of expense was only the reasonable value thereof, and that appellant was justified in relying on the specific statement in the complaint limiting such expenditures to \$50 that such statement controlled the prayer of the complaint. Section 388, Burns' Ann. St. 1901, provides that, if there be no answer, the relief granted cannot exceed the relief demanded. This may be construed to relate to the amount where pecuniary relief is sought. It does not apply to the case at bar because an answer was filed. The complaint might have been amended in the court below in the respect referred to, and should be deemed to be amended by this court. *Webb v. Thompson*, 23 Ind. 428; *Numbers v. Bowser*, 29 Ind. 491; *Colson v. Smith*, 9 Ind. 8; *Bozarth v. McGillicuddy*, 19 Ind. App. 36, 47 N. E. 397, 48 N. E. 1042; *Evansville & Terre Haute R. R. Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39. But this action of the court did no injustice to the appellant for the evidence fully warranted the amount found by the jury for this item.

The statement by counsel for appellee in the concluding argument complained of by the appellant was inexcusable. Said statement was: "Give him [plaintiff meaning] \$2,000. The defendant will make that much money in the time you are signing your verdict." Counsel for appellant promptly objected, and moved that the remark be withdrawn from the consideration of the jury. The motion was sustained, and the jury directed not to consider it. Counsel then moved the court to withdraw the submission of the cause from the jury, and to discharge the jury from further consideration of the cause. This motion was overruled. If the court erred, it was in overruling appellant's motion to discharge the jury. The court could only have been justified in taking that course upon the

ground that appellant was, by reason of the remark complained of, prevented from having a fair trial. This conclusion we think could not have been warranted. The withdrawal of the statement from the jury and the direction of the court to disregard it will be presumed to have been properly heeded. *Southern Ind. Ry. Co. v. Davis*, 32 Ind. App. 582, 69 N. E. 550; *Board, etc., v. Redifer*, 32 Ind. App. 98, 69 N. E. 305; *Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211. In support of the proposition that the harm occasioned by the offense was not cured by the action of the court in withdrawing the remark, counsel for appellant cites the following Indiana cases: *Rudolph v. Landwerlen*, 92 Ind. 34; *Town of Rochester v. Shaw*, 100 Ind. 268; *Brown v. State*, 103 Ind. 133, 2 N. E. 296; *Campbell v. Maher*, 105 Ind. 383, 4 N. E. 911.

The facts are so essentially different in the above causes from those presented by the record before us that they are clearly distinguishable.

Complaint is made that damages are excessive. The claim is not borne out by the record.

Judgment affirmed.

(40 Ind. App. 711)

MODERN WOODMEN OF AMERICA v. VINCENT. (No. 5,659.)¹

(Appellate Court of Indiana. Division No. 2. Oct. 30, 1907.)

1. INSURANCE—CONSTRUCTION OF CONTRACT—APPLICATION OF GENERAL RULES.

Insurance contracts are to be construed exactly as other contracts are.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 292-298.]

2. CONTRACTS—RESCISSION—BREACH OF WARRANTY—PLEADING.

Though a breach of warranty does not authorize avoidance of a contract unless there is an express provision in the contract permitting it, yet, where the contract expressly confers the right to avoid it for breach of warranty, an answer, in an action on the contract, is sufficient if it shows a legal election to rescind.

3. SAME—CONSTRUCTION—WARRANTIES INCLUDED IN CONTRACT.

A warranty is a promise, usually collateral to the principal contract, but not necessarily so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 878.]

4. SAME—RESCISSION—CONDITION PRECEDENT—RESTORATION.

A party rescinding a contract must restore or offer to restore everything of value which he has received under it, and the rule does not depend upon the reason for rescission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1186.]

5. SAME—TIME FOR RESCISSION—LACHES.

If a person desires to rescind a voidable contract, he must do so with reasonable promptitude, or he affirms it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1189.]

6. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTION—ANSWER—SUFFICIENCY—RESCISSION.

Where an answer to an action on a life insurance policy shows a breach of warranty, and

¹ Transfer denied.

that such breach may be the basis of rescission, but does not show a valid election to rescind, and does not show that no premiums were received or that the premiums were returned, or a willingness to restore the statu quo, it is insufficient.

On petition for rehearing. Petition overruled.

For former opinion, see 80 N. E. 427.

ROBY, J. It is conceded in appellant's brief supporting its petition for rehearing that the word "void" as used in its policy means voidable at the election of the insurer. Such construction of the term is in the interest of the insuring public who otherwise would have no certainty of protection, no matter how persistently premiums are paid and equally in the interest of the insurance companies, who being denied, as they would have to be denied, the right of keeping premiums paid upon contracts subsequently found to have been void from the beginning, would find the repayment of premiums so held burdensome. *Barber v. Lyon*, 8 Blackf. 215.

This premise being granted, the question of what facts are necessary to make a good answer must be determined by the well-established rules of law, and this is as it should be for the law is the same for all persons and insurance contracts are therefore construed exactly as other contracts are. *Ohio Farmers' Ins. Co. v. Vogel*, 166 Ind. 239, 245, 76 N. E. 977, 8 L. R. A. (N. S.) 966; 16 Am. & Eng. Encyc. Law (2d Ed.) p. 862; *May on Insurance*, § 172 et seq.; 1 *Beach on Contracts*, § 249. Breach of warranty does not in England authorize the vendee to avoid a contract of sale (unless there is an express provision in the contract that he may do so). *Street v. Blay*, 2 Barn. & Adol. 456; *Gompertz v. Denton*, 1 Cr. & M. 207; *Dawson v. Collis*, 10 C. B. 523. Such breach does not confer a right of avoidance in this state. *Marsh v. Low*, 55 Ind. 271; *Hoover v. Sidenher*, 98 Ind. 290; *Wulschner v. Ward*, 115 Ind. 219, 222, 17 N. E. 273. These decisions accord with the weight of American authority.

The contract involved in the case at bar expressly confers the right to avoid the contract for breach of warranty, and it is therefore only necessary to a good answer that sufficient facts be stated to show a legal election upon its part to avoid the same. A warranty is a promise, usually collateral to the principal contract (*Benjamin on Sales*, § 610), but not necessarily so (*Mechem on Sales*, § 1334n [1], § 1393). The rule in all cases of rescission is that the party rescinding must restore, or offer to restore, everything of value which he has received under the contract. *Calhoun v. Davis*, 2 Ind. 532; *Hanna et al. v. Shields*, 34 Ind. 86; *Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269. That rescission will not be permitted unless the parties are placed in statu quo has been declared a great many times. The doctrine has its foundation in the natural justice, which will not permit one to retain the ad-

vantage and escape the burden of his contract at the same time, and it does not depend upon the reason for rescission, which may be fraud, mistake, or (by agreement, as in this case) breach of warranty. "But, being possessed of the fruits of the contract as ultimately made, it became necessary for appellee [appellant in this case] to elect as to the status that the transaction should assume. If he would have accomplished a rescission, it was his duty to elect with reasonable promptitude, and to return or offer to return whatever of value he had received by contract. By omission to pursue this course he affirmed the contract." *Horner v. Lowe*, 159 Ind. 406, 411, 64 N. E. 218.

The answer to which the court sustained a demurrer shows a breach of warranty and that such breach may be made the basis of a rescission appears, but it does not state facts showing a valid election by the company. It does not show a return of premiums. It does not show that no premiums had been received. It does not even contain an expression of willingness to restore the statu quo, and "we think no case can be found in the books which will sustain them in this." *Johnson et al. v. Cookerly*, 33 Ind. 151, 155.

The petition is overruled. All concur.

(40 Ind. App. 478)

WREDMAN v. FALLS CITY SAVINGS & LOAN ASS'N et al. (No. 6,102.)

(Appellate Court of Indiana, Division No. 2, Nov. 6, 1907.)

HUSBAND AND WIFE—DEBTS—MORTGAGE OF WIFE'S REAL ESTATE—VALIDITY.

Defendant conveyed certain of her real estate through an intermediary to her husband, to enable him to mortgage it. The application for the loan was made by the husband to plaintiff's secretary, who had knowledge of the facts concerning the transfer and its purpose. Part of the loan, secured by a mortgage on the land, was used for the wife's benefit, and the balance for a debt of the husband, which was but a moral obligation of the wife. *Held*, that she was entitled to repudiate the mortgage, except so far as it secured the part of the loan used for her benefit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Husband and Wife, §§ 671-681.]

Appeal from Circuit Court, Floyd County; Wm. C. Utz, Judge.

Action by the Falls City Savings & Loan Association and others against Clara Wredman. From a judgment for plaintiff, defendant appeals. Reversed.

Laurent A. Douglass, for appellant. S. S. Johnson and Jos. A. McKee, for appellee.

ROBY, J. Appellee brought this action upon a promissory note and for the foreclosure of a mortgage securing it. The note was executed by William J. Wredman, and the mortgage by him and his wife, the appellant herein. The real estate described in the mortgage consisted of two town lots.

her answers appellant set up ownership to one of said lots and averred that she is a married woman, that the mortgage was given to secure the debt of her husband, that appellee had knowledge of said facts. Wherefore she prayed judgment as to her separate real estate and for her costs. The cause was tried, a special finding of facts made, conclusions of law stated thereon and judgment rendered in accordance with said conclusions, foreclosing said mortgage as to all the real estate therein described. The appellant filed a motion for a new trial. The same was overruled, and the ruling is challenged by the single assignment of error.

The undisputed evidence is that appellant is the owner of the lot designated in her answer on December 30, 1902, and on said date conveyed the same by deed, her husband joining therein, to one McKee; the stated consideration being \$1. Said McKee once reconveyed the land to William J. Edman; the stated consideration being

There was no actual consideration for her conveyance, and the purpose of the transaction was to put the title of the land in the husband to enable him to negotiate the loan. The deeds were both recorded on said day. The note and mortgage in question were executed on January 24, 1903. The application for the loan was made by Wredman to the secretary of the appellee company. They were neighbors, and there is evidence that the secretary knew of the facts, and the purpose of the transfer to Edman. Attention has not been called to the denial of this testimony, and there does not seem to have been any denial thereof. The court found that "appellee did not have notice that Wredman was not the owner, a legal and equitable, of all the land described." This finding is not supported by evidence. The question is foreclosed by the decision in *Webb v. Hancock*, 162 Ind. 616, N. E. 1006, 66 L. R. A. 632. The finding of the effect that \$300 of the money realized upon the mortgage in suit was used to pay a debt of \$300, which said sum had been paid by appellant for her own benefit, and which, with the accrued interest, she is of course, liable. As to the residue of \$1,000, it appears to be the debt of the husband. The money, it is true, was used in part to relieve the necessities of a daughter in whom the appellant may have been much concerned as the husband; but no matter how strong the moral obligation may be nor how anxious the wife was to have her husband make the loan, the law, as construed, permits her to repudiate any liability.

Field v. Campbell, 164 Ind. 389, 72 N. E. 200, 108 Am. St. Rep. 309; *Webb v. Hancock*, supra; *Guy et al. v. Libereiz et al.*, 104 Ind. 524, 65 N. E. 186. The remedy for an anomalous condition lies with the Legislature.

The judgment is therefore reversed, and

the cause is remanded, with instructions to sustain the motion for a new trial and further proceedings not inconsistent herewith.

(40 Ind. App. 476)

HOFMAN v. HOFMAN. (No. 6,035.)

(Appellate Court of Indiana, Division No. 2. Nov. 6, 1907.)

DIVORCE—GROUNDS—CRUELTY.

An allegation that a wife has hindered her husband from making large sums of money by refusing to join with him in the conveyance of real estate owned by him does not show cruel treatment within the meaning of the divorce law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 62-64.]

Appeal from Circuit Court, Orange County; Thos. B. Buskirk, Judge.

Action for divorce by William G. Hofman against Hannah Hofman. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Wm. J. Throop, for appellant. Will J. Buskirk, for appellee.

RABB, J. The appellee sued appellant in the court below for divorce. The record shows the complaint to have been filed on the 22d day of May, 1905, and was in two paragraphs. The only grounds for divorce set up in the first paragraph of the complaint is abandonment, which the complaint alleges took place on or about July 1, 1903. According to the transcript, the second paragraph of the complaint averred that the plaintiff and defendant were duly married on the 29th day of December, 1905, something like seven months subsequent to the filing of the complaint, and it charges that appellant and appellee lived together as husband and wife until the 1st day of July, 1903, a year and a half prior to the date of their marriage. The marital wrongs set forth in this paragraph of the appellee's complaint as the grounds of his right to a divorce are cruel and inhuman treatment, which is alleged to have consisted of an ungovernable temper on the part of the appellant, and her continual nagging appellee in regard to money matters, and it is averred that the appellant had hindered appellee from making large sums of money by refusing to join him in the conveyance of real estate owned by him, and that there existed an incompatibility of temper between the parties. The appellant's demurrer to this complaint was overruled, and the ruling of the court assigned as error here.

This complaint is glaringly insufficient. So far as it relies upon abandonment, it is shown upon its face that the statutory period of two years had not elapsed when the complaint was filed, and, so far as it relies on cruel treatment, the only issuable fact averred is that appellant refused to join with appellee in the execution of deeds for his real estate. The statute giving to a married

woman an interest in her husband's real estate, in the conveyance of which she has not joined, was intended for her benefit and her protection, and if, by standing upon her right under this law, she is guilty of a marital offense against her husband that would entitle him to a divorce, it would be better that the law should be repealed. Such is not the case, however, and the marital relation is not to be cast aside upon any such trivial and insufficient ground. The demurrer to the complaint should have been sustained.

Cause reversed, with direction to the court below to sustain the demurrer to the complaint.

(40 Ind. App. 486)

PITTINGER v. RAMAGE. (No. 5,919.)

(Appellate Court of Indiana, Division No. 1. Nov. 8, 1907.)

1. APPEAL—BRIEFS—REQUISITES.

Where appellant's brief did not set forth any reasons for a new trial, nor contain any statement that a motion for a new trial was filed, nor any reference to the record where such motion could be found, and did not exhibit the special findings of fact or conclusions of law, it violated Supreme Court Rule 22, cl. 5 (55 N. E. vi), and constituted a waiver of assignments of error based on such motion and findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3091-3096.]

2. TRIAL—FINDINGS OF FACT—FAILURE TO FIND—PRESUMPTIONS.

Failure to find a material fact must be regarded as a finding against the party having the burden of establishing such fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 940-945.]

3. MINES AND MINERALS—OIL AND GAS LEASE—CONSTRUCTION.

Where an oil and gas lease provided for the construction of seven wells on a 70-acre tract, but did not locate the wells nor designate the form of 10-acre lots to be apportioned to each well, the burden of making well reservations was on the lessee or his assignee, the lessor's successor not being entitled to arbitrarily set off 20 acres for two active wells actually dug, and quiet his title to the remaining tract after the expiration of the time for the construction of all the wells, but was only authorized to demand of the lessee's assignee that he make such reservation within a reasonable time, and, on his failure to do so, sue to obtain the apportionment from the court.

4. SAME—DEMAND OF LESSEE'S SUCCESSOR.

Where the right of the lessee of oil and gas land to make reservations of 10-acre lots for each well passed to the receiver of an assignee of the lease, and all the receiver's rights were transferred to defendant, without any demand having been made by the lessor's successor that the lessee's assignee or the receiver designate such reservations within a reasonable time, the receiver's assignee was entitled to notice to make such reservation notwithstanding he purchased with notice of litigation instituted by the lessor's assignee to enforce an arbitrary reservation made by him, and to quiet title to the balance of the land.

5. APPEAL—CONCLUSIONS OF LAW—EXCEPTIONS.

An exception to the court's conclusions of law raises no question as to the sufficiency of the evidence to support the findings of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1635-1637.]

Appeal from Circuit Court, Delaware County; Jas. G. Leffler, Judge.

Action by Miles J. Pittinger against Samuel Y. Ramage. From a judgment for defendant, plaintiff appeals. Affirmed.

McClellan & Hensel, for appellant. Griffith & Ross and Simmons & Dailey, for appellee.

MYERS, J. This was an action to quiet title to 50 acres off of the south end of a certain 70-acre tract of real estate in Delaware county, Ind., against a natural gas and oil lease, executed by appellant's grantors to the Home Oil & Gas Company, and held by appellee as a remote assignee. An amended complaint in two paragraphs, answered by general denial, formed the issues. Trial by the court, and at the request of appellee special findings of fact were submitted and conclusions of law stated thereon, and judgment for appellee, defendant below. Appellant's motion for a new trial was overruled, and this ruling is assigned as error. This ruling and that the court erred in its conclusions of law are the only questions, under a very liberal construction of the law and rules of the supreme and this court that can possibly be considered. Appellee vigorously insists that appellant, in the preparation of his brief, has not complied with clause 5, rule 22, of the supreme and this court (55 N. E. vi), and for that reason the questions sought to be presented are waived. We agree with appellee in this particular, and for that reason alone the cause should be affirmed. The brief does not set forth any reasons for a new trial, nor is there any statement that a motion for a new trial was filed, nor is there any reference to the record where such motion may be found, nor does the brief exhibit the special findings of fact or the conclusions of law. It would be impossible from the brief to determine either of the questions argued, and, this being true, such assignments may be considered as waived. *Chicago Terminal Transfer R. R. Co. v. Walton*, 165 Ind. 253, 254, 74 N. E. 1090, and cases cited. But in view of the very small record in this case we have concluded to pass upon the merits. *Board v. Crone*, 36 Ind. App. 283, 75 N. E. 826.

It is claimed that the decision of the court is not sustained by sufficient evidence. Under this head, it is argued that there is no evidence tending to show that seven wells had been drilled on the premises described in the lease, nor that by any act of appellant was appellee or any of his assignors released from the full performance of the conditions of the lease, or that the terms of the lease had been fully complied with. The question for consideration depends upon that part of the lease which, in substance, provides that in consideration of \$1 lessors did thereby grant unto the Home Gas & Oil Company, its successors and assigns, all the gas

d oil in and under a certain 70-acre tract land in Delaware county, Ind., reserving one-sixth part of all oil produced and saved, to be delivered in the pipe line with which the lessee might connect the wells to be drilled on said land. The lessee agreed to drill at least seven wells on said tract of real estate within the periods following, to wit: the first to be completed "within thirty-five days from the date of this grant," the second well to be completed within five months, and a well each four months after the completion of the second well until all were completed. At any time after the completion of two wells, the payment of \$1, the lessee might surrender and cancel the lease of record and thereby terminate all its rights and obligations as to all or any part of the land, with the right to the lessors to regrant to others the abandoned portion. Provision is made whereby the lessee may retain 10 acres for each of the completed wells. The lease was dated August 14, 1902. The special findings show, and there is evidence to support them, that in September, 1902, the Home Oil & Gas Company took possession of the real estate under the lease and drilled a well thereon, which produced gas in paying quantities, and which has continuously been utilized. In October, 1902, the second well was drilled, which produced neither oil or gas. On January 29, 1903, appellant became the owner of the land. In October, 1903, the first well was drilled deeper, and it produced oil. On October 17, 1903, the controversy between appellant and the Home Oil & Gas Company regarding the developing of the land for oil and gas was compromised, appellant receiving \$75. On April 22, 1904, the Home Oil & Gas Company transferred said lease in writing to the Reid Oil Company. In June, 1904, the Reid Oil Company drilled a third well, which, with the first well, was equipped and continuously ever since has been oil producers; that appellant has received and is receiving his full royalty as provided in the lease, and has ever since the completion of the first well received and used gas therefrom for domestic purposes. On October 1, 1904, this action was commenced. On October 5, 1904, the Reid Oil Company became solvent, and its property, including this lease, was by the receiver on February 1, 1905, under order of the court sold to and the sale duly confirmed by the court in appeal, that appellee on said last date took possession of said land under said lease, and from that time and continuously ever since has produced oil and gas from said first and second wells, that no other wells have been drilled or completed on said land. Other facts are bound not necessary here to set out. On the facts found, conclusions of law are stated in favor of appellee, and judgment was rendered in accordance with these conclusions of law. The settled law applicable to the consideration of special findings of fact is that a failure to find a material

fact must be regarded as a finding against the party having the burden of establishing such fact.

In the case at bar, the complaint proceeds upon the theory that inasmuch as the completed wells are located on 20 acres off the north end of the 70-acre tract covered by the lease, and no wells on the remaining 50-acre portion, and the time having passed within which the remaining four wells were to be drilled, there was such a violation of the provisions of the lease as would authorize this action. The complaint does not allege, nor does the evidence show, that prior to the commencement of this action 10 acres had been designated for each active well, nor does it appear that appellee or any of his assignors have been called upon to make such selection, nor that between the parties any agreement had been entered into whereby said north 20-acre tract should be taken as such reservation. The lease does not locate the wells or designate the form—whether oblong or square—of the 10-acre tracts, nor in case of failure to drill wells does it provide for any particular described part of the land to be released on account of such failure. The lease gave the lessee a right to enter upon the 70-acre tract and explore the same for oil and gas. Pursuant to this right, three wells were actually drilled on the north 20 acres, but they were not so located because of any contract or agreement requiring that part of the land to be first developed. The lease left the location of the wells to the judgment of the lessee, except that no well was to be drilled nearer than 200 feet of any building on the land. As we have seen, the exact form of the 10-acre tract to be reserved for each completed well is not specifically fixed by the lease, and in this particular the lease is indefinite. A similar lease to the one now under consideration was before the court in the case of *Jones v. Mount*, 166 Ind. 570, 77 N. E. 1089, and in that case it was held that the burden of making well reservations was upon the lessee, and, if upon demand such party does not make such reservation within a reasonable time, the courts may be called upon to do so. In this case appellant arbitrarily set off 20 acres as a reservation for the two active wells, and sought to quiet his title against the lease as to the remainder of the land. This appellant cannot legally do. He made no demand upon the original lessee or its assigns that well reservation be selected, and without such demand and refusal to comply therewith, in the absence of an agreement describing the premises reserved with each well, the court, because of an indefinite and insufficient description of the land, would have no basis upon which to render a decree quieting title. *Jones v. Mount*, 30 Ind. App. 59, 63 N. E. 798; *Jones v. Mount*, supra; *Monaghan v. Mount*, 36 Ind. App. 188, 74 N. E. 579.

Appellant insists that no demand was necessary, for the reason that appellee took the

lease with notice of the litigation and the claims of appellant. It must be admitted that the receiver at the time of the sale had the right to make well reservations. This right was guaranteed to him under the lease, and this right was sold to appellee. If the demand had been made on the Reid Oil Company or its receiver, and it had failed to exercise this right within a reasonable time, then such demand would be effective as against appellee, but such is not the state of this record.

The exception to the conclusions of law raises no question as to the sufficiency of the evidence to support the findings of fact, which for the purpose of any question presented by such exception must be considered as having been fully and correctly found. *Ray v. Baker*, 165 Ind. 74, 74 N. E. 619; *Conner v. Andrews Land Co.*, 162 Ind. 338, 349, 70 N. E. 376; *Elsman v. Whalen* (Ind. App.) 79 N. E. 514; *Reserve Loan, etc., Co. v. Hockett*, 35 Ind. App. 842, 73 N. E. 842.

The conclusions of law are well supported by the findings, and, the decision of the court being sustained by the evidence, the judgment is therefore affirmed.

(41 Ind. App. 118)

MERIDIAN LIFE & TRUST CO. OF INDIANA v. EATON. (No. 5,855.)¹

(Appellate Court of Indiana. Division No. 1. Nov. 8, 1907.)

1. CONTRACTS—AGREEMENT FOR BENEFIT OF THIRD PERSON—LIABILITY OF THIRD PERSON.

Where a contract is made for the benefit of a third person, and he avails himself of its advantages, the law creates a privity, and he must bear the burdens of a party to the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 808-810.]

2. SAME—ACCEPTANCE.

A contract cannot be affirmed in part and rejected in part. It must be accepted or rejected as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 100-103.]

On petition for rehearing. Petition overruled.

For former opinion, see 81 N. E. 667.

MYERS, J. On petition for a rehearing, appellant earnestly insists that the court erred in holding that the contract of December, 1898, and June, 1899, did not "protect" it from liability to repay \$3,000 received from appellee.

Appellant states its position as follows: "Our contention is that the company is 'pro-

ected,' not 'bound,' by the contract. We respectfully insist that there is no inconsistency between a claim that the company was not bound by that contract and a claim that the contract serves to protect it against any direct liability to the appellee. The appellant did insist, and still insists, that it has never recognized or acknowledged any liability growing out of the contract, and in that sense has never 'ratified' or 'adopted' it; that is, it has never recognized the contract as imposing any liability upon it to account for or refund the money received under it." By reference to the contract, a stipulation will be found whereby the appellant was to execute its promissory note to the appellee for \$1,500, with 8 per cent. interest, payable semiannually, due in 10 years, and set aside from the expense fund \$1 for each \$1,000 of insurance in force at the end of each year, to be divided annually between the parties to the contract. No claim is made that it ever complied or offered to comply with that stipulation. While appellant pleads the contract as a defense, he does not aver that it is able, ready, and willing to perform the conditions thereby imposed upon it, nor did it offer any evidence tending to prove a willingness to comply with the conditions in the contract by it to be performed. It proceeds upon the theory of a contract entered into by the individuals for its benefit, and, having received the benefit, to that extent only had the contract been ratified, but, as to the burden imposed, it disclaimed liability and refused to be bound by it on the ground that it is not a party to the contract and has never ratified or adopted it.

We are still unable to see how a party may accept the benefits of a contract, and at the same time refuse to be bound by its terms and conditions. The rule is that a contract made for the benefit of a third party, and in case such third party avails itself of its advantages, the law creates a privity, and he must bear the burdens that properly belong to him as a party to the contract. *Johnson v. Central Trust Co.*, 159 Ind. 605, 610, 65 N. E. 1028; *Foster v. Leininger*, 33 Ind. App. 669, 72 N. E. 164; *Miller v. Billingsly*, 41 Ind. 489; *Miller v. Land & Lumber Co.*, 86 N. C. 503. "A contract cannot be affirmed in part and rejected in part. It must be totally repudiated or not repudiated at all." *Leake v. Ball*, 116 Ind. 214, 17 N. E. 918. It is upon this theory that we hold that appellant was not entitled to the benefit of the contract as a defense to this action.

Petition for rehearing overruled.

¹ Transfer denied.

Mass. 389)

HOUGHTON et al. v. DICKINSON.

Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 16, 1907.)

BASTARDS—STATUS OF ILLEGITIMATE CHILDREN.

At common law a child not born in lawful wedlock is without inheritable blood, and is incapable of participating in the estate of his father, dying intestate.

d. Note.—For cases in point, see Cent. Dig. 6, Bastards, §§ 250–256.]

AME.

The state has the power to prescribe that children born out of lawful marriage may under certain conditions become legitimate.

d. Note.—For cases in point, see Cent. Dig. 6, Bastards, § 13.]

AME—ACKNOWLEDGMENT.

Under Rev. Laws, c. 133, § 5, providing that an illegitimate child whose parents have married and whose father has acknowledged shall be considered legitimate, the requirements for legitimation are the intermarriage of the parents and the subsequent recognition of the child as his offspring by the father, which recognition may be shown by conduct, as well as by declarations.

i. Note.—For cases in point, see Cent. Dig. 3, Bastards, §§ 13–18.]

AME.

On the issue whether the father of an illegitimate child acknowledged him as his child, under Rev. Laws, c. 133, § 5, evidence held to entitle a finding that the father acknowledged the child as his child, so as to entitle the child to take as heir of the father under chapter 133, c. 1, and chapter 140, § 3, cl. 2, providing for the descent of real estate and the distribution of personalty.

i. Note.—For cases in point, see Cent. Dig. 3, Bastards, §§ 9, 10.]

Appeal from Probate Court, Hampshire County.

It was argued by Edwin D. Marsh, administrator, for the plaintiff Leora Houghton and others. From the decree, certain of the defendants appeal.

William J. Reilly, for appellants. Stephen S. Taft and Stephen S. Taft, Jr., for respondent Marshall D. Dickinson.

SALEY, J. By the common law, not having been born in lawful wedlock, the respondent was without inheritable blood, and therefore would have been incapable of participating in the distribution of the estate of his putative father, who died intestate.

Com. (Sharswood's Ed.) 445. Until partially abrogated by St. 1832, p. 444, c. 147, relating to an illegitimate child, upon the intermarriage of his parents and subsequent acknowledgment by his father, to be recognized as an heir of legitimate children of the parents, and by Rev. St. 1836, c. 61, § 1, which gave to him the further right of a child, he was yet still excluding him from any share of inheritance by way of representation under either parent, this doctrine had prevailed here from the earliest times. It is, however, within the power of the state to provide that children born out of lawful wedlock may under certain conditions be-

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come legitimate; and this exception having been subsequently removed by St. 1853, p. 516, c. 253, now embodied by re-enactments in Rev. Laws, c. 133, § 5, since then a child thus born, but whose parents have subsequently intermarried and whose father claims him as his offspring, succeeds to the status and corresponding legal rights enjoyed by legitimate children. *Ross v. Ross*, 129 Mass. 247, 37 Am. Rep. 321; *In re Goodman's Trusts*, 17 Ch. D. 286. The history of our statutory recognition of what may be termed the natural rights of innocent children who have no control over the circumstances attending their birth is traced in *Ross v. Ross*, 129 Mass. 242, 258, 259, 37 Am. Rep. 321, and the reasons which may be presumed to have influenced legislative action in the passage of the last statute are very fully stated in *Monson v. Palmer*, 8 Allen (Mass.) 551, 556. In terms the statute whereby our law relating to legitimation was thus brought into harmony with the humane spirit of the civil law, and of modern times, and freed from the policy of the early common law which was founded upon reasons growing out of the feudal system, is "as broad and comprehensive as the language affords." See *Ross v. Ross*, *ubi supra*; *Stevenson v. Sullivan*, 5 Wheat. (U. S.) 207, 262, note, 5 L. Ed. 70; *Kent, Com.* (14th Ed.) 209, 210. If the statute because it modifies the common law is to be strictly construed, yet the construction adopted should advance, rather than defeat, the purpose of the Legislature. *Sanford v. Marsh*, 180 Mass. 210, 211, 62 N. E. 268; *Monson v. Palmer*, *ubi supra*; *Rogers v. Nichols*, 186 Mass. 440, 443, 71 N. E. 950. The qualifying requirements for legitimation are the intermarriage of the parents, and subsequent recognition of the child as his offspring by the father. *Brock v. State*, 85 Ind. 397.

It having been determined in the case of *Dickinson v. Dickinson*, 167 Mass. 474, 45 N. E. 1091, that the marriage was valid, the appellants insist that the facts reported are insufficient as matter of law to support the finding of acknowledgment. While no formal acts are prescribed by the statute which shall constitute the acknowledgment required, undoubtedly the recognition of parentage must be unambiguous. But if so, such recognition may be shown by conduct as well as by declarations, and upon referring to the subordinate findings the contention urged is manifestly without foundation. During their engagement, and under a promise of marriage, intercourse took place between the decedent and the respondent's mother. If upon knowledge of her pregnancy at first he refused to perform his contract, neither then, nor at birth, did he deny the paternity of the child, but declared him to be his own, and consented that he should be named after him. In the short interval which followed before marriage, he not only frequently visited the home of his wife's parents,

and spoke of getting married, and of keeping house for the benefit of the "boy," but in other ways is found to have recognized the respondent's paternity. After marriage, the respondent was received and treated as his son, and if the period of matrimonial cohabitation was short, and there was no acknowledgment of parenthood beyond the limits of his own family, and that of his parents with whom he lived, to what extent, if at all, these facts affected the weight to be given to the evidence was solely for the presiding judge to decide. *Heywood v. Stiles*, 124 Mass. 275; *Wylie v. Cotter*, 170 Mass. 356, 49 N. E. 746, 64 Am. Rep. 305. There was, moreover, a declaration or acknowledgment of a public nature, when as a witness in the divorce proceedings instituted by his wife he stated, that upon his departure from the state, she remained taking care of his "boy," and of her parents. It seems to have been substantially uncontroverted that during the time elapsing after knowledge of the pregnancy, and until the decedent permanently returned to this Commonwealth he declared and admitted the respondent to be his son. In the face of the contrary statements made after his return, which may have tended to support the position of the appellants, the facts to which we have adverted describing the paternal relations, and recognition, clearly warranted the conclusion expressed by the principle finding, that the statute had been fully satisfied. *American Malting Co. v. Souther Brewing Co.*, 194 Mass. 94, 102, 80 N. E. 526; *Wylie v. Cotter*, *ubi supra*; *Griffin v. Cunningham*, 183 Mass. 505, 509, 67 N. E. 660; *Metheny v. Bohn*, 160 Ill. 268, 43 N. E. 880; *Gaines v. New Orleans*, 6 Wall. (U. S.) 642, 670, 18 L. Ed. 950.

Having been lawfully legitimated the legal relation of parent and child was created, and consequently he takes the estate as his father's heir. *Rev. Laws*, c. 133, § 1, cl. 1; *Id.* c. 140, § 8, cl. 2.

Decree of probate court affirmed.

STATE ex rel. BOARD OF COM'RS OF HENDRICKS COUNTY v. BOARD OF COM'RS OF MARION COUNTY. (No. 20,918).¹

(Supreme Court of Indiana. Nov. 8, 1907.)

1. MANDAMUS—PETITION.

Mandamus was brought by the "state on the relation of [setting out the names of the individual members of the board] constituting the board of commissioners of H. county against the board of commissioners of M. county." *Held*, that the language used made the board of commissioners of H. county the relator.

2. COUNTIES — HIGHWAYS — IMPROVEMENTS — BONDS — VALIDITY — STATUTORY PROVISIONS.

Acts 1905, p. 495, c. 164, § 4 (Burns' Ann. St. Supp. 1905, § 6819), requires townships abutting on an unimproved highway on the boundary line between two counties to pay the

expense of the improvement thereof, including the cost of survey, printing bonds, publication, and the expense of the county auditor and members of the board of commissioners attending meetings out of their own county in the same manner, extent, and portions and under the same rule as provided by Acts 1901, p. 456, c. 205, § 7. It also provides for joint meetings of the boards of commissioners after the contract is let to determine the amount of money each township shall raise for constructing or improving such roads. Section 6 of Acts 1905, p. 495, c. 164 (Burns' Ann. St. Supp. 1905, § 6821), provides for meetings of the boards to act on estimates in favor of the contractor, etc. Section 7 (Burns' Ann. St. Supp. 1905, § 6822) provides for meetings of the boards as often as may be necessary to carry out the provisions of the act. Acts 1901, p. 454, c. 205, § 8, provides that, for the purpose of raising money to pay for the construction of free gravel, etc., roads, the board of commissioners shall issue bonds of the county not exceeding the amount of the contract price and all expenses incurred prior to the letting of the contract, etc. Section 10 provides for the appointment of a superintendent to supervise the construction of such roads, his compensation "to be paid out of the construction fund of said road or roads." *Held*, that the amount of the bonds issued by the board of county commissioners is not limited to the contract price and expenses incurred before the contract is let, and that the expenses to be incurred after the apportionment of the total cost of the improvement provided for in section 4 of the act of 1905 must necessarily be estimated.

3. SAME—DELEGATED POWERS.

A county is an involuntary corporation organized as a political subdivision of the state by the Legislature solely for governmental purposes. Such subdivisions are instrumentalities of government, and exercise the powers delegated by the state and act for the state, and, as the state is not liable for the acts or omissions of its officers, a county is not liable for the acts or omissions of its officers in relation to such functions because they belong to the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 212.]

4. HIGHWAYS—LEGISLATIVE CONTROL.

All roads laid out under legislative enactment are public highways, belonging to the state under full control of the Legislature, which may in the absence of constitutional limitations exercise such control directly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 25-37.]

5. EMINENT DOMAIN—NATURE OF POWER—POWERS OF EMINENT DOMAIN AND OF TAXATION DISTINGUISHED.

In enacting laws for the improvement of public highways of the state, the Legislature exercises the sovereign power of taxation, and not that of eminent domain.

6. TAXATION—PUBLIC PURPOSES—POWER OF LEGISLATURE.

The power of the Legislature in matters of taxation for public purposes is unlimited, except as restricted by the state or federal Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 3.]

7. HIGHWAYS—CONTROL.

Gravel and macadamized roads, and those built of other material, may be constructed and kept in repair by the state or under state authority by municipal subdivisions of the state or taxing districts created by the Legislature for that purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 323.]

¹ Superseded by opinion, 85 N. E. 512.

8. SAME.

The construction and repair of public highways by the state is the exercise of a state function.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 323.]

9. SAME—TAXATION.

A uniform tax upon all property, real and personal, in a taxing district, according to its appraised value, for taxation for the construction and repair of public highways, is for a governmental purpose, the same as a tax to support the public schools, and the remedy for such taxation, if unwise, unjust, or oppressive, must be sought from the legislative, and not the judicial, department.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, §§ 379-399.]

10. SAME—TAXING DISTRICTS.

In exercising the power of improving public highways, the Legislature may, by a general law, provide for taxing districts without regard to the boundaries of counties, townships, or municipalities.

11. COUNTIES — BONDS — STATUTES — CONSTITUTIONAL LAW—RIGHT OF LOCAL SELF-GOVERNMENT.

Act March 7, 1905 (Acts 1905, pp. 493-496, c. 164; Burns' Ann. St. Supp. 1905, §§ 6816-6822), provides for the improvement of unimproved highways on the boundary line between two counties on the petition of 50 freeholders, voters of any township or townships abutting such highway, the same to be considered and determined after notice given by the commissioners of either county. Complete jurisdiction is given the commissioners of the county before which the proceedings are commenced to order the road constructed, let the contract, etc., and the other county is required to issue its bonds for the amount apportioned to the abutting townships in said county, and levy the amount of the bonds on the taxable property in the abutting townships, etc. *Held*, that the act is not unconstitutional, as a deprivation of the right to local self-government.

12. CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS.

Const. art. 3, § 1, provides that the powers of the government are divided into three departments—the legislative, the executive, and the judicial—and that no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in the Constitution expressly provided. *Held* that, since at the time the Constitution took effect boards of commissioners had judicial power, the act did not violate Const. art. 6, § 10, providing that the General Assembly may confer on boards doing county business in the several counties powers of a local administrative character.

13. SAME—DUE PROCESS OF LAW.

The act was not violative of the fourteenth amendment to the United States Constitution prohibiting the taking of property without due process of law.

14. HIGHWAYS—IMPROVEMENT—PROCEEDINGS.

Where the commissioners of one county ordered the improvement of a highway under the act, and thereafter met in joint session the commissioners of the adjoining county, whereupon the cost of the improvement was apportioned, etc., all orders of the commissioners of the latter county attempting to vacate its own proceedings or the proceeding of the boards of the two counties were void.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Mandamus by the state, on the relation of the board of commissioners of Hendricks county, against the board of commissioners of

Marion county. Judgment for respondent, and relator appeals. Reversed.

Brill & Harvey and Harding & Hovey, for appellant. Caleb S. Denney, G. L. Denney, and H. L. Gould, for appellee.

MONKS, J. This action was brought to compel, by the writ of mandamus, appellee, the board of commissioners of Marion county, to perform certain alleged duties under the act approved March 7, 1905 (Acts 1905, pp. 493-496, c. 164, being sections 6816-6822, Burns' Ann. St. Supp. 1905), for the construction of free gravel, stone, or other macadamized roads on county lines. Appellee's demurrer was sustained to the petition and alternative writ, and, appellant refusing to plead further, judgment was rendered for appellee. The only errors assigned call in question the action of the court in sustaining said demurrer.

It appears from the petition and alternative writ that a petition was filed with the board of commissioners of Hendricks county for the improvement of a highway on the boundary line between the counties of Hendricks and Marion, under said act of 1905 (Acts 1905, pp. 493-496, c. 164; sections 6816-6822, Burns' Ann. St. Supp. 1905), and that such steps were taken under said act that the board of commissioners of Hendricks county ordered that said highway be improved, the contract for said improvement was let, and the boards of commissioners of said counties met in joint session and apportioned the cost of said improvement among the townships abutting said road as required by the said act. Afterwards the board of commissioners of Marion county entered an order that "all of its proceedings and orders made in said proceedings be vacated and annulled and that the action taken by said board of commissioners and the board of commissioners of Hendricks county fixing the amount to be paid by townships abutting on said road and the advertisement for the sale of bonds as well as the contracts entered into by the board of commissioners of Hendricks county be and the same are not concurred in by this board and that no further proceedings be had under this petition and that the same are now dismissed by this board at the cost of the petitioners." It is not claimed by appellee that there was any failure to comply with the requirements of said act, but the ruling of the court in sustaining the demurrer to the alternative writ is defended on the grounds "(1) that the members of the board of commissioners were not proper relators; and (2) that the proposed bond issue will be unlawful, being based on the estimated cost, instead of actual expenses; and (3) that said act is unconstitutional." This proceeding was brought by the "state, on the relation of," setting out the names of the individual members of the board, "constituting the board of commissioners of Hendricks

county, against the board of commissioners of Marion county." We think the language used made the board of commissioners of Hendricks county the relator. And, as no question is made as to said board being a proper relator, we pass to the second objection urged by appellee.

Section 4 of the act of 1905 (Acts 1905, p. 495, c. 164) requires the abutting townships to pay the expense of the improvement, "including the cost of survey, printing bonds, publication and the expense of the county auditor and the members of the board of commissioners attending any meeting or meetings out of their own county, in the same manner, extent and portions and under the same rule as now provided by law in section 7 of" the act of 1901. Acts 1901, p. 456, c. 205. Appellee contends that as section 6 of the act of 1901 provides that "for the purpose of raising money to pay for such construction the board of commissioners shall issue bonds of the county not exceeding the amount of the contract price and all expenses incurred prior to the letting of the contract" that the attempted bond issue is unlawful, because the amount thereof is in excess of the amount of the contract price and all the expenses incurred prior to the letting of the contract. Section 10 of said act of 1901 (Acts 1901, p. 457, c. 205) provides for the appointment of a superintendent to supervise the construction of such roads, and that his compensation shall not exceed \$2 per day, "to be paid out of the construction fund of said road or roads." Such superintendent renders all of his services under said act after the contract is let, and, according to appellee's contention, the amount thereof could not be included in the bonds issued for that reason. If said act of 1901 is so construed, there would be no funds for the construction of said road or roads out of which said superintendent could be paid for his services. It is said in 1 Lewis' Sutherland on Statutory Construction (2d Ed.) § 268, p. 514: "The different sections or provisions of the same statute or code should be so construed as to harmonize and give effect to each, but if there is an irreconcilable conflict, the later in position prevails." See, also, 2 Lewis' Sutherland on Statutory Construction, §§ 349, 350; Black on Interpretation of Laws, § 74, p. 168; 26 Am. & Eng. Ency. of Law (2d Ed.) 734, 735.

In determining the question presented by appellee, not only the sections of the act of 1901 referred to, but all of said act and the act of 1905 must be considered. Section 4 of said act of 1905 provides for joint meetings of the boards of commissioners after the contract is let and after the bonds are issued and sold, and for the payment of the expenses of the county auditor and the members of the board of commissioners in attending any meeting outside their own county. These expenses and the expense of printing the bonds, like the expense for the compen-

sation of the superintendent under the law of 1901, are incurred after the contract is let, and a part of the expense of the auditor and members of the board of commissioners may be incurred after the bonds are sold. Sections 4, 6, and 7, Acts 1905, pp. 495, 496, c. 164. It is clear, therefore, that the amount of the bonds is not limited to the contract price and expenses incurred before the contract is let as claimed by appellee, and that the expenses to be incurred after the apportionment of the "total cost" of the improvement provided for in section 4 of the act of 1905 (Acts 1905, p. 495, c. 164) must necessarily be estimated. The grounds upon which appellee insists that the act of 1905 (Acts 1905, pp. 493-496, c. 164, being sections 6816-6822, Burns' Ann. St. 1905) is unconstitutional are as follows: "(1) It is a deprivation of the right to local self-government. (2) It is a violation of section 10 of article 6 of the state Constitution, which provides that 'the General Assembly may confer upon boards doing county business in the several counties, powers of a local administrative character.' (3) It is a taking of property without due process of law in violation of the fourteenth amendment of the Constitution of the United States." Said act of March 7, 1905, provides for the improvement of unimproved highways not exceeding three miles in length on the boundary line between two counties upon the petition of 50 freeholders, voters of any township, or townships, abutting such unimproved highway, the same to be considered and determined after giving notice by the board of commissioners of either county adjoining such unimproved highway. Complete jurisdiction is given to the board of commissioners of the county before which the proceedings are commenced to order the road constructed, let the contract, etc., and the other county is required to issue its bonds for the amount apportioned to the abutting townships in said county, levy the amount of said bonds and the interest thereon on the taxable property in said abutting townships, and collect and apply the same in payment of said bonds and interest. In this case the petition was filed before the commissioners of Hendricks county, and that board ordered the road built, and let the contract therefor. Appellant insists that counties like cities "have the constitutional right of local self-government which cannot be destroyed by the Legislature, and that said act violates this right because the board of commissioners of Marion county had absolutely no voice in determining whether or not said road should be constructed"—citing *State ex rel. Jameson v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *State ex rel. Holt v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *State ex rel. Geake v. Fox*, 153 Ind. 126, 63 N. E. 19, 56 L. R. A. 893. The cases cited by appellant to sustain its con-

ention as to the right of local self-government only involve that right as applied to the incorporated cities and towns of the state. Those cases recognize the twofold character of such corporations—the one public in so far as they are agencies of the state government, and the other private in so far as they are to provide for matters of purely local concern. See, also, *Abbott, Mun. Corp.* 7, 20; *Cooley, Const. Llm.* (7th Ed.) 333-40, and note; *Am. & Eng. Ency. of Law* (2d Ed.) 1131, and cases cited; *Note to State v. Williams*; 48 L. R. A. 465-493; *State v. Barker*, 116 Iowa, 96, 102-105, 89 N. W. 204, 1 L. R. A. 244, 93 Am. St. Rep. 222, 226-28, and cases cited; *Arnett v. State* (Ind.) 6 N. E. 153, 8 L. R. A. (N. S.) 1192; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566; *Horton v. City Council*, etc., 27 I. 283, 61 Atl. 759, 1 L. R. A. (N. S.) 512; *ex parte Lewis*, 45 Tex. Cr. R. 1, 73 S. W. 1, 108 Am. St. Rep. 929, and cases cited.

Arnett v. State, supra, and *State v. Kolsem*, supra, sustain the right of the state to control the local police of a municipality on the ground that the police is a matter of state concern, as distinguished from the purely local functions of the municipality.

It was held in *State ex rel. v. Fox*, supra, that the Legislature had no authority to place the management of the fire department in a municipal corporation under the control of officers appointed by the state, on the ground that the same was a matter of purely local concern. The court said on page 130 158 Ind., and page 20 of 63 N. E. [56 L. R. A. 893]: "It is well to note at the beginning that this question does not challenge the right of the state to supervise the power of municipal bodies so far as it relates to objects of public concern, such as the preservation of the peace, the construction and care of public streets, sewers, and the like, but inquiry here is restricted to the power of the Legislature to strip a town or city organization of all right to manage in its own way the exclusively private property it is authorized to acquire." Again, on pages 136 and 138 of 158 Ind., and page 22 of 63 N. E. [56 L. R. A. 893], same case, the court said: "It should be remembered that municipal corporations are instituted by legislative authority for a twofold purpose: (1) to create state government agencies, to assist the state at large; (2) for the promotion of certain exclusively local interests which are peculiar to concentrated population, and in which the state, except in conferring the power and regulating its exercise, has no right of interference than it has with the private affairs of its several inhabitants.

With respect to the first, there are important powers delegated to municipalities which concern every citizen of the state, and for the proper exercise of which the state cannot abdicate responsibility by committing them to local officers. It is very clear from the tenor of the whole instrument that the

Constitution makers never intended that the territorial divisions recognized—that is, counties, townships, and towns—should govern themselves, independently of state supervision or of state supremacy, but in every matter which affects the safety, morals, health, or general welfare of the people at large, or of a considerable number of them, there is undoubtedly reserved in the state the power to supervise, control, and even coerce local officers in the discharge of public duties, and even to send its own agents into any organized district, if necessary, to enforce a public right, or accomplish a public benefit. For instance, every citizen has the right to travel the public highways—those in the cities and towns, where, according to common usage, they are made, dug up, and improved by local action, as well as those in rural districts. In every part of these highways the traveler is entitled to the state's protection from violence, and from dangerous situations. For the preservation of the public health, for the prevention of disease and epidemics, each inhabitant has an interest in the proper drainage of lands, and in the suppression of all unsanitary conditions, whether rural or urban, and without regard for territorial boundaries, and the right to look to the state for protection against these evils so far as the same may be legally afforded. Likewise, the enforcement of the state's criminal and revenue laws are of equal importance to all. In all these, and kindred things, the setting up of corporation lines forms no barrier to the strong arm of the state in safeguarding every public interest."

In *People ex rel., etc., v. Common Council of Detroit*, 28 Mich. 228, 15 Am. Rep. 202, the court said in regard to the dual character of municipal corporations: "In *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there conceded that when confined, as it should be, to such corporations as agencies of the state in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the state; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the state government, or assist when called upon to suppress insurrections, or aid in the enforcement of the police laws. Upon all such subjects the state may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. The same doctrine was declared in *People v. Mahaney*, 13 Mich. 481, and in *Bay City v. State Treasurer*, 23 Mich. 503. It was also recognized in the statement that in the levy of taxes for purposes of general concern the municipal

bodies cannot demand a right to be consulted, and their consent is immaterial. And we concur fully in the views which have been expressed by other courts in the cases to which our attention was called on the argument, that, as regards duties which the people in the several localities owe to the commonwealth at large, they cannot be allowed a discretionary authority to perform them or not as they may choose. Such an authority would be wholly inconsistent with anything like regular or uniform government in the state. But we also endeavored to show in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, that though municipal authorities are made use of in state government, and as such are under complete state control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the state at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. Indeed, it would be easy to show that it is not from the standpoint of state interest, but from that of local interest, that the necessity of incorporating cities and villages most distinctly appears. State duties of a local nature can for the most part be very well performed through the employment of the usual township and county organizations, so that if the state alone, in its corporate capacity, were to be regarded, the conferring of special corporate powers on cities and villages might very well be dispensed with. It is because where an urban population is collected many things are necessary for their comfort and protection, which are not needed in the country, and which the county and township organizations, with their imperfect powers and machinery, cannot well supply, that the state is then called upon to confer large powers, and to make of the locality a subordinate commonwealth, which, while it shall perform for the state, in whole or in part, what the county and township officers performed before, shall also be endowed with capacities to provide for its citizens such matters of enjoyment as a political community may demand. Indeed, it is a matter of general observation that the state does not force upon the local community these larger powers, but waits to be solicited to confer them when the people interested shall deem them for their advantage. * * * We also referred, in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, to several decisions in the federal Supreme Court and elsewhere to show that municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in state government. If the authorities are examined, it will be found that these powers and capacities,

and the interests which are acquired under them, are usually spoken of as private, in contradiction to those in which the state is concerned, and which are called public, thus putting these corporations, as regards all such powers, capacities, and interests, substantially on the footing of private corporations. This distinction is very carefully drawn in *Bailey v. New York*, 3 Hill (N. Y.) 531 [38 Am. Dec. 609], which concerned the New York Waterworks, and also in *Small v. Danville*, 51 Me. 362, *Philadelphia v. Fox*, 64 Pa. 180, and *Western College v. Cleveland*, 12 Ohio St. 375."

It will be observed in *People v. Common Council of Detroit*, supra, it is held that state duties of a local nature are imposed upon townships and counties, and that cities and villages are given larger powers than townships and counties, that they may provide for their citizens such matters of local concern as they may need. It is not necessary for us to determine what power, if any, the state may exercise over the streets and alleys of a city, but only what power may the state exercise over the improvement of highways located on the boundary line between two counties. A county is an involuntary corporation organized as a political subdivision of the state by the Legislature, the sovereign power, solely for governmental purposes. Such subdivisions are instrumentalities of government, and exercise the powers delegated by the state and act for the state. As the state is not liable for the acts or omissions of its officers, a county is not liable for the acts or omissions of its officers in relation to such functions because they belong to the state. *Board v. Mowbray*, 160 Ind. 10, 12, 66 N. E. 46, and authorities cited; *Board, etc., v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58, and cases cited; *Cones v. Board, etc.*, 137 Ind. 404, 37 N. E. 272, and cases cited; *Board, etc., v. Dalley*, 132 Ind. 73, 31 N. E. 531; *Smith v. Board*, 131 Ind. 116, 30 N. E. 949; *Morris v. Board, etc.*, 131 Ind. 285, 31 N. E. 77; *White v. Board, etc.*, 129 Ind. 308, 28 N. E. 846; *Summers v. Board, etc.*, 103 Ind. 262, 2 N. E. 725, 53 Am. Rep. 512. "The construction of a free turnpike or gravel road is not, in a strict legal sense, a county matter, for the commissioners do not levy assessments by virtue of their position as the official representative of the county, but by virtue of an express statute specially conferring that power upon them. They are not, at least so far as the property owners are concerned, acting as the agents of the county while exercising the powers conferred by the statute, and it is legally impossible to conceive any valid reason why the county should sustain any loss because of their errors, negligence or wrongs." *Board, etc., v. Fullen*, 111 Ind. 410, 415, 12 N. E. 298, 300. In *Board, etc., v. Branaman* (this term),¹ this court said: "In the enactment of the law in regard to the construction of free gravel roads, the

¹ 23 N. E. 65.

egislature has deemed it proper to designate the board of commissioners of the county as the tribunal before which the proceedings to build or construct such highways shall be instituted and carried to a final completion. The commissioners, therefore, merely act as a board for that purpose. The statute does not contemplate that the board shall be the agent of the particular township or townships which constitute the taxing district. It is merely the designated agency or instrumentality of the law to carry into effect its provisions, and for this purpose it is been invested by the statute with certain limited functions and powers, some of which are in their nature and character administrative, while others may be said to be judicial. In carrying the law into effect, the board cannot exceed the power with which it has been invested." If such powers are delegated by the Legislature, and not by the constitution, the Legislature may enlarge, diminish, or withdraw the same in the absence of a constitutional restriction. Board of Mowbray, 160 Ind. 12, 66 N. E. 46. All roads laid out under legislative enactment are public highways, belonging to the state, under full control of the Legislature. While its control is, as a general rule, exercised through the instrumentality of local governmental subdivisions of the state, the Legislature may, in the absence of constitutional limitations, directly exercise control of public highways. Elliott's Roads & Streets (2d Ed.) §§ 9, 421, 423, 424, 425, 426; Garvin v. Hussman, 114 Ind. 429, 435, 16 N. E. 826, 37 Am. St. Rep. 637; Cones v. Board, etc., 7 Ind. 404, 408, 409, 37 N. E. 272; Board, etc., v. Allman, 142 Ind. 573, 42 N. E. 206, 101 L. R. A. 58, and cases cited; City of Indianapolis v. Higgins, 141 Ind. 1, 40 N. E. 1; Backus v. Depot Co., 169 U. S. 557, 18 Sup. Ct. 445, 42 L. Ed. 853; Williams v. Eggleston, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; O'Connor v. Pittsburgh, 18 Pa. 7; Case of Phil. & Trenton Ry. Co., 6 Hart. (Pa.) 25, 36 Am. Dec. 202. It was held by this court in Cones v. Board, etc., 7 Ind. 408, 409, 37 N. E. 274: "Highways are the arteries of the state, and the state has never surrendered her right to direct, by legislation, the manner and agencies through which they are created, maintained, and valued. Even as to free gravel roads, the sole power to create them is by special and direct authority from the state, even to the effect of naming the officer and prescribing his duties, who shall perform the various functions of that authority. The state has retained the power to punish not only for the neglect of official duty with relation to highways, but for the obstruction of, and interference with, public travel upon them." In this state the Legislature, in enacting laws, exercises the one in controversy here for the improvement of public highways of the state, exercises not the power of eminent domain, but the sovereign power of taxation, and

that such laws are not in conflict with the fourteenth amendment to the Constitution of the United States. 2 Cooley on Taxation, (3d Ed.) pp. 1181-1183; Board v. Harrell, 147 Ind. 500, 504-509, 46 N. E. 124; Lowe v. Board, etc., 156 Ind. 163, 59 N. E. 499, and authorities cited; Voris v. Pittsburg, etc., Co., 163 Ind. 599, 607, and cases cited on pages 606, 607, and 608, 70 N. E. 249, 252, 253; Goodrich v. Winchester, etc., Co., 26 Ind. 119; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, and cases cited; Barber, etc., Co. v. French, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492, and cases cited; Webster v. Fargo, 9 N. D. 208, 82 N. W. 732, 56 L. R. A. 156, and authorities cited; Parsons v. District of Columbia, 170 U. S. 45, 52-56, 18 Sup. Ct. 521, 42 L. Ed. 943; Williams v. Eggleston, 170 U. S. 304, 310-312, 18 Sup. Ct. 617, 42 L. Ed. 1047. It is well settled that the power of the Legislature in matters of taxation for public purposes is unlimited, except as restricted by the state or federal Constitution. Lowe v. Board, etc., 156 Ind. 163-165, 59 N. E. 466, and authorities cited; Spencer v. Merchant, 125 U. S. 345, 352-355, 8 Sup. Ct. 921, 31 L. Ed. 763, and cases cited. Gravel and macadamized roads and roads built of other material may be constructed and kept in repair by the state or under state authority by municipal subdivisions of the state or taxing districts created by the Legislature for that purpose. Cooley on Taxation (2d Ed.) pp. 130-133, 146-152, 682; 1 Cooley on Taxation (3d Ed.) pp. 212-216, 232-238; Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763; Parsons v. Dist. of Columbia, 170 U. S. 45, 52-56, 18 Sup. Ct. 521, 42 L. Ed. 943; Williams v. Eggleston, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; Lowe v. Board, etc., 156 Ind. 163, 165, 59 N. E. 466, and authorities cited; Gilson v. Board, etc., 128 Ind. 65, 69-72, 27 N. E. 235, 11 L. R. A. 835. As was said by this court in Lowe v. Board, etc., 156 Ind. 165, 59 N. E. 467, quoting from Cooley on Taxation: "One of the most important functions of government is the making provision for public roads for the use of the people. * * * No question is made of the competency of the Legislature to levy taxes for the common highway, the improved turnpike and macadamized road, the planked or paved street, the canal tramway, or the railway. Any and all of them may be constructed by the state, or under state authority by the municipal subdivisions of the state within whose limits they are needed. They may be supported and kept in repair by taxation of the state or of proper districts, or private corporations may be invested with the franchise of constructing them and taking toll for their use." 1 Cooley on Taxation (1st Ed.) p. 94; (2d Ed.) p. 130; (3d Ed.) p. 212.

Such improvements may be made by a tax on all the property, real and personal, in the taxing district, as under the law in ques-

tion here, or by local assessments against the real estate specially benefited. *Lowe v. Board, etc.*, 156 Ind. 165, 59 N. E. 466; *Board, etc., v. Harrell*, 147 Ind. 500, 46 N. E. 124; *Gilson v. Board, etc.*, 128 Ind. 65, 70, 71, 27 N. E. 235, 11 L. R. A. 835; *Voris v. Pittsburg, etc., Co.*, 163 Ind. 599, 70 N. E. 249, and authorities cited; *Bowles v. State*, 37 Ohio St. 35; *Cass Farm Co. v. City of Detroit*, 124 Mich. 433, 83 N. W. 108, affirmed in 181 U. S. 396, 21 Sup. Ct. 644, 645, 45 L. Ed. 914, 916; *Barber, etc., Co. v. French*, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492, affirmed in *French v. Barber, etc., Co.*, 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Webster v. Fargo*, 9 N. D. 208, 82 N. W. 732, 56 L. R. A. 156, affirmed in 181 U. S. 394, 21 Sup. Ct. 623, 645, 45 L. Ed. 912; 2 *Cooley on Taxation* (3d Ed.) pp. 1180, 1205, 1210. The construction and repair of public highways by the state under any system it may adopt is the exercise of a state function, and is, as was said by Judge Cooley, *supra*, the exercise of one of the most important functions of government. A uniform tax upon all the property, real and personal, in a taxing district, according to its appraised value, for taxation for the construction and repair of public highways, as in the law in controversy here, is for a governmental purpose the same as a tax to support the public schools of the state, the police power of the state, or to maintain the different departments of the state government. The remedy for such taxation, if unwise, unjust, or oppressive, must be sought from the legislative, and not the judicial, department of the state. *Lowe v. Board, etc.*, 156 Ind. 165, 166, 59 N. E. 466, and authorities cited. The Legislature in the exercise of the power of making such improvements may by a general law provide for taxing districts without regard to the boundaries of counties, townships, or municipalities. *Gilson v. Board, etc.*, 128 Ind. 70, 71, 27 N. E. 235, 11 L. R. A. 835, and cases cited; *Board, etc., v. Harrell*, 147 Ind. 500, 504, 505, 46 N. E. 124; *Lowe v. Board, etc.*, 156 Ind. 163, 166, 167, 59 N. E. 466; *Williams v. Eggleston*, 170 U. S. 304, 308-312, 18 Sup. Ct. 619, 42 L. Ed. 1047; *Barber, etc., Co. v. French*, 158 Mo. 534, 58 S. W. 934, 54 L. R. A. 492, and cases cited, affirmed in 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879; *Elliott on Roads and Streets*, par. 83, p. 96; 2 *Cooley on Taxation* (3d Ed.) pp. 1205-1210. Judge Cooley in his work on *Taxation* (1st Ed.) pp. 113, 114, (2d Ed.) pp. 151, 152, (3d Ed.) pp. 233, 239, says: "Taxing districts may be as numerous as the purposes for which taxes are levied. * * * It is not essential that the political divisions of the state shall be the same as the taxing districts, but the special districts may be established for special purposes wholly ignoring the political divisions. A school district may be created of territory taken from two or more townships or counties, and the benefits of a highway, a levee, or a drain may be so peculiar that jus-

tice would require the cost to be levied either upon part of a township or county, or upon parts of several subdivisions of the state. * * * It is compulsory that the political divisions of the state shall be regarded in taxation only where the tax itself is for a purpose specially pertaining to one of them in its political capacity, so that, as already stated, the nature of the tax will determine the district." As was said, however, by the same author: "When the nature of the case does not conclusively fix it, the power to determine what shall be the taxing district for any particular burden is purely a legislative power, and not to be interfered with or controlled, except as it may be limited or restrained by constitutional provisions." This court in *Board, etc., v. Harrell*, 147 Ind. 500, 506, 507, 46 N. E. 124, 126, quoting from Judge Elliott's work on *Roads and Streets*, said: "The weight of authority * * * is overwhelmingly in favor of the right of the Legislature to determine what property shall be assessed and how the apportionment shall be made." In all the laws passed in this state for the construction of drains, and the improvement of rural highways, nothing has been left to the discretion of the local authorities, but, on compliance with the requirements of such statutes, it becomes the duty of the board of commissioners, circuit or other court, having jurisdiction of the proceeding, to make an order establishing the work and proceed to its completion. The validity of sections 6726-6741, *Burns' Ann. St. 1901*, giving the circuit and superior court of the county in which the petitioners resided jurisdiction to establish and construct a drain extending into another county, has been sustained by this court. *Hudson v. Bunch*, 116 Ind. 63, 65, 18 N. E. 390, and cases cited. Sections 5655-5680, *Burns' Ann. St. 1901*, provide for the construction of drains extending into two or more counties, and require (sections 5677, 5678, 5678a) that the proceeding shall be commenced in the county containing the head or source of the ditch. This court has held under said law that the whole jurisdiction or power in such a proceeding is in the board of commissioners where the proceeding is commenced, and that the boards of commissioners in the other counties into which the ditch extends only act in an administrative capacity and may be compelled by mandamus to perform such duties. *Strayer v. Taylor*, 163 Ind. 230, 233-234, 69 N. E. 145, and cases cited; *Whirlledge v. Shoup*, 165 Ind. 486, 488, 75 N. E. 871, and cases cited; *State v. Popejoy*, 165 Ind. 177, 179, 74 N. E. 994, and cases cited; *Denton v. Thompson*, 136 Ind. 446, 452, 453, 35 N. E. 264. As was said in *State v. Popejoy*, 165 Ind. 179, 74 N. E. 995: "The board of commissioners of the county in which the ditch proceeding originates is given general jurisdiction over its work, and its orders and judgments are certified to the boards of other counties concerned, to be

and of record and carried out by them in administrative capacity. This provision is necessary to preserve the unity of the proposed work and harmony in the proceedings." In *Denton v. Thompson*, 136 Ind. 452, 35 N. E. 266, this court said: "It has been frequently held by this court that under the act of 1881, for the construction of public drains under authority of the circuit court, a drain is a unit throughout all the counties into which it may extend, and is under the jurisdiction of the court where the proceedings were first instituted. *Fleenor v. Skill*, 97 Ind. 27; *Crist v. State ex rel. Moore*, 97 Ind. 389; *State, for Use, v. Vey*, 99 Ind. 599; *Meranda v. Spurlin*, 100 Ind. 380; *Updegraff v. Palmer*, 107 Ind. 181, 35 N. E. 353; *Hudson v. Bunch*, 116 Ind. 63, 35 N. E. 390; *Crooks, Adm., v. State ex rel. Vasey*, 126 Ind. 572, 26 N. E. 193. We think that a like rule must obtain where drains are constructed under authority of boards of commissioners, and where the drains extend into two or more counties. A public drain is from its very nature an entirety; though it may extend into two or more counties, yet the proceedings must be under one authority. Otherwise a board of commissioners or a circuit court having jurisdiction at the source of a drain might order its construction, while the board or court having jurisdiction at the outlet, or at some intermediate point, might determine that there should be no drain established. The Legislature did not contemplate any such absurd result, but in the circuit court act and in the act for the construction of drains by the county boards of commissioners has, as we think, provided for jurisdiction over the whole work." What was held in said drainage cases applies with full force to the proceeding to improve a way on the boundary line between two counties under said act of 1905. We will now consider the objection that the act violates section 10 of article 6 of the

state Constitution. Boards of commissioners at the time the present Constitution took effect had judicial powers—the powers of courts. 1 Elliott's General Practice, § 197; *State v. Board, etc.*, 101 Ind. 69, 71, 72; *Board v. Conner*, 155 Ind. 484, 58 N. E. 828; *Strayer v. Taylor*, 163 Ind. 230, 234, 69 N. E. 145. Section 1 of article 3 of the Constitution provides that: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Such boards of commissioners being courts belonged to the judicial department of the state government, and the Constitution recognized that fact by providing in said section 10 of article 6 that "the General Assembly may confer upon boards doing county business in the several counties powers of a local administrative character." No such provision would have been necessary if boards of commissioners belonged to "the executive, including the administrative," department of the state government. It is evident, we think, from what we have said and the authorities cited, that said act of 1905 is not open to any of the objections urged by appellee. It is clear that any and all orders of appellee attempting to set aside and vacate any of its own proceedings or orders or the proceedings of the boards of the two counties or to set aside or vacate any act or order of either or both of said boards was without authority and void, and of no effect. It follows that the court erred in sustaining the demurrer to the petition and alternative writ.

Judgment reversed, with instructions to overrule the demurrer to the petition and alternative writ, and for further proceedings not inconsistent with this opinion.

(41 Ind. App. 147)

WAMSLEY v. CLEVELAND, C. C. & ST.
L. RY. CO. (No. 6,096.)¹(Appellate Court of Indiana, Division No. 2
Nov. 5, 1907.)**1. RAILROADS—CROSSING ACCIDENT—NEGLIGENCE SPEED.**

Evidence that defendant operated his train 40 to 50 miles per hour over a city street crossing at which intestate was killed, in violation of a four-mile speed ordinance, held to warrant a finding that such negligence was the proximate cause of intestate's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1143.]

2. TRIAL—PEREMPTORY INSTRUCTIONS.

It is the trial court's duty to give a peremptory instruction, where the evidence fails to make a prima facie case for plaintiff, or would not support a verdict if returned in his favor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 381-389.]

3. RAILROADS—CROSSING ACCIDENT—PEDESTRIANS—CARE REQUIRED—CONCURRENCE PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE.

A traveler on a highway approaching a railroad crossing must use his senses of sight and hearing to protect himself from danger, and, if the situation is such that he could see or hear an approaching train in time to avoid collision, it will be presumed, if he is killed by collision with the train, either that he did not look or listen for its approach, or that he failed to heed what he saw or heard, and his administrator is therefore not entitled to recover, not because the negligence of the railroad company was not a proximate cause of the death, but because the traveler's negligence was a concurring proximate cause contributing thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1020-1022.]

4. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Burns' Ann. St. 1901, § 350a, providing that in all actions for personal injuries contributory negligence is a defense that must appear affirmatively from the evidence in order to be available, changed the prior law that the burden was on plaintiff to aver and prove his freedom from contributory negligence, and placed such burden on the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 221-223, 229-234.]

5. RAILROADS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for death of plaintiff's intestate at a city railroad crossing, defendant proved that at the time of the trial a person walking along the street from the direction intestate approached could have seen the train 56 feet from the track, but the evidence did not disclose the condition of the view at the time of the accident, nor show what, if any, obstructions to such view existed at that time, and there was no evidence that, if intestate heard the train whistle, she would have known that it was an approaching train on defendant's road. Held, that she was not shown to have been negligent as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1168-1189.]

Appeal from Superior Court, Marion County; Jno. L. McMaster, Judge.

Action by Charles O. Wamsley against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

¹ Rehearing denied, 83 N. E. 640.

Jno. P. Leyendecker and Wm. A. Pickens, for appellant. Frank L. Littleton, for appellee.

RABB, J. The appellant sued appellee to recover damages for the death of his intestate, alleged to have been caused by the negligence of appellee. The cause was submitted to a jury for trial, and over appellant's objection and exception the court gave the jury a peremptory instruction to return a verdict in favor of appellee. This action of the court presents the only question in the record in this court.

The negligent act complained of in appellant's complaint was that the appellee ran its train of cars through a densely populated part of the city of Indianapolis, at a dangerous rate of speed, and in violation of the provisions of a speed ordinance of the city, which train in its passage through the city struck and killed appellant's intestate while she was crossing appellee's railroad track where the same intersects Roach street, in said city. The evidence in the case showed without dispute that appellant's intestate was struck and instantly killed by appellee's engine drawing a passenger train over its road; that the accident occurred in a populous part of the city of Indianapolis, at a point where appellee's track intersects Roach street, one of the public streets of the city; that the engine which struck and killed the deceased was running at the rate of from 40 to 50 miles per hour, and that there was in force at the time an ordinance of said city prohibiting persons in charge of an engine or train of cars from permitting the same to be run within the city limits at a greater rate of speed than 4 miles per hour. This evidence fully established the charge of negligence made in the complaint against the appellee, and it fully justified the inference, also, that such negligence was the proximate cause of the appellant's intestate's death.

The instruction given by the court withdrawing the case from the jury is defended on the ground that the evidence without dispute showed that the deceased was guilty of contributory negligence proximately causing her death. Appellee's proposition that it is a duty of the trial court to give the jury a peremptory instruction, where the evidence fails to make out a prima facie case for the plaintiff, or where it would not support a verdict if returned in his favor, correctly states the law. And we also fully recognize the rule contended for by appellee, and so often announced by all the courts of last resort in this country, some of which are cited in appellee's brief, to the effect that it is the duty of a traveler on a public highway approaching a railroad crossing to use his sense of sight and hearing to protect himself from danger, and that, if the situation is such that a traveler on the highway could see or hear an approaching train in time to avoid

collision, it will be presumed against him, injured by a collision with the train, either that he did not look or listen for its approach, or that, if he did, he failed to heed what he saw or heard, and that under such circumstances, if injury results to the traveler.

He cannot recover against the railroad company for the injury sustained by the collision, no matter how negligently its servants may have operated the train, not on the ground that the negligence of the servants of the railroad company was not a proximate cause of the injury, but on the ground that the traveler's negligence was a concurring proximate cause contributing to the accident. This doctrine is too well settled to need citation of authorities in its support, and we do not understand that it is seriously disputed. Under the law in this state as it has existed since the act of February 17, 1899 (section 9a, Burns' Ann. St. 1901), when the law on the subject went into force, in all actions for personal injuries contributory negligence is a defense that must be made to appear affirmatively from the evidence in order to be available. Prior to that time the burden was on the plaintiff in actions of this character to aver and prove his freedom from contributory negligence. Appellee's argument in support of the court's instruction proceeds upon the assumption that the evidence in this case shows without dispute that appellant's intestate could have seen the approaching train at struck and killed her, had she used her use of sight, for a distance of 56 feet from the railroad crossing as she approached it; that the approaching train was in plain sight, running down the track, for a distance of 200 or 1,500 feet before it reached the crossing, and that it could be seen by persons approaching the crossing from the direction from which the deceased came upon the track at the said distance of 56 feet. If this assumption is correct, we are not prepared to question the appellee's conclusion. The appellee, however, had the burden of establishing these assumed facts. It is unnecessary under the law as it now stands in this state at the plaintiff in an action against a railroad company for injuries, or for death sustained at a crossing collision, go into the details of the surroundings of the scene of the accident, to show what obstructions were or were not present that would or would not prevent the person injured from seeing or hearing approaching trains, unless such facts are necessary to prove the defendant's negligence charged in the complaint. They were not necessary to prove the alleged negligent acts in this case. The fact that there were no obstacles or obstructions in the way that could have prevented the appellant's intestate from seeing the engine that struck her as a fact essential to be shown to establish contributory negligence. The burden of proving them rested upon the appellee. They had nothing to do with making the appellant's case. The evidence is meager and unsatisfac-

tory upon the question of the surroundings of the accident. There is no evidence as to the movements of the deceased from the time she left the corner of Burton avenue and Roach street, a distance of perhaps 200 or 300 feet from the railroad, until the very instant the locomotive struck and killed her. The evidence shows that Udell street is 3 squares, a distance of some 1,000 or 1,200 feet, north of Roach street; that the railroad runs north and south, Roach street east and west; that the train which struck and killed appellant's intestate was a passenger train, and approached from the north.

But one witness, Prather, was examined with reference to the approach to the railroad crossing on Roach street. His testimony is very meager. It does not undertake to show what the conditions were at the time the accident happened. It is as follows: In his examination in chief he was asked: "Q. About how many houses are there in the first square north of Roach street? Ans. There is only one house, and there is a shoe shop on the rear end right on the corner of the alley. Q. Could you get a clear view of the railroad north of there? Ans. You could not." On cross-examination, he testified on the subject as follows: "Q. I believe you stated that a person coming along Roach street could not see until they passed the shoe shop? Ans. I don't think they could. Q. There was nothing to prevent their seeing after they passed the shoe shop, was there? Ans. Well, the distance was not very great, but I should not judge there would be anything to obstruct their view. Q. There is nothing to obstruct their view to the north of a train coming down? Ans. No, sir. Q. When you get past the shoe shop you can see clear up past Udell street? Ans. You can see after you get into the center of the track. The elevation of the track is higher than where you walk." These facts were supplemented on this subject by the following admission: "It is agreed that the distance from the northeast side of the shoe shop to the center of the railroad track, measuring at right angles with the railroad track, is 46 feet. It is agreed, also, that the distance from the eastern corner of the shoe shop measuring with the north line of Roach street to the center of the railroad track is 56 feet, and that there is nothing to obstruct the view of defendant's tracks as far as Udell street at any point east of the shoe shop to the defendant's tracks, and that defendant's track is a single line of track." This is all that appears in the evidence upon this subject. The witness Prather did not pretend to know what obstructions, if any, intervened between the corner of the shoe shop and the appellee's railroad track at the time of the accident. His testimony was not directed to that particular time, nor does the agreement cover the time the accident occurred. It matters not what may be, or may have been, the con-

dition of the railroad approach, and the ability of persons to see approaching trains, and the character of obstructions to the view of travelers on the street approaching the crossing at any time except at the time the deceased was killed. The question is: What was the condition with reference to obstructions at that time and could she have seen the approaching train? The evidence nowhere indicates whether or not there is a right of way fenced off, or what temporary obstructions may, or may not, have been upon the line of vision of one approaching the railroad track from the corner of the shoe shop at any time. There is some evidence that there was an alley between Burton avenue and the railroad, but just the location of the alley is not made clear, except that the shoe shop is said to be upon the alley, and the corner of the shoe shop was 46 feet from the railroad, in a direct line. There is evidence that there were dwellings along Burton avenue, with outhouses reaching back to the alley. What the distance from the alley in question to the railroad track north of Roach street was is not made clear, and, for anything that appears to the contrary, the space between the alley and the railroad may have, at the time of the accident, been filled all the way along from Roach street to Udell street, with temporary obstructions, such as vans, or wagons, or other obstacles of that character; and, for aught that appears in the evidence, there may have been buildings along there at that time that would obstruct the vision. The admission introduced in evidence speaks in the present tense. It does not pretend to relate to the condition that prevailed at the time of the accident. It was made six or seven months after the accident occurred. The evidence is an utter blank as to what the conditions were with reference to obstructions at the time of the deceased's death.

It is true that one or two witnesses testified to having heard the train whistle when it was somewhere between the bridge and Thirtieth street. Where the bridge was is not indicated—evidently above Thirtieth street. Thirtieth street was several blocks beyond Udell street, and out of sight of the crossing. Many of the witnesses who testified did not hear the train whistle, and there is not sufficient evidence on this subject to justify the court in withdrawing the case from the jury and to have made a case of contributory negligence against the deceased, even if she did hear the whistle sounded when the train was out of sight, at an uncertain distance from the crossing, and was able to recognize and know that it was a train approaching the crossing. But there is nothing in the evidence that would have compelled the jury to find that the deceased, if she did hear the whistle, would have known that it was an approaching train on appellee's road. To justify a peremptory in-

struction withdrawing the case from a jury, and requiring a verdict to be returned in favor of either party, plaintiff or defendant, the evidence must have been so clear and satisfactory as to have left no reasonable ground upon which the jury might have inferred facts justifying a verdict favorable to the other party.

Judgment reversed.

(40 Ind. App. 480)

LOUISVILLE & N. R. CO. et al. v. GOLLIHUR. (No. 6,161.)

(Appellate Court of Indiana, Division No. 2. Nov. 6, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—JOINT LIABILITY OF MASTER AND FELLOW SERVANT.

A railroad dispatcher whose negligence has caused an injury to a fellow employé is liable as a joint tort-feasor with the railroad, though his negligence is the negligence of the railroad under Burns' Ann. St. 1901, § 7083, relating to the liability of railroads for personal injuries to employes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1238.]

2. REMOVAL OF CAUSES—CITIZENSHIP OF PARTIES—JOINT AND SEPARATE ACTIONS.

Where plaintiff in a negligence action against a railroad and its employé, which action is both joint and separable, elects to make it joint, defendants cannot make it separable for the purpose of removal from a state to a federal court, although the purpose of suing defendants jointly was to prevent the removal, since the motive of a person asserting a right is immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 95-99.]

3. DEATH—ACTIONS—MEASURE OF DAMAGES.

In an action for tortious death, the measure of damages is the amount necessary to compensate decedent's beneficiaries for the pecuniary loss caused by the death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 120.]

4. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action for death in a railroad collision, caused by negligence of the train dispatcher, the admission of a letter from a railroad officer, which was pinned to the original dispatch, held, under the circumstances, not prejudicial to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4155.]

5. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS—INSTRUCTIONS COVERED BY OTHERS GIVEN.

It is not error to refuse requests for instructions covered by others which are given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Circuit Court, Posey County; O. M. Welborn, Judge.

Action for death by Henry H. Gollihur, administrator of Loran G. Coker, against the Louisville & Nashville Railroad Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

C. A. De Bruler, for appellants. G. V. Menzies, L. M. Wade, and C. B. Thomas, for appellee.

COMSTOCK, C. J. The appellee brought this action to recover damages for the death of his decedent, Loran G. Coker, who was a brakeman in the employment of the appellant company, and who was killed in a collision between two freight trains. It is claimed in the complaint that the death of Coker was due to the negligence of the appellant Hart, who was a train dispatcher for the appellant company at the time of the accident, and that his negligence consisted in giving wrong telegraphic orders as to the movement of the trains which came into collision. The first paragraph of the complaint, after setting forth that the appellant company operates a railroad extending from St. Louis, Mo., to Evansville, Ind., charges that for the safety of the public and of its employees appellant company maintained a dispatcher's office in the city of Evansville, which was at the time of the accident in charge of the appellant Ira O. Hart as train dispatcher; that, as such, Hart was charged with the duty of carefully notifying the company's agents along the line of the railroad of the time of the departure and arrival of trains, and of the giving such agents orders to stop, start, and sidetrack all approaching trains, and was further charged with the duty of seeing that his dispatches to the different agents were verified by the agents receiving them, and, upon verification, to announce to the agents that the orders were correct, but that all this must be done before the agents delivered the orders to the employees of appellant. The appellant company filed its petition and bond to remove the cause into the Circuit Court of the United States. The petition was overruled and exception taken. Afterward appellee filed a second paragraph of complaint, in which the allegations were the same as in the first, except, in addition to the alleged negligence of the train dispatcher, Hart, in transmitting and verifying the orders affecting the two trains, it is charged that the agent at the city of Mt. Vernon was negligent in receiving and properly reporting to Hart said orders, and through the joint carelessness of Hart and the agent at Mt. Vernon the agent was not apprised of the fact that the trains were to meet and pass at Mt. Vernon, and in consequence this train, No. 80, was allowed to pass Mt. Vernon and come into collision with train No. 79, on which the decedent, Coker, was working as a brakeman. After the appellant company had unsuccessfully tried to remove the cause to the Circuit Court of the United States, and after the appellants had unsuccessfully demurred jointly and severally to the complaint, the issue was formed by appellants filing joint and separate answers of general denial to the complaint. There was a trial by jury resulting in a verdict and judgment for appellee for \$5,000.

Counsel for appellants discuss only three questions (and they are properly reserved) upon which a reversal is asked: First. The

refusal of the court below to remove the cause to the United States court. Second. Excessive damages. Third. Error in admission of evidence. These in the order named.

It is claimed in behalf of appellants that the cause should have been removed to the federal court upon the petition and bond of appellant railroad company, for the reason that the petition states a separable controversy, and that Hart, the resident defendant, was made a party to the action for the fraudulent purpose of defeating the jurisdiction of the federal court, and that concurrent negligence of the railroad company is not shown with the defendant Hart in negligence which is alleged to have been the cause of the accident. "In other words, the whole case depends upon the negligence of Hart in transmitting an incorrect message, and the railroad company was not charged with any concurrence in this act of negligence, or with any other negligence, except that which grew out of the alleged act of Hart in sending the incorrect message." Although the negligence of Hart was, under section 7083, Burns' Ann. St. 1901, the negligence of the appellant railroad, Hart was also liable as a joint tortfeasor. *L. E. & W. v. Charman*, 161 Ind. 98, 67 N. E. 923; *Charman v. L. E. & W. R. R. Co. (C. C.)* 105 Fed. 449. *L. E. & W. R. R. Co.*, supra, affirms the rule, citing *Wright v. Compton*, 53 Ind. 337; *City of Peoria v. Simpson*, 110 Ill. 294, 51 Am. Rep. 683; *Johnson v. Magnuson*, 68 Ill. App. 448; *Hoye v. Raymond*, 25 Kan. 685; *Phelps v. Walt*, 30 N. Y. 78; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Dec. 507; *Montfort v. Hughes*, 3 E. D. Smith (N. Y.) 591; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Wilkins v. Ferrell*, 10 Tex. Civ. App. 231, 30 S. W. 450; *Schaefer v. Otserbrink*, 67 Wis. 495, 30 N. W. 922, 58 Am. Rep. 875; *Greenberg v. Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911; *Scheerer v. Evans*, 89 Ind. 400; *Michael v. Alestree*, 2 Lev. 172; *Steel v. Lester*, 3 C. P. Div. 121; *Morton v. Hardern*, 4 Barn. & C. 223; *Newman v. Fowler*, 37 N. J. Law, 89; *Comitez v. Parkerson (C. C.)* 50 Fed. 170; *Connell v. Railway Co. (C. C.)* 13 Fed. 241; 2 *Thomp. Neg.* 892; *Cooley on Torts* (2d Ed., 1888) p. 164. In 54 *Central Law Journal*, pp. 404, 405, and volume 60, p. 305, this view is sustained with many citations. This action is joint as to the company and its servant, being joint and separable, and, the plaintiff having elected to make it joint, it follows that the defendant cannot make it separable for the purpose of removal from a state to a federal court. "A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of this controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be." *Ches. & O. Ry. Co. v. Dixon*, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121, and cases cited; *Powers v. C. & O.*

Ry. Co., 169 U. S. 96, 18 Sup. Ct. 264, 42 L. Ed. 673. The motive of a party asserting a right is not material, and so the purpose of appellee in making appellant Hart a party does not affect the merits of the question.

Are the damages excessive? There is no hard and fast rule by which this question may be answered. The question of damages is essentially one of fact. The deceased was under no legal obligation to support the next of kin for whose benefit the suit was brought. The amount awarded should depend upon the facts in the particular case. "The sole inquiry is how many dollars are necessary to compensate the beneficiaries for the pecuniary loss caused to them by the wrongful death." 8 A. & E. Ency. of Law (2d Ed.) 909. The jury was instructed that the compensation should be limited to the pecuniary loss. Another jury might have fixed a greater sum, another a less; but in a matter so difficult of measurement we cannot say that, under the evidence, the amount named is excessive. There is no intimation that the jury acted from partiality or corruptly.

When appellants offered in evidence what they claimed was the original dispatch sent by the train dispatcher, Hart, to the agent at Mt. Vernon, there was attached to it by a pin a letter addressed to the appellant's superintendent at Evansville from its master of transportation at Louisville, stating, in effect, that he returned to the superintendent at the Carmi office copy of the dispatch. Appellee was permitted, over the objection of appellant, to put this letter in evidence. It is insisted that the action was error, for the reason that it was not a part of the dispatch, was a mere statement made by one officer of the company to another in the transmitting of the dispatch, and was hearsay testimony. If this were error, which we do not decide, we cannot see it was prejudicial. Appellant Hart and the witness Becker had testified to the contents of the dispatch sent by Hart to the agent at Mt. Vernon. Witnesses were also permitted to testify as to why the original dispatch was taken from the book in which it belonged in the dispatcher's office, and sent to Louisville, and from there back to Evansville. Appellants had the benefit of their version of the dispatch. The jury found in answer to interrogatories that the appellant Hart sent the correct dispatch to Whiting, the agent at Mt. Vernon, but that Whiting did not properly repeat the dispatch to Hart, and that Hart did not properly verify the order. The correct dispatch sent by Hart was to the effect that train No. 79 would wait at Carmi until train No. 80 should arrive at that point. The train order as given to the train crew of No. 80 by Whiting was to the effect that No. 79 would wait at Carmi. Train No. 79 was the one that came in collision with 80, and caused the death of decedent. The mistake therefore, according to these findings, was made by Whiting in de-

livering a wrong message to the train men of No. 80, and this resulted directly from Whiting's mistake in repeating the order to Hart, and Hart's mistake in not verifying the message thus repeated, and in telegraphing to Whiting that the order was complete. The combined negligence of Hart and Whiting caused the death of decedent. We conclude that the admission of this evidence, even if erroneous, was harmless.

Some criticism is made of instructions given and refused. Appellant's request for a peremptory instruction to return a verdict in behalf of appellant Hart was correctly refused. The other instructions requested and refused were substantially covered by those given. The verdict is sustained by the evidence. We find no reversible error.

Judgment affirmed.

(41 Ind. App. 481)

OGLEBAY v. TIPPECANOE LOAN & TRUST CO. (No. 5,882.)¹

(Appellate Court of Indiana, Division No. 1.
Nov. 7, 1907.)

1. PLEADING—DEMURRER—FORM.

Burns' Ann. St. 1901, § 349, declares that, when the facts stated in any paragraph of the answer are not sufficient to constitute a cause of defense, plaintiff may demur under the rules prescribed for demurring to a complaint. *Held*, that a demurrer to a paragraph of the answer, alleging that plaintiff demurred to such paragraph for the reason that it was not sufficient to constitute a sufficient cause of defense to plaintiff's cause of action, did not state any cause of demurrer enumerated in the Code, and was therefore insufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 473-481.]

2. APPEAL—ASSIGNMENTS OF ERROR—WAIVER.

An assignment of error not discussed in appellant's brief is waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

3. SAME—RECORD—INSTRUCTIONS.

Instructions given or refused may be made a part of the record by order of court, by bill of exceptions, or by the entry, signing, and dating of exceptions on the instructions by the judge, and the filing of the instructions and exceptions as provided by Burns' Ann. St. 1901, § 543, and Burns' Ann. St. Supp. 1905, § 544a.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2376-2379.]

4. SAME.

Where instructions given or refused are sought to be made a part of the record as prescribed by Burns' Ann. St. 1901, § 543, and Burns' Ann. St. Supp. 1905, § 544a, it must affirmatively appear that they were filed and the exceptions thereto were written at the close thereof, dated, and signed, or, if excepted to orally, that entry thereof was made on the minutes or records of the court.

5. TRIAL—RECEPTION OF EVIDENCE—WAIVER OF ERROR.

Where evidence objected to when offered was limited in its application by an instruction requested by the objecting party, the objection to its admission was waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Trial, § 977.]

¹ Rehearing denied. Transfer to Supreme Court denied.

JUDGMENT—CONCLUSIVENESS—PARTIES IN PRIVACY.
A judgment against an administrator is binding on a creditor in the distribution of assets; the creditor being in privity with the administrator.

1. Note.—For cases in point, see Cent. Dig. § 30, Judgment, §§ 1199-1212.]

APPEAL—REVIEW OF EVIDENCE.
In determining whether there is evidence sufficient to support a verdict, it is necessary to consider that which tends to sustain the verdict, as the Appellate Court will not weigh evidence or determine the credibility of witnesses.

1. Note.—For cases in point, see Cent. Dig. § 3, Appeal and Error, §§ 3928-3934.]

NEW TRIAL—ACCIDENT—SURPRISE—DILIGENCE.

Where the testimony occasioning alleged surprise for which plaintiff desired a new trial was that of a witness called by plaintiff, and the witness proposed to be called to supply the lack of evidence was one to whom plaintiff had the goods concerning which the testimony desired, there was no sufficient showing of surprise to avoid the surprise or discover the evidence to authorize a new trial.

1. Note.—For cases in point, see Cent. Dig. § 7, New Trial, §§ 190-194.]

Appeal from Circuit Court, Tippecanoe county; R. R. De Hart, Judge.
Action by William R. Oglebay against the Tippecanoe Loan & Trust Company, as administrator of the estate of John P. Oglebay, deceased. From a judgment for defendant plaintiff appeals. Affirmed.

S. Potter and Oglebay & Oglebay, for plaintiff. Stuart, Hammond & Simms, for lee.

MATSON, J. This was an action by appellant against appellee upon a promissory note in the sum of \$1,000, dated May 1, 1885, payable one day after date, and executed to and by decedent, John P. Oglebay, Jr. Appellee answered in six paragraphs. The first, second, third, fourth, and fifth were issues available to appellee under the plea. The sixth was estoppel. Appellant demurred to the sixth paragraph was overruled. The issues were tried before a jury and a verdict was rendered for appellee. The jury also returned special answers to interrogatories with the general verdict. Appellant assigns errors as follows:

(1) In overruling the demurrer to the sixth paragraph of the answer; (2) in overruling the motion to strike out part of the sixth paragraph of the answer; (3) in overruling the motion for a new trial.
The averments of said sixth paragraph are in substance that by reason of the conduct of appellant toward the said Ada May and advice given her, in the settlement of decedent's estate, and because appellant refused the Tippecanoe Loan & Trust Company to be appointed administrator of said estate, and procured said trust company to bring an action with proceedings in attach-

ment against said Ada May Carr to recover the amount which she had received as the purchase money from the sale of decedent's real estate in order to pay the note sued upon herein, and caused the National Fowler Bank to be summoned as garnishee to answer for said money which action in attachment and garnishment resulted in a judgment in favor of said Carr and said bank, that appellant is estopped from prosecuting the claim in this present action. Appellant demurred to this paragraph of answer; the body of the demurrer being as follows: "Plaintiff, William R. Oglebay, demurs to the sixth paragraph of defendant's answer for the reason that the same is not sufficient to constitute a sufficient cause of defense to plaintiff's cause of action." The appellee assails the form of this demurrer, and contends that it is not sufficient to present any question. Section 349, Burns' Ann. St. 1901, provides that: "Where the facts stated in any paragraph of the answer are not sufficient to constitute a cause of defense, the plaintiff may demur to it under the rules prescribed for demurrer to a complaint." In *Reed v. Higgins*, 86 Ind. 143, the demurrer was: "The plaintiffs separately and severally demur to the second, third, and fourth paragraphs of defendant's answer herein, and for ground of demurrer say that neither of said paragraphs constitutes any defense to this action." Held, the demurrer was insufficient. In *Thomas v. Goodwine*, 88 Ind. 458, the demurrer to the first paragraph of answer was for the following cause: "Because said defendant's answer does not state facts sufficient to constitute an answer to plaintiff's complaint." Held, insufficient. In *Wintrobe v. Renbarger*, 150 Ind. 556, 50 N. E. 570, the demurrer was for the reason that facts were not stated "sufficient to constitute a good answer to the complaint of the plaintiff." The demurrer was held bad. The demurrer in this case does not present any of the six causes of demurrer enumerated in the Code and therefore is insufficient. *City, etc., v. Bleefeld*, 20 Ind. App. 1, 49 N. E. 1090; *Flanagan v. Reitemier*, 28 Ind. App. 243, 248, 59 N. E. 389; *State v. Katzman*, 161 Ind. 504, 506, 69 N. E. 157. The court committed no error in overruling the appellant's demurrer to the answer in this cause.

No question is presented on the second assignment of error, since it is not discussed in the brief on appeal, and therefore is deemed to be waived. *Rudisell v. Jennings*, 38 Ind. App. 403, 408, 77 N. E. 959; *McCaslin v. State*, 38 Ind. App. 184, 185, 75 N. E. 844, and cases cited.

There seems to be an attempt by the appellant to raise the question as to the instructions given or refused by the court, and bring the same into the record under the provisions of the statute. Section 543, Burns' Ann. St. 1901; section 544a, Burns'

Ann. St. Supp. 1905. There are three ways by which instructions given or refused by the court are made part of the record: First, by order of the court; second, by bill of exceptions; and third, under the statute above cited. If the last method is pursued, the statutory requirements are imperative, and it must affirmatively appear that the instructions were filed, and the exceptions thereto were written at the close thereof, dated, and signed, or, if excepted to orally, the entry thereof must appear upon the minutes or records of said court. *Storrs, etc., Co. v. Fusselman*, 23 Ind. App. 203, 294, 55 N. E. 245; *Ayres v. Blevins*, 28 Ind. App. 101, 102, 62 N. E. 305; *Behymer v. State*, 95 Ind. 140, 142; *Childress v. Calender*, 108 Ind. 394, 396, 9 N. E. 292; *Roose v. Roose*, 145 Ind. 162, 164, 165, 44 N. E. 1; *Malott v. Hawkins*, 159 Ind. 127, 138, 139, 63 N. E. 308; *City of Michigan City v. Phillips*, 163 Ind. 449, 452, 71 N. E. 205. It therefore follows that no question is presented to this court as to the instructions enumerated in the motion for a new trial.

Appellant further contends that there was error in permitting the widow to testify as to the business relations between herself and Geo. H. Oglebay and as to assistance given her by said Oglebay in the sale of decedent's real and personal property and the payment of debts of decedent and of her right to administer. At appellant's request the court instructed the jury that such evidence was admitted only as to the credibility of the witness Geo. H. Oglebay and it was to be given weight only with reference to that credibility. Where evidence, objected to when offered, is limited in its application by an instruction requested by the objecting party the objection as to admission is deemed to be waived and there is no cause for an assignment of error thereon in this court. *Elliott, Appellant Procedure*, § 703; *Vannoy v. Klein*, 122 Ind. 416, 419, 23 N. E. 526; *Price v. Brown*, 98 N. Y. 388, 396.

It is also urged that there was error in admitting in evidence the papers and order book entries, including the judgment, in the case of *Tippicanoe Loan & Trust Co. v. Ada May Carr et al.* A creditor of a decedent is in privity with the administrator of such

decedent's estate, and a judgment against the administrator is binding on the creditor in the distribution of the assets. 2 *Van Fleet, Former Adjudications*, § 461; *Blankenbaker v. Bank of Commerce*, 85 Ind. 459; *Moore v. Sloan*, 71 Ark. 599, 76 S. W. 1068; *Hansen's Empire Fur Factory v. Teabout*, 104 Iowa, 360, 370, 73 N. W. 875; *Merchants', etc., Bank v. Fitzgerald*, 61 Ark. 605, 33 S. W. 1064; *Blue v. Watson*, 59 Miss. 619. Under the issues in this case the evidence was clearly admissible.

The further reasons are assigned as showing error in the overruling of the motion for a new trial: (1) The verdict is not supported by sufficient evidence; and (2) the verdict is contrary to law. Both may be determined by the consideration of the sufficiency of the evidence. In determining whether there is evidence sufficient to support the finding, it is necessary to consider only that which tends to sustain such finding. The court, on appeal, will not weigh the evidence, or determine the credibility of the witnesses. *Board of Com'rs v. Eaton*, 38 Ind. App. 30, 32, 77 N. E. 958; *Robinson, etc., v. Hathaway*, 150 Ind. 679, 50 N. E. 883; *L. E. & W. Ry. Co. v. Stick*, 143 Ind. 449, 454, 41 N. E. 365; *Cincinnati, etc., Ry. Co. v. Madden*, 134 Ind. 462, 469, 34 N. E. 227; *Ewbank's Manual of Practice*, § 46. The verdict is fully supported by sufficient evidence.

The final specification of the motion for a new trial was for accident and surprise. In order to make such reason available, it must be shown that proper diligence was used to avoid surprise and to discover the new evidence. *Lockwood v. Rose*, 125 Ind. 588, 597, 25 N. E. 710; *Reno v. Robertson*, 48 Ind. 106. The testimony occasioning the alleged surprise was that of a witness called by appellant in his own behalf. The witness whom he proposes to call to supply the lack of evidence is one to whom appellant had sold the goods concerning which the testimony is desired. The reasons do not show proper diligence in avoiding the surprise, or discovering the new evidence.

We find no available error.

The judgment is affirmed.

(196 Mass. 484)

**CHAFFE v. CONSOLIDATED RY. CO.
INGRAHAM v. SAME.**(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 26, 1907.)**1. CARRIERS—INJURY TO PASSENGER—RELATION OF CARRIER AND PASSENGER—EVIDENCE.**

In a personal injury suit by a passenger against a street railway company, the evidence showed that defendant received and undertook to carry plaintiff and others in a car which it owned over a line of street railway. *Held*, in the absence of any contrary showing, that the inference that defendant was operating the car for the benefit of those who wished to avail themselves thereof was warranted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1284.]

2. SAME—CARRIER OF PASSENGERS—DEGREE OF CARE REQUIRED.

A carrier must exercise such reasonable diligence for the safety of a passenger as the nature of the business allows.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1087.]

3. SAME—NEGLIGENCE—EVIDENCE—COLLISION WITH STREET CAR.

The mere fact of a collision between street cars, until explained by the company, is evidence of its negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1283.]

4. SAME—QUESTIONS FOR JURY.

In an action against a street railway company by a passenger injured in a collision, whether the company was negligent in managing the other colliding car *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1315-1325.]

5. SAME—LIABILITY OF COMPANY.

A street railway company is liable for an injury to a passenger, caused by negligent management of a work car, resulting in a collision with the car in which the passenger was riding, even if the work car and the railway were under the control of another company.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1240-1251.]

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Consolidated actions by Belle Chaffe and Henry M. Ingraham against the Consolidated Railway Company. Judgments for plaintiffs and defendant excepts. Exceptions overruled.

John Alden Thayer and Charles B. Perry, for plaintiffs. Choate, Hall & Stewart, for defendant.

BRALEY, J. Unless there was evidence that the relation of passenger and carrier existed between the parties, the defendant's request that a verdict be ordered in its favor should have been granted. At the outset, the bill of exceptions states, that at the time of the accident the plaintiffs "were passengers upon a car of the defendant." The subsequent recital of an admission of ownership merely emphasizes this statement. It is urged by the defendant, that notwithstanding this admission there was no evidence as to who was operating the car, or in control of the railway. But if the details are meager,

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it was beyond conjecture that the defendant, described in the writ as a railway company, owned a car running over a line of street railway, operated by electricity, in which the plaintiffs in common with others were being transported. It received and undertook to carry the plaintiffs in this car over the line of track on which it ran, and the use to which the car was put, with the conditions of operation unexplained, warranted the inference, that the defendant at the time offered this means of transportation to those who wished to avail themselves of such facilities. *Indiana Union Traction Co. v. Jacobs (Ind.)* 78 N. E. 325, 327. If the plaintiffs were passengers, in a car provided by the defendant, it had engaged to exercise such reasonable diligence for their safety during transportation as the nature of the business required. *Gordon v. West End Street Railway Co.*, 175 Mass. 181, 55 N. E. 900; *Davey v. Greenfield & Turners Falls Street Railway Co.*, 177 Mass. 106, 58 N. E. 172; *Pomeroy v. Boston & Northern Street Railway Co.*, 193 Mass. 507, 79 N. E. 764; *Egan v. Old Colony Street Railway Co. (Mass.)* 80 N. E. 696, and cases cited. Another car variously described as a work or flat car preceded the car in which the plaintiffs were riding, when as it approached a portion of the track in which there was a rising grade, the forward car being then a short distance in advance, slid on the rails, and suddenly descending came into collision with the passenger car, causing the accident. It is again said that there is a failure of evidence to connect the defendant with the management of the work car. But the plaintiffs having shown the collision, this fact until explained by the company was some evidence of negligence, as the jury could find that in the ordinary course of affairs it would not have happened if proper precautions had been taken. *Egan v. Old Colony Street Railway Co.*, *ubi supra*. The defendant, indeed, offered some evidence of the efforts made by those in charge of the work car, and the section men, as it passed, to prevent it from sliding, but the fact that neither the application of the brake, nor of the sand and gravel placed on the track appreciably retarded its speed, still left the question of negligence in the management of this car; to be determined by the jury. If negligence were found, then the defendant was responsible to the plaintiffs for the resulting injury to which it voluntarily had exposed them, even if the work car, and the railway were under the control of another corporation. *Littlejohn v. Fitchburg Railroad Co.*, 148 Mass. 478, 20 N. E. 103, 2 L. R. A. 502; *Stetler v. Chicago & Northwestern Railway Co.*, 46 Wis. 497, 1 N. W. 112. See, also, *Engel v. New York, Providence & Boston Railroad Co.*, 160 Mass. 260, 263, 35 N. E. 547, 22 L. R. A. 282.

Exceptions overruled.

(196 Mass. 423)

ADAMS v. COLLINS et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 25, 1907.)**1. FRAUD—FRAUDULENT REPRESENTATIONS—MATTERS OF FACT OR OF OPINION**

A statement that the one making the same understood that the owner of bonds had obtained a loan of a certain amount on the bonds from a bank was a representation of a fact, and not the expression of an opinion, or statement of something which he had heard, and which he intended to simply state as such.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 12.]

2. SAME.

A false denial that bonds had sold as low as 10 per cent. of their par value is an actionable misrepresentation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 12.]

3. SAME—ACTIONS—PARTIES.

Where a broker, knowing that a purchase of bonds from another was contemplated, stated to the proposed purchaser that he understood that the owner had obtained a loan on the bonds to a certain amount from a bank, and that the bonds were a good, safe investment, and denied that they had sold for 10 per cent. of their par value, such statements being false and made to aid the owner to defraud the buyer, such broker and the owner are properly joined in one action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 35.]

4. SAME—SUFFICIENCY OF EVIDENCE.

Evidence in an action for false representations in the sale of bonds held to warrant a finding that the seller stated that he had pledged them to a bank for a loan of a certain amount and that such statement was false.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 55-57.]

5. SAME—STATEMENT AS OF OWN KNOWLEDGE.

A representation by one as true of his own knowledge, where he did not know whether it was true or false, is actionable, if it was in fact false, without further proof of intent to deceive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 5.]

6. SAME—INSTRUCTIONS.

Instructions, in an action for false representations in the sale of bonds, that to entitle plaintiff to recover the representations must have been false and he must have relied on them to a substantial degree, and that it was for the jury to say whether it was reasonable for plaintiff to rely on defendant's representations, in view of what he knew and could ascertain by reasonable effort, were not objectionable as not leaving it to the jury to say whether plaintiff exercised due diligence or acted reasonably in surrendering his judgment to that of the seller.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 72.]

7. SAME—ADMISSIBILITY OF EVIDENCE.

Where, in an action for false representations in the sale of bonds, plaintiff disclaimed bad faith on defendant's part other than that inferable from statements of a fact as of his own knowledge when he did not know it to be true, or a lack of belief on his part in the truth of his representations, evidence offered by defendant that he believed the bonds to be worth not less than the amount he represented had been their lowest market price and that he had no intent to deceive plaintiff was properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 50.]

8. APPEAL — REVIEW — PRESUMPTIONS — BURDEN OF SHOWING ERROR.

Where from the bill of exceptions the reviewing court is unable to tell whether certain evidence was or was not properly admitted, the exception will be overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3670.]

9. FRAUD — ACTIONS — SUFFICIENCY OF EVIDENCE.

Evidence in an action for false representations in the sale of bonds held to warrant a finding that one of the defendants, a third person, had stated that he understood that the seller had got a loan in a certain amount from a bank on the bonds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 56.]

10. SAME — EXPRESSION OF OPINION — THIRD PERSON.

A third person, undertaking to express an opinion to the buyer as to the subject-matter of a contemplated purchase, must give his honest opinion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 12.]

11. SAME

A third person has not the same latitude as to representations respecting the subject-matter of a contemplated purchase as the seller.

12. APPEAL — REVIEW — HARMLESS ERROR — VARIANCE.

A third person being liable for a false representation of his opinion as to the subject-matter of a contemplated purchase, as well as for a false representation of a matter of fact, it is immaterial which of the two an allegation that defendant said that the bonds "were a good, safe investment" was construed to be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4075.]

Exceptions from Supreme Judicial Court, Suffolk County.

Action by Francis W. Adams against Charles H. Collins and others. Judgment for plaintiff, and defendants except. Exceptions overruled.

Jesse D. Crook, for plaintiff. C. F. Eldredge, for defendant Robinson. William B. Orcutt, for defendant Cox.

MORTON, J. This is an action to recover damages for false and fraudulent representations in regard to certain bonds purchased by the plaintiff of the defendant Cox. There were five bonds in all. This action relates to two of them. It was tried with two other actions by the plaintiff against the defendant Cox alone; one for one of the bonds and the other for the other two. There was a demurrer by the defendant Robinson which was overruled, and he appealed. The plaintiff had a verdict in each case, but no judgments have been entered in the other two actions. The case is here on exceptions by the defendants to various rulings and refusals to rule and to the admission and exclusion of evidence. The defendant Cox also excepted to what the court did in sending the jury out again to consider their verdicts in this and the other two cases, after they had reported a verdict in this, and to the verdicts thus rendered, but that exception has been waived.

e plaintiff discontinued as to the defendants Collins and Libby.

We take up first Robinson's demurrer. If in substance that the matters alleged in amended declaration, on which the case is tried, are, so far as Robinson is concerned, matters of opinion, and that the alleged use of action against him is improperly mixed with that against Cox. The allegations omitting preliminary allegations as to the plaintiff came to apply to Robinson in substance, that Robinson, knowing that the plaintiff contemplated the purchase of the bonds from Cox, concealed the fact that he had had the bonds in his possession and stated to the plaintiff that "he understood that said Cox obtained a loan on bonds from a banking institution to the amount of \$3,500 and that said bonds were a safe investment, and that said bonds were not sold in the market for 10 per cent. their par value." These allegations are accompanied by averments to the effect that defendant Robinson knew that the statements were not true, and that he knowingly made them and concealed the facts as to his connection with the bonds for the purpose of inducing Cox to defraud the plaintiff. We think the demurrer was rightly overruled. To that he understood that Cox had obtained a loan of \$3,500 on the bonds from a banking institution, when he knew that he had not understood, was a false representation of fact and not the expression of an opinion, a statement of something which he had said and which he intended to simply state such. It is plain that to say that the bonds had not sold for 10 per cent. of their value was or could be found to be an actionable misrepresentation. It sufficiently appears that the alleged representations were fraudulently made, and it is plain, we think, that according to the allegations contained in the declaration both defendants were properly joined in one action. *Stiles v. White*, 11 Ct. 356, 45 Am. Dec. 214; *Patten v. Gurney*, 17 Mass. 182, 9 Am. Dec. 141. See, also, *Wells v. Dockray*, 156 Mass. 135, 30 N. E. 1, and *Peabody v. Whitcomb* (Mass.) 81 N. 193, in which the actions were similarly brought, and *Medbury v. Watson*, 6 Metc. 247, Am. Dec. 726, where the converse of the position was decided. We do not stop to consider now the representation that the bonds were "a good, safe investment." The other representations were sufficient to justify the overruling of the demurrer.

We pass to the exceptions, taking up those of Cox first. The court in stating the substance of the declaration to the jury said that it embraced "four different alleged false representations"—first, that Cox said that he had paid \$5,000 for the bonds, their par value; second, that he stated that they were worth their par value; third, that no bonds that issue had been sold for less than 95 per cent.; and fourth, that he had pledged

them to a banking institution for a loan of \$3,500. As to the first two the court instructed the jury in substance, as requested by the defendant Cox, that they were to be regarded as seller's talk, and would not justify a verdict for the plaintiff. The first objection to the instructions and refusals to instruct concerning the other two is that the evidence introduced by the plaintiff did not warrant a finding that Cox had made the fourth misrepresentation relied on. The plaintiff testified that he said to Cox that Dr. Hipkiss had told him that he, Cox, had said the bonds were a good and sure investment, and were selling at par, and there had not been any sale for less than 95, and that he, Cox, had borrowed \$3,500 from a bank on these bonds, and that Cox replied in substance: "Yes, I have got these bonds. They are in the bank and I borrowed on them \$3,500. My note is coming due, and I want to keep my credit good with the bank, and for that reason I am willing to let you have them at a lower figure than I really ought to. I paid par for them, but if you want them, and because I want to meet my note, I will sell them to you at 80." The real facts were, as evidence introduced by the defendant Cox tended to show, that he borrowed \$3,500 from one Charles H. Collins, vice president and director of the American National Bank, for which he gave him his note secured by the bonds, and that Mr. Collins got the money from the bank by turning over to it the note and bonds and guaranteeing the payment of the note. We think that the evidence warranted a finding that the representation was made in substance as alleged, and that it was false and fraudulent. The representation made by the defendant Cox, as testified to by the plaintiff, imported or could be found to import that he had himself borrowed the sum named from a bank, and that the bank had been satisfied to lend it to him on the security of the bonds, which was substantially what was alleged; whereas the fact was that he had borrowed the money from Mr. Collins, and Mr. Collins had got it from the bank by giving in addition to defendant's note and bonds his own personal guaranty. The alleged representation was, therefore, or could have been found to be, a statement which he knew was not true, or which he when he did not know whether it was true or not, made as of his own knowledge, and which in that case would constitute a fraudulent misrepresentation without any further proof of an intent to deceive. *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727. The same could have been found in regard to the representation that the bonds had not been sold for less than 95. Whether they had been so sold or not was plainly, as ordinarily understood, a matter susceptible of knowledge.

The plaintiff made inquiries of others and in at least two instances was told that the

bonds had been sold for 10 cents on the dollar. He informed the defendant Cox of this and was told by him that it was impossible, that it could not be so, and that there must be some mistake. The plaintiff was also told that the bonds had sold at 95, and that they were a good investment. In the end, the plaintiff relied, as the jury must have found, on what the defendant Cox said and he, Cox, contends that the plaintiff was not justified in relying on his representations and did not exercise due diligence and could not recover unless he did, and that the jury should have been so instructed, as, in various forms, he requested that they should be. We see no error in the instructions or in the refusals to instruct. The jury were told in substance that in order to entitle the plaintiff to recover, he must satisfy them by a fair preponderance of the evidence that the representations were false and fraudulent, that he relied on them to a substantial degree in making the purchase, that, in view of the plaintiff's admission it was necessary for him to show that the representations relied on were made by the defendant as of his own knowledge when he did not have such knowledge and were false and that it was for them to say whether it was reasonable for the plaintiff to rely on the defendant's statements in view of all that he knew and of all that he could ascertain by reasonable effort. This in effect left it to the jury to say whether the plaintiff exercised due diligence (*Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 262) or acted reasonably in surrendering his judgment to that of the defendant Cox.

The evidence offered by the defendant Cox, that he believed the bonds to be worth 95 and that he had no intent to deceive the plaintiff was rightly excluded. *Chatham Furnace Co. v. Moffatt*, supra; *Litchfield v. Hutchinson*, 117 Mass. 195. The plaintiff disclaimed bad faith on the part of the defendant, meaning thereby actual intent to deceive other than that inferable from the statement of a fact as of his own knowledge when he did not know it to be true or a lack of belief on his part in the truth of his statements. We see no error in regard to the admission of the testimony of the witness Skelton.

We are unable to tell from the exceptions whether the testimony in regard to the \$6 note and the London Asylum and North Shore Railroad bond was or was not admissible, and, as the burden is on the excepting party, the exceptions must be overruled. It seems to us, as far as we understand it, that the matter was wholly irrelevant and immaterial; but it does not appear that any harm was done by its admission.

The defendant Robinson contends that so far as he was concerned there was a variance between the allegations and the proof, and that the representation that the bonds were a good safe investment was matter of opinion. Other questions raised by him are

sufficiently covered by what has been said so far as the instructions requested by him were not given. The allegations were as already stated that the defendant Robinson said that "said bonds had not sold in the market for 10 per cent. of their par value," that they "were a good safe investment," and that he stated that "he understood that * * * Cox had obtained a loan on said bonds from a banking institution to the amount of \$3,500." The evidence in support of these allegations all came from the plaintiff and was in substance as follows: "He * * * went down to see * * *. Robinson and asked him about these bonds; that Robinson said they were not a good investment at 90 for a trustee; that British consols could be bought for nearly that, and he did not consider them as good as British consols; that the plaintiff then asked Robinson what he thought of a purchase of them at 80, and Robinson replied that he considered them a perfectly good investment at 80, and the plaintiff would undoubtedly make money if he could purchase them at 80; that he, Robinson, knew that Cox borrowed \$3,500 from a bank on them, and that ought to be a guaranty of their validity and of their value"; that the plaintiff then said to Robinson that he had heard that these bonds had been selling at 10 per cent. of their face value, to which Robinson replied, that he would "like to buy a bushel basket full of them at that price"; that "that is absurd." On cross-examination the plaintiff testified that "he told Robinson that there had been sales of these bonds at 10, and Robinson replied that 'he would like to buy a bushel basket full at that price'; that Robinson told him, the plaintiff, that he knew that Cox had got '\$3,500 from a bank and put up these bonds as security.' Robinson was a witness and denied that he said what the plaintiff testified that he did. We think that what Robinson thus said (if he did say it) could fairly be understood and ordinarily would be understood to be an affirmation, though expressed in an indirect manner, that the bonds had not sold for 10 per cent. of their par value, and that it therefore tended to show that the representation was made as alleged. As to the allegation that he said that he understood that Cox had got \$3,500 from a bank on the bonds, the evidence clearly warranted a finding in the plaintiff's favor. The defendant denied that he said so. But the jury were not bound to believe him. And if they did not, but believed the plaintiff, Robinson's denial would make the case all the stronger against him.

The defendant Robinson further contends that there was a variance between the declaration and the proof in respect to the allegation that he represented that the bonds were "a good and safe investment"—his contention being that the evidence showed that the statement was made as matter of opinion and not as the representation of a fact, and that

he was not liable therefor. But he was a third party with no interest, so far as appears, in the trade. And he was bound to act honestly and in good faith, not only in regard to matters of fact, but also in regard to matters of opinion. *Medbury v. Watson*, 6 Metc. 246, 39 Am. Dec. 726. If he undertook to express an opinion he was bound to give his honest opinion. He had not the same latitude as a seller, for the reason that the buyer in dealing with the seller would naturally be supposed to be on his guard, whereas he would not be on his guard, and would have no reason for being on his guard in dealing with a disinterested third person. For aught that appears, the jury found that he made the representation as alleged and that it was false. Being liable for a false representation as to his opinion as well as for a false representation in respect to a matter of fact, it is immaterial which the allegation was construed by the presiding judge to be. Whichever construction was adopted Robinson could not have been harmed thereby.

Exceptions overruled.

(139 N. Y. 423.)

In re ROBBINS et al.

(Court of Appeals of New York. Nov. 1, 1907.)

1. ATTORNEY AND CLIENT—CONTRACTS—CONSTRUCTION—"PUBLIC PLACES."

Where a statute creating a public park declared that the tracts of land taken for park purposes should be "public places," an addition to the park afterwards made was also a public place, and hence an agreement of retainer whereby an attorney was engaged to take all lawful proceedings to obtain compensation for lands, etc., proposed to be taken for the opening of streets, avenues, and "public places," embraced proceedings to condemn land for an addition to the park.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5806-5812; vol. 8, p. 7778.]

2. APPEAL—DECISIONS OF LOWER COURT—CONCLUSIVENESS OF FINDING OF FACT.

Where a decision of the Appellate Division is unanimous, a finding of fact by a referee in the proceeding is binding upon the Court of Appeals.

Appeal from Supreme Court, Appellate Division, First Department.

Application of Clarence H. Robbins and others, executors of Aaron S. Robbins, to have determined an attorney's lien filed by Clarence C. Ferris against an award of damages in condemnation proceedings. From an order of the Appellate Division, First Department (105 N. Y. Supp. 1140), affirming an order of the Special Term canceling the lien, Charles C. Ferris appeals. Reversed, and lien sustained in part.

George M. MacKellar, for appellant. Edward H. Hawke, Jr., for respondents.

EDWARD T. BARTLETT, J. In November, 1899, Aaron S. Robbins, the testator, being the owner of several pieces of property on

Washington Place, in the borough of Brooklyn, adjacent to the Willink entrance to Prospect Park, entered into an agreement of retainer with Clarence C. Ferris, an attorney, as follows: "New York, November 11th, 1899. I, Aaron S. Robbins, owner of premises described below, authorize Clarence C. Ferris, Esq., to take all lawful proceedings to obtain compensation for lands, buildings and rights proposed to be taken for the opening of streets, avenues and public places through or affecting property situate Washington Place. I agree to pay him for all services ten per cent of the amount awarded for damages. No other compensation whatever either for expert witness fees or for any other disbursements is to be paid by me." Here follow block and lot numbers and the name and address of Aaron S. Robbins. On June 20, 1902, the board of estimate laid out an addition to Prospect Park at the Willink entrance, and included therein a portion of the lands of Robbins described in the above agreement. Later the board of estimate directed the corporation counsel to institute proceedings to acquire title to such lands. After the appointment of commissioners a little later, Ferris on February 2, 1903, filed with the corporation counsel a notice of his appearance for Robbins in the proceedings. The commissioners held their first meeting in the following April, and Ferris was present and made proof of Robbins' title to the damage parcels to be taken. Prior to that meeting Ferris had filed a verified claim in behalf of Robbins. At a subsequent meeting Mr. Hawke, an attorney, appeared and claimed the right to represent Robbins. In view of this conflicting claim of the attorneys, the commissioners decided to leave the matter to Robbins, who appeared and stated that he desired Mr. Hawke to represent him. The commissioners thereupon declined to allow Ferris to act further as counsel for Robbins. Ferris then stated that he was ready and willing to proceed with further proofs in the case, and it is conceded that no question is raised by the respondents as to the failure of Ferris to act further in the premises, as he was prevented from so doing by Robbins. Pending these proceedings Robbins died. Subsequently the commissioners made an award for the lands of Robbins and his estate taken for the addition to Prospect Park amounting to \$83,055.51. Ferris filed with the comptroller of the city a notice of his lien upon the award. The executors of Robbins' estate thereupon instituted this proceeding to determine the validity of the lien, basing their application upon the affidavit of one of the executors. Ferris filed an opposing affidavit, and a referee was appointed to take testimony and report with his opinion therein "in aid of the conscience of the court." The referee took testimony and made a report in favor of the executors of Robbins. The Special Term thereafter, upon the report of the referee and the evi-

dence taken by him, made an order canceling the lien. On appeal the Appellate Division unanimously affirmed the order of the Special Term. From this order Ferris appeals to this court. No opinion was written below except a memorandum by the referee, which is a discussion of the facts and the law, and a finding of fact which has an important bearing upon this case.

The principal point taken by the executors in the court below was to the effect that the words in the agreement of retainer "for lands, etc., to be taken for the opening of streets, avenues and public places," do not cover lands taken for a public park. This contention is in harmony with Robbins' letter to Ferris when declining to accept his services before the commissioners, wherein he claimed that the retainer merely authorized an appearance for him in street openings which were likely to take place, and that he wished Hawke to represent him in the matter of lands taken for an addition to Prospect Park. In regard to this contention that the words "public places" do not include lands taken for a public park, the construction is narrow and unauthorized. The act creating and laying out Prospect Park (chapter 489, p. 964, Laws 1860) states in section 1, after describing the various lands to be taken for park purposes, as follows: "The said tracts, pieces and parcels of land are hereby declared to be public places." If the lands originally taken were in technical phrase "public places," it follows that any addition in later years would be embraced within the same definition.

It being clear that the agreement of retainer does cover lands taken belonging to Robbins or his estate, which were located on Washington Place, for laying out an addition to Prospect Park at the Willink entrance, it becomes necessary to consider the effect of a stipulation entered into by counsel for the executors in the proceeding before the referee, which is as follows: "Now, we make no question about the right of Mr. Ferris to recover if the retainer covers the proceedings and is broad enough in its scope to include property condemned by the city for park purposes and for a public place. We make no question that Mr. Ferris had rendered no service, because we admit that he was prevented from so doing by Mr. Robbins. The sole question, as I understand it and as I believe it is, is to have the referee determine whether or not the retainer in its scope, taking it altogether, considering the block numbers and the lot numbers and the phraseology of the retainer itself, whether it covers the proceedings for the opening of an addition to Prospect Park—the Willink entrance. The Referee: And if he is entitled to recover this precise sum would accrue? Mr. Hawke: Yes. First. Does it apply to the Willink park entrance proceeding, where land was taken for park purposes? Second. If it does apply, is not the retainer

limited to the lot and block numbers specified or designated on the face of it, and does it not exclude all other property? Thirdly. Does it apply to property situate other than on Washington Place?" It was further stipulated by counsel for the executors as follows: "I will stipulate that the total award in the matter of the Willink proceeding paid to the estate of Aaron S. Robbins was the sum of \$83,055.51, and that 10 per cent. thereof, which Mr. Ferris has claimed, amounts to \$8,305.55, and that the award was made for all of the parcels shown upon the damage map, Exhibit 1, in lump, no separate award being made for the separate parcels." The order of the Appellate Division being unanimous, the finding of fact by the referee is controlling as to the amount of recovery in this case by Ferris, if he is entitled to recover anything. The learned referee states: "I am inclined to believe the testimony of the respondent's clerk [Ferris' clerk] to the effect that the retainer was made with reference to map then before both parties, in which the three aggregate damage parcels were together designated as lot 2, block 299, and that, therefore, the retainer was made, so intending. And although the respondent should have known of this existing 'mapped street,' and that, therefore, such designation was erroneous and not in accordance with the city map, yet, on this issue, I report in his favor, because, believing the clerk's testimony, I must so interpret the intention of both parties. On the basis of such a finding the amount for which the respondent would be entitled to maintain his lien is \$6,400. I have felt constrained to make this finding so that in case the court should deny the petitioner's motion, but should sustain the view above expressed, it may not be necessary to take up anew the question of the proper amount of the respondent's claim. I have done this, notwithstanding the fact that, in my opinion, the respondent must fall wholly on the main question presented by the motion. I do not think that the retaining agreement, either in terms or intent, covers the particular condemnation proceeding involved herein." It will be observed that the referee expressly found that the agreement of retainer was made with reference to the map before the parties, in which the three aggregate damage parcels were together designated as lot 2, block 299, and that, therefore, the retainer was made in reference to the same. In setting forth in the opening of this opinion the agreement of retainer it is stated that it contained lot and block numbers, but the same are not quoted. The fact is that lot 2, block 299, is expressly referred to in said agreement of retainer.

We thus have a finding of the referee that a portion of the lands described in the agreement of retainer were taken for the addition to Prospect Park, and that Ferris' commissions thereon at 10 per cent. would be \$6,400.

The referee evidently was of opinion, when he states that the retaining agreement does not over the condemnation proceedings, that the words "public places" do not describe lands taken for park purposes. These lands were taken from Washington Place and named in the agreement of retainer, thereby showing conclusively that this particular addition to Prospect Park must have been in the minds of Robbins and Ferris. Assuming, as we must, that the agreement of retainer applied to this addition to Prospect Park, it follows that the referee having found that a portion of the lands of Robbins mentioned in said agreement were taken in this proceeding, and that the amount of Ferris' commissions thereon is \$8,400, he is entitled to recover that amount, with interest from December 8, 1905, that being the day the award became payable to the estate of Robbins.

The orders of the Appellate Division and Special Term should be reversed, with costs, and an order entered sustaining the lien of Clarence C. Ferris in part, and directing the executors of Aaron S. Robbins, deceased, to pay to him the sum of \$6,400, with interest from December 8, 1905.

CULLEN, C. J., and O'BRIEN, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

Ordered accordingly.

(189 N. Y. 481)

ROSENBERG v. HAGGERTY et al.

(Court of Appeals of New York. Nov. 19, 1907.)

1. APPEAL—REVIEW—INTERMEDIATE APPEAL—APPELLATE DIVISION—UNANIMOUS AFFIRMANCE.

On appeal from a decree unanimously affirmed by the Appellate Division, the Court of Appeals cannot examine the facts, but is confined to the findings made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4322.]

2. SPECIFIC PERFORMANCE—SCOPE OF RELIEF—DISCRETION—EXERCISE.

Where the trial court found as a fact that a vendor could not specifically perform because of the pendency of an ejectment action, and no facts were found which would warrant the suspension of a decree for specific performance, it was not a proper exercise of discretion for the court to decree specific performance and suspend the operation thereof until such action had been fully disposed of.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 406-411.]

3. SAME—FORM OF DECREE.

Where a decree for specific performance provided that it should be suspended pending the termination of an ejectment action against the vendor, it was improper for the court to fix in the decree the time when the ejectment action should be considered as determined; it being sufficient for the purpose of specific performance that it should appear that the action had ceased to be pending, and that the lis pendens had been canceled.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Samuel Rosenberg against Agnes F. Haggerty and others. From a judgment for complainant, unanimously affirmed by the Appellate Division (114 App. Div. 920, 100 N. Y. Supp. 1140), defendant appeals. Reversed, and new trial ordered.

William F. Clare, for appellants. Albert A. Hovell and Charles Schwick, for respondent.

GRAY, J. This action was brought to compel the defendants specifically to perform their contract for the sale of certain land, and the decree, which orders specific performance, presents a question for our consideration upon this appeal. The plaintiff is the assignee of the vendee in the contract, and his complaint averred his ability and willingness to perform the contract, his tender to the defendants of the balance remaining to be paid of the purchase money, at the time and place agreed upon for the closing of the title, and the inability and refusal of the defendants to deliver a conveyance of the fee of the land free from incumbrances, as agreed upon. The judgment prayed for was for the specific performance of the terms of the contract, and that, if specific performance could not be had, the defendants should pay to the plaintiff the amount deposited on account of the purchase price, the sum of \$125, for the expenses incurred, and the sum of \$3,120 as damages. The answer of the defendants simply denied the allegation as to damages, and alleged the tender by the defendants, upon the plaintiff's refusal to accept the deed, of the amount of the moneys deposited, with interest, and such reasonable sum as the plaintiff might demand for the expenses incurred, which tender is alleged to have been refused.

The trial court made certain findings of fact and conclusions of law, upon which the judgment, or decree, now questioned, was directed to be entered. The facts alleged in the complaint were found, and there was the special finding "that the inability of the defendants to perform the contract arose from the fact that at that time there was pending and undetermined an action brought in the Supreme Court, * * * in which a summons and verified complaint and notice of pendency of action, * * * were duly filed in the office of the clerk of Kings county, * * * brought for the recovery and possession of the premises above described, and for damages," etc., against the then owner of the fee. As a conclusion of law, the court found that the pendency of the said action "constituted a legal objection to the title and rendered the defendants * * * unable to perform the said contract according to the terms." Then followed this conclusion of law, which, so far as material, I shall quote: "The court, in the exercise of its discretion, decides that a decree shall be entered for the specific performance of said contract by the defendants and for the conveyance

by them to the plaintiff of the premises, upon payment by plaintiff of the balance of the purchase price, with interest, etc., such contract to be so specifically performed within 20 days after the final determination of the action affecting said premises now pending in this court [describing it]. * * * Said action * * * shall be considered as finally determined on the first day wherein neither party can appeal, or further appeal, from any judgment, order, decree, or proceeding therein, and when neither party can proceed further with said action, or when said action is, by consent, or by order from which no appeal lies, discontinued, or dismissed and its pendency canceled. In the event of the said action * * * being finally determined in favor of the plaintiff therein, then the plaintiff herein may move at the foot of the judgment * * * and shall be entitled * * * to a judgment against the defendants for three thousand and twenty-five (3,025) dollars with interest," etc.

The decree in question followed the conclusion of law which has just been quoted from, and was affirmed by the Appellate Division, by the unanimous vote of the justices. 114 App. Div. 920, 100 N. Y. Supp. 1140. This disposition of the case, at the Appellate Division, precludes any examination on our part of the facts and confines us to the findings as made. Inspection of the record would not disclose the taking of any evidence, or anything beyond a colloquy between the judge presiding at the trial and the counsel; but that is of no consequence now, and it is for this court to decide whether the decree was, within settled rules, a correct exercise of judicial discretion. I think that it was not, and that the conclusion of law, which was embodied in the decree, had no sufficient basis in the facts as found. The difficulty with the case is not that the court was without power to exercise its discretion in the granting of equitable relief, but that the discretion was not judicially exercised upon the conditions as they were decided to exist. That is to say, that while the form of relief may rest in the discretion of the court, in order that that discretion, when exercised, shall appear to be sound and not arbitrary, it must find its justification in the circumstances of the case. Broad as is the jurisdiction of a court of equity in such cases, it nevertheless is governed in the administration of relief by settled principles and the action of the court is dependent, not upon its pleasure, but upon the facts of the case and the condition of the parties. The facts of a case might be found to exhibit such culpable conduct on the part of the vendor, whether fraudulent or neglectful, as to justify a decree in the nature of the present one at the suit of the vendee. But the findings here, and we cannot look beyond them, exhibit nothing except an inability on the part of the vendor to perform the contract of sale, because of the pendency of the ejectment action.

The trial court found the fact of the defendants' inability to perform and the fact that the pendency of the other action constituted a legal objection to the title; but no facts were found which would directly or impliedly warrant this suspension of the decree over the defendants. If no such extraneous facts exist, the court could only adjudge the return of the purchase moneys deposited by the vendee, with such further sum to cover his expenses and damages, as he might be able to prove. In the case of *Haffey v. Lynch*, 143 N. Y. 241, 38 N. E. 298, to which both parties refer, the general rule in equity was stated to be that specific performance of a contract to convey real estate will not be granted when the vendor, in consequence of a defect in his title, is unable to perform. This rule expresses the general doctrine of the cases and text-books in that respect, and the reason for it is, of course, plain, in that not only it would be oppressive to the vendor to do otherwise, but the court could not enforce a judgment of specific performance. *Haffey v. Lynch* was an action brought by the vendee, and it appeared that the pending action of ejectment, which constituted the legal objection to the title, had been brought after the making of the contract for the sale of the property and before the time for the closing of the title. Before the trial of the action for specific performance, however, the ejectment suit had been tried and the complaint therein had been dismissed. The judgment of the court below had refused to order specific performance and dismissed the complaint; but it was reversed in this court. We held that the general rule in equity, to which I have referred, is not applicable to a case where the defect in the title has disappeared at the time of the trial, and where the court can give an effective judgment for the equitable relief demanded. It was observed that "equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action and adapt their relief to those conditions." If, in the present case, the pending ejectment action had been disposed of in favor of these defendants before the trial came on, it would have been like the case of *Haffey v. Lynch*, and the court have effectively decreed specific performance by the defendants.

I think that this judgment should be reversed, and that a new trial should be had of the action, wherein it may appear either that the defect in the defendants' title continues, or that it has disappeared, in which latter event the court will be able to decree specific performance. In another respect, I think that this decree went too far in its terms, and that is with respect to fixing the time when the ejectment action should be considered as determined, for the purpose of directing specific performance. It would be sufficient if it was made to appear simply that the action had ceased to be pending, and that the *lis pendens* had been canceled.

he judgment should be reversed, and a trial should be ordered, with costs to the event.

ULLEN, C. J., and O'BRIEN, VANN, RNER, WILLARD BARTLETT, and ASE, JJ., concur.

idgment reversed, etc.

N. Y. 51)

TREADWELL v. CLARK et al.

rt of Appeals of New York. Nov. 19, 1907.)

PPREAL—FINDINGS OF FACT—CONCLUSIVE-

SS. The facts are conclusively established for Court of Appeals by the unanimous affirm- of the Appellate Division of the judgment red on the findings.

d. Note.—For cases in point, see Cent. Dig. 3, Appeal and Error, § 4322.]

LEDGES—SUIT TO REDEEM—RELIEF IN

UTY. Where corporate stock pledged to secure a the amount of which was disputed, was sferred by the pledgee without the knowl- of the pledgor to a third person, who red dividends thereon, the pledgor was enti- to sue in equity to redeem, an accounting to mine the amount of the debt and the divi- s being necessary, and the pledgor, if his had not been divested, being entitled to stock.

CORPORATIONS—PLEDGING STOCK—TRANS-

R BY AGENT OF PLEDGEE. Where corporate stock was stolen from a gee, the pledgor, not having assigned the cer- ate nor passed title thereto, might assert ti- o the stock in whosoever hands he found subject to the discharge of the lien of the gee.

d. Note.—For cases in point, see Cent. Dig. 12, Corporations, §§ 539-546; vol. 40, ges, § 49.]

AME.

A certificate of stock was pledged, but the ficate was not assigned nor was any power attorney authorizing assignment executed. rrvant of the pledgee transferred the stock out knowledge of the owner to one who did purchase in good faith. *Held*, that the sferree took the stock subject to the equities ast it in the hands of the pledgee, and was iently protected by the award to him of the ant he paid for the stock, with interest.

IMITATION OF ACTIONS—SUIT TO REDEEM

RPORATE STOCK PLEDGED—STATUTES. A suit by a pledgor of corporate stock to em against a transferee of the pledgee is rned by Code Civ. Proc. § 388, fixing limi- n of 10 years after the accrual of the cause ction in a case where limitation is not spe- ally prescribed.

d. Note.—For cases in point, see Cent. Dig. 33, Limitation of Actions, §§ 190-211.]

AME—TIME OF ACCRUAL OF CAUSE OF AC-

ON. Where the title to stock pledged to secure sputed debt was not divested, and the own- right to possession depended on his satisfac- of the debt, his right to sue to redeem the t in the hands of a transferee of the pledgee ed on his obtaining knowledge of the trans-

d. Note.—For cases in point, see Cent. Dig. 33, Limitation of Actions, §§ 473, 474.]

7. EQUITY—LACHES—AVAILABILITY AS A DE-

FENSE. Laches, to be available, should be pleaded. [Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 393, 648.]

8. SAME—ELEMENTS.

Where limitation has not barred a suit, mere delay will not bar it, unless unreasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 204-209.]

9. APPEAL—FINDINGS OF FACT—CONCLUSIVE-

NESS. A finding that a suit in equity was not barred by laches is a finding of fact, and, if unanimously affirmed by the Appellate Division, the Court of Appeals cannot disturb it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4345.]

Edward T. Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Di- vision, First Department.

Action by George A. Treadwell against William A. Clark and others. From a judg- ment of the Appellate Division (114 App. Div. 493, 100 N. Y. Supp. 1), affirming a judg- ment for plaintiff, defendants appeal. Af- firmed.

A. B. Orukshank, for appellants. Charles M. Demond, for respondent.

GRAY, J. This action was brought to re- deem from the defendants' possession 100 shares of the capital stock of the United Verde Copper Company, which the plaintiff had pledged to secure an indebtedness, and which, having been lost by, or taken from the pledgee, eventually, was purchased by the defendant Clark. The plaintiff had judg- ment, entitling him to redeem the certificate for the shares upon payment of the amount of the indebtedness for which it was pledged, and upon further making good to Clark the amount that he had paid for it. The judg- ment requires Clark to return, with the cer- tificate, the dividends received upon the stock, with interest, and, in default thereof, gives the plaintiff the value of the stock at the time of the trial.

The facts, as they are conclusively estab- lished for this court by the unanimous af- firmance of the judgment entered upon the findings, may, sufficiently for the questions to be considered, be stated as follows: The plaintiff, while residing in London, England, became indebted to Bennett, a grocer, for provisions and, in 1888, "as a pledge for the payment of" his then indebtedness and for that which he might thereafter incur, "and for no other purpose," delivered to Bennett's manager 100 shares of stock in question. Up- on delivering the certificate, which stood in his name, the plaintiff wrote his name upon the back thereof; but the finding is that he "did not execute, or subscribe, any written assignment thereof, or any power of attorney in blank, or otherwise, authorizing any other person to assign said certificate." Thereaft- er Bennett's manager, in whose possession he had left the certificate, left him; took, with-

out his employer's knowledge, the certificate to this country, and then, in January, 1893, sold it to Burgess from whom Clark acquired it, in June of the same year, for the price of \$300. No proceedings had ever been taken by, or for, Bennett to realize upon the pledged stock by a foreclosure of the lien, or by sale with notice, or otherwise. The amount of that indebtedness was in dispute at the time of the deposit of the stock by the plaintiff, and it remained in dispute until the trial of this action. The plaintiff, in his complaint, made a tender to Bennett of the amount he, plaintiff, alleged to be due upon his account, and also of any larger sum which might be found to be due from him. In June, 1893, the plaintiff first became aware that Clark had possession of his stock through a request to him to execute an assignment of the certificate. Bennett's manager and his vendee, Burgess, whose indorsements upon the certificate were insufficient and irregular, at Clark's request, had executed formal assignments. When the request came to plaintiff from Clark, it was his first knowledge that Bennett had parted with the pledged stock, and he notified Clark, personally and in writing, of the facts relating to his ownership and to the pledge. He demanded of him the certificate, and, further, notified the copper company of his ownership of the stock. When Clark had purchased the stock, he observed that there had been no regular, or formal, transfer, or assignment, of the certificate. In subsequent interviews, after the plaintiff knew that Clark had his stock, the facts were fully disclosed to Clark or his agent, concerning plaintiff's title and his grounds for claiming its return to him. The trial court found that Clark, prior to his acquisition of the stock, had no knowledge that it had been pledged by the plaintiff to Bennett, or how it had come into the possession of Bennett's manager; but the court expressly refused to find, upon Clark's request, that Clark "purchased said stock in good faith, believing Burgess had the title thereto and a right to dispose thereof." For this refusal, there was warrant in the evidence of the circumstances surrounding Clark's transaction of purchase. The inferences were certainly sufficiently strong for the court to refuse to find good faith and to limit its statement of fact to the one that Clark, prior to his acquisition of the stock, had no actual knowledge or information of the defendant's pledge of the stock. The plaintiff, some time after Clark's refusal to deliver up the stock to him, in 1899, commenced this action. He joined as parties defendants all who had been, or might be, interested in the issues, including the public administrator of the county of New York, who, upon Bennett's death pending the action, had received letters of administration upon Bennett's estate, and the directors of the copper company, who, by reason of proceedings for the dissolution of the corporation, had become vested with

its property and rights under our statutes. Of the many objections which the appellants, who are Clark, the company, and its directors, have made to the plaintiff's recovery, there are but a few which I deem it important to consider.

His right to maintain an equitable action is questioned, and it is argued that his remedy was at law, by a possessory action, or by an action for damages for conversion. This defense was not pleaded in the answer; but, assuming that he could assert it upon the trial by his motion to dismiss upon the pleadings, it is untenable. The plaintiff's right to the stock had never been foreclosed, or divested, by any proceedings on the part of Bennett, who held the title to it as pledgee. It is true that, as a general rule, an action in equity will not lie to redeem property pledged for a debt; but this case falls within a recognized exception to the rule. An equitable action is proper where special grounds appear. See 2 Story's Eq. Jur. § 1032; Jones on Pledges, § 556; Roberts v. Sykes, 30 Barb. 173. In the first place, it was necessary that there should be an accounting, in order to ascertain the amount of the plaintiff's indebtedness, for which the stock had been pledged. That was in dispute at all times. In the next place, while Clark held the certificate of stock, he did not own the debt for which it had been pledged, and, if he had not acquired the stock in good faith and was not entitled to retain it he was bound to account for the dividends and profits which he had received upon it. Further, if the plaintiff's title had never been divested, he was entitled to have back the stock itself. He had the right to have his investment, and could not be remitted to a judgment for damages against Clark. In that connection it may be remarked that it was alleged in the complaint, and it was not denied in the answer, that Clark was practically through his ownership, or control, of all but a few hundred shares of the capital stock, the United Verde Copper Company itself.

It is unnecessary to discuss the claim of the appellant that he should be protected in his purchase, by reason of the delivery to him of the certificate, with indorsements in blank by the plaintiff and by his assignor. It appears that upon the back of the certificate was printed a blank power to transfer, which was not subscribed, nor executed, by the plaintiff. He, Thomas, and Burgess had signed their names in the blanks in the instrument intended for the insertion of those of the assignor, his attorney, and his assignee. No signatures of parties, or witness, appeared below, as regularity would require. If Clark had purchased in good faith, mere irregularities in the signatures of the previous holders and the want of formal transfers might be disregarded, and the intent to transfer by delivery might be found and would be given effect. But, in addition to the finding that the plaintiff did not execute,

cribe, any written assignment, or any of attorney in blank, authorizing any person to assign the certificate, we refusal by the court to find that purchased the stock in good faith, be Burgess had the right to dispose of the stock was stolen from the pledgee, the plaintiff, as its true owner, had the right to assert title to it in whosoever hands he might find it, subject to the discharge of the debt of the pledgee for the debt. As he cannot stand upon his good faith in selling it, he certainly cannot be heard that plaintiff's indorsement of the certificate, or that of the other intermediate parties, was sufficient, or intended, to make the certificate negotiable and pass with title by mere delivery. He took it subject to all the equities existing against it in the hands of his assignor. In awarding to him notwithstanding the refusal to credit him with good faith in the purchase, the fact that he had paid for the stock, with interest, the trial court was more lenient, perhaps it was compelled to be.

He argued that the plaintiff's cause of action was barred by the lapse of more than six years from the time it accrued. The plaintiff first knew that his stock had gone from the possession of Bennett, the pledgee, in 1893, when he received the request to execute a formal assignment of the certificate. As this action was commenced in December, 1899, more than six years elapsed since the plaintiff's discovery of the disposition made of his stock. I think the action was governed by the provision in section 388 of the Code of Civil Procedure which fixes a limitation of 10 years in the cause of action accrues in a case where a limitation is not specially prescribed; this section applies to all equitable actions. *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. 2d 401, 10 Am. St. Rep. 554, and this clearly is, as I have before pointed out. That so, the cause of action did not accrue when the plaintiff knew of Clark's wrongful disposition of his stock and his determination to sell it. His title to the stock had never been divested, and his right to resume its possession depended upon his satisfaction of a disputed indebtedness, not to Clark but to Bennett. Hence his action to recover the stock from Clark's hands was based on any contract obligation, or liability, on Clark's part, but upon his obligation to return the stock for want of a good title and to account for the profits received from it. Bennett had made no request to Clark to redeem, and the latter was placed in the position of having to establish the full disposition of the pledge, the injury of Clark's title to it, and the amount due to him, the plaintiff, was indebted upon the stock to his pledgee. It seems to me clear that, as the legal remedy was barred, the statute bar as prescribed for equitable remedies was applicable.

Finally, the appellants make the objection that the plaintiff was guilty of laches in bringing his action. This defense properly should have been pleaded (*Zebble v. Farmers' L. & T. Co.*, 139 N. Y. 461-468, 34 N. E. 1067); but even if it was open to the appellants to insist upon such an objection, under the circumstances as disclosed upon the trial, this court should not overrule the courts below in their refusal to recognize it. If the statute of limitations has not barred the suit, mere delay should not be held to bar it, unless unreasonable. The trial court refused to find, at the request of the defendants, that the plaintiff was guilty of unreasonable delay in acting upon his rights, and this court should not overrule the determination of the courts below in that respect. We have held it to be a matter of serious doubt whether the equitable doctrine of laches, as distinct from the statute of limitations, now exists in this state (*Cox v. Stokes*, 156 N. Y. 511, 51 N. E. 310); but, however that may be, I do not see how this court can interfere with the finding below that the plaintiff has not waived his right to equitable relief by any neglect to proceed promptly. Whether he was at fault for unreasonably deferring his action, or was chargeable with acquiescence in the situation, was a question upon all of the facts developed by the evidence. It was one to be determined in the discretion of the court upon the circumstances. *Galway v. Metr. E. R. Co.*, 128 N. Y. 132, 156, 28 N. E. 479, 13 L. R. A. 788.

No other material objections are presented by this appeal, and, in view of the full consideration which the case has received in the Appellate Division, further discussion is unnecessary.

I advise the affirmance of the judgment, with costs.

HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur. CULLEN, C. J., not voting. EDWARD T. BARTLETT, J., dissents.

Judgment affirmed.

(189 N. Y. 460.)

METZ, Comptroller, et al. v. MADDOX, Justice of Supreme Court, et al.

SAME v. DAYTON, Justice of Supreme Court, et al.

(Court of Appeals of New York. Nov. 19, 1907.)

1. ELECTIONS—RECANVASS OF VOTES—STATUTES—VALIDITY.

Laws 1907, p. 1123, c. 538, providing for the determination by the Supreme Court of an election contest, if construed as providing for a recount and recanvass as described in its title, contravenes Const. art. 2, § 6, requiring laws creating officers for counting votes at elections to secure equal representation of the two largest political parties.

2. SAME—CONTEST—REVIEW BY COURTS—SCOPE OF INQUIRY.

An appeal to the courts under the general election law authorizing an appeal to the courts to review the action of canvassers in holding

ballots void because not marked in accordance with the statute, or to have any protested ballots thrown out, presents only questions of law arising on the face of the ballots for judicial determination.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Elections, § 325.]

3. MANDAMUS — PROCEEDINGS OF PUBLIC BOARDS—BOARDS OF CANVASSERS.

Mandamus lies to compel an election board of canvassers to do its duty, but not to compel it to certify the result by specifying any particular number of votes as cast for one party or the other; the actual determination of the result of the count of ballots being the exclusive province of the board, subject to review by quo warranto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, §§ 154-156.]

4. JURY—RIGHT TO TRIAL BY.

Laws 1907, p. 1123, c. 538, providing for a hearing and determination by the Supreme Court of an election contest, if treated as authorizing a proceeding to determine title to office as a substitute for quo warranto, and construed as implying that questions of fact therein should be disposed of in the ordinary manner prevailing in judicial trials, contravenes Const. art. 1, § 2, requiring trial by jury in cases in which it has been heretofore used, in that it deprives the incumbent holding the office under a certificate of election of a jury trial.

5. ELECTIONS—RECANVASS OF VOTES—STATUTES—VALIDITY.

If the provision in Laws 1907, p. 1123, c. 538, entitled, "An act to provide for a judicial recount and recanvass of the votes" cast for an office at an election, that there shall be no other judicial review of any ballots canvassed in the proceedings authorized by the act, be stricken out as invalid, the proceeding authorized by the statute is reduced to a mere canvass, and contravenes the constitutional provision for bipartisan boards embodied in Const. art. 2, § 6.

6. MUNICIPAL CORPORATIONS — OFFICERS — CONSTITUTIONAL OFFICE.

The office of mayor of the city of New York, whether a constitutional office because recognized in Const. art. 12, § 2, or not, is a local office, which under the Constitutions of 1846 and 1895 must be filled by election by the people or by appointment from local officers, and the Legislature has no power to fill it in any other manner, and, so long as the term of office is not reduced, the one holding a certificate of election thereto is entitled to hold the office until ousted as the result of a judicial determination or removed for misconduct.

7. ELECTIONS—RECANVASS OF VOTES—STATUTES—VALIDITY.

Where a canvass was concluded under the statutory provisions for its conduct existing at the time, the Legislature has no power to create a new tribunal to recanvass the election and award possession of the office to another claimant.

Appeal from Supreme Court, Appellate Division, Second Department.

Separate applications of Herman A. Metz, as comptroller of the city of New York, individually and as a taxpayer thereof and others, to prohibit Samuel T. Maddox, justice of the Supreme Court, and others, and to Charles W. Dayton, justice of the Supreme Court, and others, from proceeding to recanvass and recount ballots of an election. From orders of the Appellate Division of the First and Second Departments denying the writ (105 N. Y. Supp. 702), petitioners appeal.

Reversed, and writ of prohibition ordered in each case.

Francis K. Pendleton and Eugene Lamb Richards (William B. Crowell and Francis Martin, of counsel), for appellants. Clarence J. Shearn, for respondents.

CULLEN, C. J. At the general election held in November, 1905, the office of mayor of the city of New York was to be filled. The two leading candidates for that office were George B. McClellan and William R. Hearst. After the canvass of the votes, a certificate of election was duly issued by the board of elections of the city of New York to George B. McClellan, and on the 1st of January following he entered into possession of the office under said certificate and has held it ever since. The contest for the office was comparatively close, there having been nearly 600,000 votes cast, and the majority returned for McClellan being about 3,400. Question was raised as to the fairness of the election and the accuracy of the result certified. In 1906 an application was made by Mr. Hearst to the then Attorney General for the commencement of an action in the nature of quo warranto to test the title of McClellan to his office. This application was denied. In 1907, a new Attorney General having been elected, the application was renewed and a suit brought against McClellan, which is now pending. On the 18th day of June, 1907, there was enacted by the Legislature and approved by the Governor a statute (Laws 1907, p. 1123, c. 538), the validity of which is the subject of this controversy. It is entitled "An act to provide for a judicial recount and recanvass of the votes cast for the office of mayor at the election of the seventh of November, nineteen hundred and five, in all cities of the first class in which the ballots have been preserved," and will be given in detail hereafter. It is sufficient at this point to say that the act provided for a recanvass of the votes on the petition of any candidate for said office. In June Mr. Hearst presented his petition to a Special Term of the Supreme Court in the Second judicial department for a recanvass of the votes under the terms of the statute, and a few days thereafter a similar petition to the Supreme Court in the First judicial department. The justices to whom such applications were made proceeded to conduct a recanvass of the votes, whereupon the present appellants, the comptroller, and other officers of the city of New York, and McClellan individually, applied to the Appellate Divisions of the two departments for writs of prohibition restraining the Special Term of the Supreme Court from proceeding on said petition on the ground that the statute was unconstitutional and void. On the return of the alternative writs, the controversy was submitted to the courts. The Appellate Division of the Second Department first reached a decision, and upheld the validity of the statute by a divided court. The

ed justices of the Appellate Division of First Department were unanimously of opinion that the statute was unconstitutional, deemed it proper to follow the decision of the Second Department, earlier made, but regard to their own judgment. Orders were entered in each department denying the writ. From these orders appeals have been taken to this court. No objection is made to us as to the procedure adopted by the Justices, and the sole question before us to be determined is whether said statute of 1907 is in contravention of the provisions of the Constitution.

The statute reads as follows:

Section 1. Upon the petition, within twenty days after the passage of this act, of any date for the office of mayor voted for at the election of the seventh of November, nine hundred and five, in any city of the first class in which the ballots have been preserved upon such notice as the court shall prescribe, the Supreme Court, in any judicial district within which any of the election districts affected are situated, must proceed to a canvass of the vote in any election district specified in the petition. The court, in such a proceeding, make an order, copy of which shall be served upon each date voted for at such election, that all requisite ballots shall be produced in the city courthouse and canvassed in the presence of all candidates affected, or the counsel for each candidate as shall have appeared in the proceeding, and of an attorney who shall be appointed by the court and designated in order as commissioner. The commissioner shall canvass the ballots one by one, permitting the counsel for the candidates affected to examine them. If counsel differ from the commissioner as to the counting of any ballot, it shall be at once placed on one side as a disputed ballot. At the conclusion of the canvass of the vote in each election district the commissioner shall prepare a written statement of the count upon the undisputed ballots, and that statement, together with the disputed ballots, shall be submitted to the court. The court shall thereupon proceed to canvass the disputed ballots and shall rule on each ballot in turn. If exception is taken to any ruling, the court must endorse the ruling and the exception upon the back of the ballot in ink. At the conclusion of the canvass the court shall make, in triplicate, a final order for each election district filed in the petition, which shall contain a complete return of the vote under review. One of these orders shall be filed in each office where the returns of the election officers have been filed, which returns it shall in all respects supersede. A summary appeal may be taken to the Appellate Division from any final order within ten days after it is made. Upon such an appeal, beside the order of the court below, only the ballots as to which exception was taken in the court below shall be produced, and the Appellate Division shall proceed to canvass them in a summary way. The Appellate Division shall make, in triplicate, a final order for each election district which shall contain a complete return of the vote then under review. One of these orders shall be filed in each office where the returns of the election officers have been filed, which returns and the order of the court below it shall in all respects supersede. No appeal shall be taken from any such order of the Appellate Division.

"Sec. 2. Within ten days after filing the order or orders containing a return of the vote under review, or, if an appeal therefrom has been taken, then, within ten days after filing the final order or orders of the Appellate Division, the board or officer authorized to issue certificates of election must prepare from said orders and from the returns not then superseded a tabulated statement showing the total number of votes cast for each candidate for the office of mayor at the election aforesaid, which tabulated statement, certified by the board or officer aforesaid, shall be filed in the office of the said board or officer. Thereupon and within three days the said board or officer shall issue and deliver a certificate of his election to the candidate shown to have received the greatest number of votes for the office of mayor, which certificate shall, in all respects, if it shall change the previously declared result of the election, supersede the certificate theretofore issued by the said board or officer. Upon receipt of such new certificate, the candidate certified therein to have been elected shall forthwith take office, be invested with the powers and perform the duties appertaining to such office. Any justice of the Supreme Court may make such summary order or entertain such proceedings as may be necessary to carry said recount into effect and secure to the candidate shown by said recount to have been elected, full possession of the office of mayor and the exclusive right to exercise the functions of said office.

"Sec. 3. Nothing in this act contained shall impair or affect any right under the Constitution or laws of this state to question, by proceeding in the courts, the right or title of the candidate who shall, as a result of said recount, be declared elected; but there shall be no judicial review of any ballots which shall have been canvassed in the proceedings herein authorized."

The remainder of the statute provides for the validity of the acts of the incumbent of the office until the issue of the new certificate, if that changes the result, and for defraying the expenses and costs of the proceeding, provisions that are not material to our discussion of the case.

The constitutionality of the statute before us has been attacked on many grounds. Some of the objections presented to it are frivolous, and need no consideration. There are some others which raise questions fairly debatable and which might be difficult to answer. All of these, however, we do not in-

vision shall proceed to canvass them in a summary way. The Appellate Division shall make, in triplicate, a final order for each election district which shall contain a complete return of the vote then under review. One of these orders shall be filed in each office where the returns of the election officers have been filed, which returns and the order of the court below it shall in all respects supersede. No appeal shall be taken from any such order of the Appellate Division.

tend to review, as we think the statute so clearly contravenes the Constitution in one of two respects as to render it unquestionably invalid. The proceeding authorized by the statute either is, as its title indicates, a recanvass of the votes cast for the office of mayor, or is a judicial hearing and determination of the title of the respective candidates at that election to the office of mayor. Elaborate discussion is to be found in the briefs of the opposing counsel and in the opinions of the learned judges of the courts below as to which of these two is the real character of the proceeding. Neither at this point nor, indeed, at all, is it necessary to definitely determine which is the true character of the proceeding. If it is a recanvass, it contravenes section 6, art. 2, of the Constitution, which provides: "All laws creating, regulating or affecting boards of officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes." If, on the other hand, it is a judicial determination of the title to office, it contravenes section 2, art. 1, of the Constitution, which provides: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." That the courts by whom the recanvass is to be made are not bipartisan bodies is apparent, and that the statute provides for no determination by a jury of the disputed issues of fact is equally clear. Here we may well rest, and it is necessary to consider only the arguments adduced to withdraw the statute from both these constitutional limitations.

It is urged by the counsel for the respondents that there has prevailed in this state for some years a certain measure of review exercised by the courts over the action of canvassers, and that the validity of the election law authorizing such review has never been challenged. The statement is entirely correct. Nor do we think that the validity of the legislation can be successfully challenged. But the recanvass authorized by this statute is of a far different character. Under the general election law ballots not marked in accordance with the statutory provisions are void, and the canvassers do not count them. Ballots protested by either party as marked for identification are counted. The void ballots and the protested ballots are not returned to the box, but inclosed in envelopes and deposited in the clerk's office. Either party may appeal to the courts to review the action of the canvassers in holding any ballot void or to have any of the protested ballots thrown out as marked for identification. This review presents for determination only questions of law arising on the face of the ballots. Boards of can-

vassers have never been wholly exempt from judicial control. There has been no time in the history of the state when mandamus would not lie to compel a board of canvassers to do its duty, but at no time have the courts had power to compel the board of canvassers to certify the result of their canvass by specifying any particular number of votes as cast for one party or the other. In other words, the actual count and determination of the result of the count of the ballots has always been the exclusive province of the board of canvassers, subject to review in but one proceeding known to the law, *quo warranto*. Of course, the officers making a false count could be punished for their crime. Their false determination was no protection to them. Now it was the count, in which at all times there has been the greatest danger of fraud, that the Constitution intended to safeguard, and the people by the Constitution determined that the best way to safeguard the count was to require it to be made by a bipartisan board. The most cursory examination of the present statute will show how widely the scheme provided by it differs from any review or control the courts have ever exercised over a board of canvassers. By this statute an absolutely new canvass is to be made, proceeding from the very initial step, that of counting the votes in the boxes. The title of the statute well describes the proceeding as a "recount and recanvass." The effect of the proceeding is or may be to give a certificate of election to another person than him whom the original canvass showed to be elected. The Legislature can no more authorize a recount and recanvass by other than a bipartisan board, the result to act as a substitute for that of the original canvass, than it can authorize a count and canvass to be made in the first instance by other than a bipartisan board. Of course, this statement is made on the assumption that the title of the statute accurately characterizes the proceeding therein described, and that it does not provide for a judicial determination of the title to the office, in which latter aspect we will now proceed to consider the validity of the act.

There are serious difficulties in treating the proceeding as one to determine the title to office. What does the statute direct the court to do after the receipt of the petition? There is no provision for any answer to the petition, nor, if its allegations be denied, for any hearing on the issues raised by such denial. There is no provision for the examination of witnesses as to the identity of the ballots and their preservation, nor on any other question of fact that might arise. Still, it is possible that, the proceeding being before a court, we should construe the statute as implying that questions of fact arising in the proceeding should be disposed of in the ordinary manner prevailing in judicial trials, and it is very probable that we should consider it our duty to so construe

statute were it otherwise valid. But the objection to the constitutionality of statute, regarded from this point of view, at it deprives McClellan of his right to trial by jury. The constitutional provision that the right of trial by jury in cases of such mode of trial had hitherto prevailed, found in every Constitution of the state the people have at any time adopted. A recent appeal to this court (*Malone v. Peter's & St. Paul's Church*, 172 N. Y. 64 N. E. 961) to determine whether an action in character of action was referable or it was necessary for us to examine the law of the law prior to the Revolution to find at that time the party had an absolute right to a trial by jury, for, if he had, the right was still extant. That actions to determine the title to public office were always, in this state and in England before our independence, triable before a jury, is common knowledge. *People v. Albany & Susannah R. R. Co.*, 57 N. Y. 161. The *Real Statutes* of 1830 declared that issues on a writ of quo warranto should be tried in the same manner as in personal actions, i. e., by a jury. Both the Code of 1849 and the Code of Civil Procedure of 1877 expressly enumerate the action as triable before a jury. The special proceeding for delivery of books and papers of an officer does not violate this provision. In such proceeding the court merely deals with the prima facie title of the applicant. It does not go behind the certificate of election. To maintain the contest for the present will largely, if not principally, present questions of fact. The count of the votes in one of the boxes may differ radically from the vote returned by the canvassers. The proof given may tend to show that the count has been preserved inviolate, and thereby justify the admission of its contents in evidence. On the other hand, there may be evidence tending to show that the box was tampered with, and there may also be the testimony of the election inspectors and canvassers that on the night of election the ballots in the box were examined as returned by them in their statement to the count. The vital issue will then be whether the true count of the ballots on election night, and the exclusive determination of that question will belong to a jury. Have it so determined is the appellant McClellan's constitutional right.

The learned justice who wrote for the majority of the Second Appellate Division answers the claim of McClellan to a trial: "If trial by jury were used in actions of quo warranto at the time of the adoption of our Constitution, that secures the form of trial in such action or in any form of action or proceeding substituted for it."

People v. Albany & Susquehanna R. R., 57 N. Y. 161. But under the common law and by statute such an action could only

be brought by the sovereign. A contestant for an office could not bring any action or proceeding to oust the incumbent, or try the right to the office; and that has remained the case in this state down to the present time. In creating a new action or proceeding—one that did not exist when the Constitution was adopted—for the trial of disputes of contestants of an election of (at?) the suit of a contestant, the Legislature is free to make it summary or by jury trial. That has been generally held throughout the country, as appears by the decisions of other states, cited in the foregoing." The error of this reasoning lies just here: The learned justice has overlooked the difference between the situation of the contestant for an office and that of the incumbent of an office. As the learned judge writes, the title to an office could be challenged only by the sovereign, in this country the people, and it is a matter of grace on the part of the people or their legal representative to allow a suit to be brought on the relation of the contestant. Therefore, as a contestant has no constitutional right to bring an action, it may be argued that he can have no right to have the trial of the action in any particular manner. Assuming the correctness of this proposition, it would be a perfect answer to any attack on the validity of the statute that the contestant might make, but we are at a loss to perceive its application to the case of the incumbent. McClellan was in office under a certificate of election entitling him thereto. In the only judicial proceeding known to the law, or that ever prevailed in the state, through which he could be ousted from office, he was entitled to a jury trial on the issues of fact. As is well said by the learned justice below in the excerpt already quoted: "If trial by jury were used in actions of quo warranto at the time of the adoption of our Constitution, that secures that form of trial in such action or in any form of action or proceeding substituted for it." Giving the present statute the fullest force and effect as authorizing a judicial proceeding, the most that can be said of it is that it is a "proceeding substituted for" quo warranto.

The learned counsel for the respondents relies on the provision of that portion of the third section of the act already quoted to relieve the statute from the objection of failure to provide for a jury trial: "Nothing in this act contained shall impair or affect any right under the Constitution or laws of this state to question, by proceeding in the courts, the right or title of the candidate who shall, as a result of said recount, be declared elected; but there shall be no judicial review of any ballots which shall have been canvassed in the proceedings herein authorized." He urges that this leaves unimpaired the constitutional right of the incumbent to assert his title to office. If, however, there is to be no judicial review "of any ballots which shall

have been canvassed in the proceedings," it is difficult to see that there is much left open to litigation in the quo warranto suit. True, if McClellan's eligibility to office, his residence, his age, his citizenship were challenged, these matters would be open to litigation; but they are not challenged, and the real issue in the case, the question who got the most votes at the election, will be foreclosed by the determination on the judicial recount. The learned counsel appreciates this, and, to obviate the difficulties, suggests that to uphold the statute the court should strike therefrom the provision that there shall be no further judicial review of the ballots, under the well-known rule that if a part of a statute is valid and part is invalid, if the parts are separable, the valid part may be upheld though the invalid part be declared void. To make the elimination suggested would be to thoroughly emasculate the statute. If, however, we accede to the counsel's contention, what will be the result? The essence of a judicial proceeding is that it decides something, and that its decision is conclusive on the parties. If we eliminate the provision that there shall be no judicial review of the ballots, it seems to us clear that the proceeding authorized by the statute is reduced to a mere canvass, pure and simple, and it at once runs counter to the constitutional provision for bipartisan boards. The only result of the proceeding would be a new canvass and a new certificate of election did the recanvass differ from the original.

Now, at this point it becomes necessary to state an objection that we have to the constitutionality of this statute that goes beyond any that we have discussed. The results of the election were canvassed and determined under the provisions of law then existing, and a certificate of election given to McClellan which conferred *prima facie* title to office, and under which he entered into the office of mayor. In this state *prima facie* title to elective office has always been conferred by certificates of election according to the results canvassed, and conclusive title has been the subject of determination by judicial proceedings. The incumbent holding the *prima facie* evidence of title has never been subject to be ousted in any other manner than by legal proceedings, members of the Legislature alone excepted. It is true that the appellant McClellan has no property right in his office nor in the incumbency of his office during the term for which he was elected. In theory of law he holds the office for the benefit of the public, not for his own. It is possible that the office may now be considered a constitutional one, for it is recognized in article 12, § 2, of the Constitution of 1895; but, whether considered a constitutional office or not, it is and has always been a local office which, under the Constitution of 1846 and that of 1895, must be filled by election by the people or by appointment

from local officers. It is not within the power of the Legislature to have it filled in any other manner. It is true that no term is prescribed for the office by the Constitution, and that the present incumbent might be legislated out of office by an act of the Legislature changing the official term (*People ex rel. Devary v. Coler*, 173 N. Y. 103, 65 N. E. 956); but no other man can be legislated into office. As long as his official term has not been reduced by legislation, the appellant McClellan is entitled to hold the office until he is ousted as the result of a judicial determination, or is removed for misconduct. A canvass having been concluded under the statutory provisions for its conduct existing at the time, the Legislature has no power to create a new tribunal with power to recanvass the election and to award possession of the office to another claimant. If such were its power, the Legislature might, except for the bipartisan provision first found in the Constitution of 1895, equally conduct the recanvass and make the determination itself. The result of such a doctrine would be appalling. Where the result of an election had been adverse to the party to which a majority of its members belonged, the Legislature might by a subsequent statute authorize a recanvass of the election of the Governor, of the judges of the courts, of the state officers, and of the presidential electors, who, in this state, are elected by the people. We hold that no such power exists. Of course, the Legislature may alter the form of judicial proceedings to try the title to office, making it as summary as possible, provided it retains the right of trial by jury, but we are speaking of a mere recanvass as distinguished from judicial proceedings.

It is unfortunate that the election in New York was so close as to leave doubts in many minds as to the accuracy of the result declared. The whole question, however, can be tried and determined in the quo warranto suit now pending, and in that suit everything that is authorized or directed by the statute before us, opening the boxes, recount, and the like, can be had, and it is not apparent why a determination cannot be as speedily reached in that action as by the proceedings authorized by this statute. It is also unfortunate that dilatory objections to the prosecution of that suit have apparently met with some success in the courts, but it would be far more unfortunate if, moved by any considerations of that character, or by the entirely natural desire of the electors of the city of New York to learn whether the result of the election of mayor was honestly and accurately declared, we should not only shut our eyes to plain constitutional provisions, but uphold the validity of a practice which might lead to infinite mischief in the future.

The order appealed from should be reversed and the writ of prohibition issue in each

with costs to the appellants in both, but in one proceeding only.

RIEN, EDWARD T. BARTLETT, HT, VANN, HISCOCK, and CHASE, incur.

er reversed, etc.

Y. 84)

OF BUFFALO v. DELAWARE, L. & W. R. CO.

of Appeals of New York. Nov. 19, 1907.)

MUNICIPAL CORPORATIONS—STREETS—EXISTENCE—PRESUMPTIONS.

A street once in existence is presumed to be until it ceases to be such owing to neglect or some other lawful cause.

AL—FINDINGS OF FACTS.

A finding that for a period of six years and remises designated as a street "ceased to be used or used as a public highway" is a finding of fact, though included among the findings of law; the question of cessation of a street for the prescribed period being a question of fact.

Note.—For cases in point, see Cent. Dig. Trial, § 926.]

REAL—ERRONEOUS CLASSIFICATION OF FINDINGS—CORRECTION.

An error in the classification of findings as of fact does not prevent the Appellate Court from classifying them in accordance with their character, and a finding of fact placed under the head of "Conclusions of Law" will stand on appeal as a finding of fact, at least for the purpose of upholding the judgment.

MUNICIPAL CORPORATIONS — STREETS — STRUCTURES OVER STREETS.

Where a private dock is built on a public shore on the shore of navigable waters, the dock comes a part of the street and the public has the right to travel over it; ownership of the dock is not being inconsistent with the existence of the street and the public right to travel.

Note.—For cases in point, see Cent. Dig. Municipal Corporations, §§ 1441-1446.]

E. A street. The right of an upland owner to build a street, the fee of which is in himself, does not involve the right to appropriate the street or to make a reasonable use thereof.

Note.—For cases in point, see Cent. Dig. Municipal Corporations, §§ 1441-1446.]

DEDICATION—OPERATION AND EFFECT—DEDICATION.

A person dedicating land for a public street at any time before acceptance withdraws the land from the public, while after acceptance the land ceases, except that he may use his land for such purposes as do not interfere with the use for street purposes.

Note.—For cases in point, see Cent. Dig. Dedication, § 79.]

MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTION—REMOVAL.

Where a dock is built on a public shore on the shore of navigable waters, the dock comes a part of the street and the public has the right to travel over it; ownership of the dock is not being inconsistent with the existence of the street and the public right to travel. An owner cannot destroy a highway by any action of his own, and, if he prevents public travel, he can be compelled under Pen. Code, § 385, and Highway Laws 1890, p. 1198, c. 568, § 104, to remove the obstruction, and, if it does not, it becomes part of the street.

move the obstruction, and, if it does not, it becomes part of the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1498-1501.]

8. APPEAL—REVIEW—INCONSISTENT FINDINGS.

A finding that a street has been abandoned is inconsistent with a finding that a dock built over the street has been used and traveled continuously as a street, and the court on appeal from a judgment adjudging the nonexistence of the street must reject the former finding, and accept the latter, with the same effect as if it was the only finding on the subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3313.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the city of Buffalo against the Delaware, Lackawanna & Western Railroad Company. From a judgment of the Appellate Division (114 App. Div. 915, 99 N. Y. Supp. 1049), affirming a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

The object of this action was to secure a judicial determination that a portion of the river front in the city of Buffalo is a public street, and to compel the defendant to remove certain obstructions therefrom. The main issue raised by the answer was whether the locus in quo, called Front street, was a public street when the action was commenced. The first trial resulted in two adjudications: First, that the portion of the alleged street lying west of Main street is not a public highway; second, that the part lying east of Main street, between Main and Washington, is a public highway. Each party appealed from the judgment so far as it was against itself, and the Appellate Division affirmed the first determination, but reversed the second and ordered a new trial, both on the law and the facts, as to that branch of the controversy only. 68 App. Div. 488, 74 N. Y. Supp. 343. The plaintiff thereupon applied to the Appellate Division to so modify its order as to grant a new trial of all the issues, but the application was denied, and upon appeal to the Court of Appeals the order denying the application was affirmed. 81 App. Div. 655, 81 N. Y. Supp. 1120; 176 N. Y. 308, 68 N. E. 1115. The plaintiff, which in the meantime had appealed from the entire judgment rendered by the Appellate Division, then moved for leave to withdraw that part of its appeal relating to the locus in quo lying east of Main street, as to which a new trial had been ordered, and the application was granted. 176 N. Y. 594, 68 N. E. 1115. When the portion of the appeal then remaining undisposed of was heard by this court, the judgment of the Appellate Division relating to the locus in quo lying west of Main street was affirmed. 178 N. Y. 561, 70 N. E. 1097. The issue as to the existence of a street on the river front west of Main street having thus been finally determined against the city, the issue remain-

ing as to a street on the east side was tried at Special Term, where the complaint was dismissed.

The trial justice found the following facts, among others: In 1805 the land in question formed part of an extensive tract owned by the Holland Land Company, which caused the same to be surveyed and laid out into lots and streets and a map thereof to be filed with the proper county clerk. This map, entitled the "Plan of New Amsterdam," shows a street without a name running along the north bank of Buffalo river on the east side of what is now Main street, but which then went by the name of Willinks avenue, to and beyond Washington street as now located. No street, however, was laid down on the map as existing on the west side of Main street. Said map shows a lot designated as "outer lot 78," extending from Main street easterly to Washington and bounded on the south by the unnamed street, above referred to. In 1807 the Holland Land Company conveyed outer lot 78 to one Grant, who in 1815 conveyed a portion thereof to one Grosvenor, and in such conveyances the southerly line of lot 78 was referred to as the northerly bounds of Water street, thereby meaning the street appearing on said map without a name. In all subsequent conveyances of said parcel down to that made to one John W. Clark in 1831, a similar description was used. In 1813 the village of Buffalo was incorporated by an act referring to said map as the sole description of the territory included. Laws 1813, p. 113, c. 106. Said act was revived and continued in force by chapter 164, p. 108, Laws 1815, and by chapter 69, p. 68, Laws 1816. The commissioners of highways of the town of Buffalo were the commissioners of highways of the village of Buffalo until 1826 when the village trustees became the commissioners of highways within the corporate limits. Laws 1826, p. 140, c. 152. In 1821 the commissioners of highways of the town of Buffalo caused Water street to be surveyed, described, and entered of record pursuant to chapter 33, p. 270, Rev. Laws 1813, and as so surveyed, described, and recorded the street was one chain in width. In 1826 the trustees of the village changed the name to Ohio street, and in 1830 to Front street, and contracted its width to two rods. Buffalo creek or river, as shown on the plan of New Amsterdam, at the time said map was filed, was and ever since has been a public highway. On various assessment maps of the city between 1842 and 1846 Front street is delineated from the intersection of the east line of Main street to the west line of Washington street, and on various assessment rolls between 1847 and 1863 property was assessed for local improvements as fronting on Front street in the locality in question.

After finding these facts, among others, the trial court further found as follows:

"Thirteenth. In 1829 the Holland Land

Company conveyed an undivided three-quarters of the fee of said Water street, then known as Ohio street, abutting on the southerly line of outer lot 78, to one Clark, and conveyed the remaining undivided one-quarter of said fee to one Scott and one Capron, and the last-named grantees subsequently, and in 1833, conveyed the said undivided one-quarter to said Clark. The said Clark subsequently conveyed the premises herein described, together with said outer lot 78, to various grantees, referring in such conveyances to said premises as 'Front street.'

"Fourteenth. Through the grantees of said Clark by mesne conveyances the said the New York, Lackawanna & Western Railway Company, in or about the year 1891, acquired the fee of the premises hereinbefore variously referred to as Water street, Ohio street, and Front street, abutting on that portion of outer lot 78 lying between Main street and Washington street as now laid out."

"Sixteenth. That more than 40 years prior to the commencement of this action the grantees of the said Clark, then owning that portion of outer lot 78 abutting on the premises herein referred to as Front street, constructed brick buildings upon their lands fronting on Ohio street, and extending backward to a line substantially the northerly line of the premises herein designated as Front street, as contracted to two rods in width; that between such brick structures and the Buffalo river, and upon the premises herein designated as Front street, such grantees caused to be constructed, in or about the year 1838, a dock and wharf, and that such dock and wharf has ever since been maintained by the defendant and its predecessors in interest, except such repairs as were made by the municipality under 'certain resolutions adopted by the common council.'

"Seventeenth. That said dock and wharf from the time of its erection down to the commencement of this action was used by the owners of the abutting property, in connection with the adjacent premises, for the purpose of receiving freight from the vessels and delivering freight to vessels entering and leaving the port of Buffalo by Buffalo river, and that said abutting owners have at all said times used the said dock and wharf for the temporary storage of freight received from vessels, or freight awaiting shipment by lake and canal. That more than 30 years since the owners of the property abutting said dock or wharf erected a shed over the same, extending from the buildings fronting thereon practically to the exterior line of such wharf, for the purpose of protecting freight delivered from vessels, or placed upon such wharf for delivery to vessels, and that said shed was so maintained until about the year 1892, when the same was torn down. That said shed constituted no physical obstruction to the use of said dock and wharf by vehicles and pedestrians.

Eighteenth. That said dock and wharf at the time of its erection down to the commencement of this action, and since, has been open to travel by vehicles and pedestrians except when such travel was temporarily obstructed by freight stored upon said dock or wharf, and the said dock or wharf has been used during the said times by vessels and pedestrians, more largely by the latter than the former; that the greater number of persons using said dock or wharf for vehicle traffic did so for the purpose of reaching the stores and warehouses abutting on said wharf, and for the purpose of receiving supplies to the vessels lying there, receiving passengers from such vessels or transacting other business with said vessels. But it is equally true that many of the people using said dock and wharf, for foot and vehicle traffic, used the same as a way of communication between the street and points east of Washington street, and that many pedestrians constantly used said dock and wharf who had no connection with the abutting stores and warehouses, or the vessels lying at said dock." After finding the facts as thus stated, the court found the following, which were stated as "Conclusions of Law":

First. That the filing of said 'Plan of New York and the conveyances of the pre-empting on Front street by the Holland Company, was intended as and constituted a dedication of the premises in question as Front street for the purposes of a public highway.

Second. That subsequent to such dedication the aforesaid premises in question were accepted by the public as a public highway by the act of the Legislature of the state incorporating the village of Buffalo, and the subsequent acts reviving and confirming such incorporation; and also by the action of the commissioners of highways of the town of Buffalo in the year 1821 in causing the said street to be surveyed, described, and entered in the records, and by the action of the trustees of the village of Buffalo in the year 1826, in changing the name of said street.

Third. That for a period of six years and prior to the commencement of this action the said premises herein designated as 'Front street' ceased to be traveled or used as a public highway, and ceased to be a highway for any purpose.

Fourth. That the New York, Lackawanna and Western Railway Company, the defendant's agent, is the owner of the premises herein designated as 'Front street,' and that the defendant as its lessor is entitled to the exclusive possession, and occupancy of the premises free from any interference on the part of the plaintiff, its officers, agents, servants, employees, and that the plaintiff is not possessed of any right, title, or interest therein. Fifth. That the defendant is entitled to the judgment of this court, dismissing the action upon the merits, with the costs of

this action, and I direct the entry of judgment accordingly."

The judgment entered upon this decision was affirmed by the Appellate Division, one of the justices dissenting; and the plaintiff now appeals to this court.

Louis E. Desbecker and Samuel F. Moran, for appellant. Louis L. Babcock, for respondent.

VANN, J. (after stating the facts as above). The trial court rendered judgment against the plaintiff on the theory that, although Front street became a public highway as early as 1826 through tender of dedication by the owners and acceptance by the municipal authorities, still it had ceased to be a public highway because it had not been traveled or used as such for a period of more than six years prior to the commencement of the action. While facts were found which sustain the conclusion of law that Front street became a public highway through offer and acceptance, no finding of fact, classified as such, was made that the street had not been traveled or used as a public highway for the statutory period required to effect an abandonment. *City of Cohoes v. Delaware & Hudson Canal Co.*, 134 N. Y. 397, 31 N. E. 887; *Matter of Hunter*, 163 N. Y. 542, 548, 57 N. E. 735, 79 Am. St. Rep. 616; *Laws* 1861, p. 709, c. 311; *Laws* 1890, p. 1198, c. 568, § 99.

It is claimed that the third conclusion of law contains the finding of fact needed to support the judgment, and that, although it is classified as a conclusion of law, since it is really a finding of fact, the same effect should be given to it as if it had been so designated in the decision. The finding in question is one of fact or law. If it is the latter, the facts found do not support the judgment, because a street once in existence is presumed to continue until it ceases to be such owing to abandonment or some other lawful cause. *Cohoes Case*, *supra*. We think, however, that the finding, except the last clause thereof, is not one of law, but of fact. The cessation of user and travel upon a street for the period prescribed involves a question of fact. Traveling upon a street is an act or a series of acts which can be seen and described. The use of a street for traveling purposes requires that something should be done thereon which is apparent to ordinary observation. One may travel on a street by walking, riding, or driving. Each method involves action, and an act is a fact, as that word is known to jurisprudence. An error in the classification of findings by the trial court does not prevent an appellate court from classifying them for itself in accordance with their actual character. Giving a wrong name to a finding does not change its nature, and, if it is placed under the head of "Conclusions of Law," when it is a finding of fact, it will be treated on appeal as what it really is, at least for the purpose of up-

holding a judgment. *Berger v. Varrelmann*, 127 N. Y. 281, 288, 27 N. E. 1065, 12 L. R. A. 808; *Christopher & Tenth Street R. R. Co. v. Twenty-Third Street R. R. Co.*, 149 N. Y. 51, 57, 43 N. E. 538. As we have already seen, the judgment appealed from cannot stand unless the finding under consideration is a finding of fact, and it now remains to be seen whether it can stand even on that theory, since it is claimed that such finding of fact is inconsistent with other findings of fact, and hence must yield thereto at the election of the appellant in aid of his exceptions. It was upon this ground that one of the learned justices below based his dissent.

What is the situation according to the findings when properly classified? About 1826 a public highway existed on the river front between Washington and Main streets. It still existed in 1838, when a dock was built by the abutting owners over and upon the land owned by them constituting said highway, covering it for its entire width and length. From that time to this the abutting owners have used the dock for dock purposes and the general public have used it for highway purposes, neither use excluding the other altogether, although doubtless interfering with it to some extent. Under these circumstances, what became of the street when the dock was built? Can abutting owners destroy a street in this way? Did the construction of the dock annihilate the highway? There is no statute which gives it that effect, and, according to the common law, the street leaped from the ground to the dock and stayed there. It is there now unless it has been abandoned by nonuser as we read the authorities. Thus, in an early case, an owner of lands lying on East river was authorized by the Legislature to construct wharves and bulkheads in front of his land. There was a street known as "Warren street" extending through his land to the river, and there "was a continuous public way upon as well as between the street and the river." The abutting owner built a bulkhead in the river in front of his land, including that covered by the street, and filled up the intervening space with earth, "so as to transfer the shore of the river to the bulkhead, instead of remaining where it was at the time of opening Warren street." The court held that the street, by operation of law, was extended from the former terminus over the newly made land to the water, and through its Chief Justice said: "The distance to which the shore was thus advanced into the stream of the river does not appear in the bill of exceptions, nor, in our view of the law of the case, is it material to be ascertained, for, whether the distance was 10 feet or 1,000, we think this extension of the main land to the bulkhead carried with it a corresponding extension of the street; the bulkhead having now become for all purposes the shore of the river." After alluding to accretions of earth sometimes washed up on the shore of navigable waters,

the learned Chief Justice continued: "It is entirely settled that these alluvial additions become the property of the owner of the land against which the deposit is made; and it would hardly admit of a question that in such a case a public street leading to navigable waters would keep even pace with the extension of the land, so as to preserve an unbroken union between the easement on land and that on such navigable waters. And, if this consequence would follow from a change in the land by the action of natural causes, we think it must also be held to follow from one made by the immediate and voluntary act of the owner of the land on the shore in its original condition. * * * We hold that the filling up by Johnson of the river in front of Warren street carried with it a necessary and legal extension of the street over the new made land and to the shore of the river at the bulkhead." *People v. Lambier*, 5 Denio, 9, 47 Am. Dec. 273. See, also, *Radway v. Briggs*, 37 N. Y. 256, 257; *Taylor v. Atlantic Mutual Ins. Co.*, 37 N. Y. 275, 282, 283; *Matter of N. Y. C. & H. R. R. Co.*, 77 N. Y. 248; *City of Brooklyn v. N. Y. Ferry Co.*, 23 Hun, 277; *Id.*, 87 N. Y. 204; *Fowler v. Mott*, 19 Barb. 204; *Elliott on Roads & Streets* (2d Ed.) § 5; *Gould on Waters* (3d Ed.) § 103.

If the abutting owner by erecting a dock cannot sever the connection between the street and the river front, can he blot out the street altogether by extending the dock over it? "Once a highway always a highway," until it ceases to be such by the action of the general public in no longer traveling upon it, or by action of the public authorities in formally closing it. *City of Cohoes v. Delaware & Hudson Canal Co.*, 134 N. Y. 397, 406, 31 N. E. 887; *Driggs v. Phillips*, 103 N. Y. 77, 83, 8 N. E. 514; *Beckwith v. Whalen*, 65 N. Y. 322, 332; *Elliott on Roads & Streets* (2d Ed.) § 877. When a private dock is built over a public street upon the shore of navigable waters, the dock becomes part of the street, and the public has a right to travel over it. Ownership of the dock is not inconsistent with the existence of the street any more than ownership of the land over which the street extended. Assuming that the defendant or its predecessors could lawfully build a dock over their own land in order to reach the river, still, as their land was subject to the right of the public to travel upon it, they could not unreasonably interfere with that right nor with the existence of the street, which was the foundation thereof. Two rights coexisted. The defendant, as owner of the river front, had the right to reach the water. As there was a street along the river front over the defendant's land, the public had the right to use the street. The building of the dock changed neither right. Both continued to exist, although under changed conditions. They met, but did not merge; nor did either destroy the other. The defendant had the right to use its dock as a private dock, subject to the right of the public to travel over it, as they

previously traveled upon the land over which it was built. The city had no right to the dock for dock purposes, but its citizens had the right to use it for street purposes. While the street followed the dock, it covered the whole of it, that did not authorize the city to collect wharfage; and, although the dock was private property, the city as the land beneath it, that did not authorize the defendant to prevent the public from using it for the same purpose that it previously used the land. The easement for travel still existed, but it was over the dock which took the place of the land constituting the street. The public had the right to travel in the same place and in the same manner that they had before, but, instead of traveling upon the surface of the land, they were obliged to travel and had the right to travel upon the structure that the defendant had placed on the land. That structure was a street for the purpose of travel and a private dock for use as such, with a superior right in the public in case of conflict with any reasonable use of the respective streets.

The right of an upland owner to build a highway over a street, the fee of which is in him, is out to navigable water, does not involve the right to appropriate the street or to make an unreasonable use thereof. The owner of a dock can neither create nor destroy a highway over it without the co-operation of the city. He may lay out a proposed street on the dock, grade it, and offer it to the public use, but it does not become a public highway until it is accepted as such. At any time after acceptance, he can withdraw his tender of dedication, but after acceptance his offer ceases, except that he may still use the dock for such purposes as do not interfere with its free use for all street purposes. If accepted, it becomes ipso facto subject to the easement of a street over it for all street uses until the public yields up the right in some manner provided by law. The owner cannot destroy a highway over his dock by any action whatever taken by him alone. If he obstructs it, the public authorities can compel him to remove the obstruction and punish him for creating it. Code, § 385; Highway Law, Laws 1890, 8, c. 568, § 104. The erection of a dock is an exception to the rule. If the dock prevents public travel, it can be removed. If it does not obstruct travel, it becomes part of the street, and may be used by the public for legitimate street purposes.

The court have thus laid down the law applicable to the facts as found, independent of the fact arising in the third conclusion of law. It is that the latter, treated as a finding of fact, that Front street had not been traveled or used as a public highway for more than six years is inconsistent with the eighteenth finding of fact, that the public used the dock consistently from the time it was built, both for pedestrian and vehicle traffic, as a way of communi-

cation between Main street and points east of Washington street. The learned trial justice evidently regarded the street as no longer in existence after the dock was built, and hence found that travel had ceased upon the street, although he found that it continued upon the dock which took the place of the street. He may thus have been misled into making the inconsistent findings.

"While an appellate court should harmonize inconsistent findings when it is possible to do so, if they prove irreconcilable, it is the duty of the court to accept those most favorable to the appellant, as he is entitled to rely upon them in aid of his exceptions." *Israel v. Manhattan Ry. Co.*, 158 N. Y. 624, 631, 53 N. E. 517; *Nickell v. Tracy*, 184 N. Y. 386, 390, 77 N. E. 391. The finding that the street has been abandoned cannot be reconciled, according to our view of the law, with the finding that the dock has been used and traveled upon continuously as a street. We are therefore compelled to reject the former and to accept the latter, with the same force and effect as if it was the only finding upon the subject appearing in the decision. This leaves the conclusion of law that the defendant is entitled to the exclusive use, possession, and occupancy of Front street, and that the plaintiff is not possessed of any right, title, or interest therein, without any finding to support it. The exception to this conclusion of law, as well as to the direction for judgment against the plaintiff, raised reversible error and requires us to reverse the judgment appealed from and to order a new trial, with costs to abide the event.

CULLEN, C. J., and GRAY, O'BRIEN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

(77 Ohio St. 1)

STATE ex rel. WEBBER, Pros. Atty., v. WICKHAM, Recorder.

(Supreme Court of Ohio. Oct. 22, 1907.)

RECORDS—GENERAL INDEX OF COUNTY RECORDER—RECORDER NOT COMPELLED TO KEEP UP SAME, WHEN.

Under the provisions of section 1155, Rev. St., a recorder cannot be compelled to keep up general indexes provided for by section 1154, Rev. St., and theretofore authorized and completed, when the commissioners of the county refuse to pay therefor.

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

Application by the state, on the relation of one Webber, prosecuting attorney, for writ of mandamus against one Wickham, recorder. Judgment for respondent, and relator brings error. Affirmed.

Webber, McCoy, King & Game, for plaintiff in error. M. E. Thrailkill, for defendant in error.

DAVIS, J. In February, 1883, the commissioners of Franklin county contracted with the recorder to prepare an index of deeds and mortgages according to a special plan for a stipulated price, "said indexing with respect to names of the several parties to each instrument to be done as now required by law." The only specific provisions of law relating to this subject were then, as now, sections 1153, 1153a, 1154, and 1155, Rev. St. This contract was performed by the recorder then in office, and the indexes thus completed have been kept up by the successors in the recorder's office until November 1, 1905, at which time the commissioners of the county notified the recorder that they would no longer pay for keeping up these indexes. Upon receiving this notice the recorder discontinued the indexes, which had been completed and kept up under the contract made in 1883, but continued to make the indexes required by sections 1153 and 1153a. The prosecuting attorney then instituted this proceeding to compel the recorder to keep up, without compensation, the indexes which he had discontinued after notice from the commissioners that they would no longer pay for the work. The circuit court found that the recorder had been, and was, complying with the requirements of sections 1153 and 1153a, except in some details which the court ordered to be corrected; that the indexes which are subject of this litigation are not the indexes required by section 1153a; and that the relator is not entitled to a writ of mandamus commanding the recorder to bring up to date the indexes in controversy and to keep up the same in the future. The circuit court also refused to state as a conclusion of law, as requested by the relator, that the indexes which the recorder has refused to continue without compensation are not indexes authorized by section 1154, Rev. St.

The only provision for "general indexes" is in section 1154, and there it is provided that such indexes shall be made "in addition to the alphabetical indexes"; that is, separate and distinct therefrom. The distinctive characteristic of such general indexes is that they present at a glance a sort of abstract of the conveyance, in addition to an alphabetical reference to the conveyance itself; and they present also, a means of tracing all the conveyances and instruments affecting the title to any particular piece of real estate. These are matters of great convenience and value, especially in populous communities, where the records are voluminous. The circuit court has stated in its findings of fact in this case that the general indexes contain the names of both parties to the instrument alphabetically arranged under appropriate headings, the year when filed for record, the reference to the volume and the page thereof where the instrument is recorded, and a summary description of the property conveyed, by reference to the town or township, lot, section or survey, addition or subdivision, in

which the property is located. The description of the indexes which are the subject of this controversy, as found by the circuit court, brings them clearly within the provisions of sections 1154 and 1155; and they are not provided for or required by any other sections. These "general indexes" are to be made only when in the opinion of the county commissioners they are needed and they so direct; but the power to direct and the obligation to pay are reciprocal, for, while the recorder shall make the indexes when directed by the commissioners, the statute is just as imperative that he shall receive compensation. So that, when the commissioners notified the recorder that they would no longer pay for the service, the latter was necessarily relieved from the duty of further performing it.

The relator insists, however, that, whether or not these "general indexes" are authorized by section 1154, they having been made, the recorder is required by section 1155 to "keep up the same"; but here again the reciprocal nature of the obligation, on one side to perform the service, and on the other side to pay for it, is carefully preserved, and it follows that, when the commissioners notified the recorder in advance that they would not pay, they absolved him from that obligation to perform which was based on their obligation to pay. The circuit court found that the recorder has substantially complied with the requirements of sections 1153 and 1153a, and we think that its conclusions in that respect were also correct.

The judgment of the circuit court is affirmed.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and SPEAR, JJ., concur.

(77 Ohio St. 7)

STATE ex rel. HUNT, Pros. Atty., v. FRON-
IZER et al.

(Supreme Court of Ohio. Oct. 22, 1907.)

COUNTIES—VOID CONTRACT—EXECUTION—RE-
COVERY OF MONEY PAID.

Section 1277, Rev. St., which authorizes a prosecuting attorney to bring action to recover back money of the county which has been misapplied, or illegally drawn from the county treasury, does not authorize the recovery back of money paid on a county commissioners' bridge contract fully executed but rendered void by force of section 2834b, because of the lack, through inadvertence, of a certificate by the county auditor that the money is in the treasury to the credit of the fund, or has been levied and is in process of collection, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of such contract for such work, nor any claim of effort to put the contractor in statu quo by a return of the bridge or otherwise; the same having been accepted by the board of commissioners and incorporated as part of the public highway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 198.]

(Syllabus by the Court.)

error to Circuit Court, Sandusky County. Action by the state, on the relation of prosecuting attorney, against S. M. Fronizer and others. Demurrer to answer ruled, and, on affirmance of judgment by circuit court, relator brings error. Affirmed.

The state, on the relation of the prosecuting attorney of Sandusky county, brought action in the common pleas of that county against S. M. Fronizer, N. V. Elliott, and Bellefontaine Bridge & Iron Company, virtue of section 1277, Rev. St., for the sum of \$1,931, as money illegally drawn from the treasury of said county by the defendants.

The substance of the petition as amended is the making on and before July 18, 1903, of certain contracts by the defendant company through its agent, Fronizer, with a majority of the board of county commissioners, for furnishing the materials and forming the work therein specified for construction of certain bridges in Sandusky county, and the repair of other bridges at prices therein named, the same to be paid on the 1st day of January, 1904, on completion of the same. The contracts made were illegal, contrary to and in violation of law, and unlawful, as the defendant Fronizer and the company, as also the commissioners then well knew. Said defendant did not, nor did any member thereof nor at the time of entering into said contracts, nor at any other time, procure a certificate of the county auditor as required by section 2834b, Rev. St.; that they required for the payment of the action created by the contracts, or any part thereof, was in the treasury of said county to the credit of the bridge fund of said county, or had been levied and placed as a duplicate of said county and in proof of collection and not appropriated for any other purpose, as in said statute provided, nor any such certificate made and by the county auditor at the time said contracts were entered into, and no such sum not otherwise appropriated was in the treasury of said county at the time of the entry of said obligations. The prices of materials agreed upon in said contracts were exorbitant, largely, grossly, and fraudulently in excess of the true and reasonable value thereof, to wit, double the real value of and more, as the defendants Fronizer and the company then and there well knew, to the great damage of the county and the injury thereof. The said contracts were made into secretly between two of the members of county commissioners and Fronizer, then and there purposely and fraudulently kept and concealed all their acts and intentions concerning said contracts from every other member of the board, and said contracts, nor any of them, were never entered upon public board meeting or session of said board; nor was any minute or record

made by the commissioners or the auditor of any proceedings in making said contracts in the journal or proper record of said board. On the 20th day of December, 1903, and before any sum was due and payable according to the terms of said illegal contracts, said defendants (Elliott claiming to be agent for the company), well knowing the contracts to be so fraudulent, illegal, and wrongful, wrongfully procured the allowance by two of the commissioners, who then well knew that said contracts were so fraudulent, illegal, and wrongful, procured from the treasury of said county payment of the amount of said illegal contracts, to wit, the sum of \$1,931, which relator demands to be paid back into the treasury of the county.

The three defendants filed separate answers, but in substance the same. They admitted that the company, through Fronizer, entered into the contracts set forth; that they were informed and believed that in making the contracts the commissioners inadvertently failed and neglected to procure the certificates of the auditor of the county, as set out in the petition, and that said auditor inadvertently failed and neglected to make and file such certificates before said contracts were entered into. They admit the allegations of the petition as to the omission of such certificates. They admit the voluntary payment to the company's agents, and aver that each and every of said contracts has been and was, before bringing of this action, fully performed and executed, and the defendants deny each and every allegation of the petition not hereinbefore specifically admitted to be true, and especially deny all allegations of fraud, conspiracy, excessive prices, and fraudulent conduct on part of any of defendants, and of damages. As an affirmative defense, it was pleaded that before any of the company's claims for said bridges, repairs, etc., had been adjudicated or payments made thereon, each and all the bridges, materials, and repairs mentioned in several causes of action in the petition had been in good faith duly furnished to said Sandusky county and erected and placed in all respects as required by the several contracts therefor, which have been fully executed and performed; that said bridges, materials, and repairs, on being so erected, furnished, and placed, were received, accepted, and appropriated to its own use by said county, and by the board of county commissioners thereof, who had then full jurisdiction and power and authority over the matter of the purchase and erection of said bridges, materials, and repairs for said county, and who then had full knowledge of all the facts concerning the making of the contracts therefor. Ever since said bridges, etc., were so received, accepted, and appropriated, they have been retained in the possession of said board and its successors, and of said county, and have been constantly used and enjoyed by them and by the in-

habitants and taxpayers of said county as necessary and essential parts of the public structures and highways of said county, and no part of said bridges, materials, or repairs, or of the value thereof, has ever been offered or tendered back to the defendants or any of them by said county or any of its officers or authorities.

To this defense the relator interposed a general demurrer. On hearing, this demurrer was overruled, and, the relator not desiring to plead further, judgment was entered dismissing the petition and for costs. This judgment being affirmed by the circuit court, relator brings this proceeding in error.

M. W. Hunt, Pros. Atty., and Basil Meek, for plaintiff in error. Hunt & Garn, Lester Wilson, Kline, Tolles & Goff, and S. H. West, for defendants in error.

SPEAR, J. (after stating the facts as above). A somewhat extended epitome of the pleadings has been given in order that the general character of the controversy may be the more easily comprehended. But the real question presented to this court is in a very narrow compass. Whatever the actual facts may be, the demurrers of the relator to the answers admit, for the purposes of the inquiry, the truth of the allegations therein well pleaded, and, if those allegations constitute a defense to the relator's claim to recover back the money paid on the contracts for the bridges, etc., then there is no error in the judgment below. It is to be borne in mind that this is not an action in injunction to prevent the paying out of money from the treasury, nor to recover damages by reason of faulty work or excessive charges, but is simply an action to recover back the money paid under the contracts for the bridges, repairs, etc.; and, further, that the contracts, though void, are not, under the facts admitted by the pleadings in this case, tainted.

The inquiry involves consideration of section 2834b, Rev. St., the pertinent provisions of which are: "The commissioners of any county * * * shall enter into no contract, agreement or obligation involving the expenditure of money, nor shall any resolution or order for the appropriation or expenditure of money, be passed by any board of county commissioners * * * unless the auditor * * * shall first certify that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose; which certificate shall be filed and immediately recorded, * * * and all contracts, agreements or obligations, and all orders or resolutions, entered into or passed contrary to the provisions of this section shall be void." Also of section 1277, affording a right of ac-

tion to the prosecuting attorney, which is in these terms, to wit: "Sec. 1277. (Duty as to restraining order.) The prosecuting attorneys of the several counties of the state, upon being satisfied that the funds of the county, or any public moneys in the hands of the county treasurer or belonging to the county, are about to be, or have been misapplied, or that any such public moneys have been illegally drawn out of, or withheld from the county treasury, or that a contract in contravention of the laws of this state has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption, or that any property, real or personal, belonging to the county is being illegally used or occupied, or is being used or occupied in violation of the terms of any contract, or that the terms of any contract or agreement made by or on behalf of the county are being violated, or that any money is due the county, may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of any such illegal contract not fully completed, or to recover back, for the use of the county, all such public moneys so misapplied or so illegally drawn out or withheld from the county treasury, or to recover, for the benefit of the county any damages resulting from the execution of any such illegal contract, or to recover, for the benefit of the county, any such real or personal property so used or occupied or to recover, for the benefit of the county, any damages resulting from the non-performance of the terms of any contract, or to otherwise enforce the same, or to recover any such money due the county."

And, putting the question presented in terse form, it is whether or not section 1277, as above given, authorizes the recovery back of money paid on a county commissioners' bridge contract fully executed, but rendered void by force of section 2834b, because of the lack, through inadvertence, of the county auditor's certificate as therein required, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution, of such contract for such work, nor any claim of effort to put the contractor in statu quo by a return of the bridge or otherwise; the same having been accepted by the board of commissioners and incorporated as part of the public highway. This court is of opinion that such recovery is not authorized. The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in statu quo, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty

that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases. *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Lee v. Board of Commissioners*, 114 Fed. 744, 52 C. C. A. 376; *Bridge Co. v. Utica* (C. C.) 17 Fed. 318. It is an equally well-established rule that the General Assembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly imports such intention. *Holum, Adm'r, v. C., M. & St. P. Ry. Co.*, 80 Wis. 299, 50 N. W. 99; *Reynolds v. Hindman*, 82 Iowa, 146; *Renfro v. Colquitt*, 74 Ga. 618; *Felix v. Griffiths*, 56 Ohio St. 39, 45 N. E. 1092.

We look in vain for any such intention clearly expressed in section 1277. Whatever right of action is given by that section is devolved upon the prosecuting attorney, and the suit below was grounded upon that section, and that alone. By it that officer is authorized, whenever in his judgment money of the county has been illegally drawn from the treasury, or misapplied, to apply by civil action in the name of the state to a court of competent jurisdiction to recover back the money so illegally drawn or misapplied. Here the power or right expressed ends. It does not appear that it was the intention to deprive a party who has dealt with the county honestly, and in good faith, of any legitimate defense or to impose upon the court any duty to ignore the well-established rules of jurisprudence, and adjudge in favor of the plaintiff upon his application whether such demand violates fundamental principles of law or not. In the absence of legislative intent clearly expressed, we must conclude that none was intended. As stated in *Felix v. Griffiths*, supra: "Where it is attempted to abrogate or modify a well-established rule of common law by statute, * * * the scope should not be extended beyond the plain import of the words used, where reasonable effect can be given to the amendment without such extension." Here reasonable effect can be given the section without extension because the right to sue for damages is clearly expressed.

The exact question arising upon this record has not before been presented to this court, although the statute itself was under review in *Vindicator Printing Company v. State*, 68 Ohio St. 362, 67 N. E. 733. That case is authority for the proposition that there may be a recovery back by the prosecuting attorney where the money has been paid for the publishing of certain notices the publication of which was not authorized by law. The publications were not only without authority of law, but they were of no value to either the county or the public. Therefore no property of the company had been obtained by the county. Clearly the case is not analogous to the case at bar. *Buchanan Bridge Company v. Campbell*, 60

Ohio St. 406, 54 N. E. 372, is cited. That case simply holds that a contract for a bridge made in violation or disregard of the statutes on the subject is void, and no recovery can be had against the county for its value. Courts will leave parties where they have placed themselves and refuse relief. It is difficult to see that this case aids the plaintiff's contention.

The county should not be permitted to retain both the consideration and the bridges. And, as in the case above cited the court left the bridge company where it found it, so in this case the court leaves the county of Sandusky where it finds it.

The judgment of the circuit court will be affirmed.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and DAVIS, JJ., concur.

(230 Ill. 65.)

MILLER v. PEOPLE.

(Supreme Court of Illinois. Oct. 4, 1907.
Rehearing Denied Dec. 3, 1907.)

1. COURTS—MUNICIPAL COURTS—CREATION—CONSTITUTIONAL PROVISIONS.

Const. art. 4, § 34, authorizing the General Assembly to pass a charter of local municipal government for the city of Chicago, and in case it created municipal courts in the city to abolish the offices of justices of the peace, police magistrates, and constables within the city, and to limit the jurisdiction of justices in the territory of Cook county outside the city, did not in terms authorize the General Assembly to create municipal courts in Chicago.

2. WORDS AND PHRASES—"MUNICIPAL."

The word "municipal" is defined as meaning or pertaining to a city or corporation having the right to administer local government.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 5, pp. 4618-4632; vol. 8, p. 7726.]

3. COURTS—MUNICIPAL COURTS—JURISDICTION—CONSTITUTIONAL PROVISIONS.

Const. art. 4, § 34, authorizing the General Assembly to provide a scheme or charter of local municipal government for Chicago, and providing that if the General Assembly should create "municipal courts" in the city it might abolish the offices of justices of the peace, etc., did not authorize the Legislature to confer on a municipal court so created jurisdiction of cases arising outside the limits of the city; so that Act July 1, 1905 (Acts 1905, pp. 158, 169, §§ 2, 24), in so far as it attempted to confer on such municipal court jurisdiction of criminal cases arising outside the city limits, but within Cook county, which were transferred to such municipal court for trial by the criminal court of such county, was invalid.

4. CRIMINAL LAW—CHANGE OF VENUE—APPLICATION.

Under the act authorizing a change of venue in criminal cases, such change can be granted only on the application of the defendant.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 14, Criminal Law, § 237.]

5. SAME—TRANSFER OF CAUSE.

A transfer of a criminal cause from the criminal court of Cook county to the municipal court of Chicago, as authorized by Municipal Court Act July 1, 1905 (Acts 1905, p. 158), is not a change of venue.

Error to Municipal Court of Chicago; Fred L. Fake, Judge.

William A. Miller was convicted of larceny, and he brings error. Reversed.

Charles E. Erbstein and Charles P. R. Macaulay, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (William A. Rittenhouse and Hiram T. Gilbert, of counsel), for the People.

CARTWRIGHT, J. An indictment was returned into the criminal court of Cook county, the first count of which charged that plaintiff in error, on September 1, 1905, in said Cook county, committed larceny of a rug of the value of \$235, the property of John M. Symth Company, a corporation. The second count charged plaintiff in error with buying, receiving, and aiding in concealing the said rug in said Cook county knowing the same to have been feloniously stolen. To these counts an habitual criminal count was added. On motion of the state's attorney of Cook county, the criminal court ordered the cause transferred for trial and disposition from the criminal court to the municipal court of the city of Chicago, and the files of the cause were transmitted to the clerk of said municipal court. Plaintiff in error was arraigned in the municipal court and his plea was not guilty. The state's attorney waived trial on the habitual criminal count, and a trial on the remaining counts resulted in a verdict of guilty. Motions for a new trial and in arrest of judgment were made and overruled, and the court sentenced plaintiff in error to the penitentiary. He sued out a writ of error from this court to the municipal court, and the record has been brought here for review.

The jurisdiction of the municipal court to try the cause and sentence plaintiff in error to the penitentiary is disputed upon the ground that the jurisdiction of that court is confined to the city limits of the city of Chicago, and, although the assignment of errors includes jurisdictional questions and matters relating to the record and proceedings of the court in the cause, the question of the territorial jurisdiction of the court is the only one that will be considered. If the jurisdiction of the municipal court is confined to the city of Chicago, and does not extend to the whole county of Cook, it was without jurisdiction to try plaintiff in error upon an indictment charging an offense committed at and within said county and which did not allege an offense committed within the jurisdiction of the court, and the other questions are thereby rendered immaterial.

Section 34 of article 4 of the Constitution, which was added by an amendment adopted in 1904, does not, in terms, provide that the General Assembly may create municipal courts in the city of Chicago, but it does confer upon the General Assembly power to pass any law providing a scheme or charter of lo-

cal municipal government for the territory embraced within the limits of said city, and provides, in case the General Assembly shall create municipal courts in the city of Chicago, it may abolish the offices of the justices of the peace, police magistrates, and constables in and for the territory within said city and may limit the jurisdiction of justices of the peace in the territory of said county of Cook outside of said city to that territory, and in such case the jurisdiction and practice of said municipal courts shall be such as the General Assembly shall prescribe. The authority given is to provide a scheme or charter of local municipal government for the territory within the limits of the city, and it is only for the reason that municipal courts constitute a proper part of the local municipal government that they are authorized by the amendment. By virtue of that amendment of the Constitution, the General Assembly passed an act entitled "An act in relation to a municipal court in the city of Chicago," in force July 1, 1905 (Act 1905, p. 158), by which a court was established in and for the city of Chicago styled the "municipal court of Chicago," and the offices of justices of the peace, police magistrates, and constables in and for the territory within the city of Chicago were abolished, and the jurisdiction of justices of the peace in the territory of the county of Cook outside of the city of Chicago was limited to the territory of said county outside of said city. The question of the validity of that act was considered in the case of *City of Chicago v. Reeves*, 220 Ill. 274, 77 N. E. 237. The conclusions reached were: That the creation of a municipal court in and for the city of Chicago was germane to the establishment of local municipal government in said city; that the establishment of such a court was a proper and legitimate part of a general scheme of local municipal government for the territory embraced within the limits of the city; that the municipal court was designed to occupy the field in jurisprudence previously occupied by justices of the peace and police magistrates in the city; and that it was germane to the object of the amendment to abolish the offices of justices of the peace, police magistrates, and constables in the city, and to limit the jurisdiction of justices of the peace in Cook county to territory outside of the city. The controlling question in that case was whether the amendment of 1904 was a valid amendment, and it was held to be a valid constitutional amendment, and the municipal court act, passed in pursuance of it, to be in its main features a valid enactment. A number of the provisions of the act were called in question in the briefs, but little, if anything, was said with reference to them in the argument, and it was deemed better to determine such questions as they might arise and decide them upon fuller argument than was presented in the arguments in that case.

In this case the validity of sections 2 and

of the municipal court act is challenged far as they are claimed to authorize the municipal court to try cases transferred from the criminal court of Cook county lying beyond the territorial limits of the city, and to exercise all the powers with respect to any case so transferred which the criminal court of Cook county might have exercised had the case not been transferred. Section 2 provides that said municipal court shall have jurisdiction within the city of Chicago in five classes of cases enumerated therein. The second class includes criminal cases which may be transferred to the municipal court, by change of venue or otherwise, by the criminal court of Cook county trial and disposition; but the jurisdiction conferred by that section is jurisdiction on-ly within the city of Chicago, which means within the territorial limits of said city, and language is not broad enough to give the municipal jurisdiction of a case transferred by criminal court of Cook county which did arise within the city. What jurisdiction municipal court might have in the case of change of venue under the statute authorizing such change on the application of defendant is not involved in this case. Section 24 provides that the criminal court of Cook county may, in its discretion, upon request of the state's attorney or of any defendant, transfer to the municipal court trial and disposition any case pending in criminal court, and that said municipal court, when any case shall have been transferred to it, shall exercise all the powers with respect to the trial and disposition of said case which the said criminal court of Cook county might have exercised had said case not been so transferred. Taking the two provisions together, there is at least doubt whether the General Assembly intended to extend the jurisdiction of the municipal court beyond the limits of the city by virtue of the provisions. Waiving that question, however, and assuming, as counsel on both sides do, that the intention of the General Assembly was to give the municipal court jurisdiction throughout Cook county in cases transferred to it, the question to be determined is whether the General Assembly had power to confer such jurisdiction. The General Assembly in proposing, and the people in adopting, the amendment of 1898, are presumed to have used the words "municipal courts" in their natural and ordinary meaning. *Hills v. City of Chicago*, 60 Ill. 36; *City of Beardstown v. City of Virginia*, 76 Ill. 34; 8 Cyc. 729; *Cooley's Const. L. 58*. The word "municipal" is defined by all authorities as meaning of or pertaining to a city or corporation having the right to administer local government. The municipal court of the city of Chicago is therefore one which pertains to the corporate or municipal government of the city and the administration of the law within the city. We held,

in *City of Chicago v. Reeves*, supra, that municipal courts are a proper part of the local government, and such courts are generally given exclusive jurisdiction for violations of municipal ordinances. Whether the municipal court of Chicago can be given exclusive jurisdiction in any case is not here involved. It is a proper part of the city government for the enforcement of city ordinances, and as a part of such city government it may be given jurisdiction for the purpose of enforcing all laws within the city. Municipal courts may be invested with jurisdiction of prosecutions for crimes and misdemeanors occurring within the municipality, and may also be given civil jurisdiction. They are limited, territorially, to the municipality in and for which they are created, and their jurisdiction is usually limited in amount or to petty offenses. *Black's Law Dict.*; 21 *Am. & Eng. Ency. of Law* (2d Ed.) 1. Under the rule that the words "municipal courts" were used in the amendment in their ordinary and natural meaning, the municipal court of Chicago is to be regarded as a local court of the city, established for the purpose of administering the law within the city, and not as a part of the judicial department of the government of the state at large. It was because we were convinced of the correctness of that view that we were enabled to hold the amendment to be single in character, relating to but one subject, and to sustain the amendment and the main features of the municipal court act. This leads to the conclusion that the authority conferred upon the General Assembly by the amendment was to establish municipal courts with civil and criminal jurisdiction confined to the limits of the municipality.

There is another rule of construction, which, in itself, would necessitate a decision that the municipal court has no jurisdiction beyond the limits of the city of Chicago. The rule is that, where a constitutional provision has received a settled judicial construction and is afterward incorporated into a new or revised Constitution, it will be presumed to have been retained with a knowledge of that construction, and the courts will feel bound to adhere to it. 8 Cyc. 739. There is no substantial or material difference between the terms "city court" and "municipal court," both of which are courts of the municipality in which they are established, and the Constitution of 1848, as well as the present Constitution, provided for the establishment of such courts. It was repeatedly held before the adoption of this amendment, in cases arising under each of those Constitutions, that the General Assembly had no power to extend the jurisdiction of courts of that character beyond the territorial limits of the municipality. The Constitution of 1848 vested the judicial power of the state in one Supreme Court, in circuit courts, in county courts, and in jus-

tices of the peace, provided that inferior local courts of civil and criminal jurisdiction might be established by the General Assembly in the cities of the state. Under that Constitution, an act was passed in 1857 establishing the recorder's court of the cities of La Salle and Peru. The question of the constitutionality of the act was before this court in the case of *People v. Evans*, 18 Ill. 361. The court, speaking by Mr. Justice Catton, held that the Constitution limited the territorial jurisdiction of courts established in the cities of the state to cities within which they were established; that they were intended to be for the benefit of the cities and designed to be local courts; and that, if it were competent for the General Assembly to extend the jurisdiction of such a court to two towns, it would be equally competent to extend it to the whole county or even to the whole state. It was decided that the General Assembly transcended its constitutional power in the establishment of the court. In *Covill v. Phyl*, 26 Ill. 432, Mr. Justice Walker delivered the opinion of the court, and it was held that the common pleas court of the city of Aurora had no jurisdiction of an action which accrued outside of the city limits; that the court had no jurisdiction to send original process beyond the limits of the city; and that the General Assembly did not have constitutional power to extend the jurisdiction of the court beyond such limits. In *Holmes v. Fihlenburg*, 54 Ill. 208, in which Mr. Chief Justice Lawrence delivered the opinion, it was held that the court of common pleas of the city of Sparta could not acquire jurisdiction of the person of a defendant by the service of summons beyond the city limits. Mr. Justice Sheldon, speaking for the court in *Gardner v. Withford*, 59 Ill. 145, said that the territorial jurisdiction of the same court of common pleas of the city of Sparta was limited by the Constitution to said city. In the case of *Dixon v. Dixon*, 61 Ill. 324, in a per curiam opinion, it was held that the court of common pleas of the city of Amboy had no power to send its original process beyond the limits of the city. In *Joslyn v. Dickerson*, 71 Ill. 25, Mr. Justice Scholfeld delivered the opinion of the court, again holding that the court of common pleas of the city of Elgin had no jurisdiction beyond the limits of said city. In *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414, the opinion was delivered by Mr. Justice Sheldon, and the court adhered to previous decisions as to the territorial limits of the city court of Alton; but it was held that the court had power to order the sale of a ward's land beyond the city limits by his guardian. The ground of the decision was that the term "jurisdiction" related only to the exercise of powers judicial in their nature, and that to order a sale of land by a guardian did not fall within the province of judicial action, but was analogous to the powers exercised

by the British Parliament on similar subjects. The question whether a sale should be ordered was regarded as one which a court might be authorized to consider and pass upon, and that, the ward residing in the city of Alton, the power might be given to the court to order a sale by the guardian. It was said that making the city court a court of record did not make it a superior and not an inferior court, within the meaning of the Constitution.

These decisions established and settled the construction to be given to a provision of the Constitution authorizing the General Assembly to create courts in and for the municipalities. It is argued, however, that some other decisions tend to establish the doctrine that the jurisdiction of a municipal court may be extended beyond the city limits. In the case of *People v. Barr*, 22 Ill. 241, it was held that when jurisdiction of a cause had once attached, and had been lawfully exercised by the court of common pleas of the city of Aurora, the court might issue process beyond the limits of the city to aid in enforcing the judgment; and in *Miller v. People*, 183 Ill. 423, 56 N. E. 60, it was decided that the act for selecting grand jurors from the county applied to the city courts organized under the act of 1874, which was passed under the present Constitution. The provision of the Constitution now in force is that the judicial powers shall be vested in one Supreme Court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns. Neither of these cases supports the claim that a city has jurisdiction beyond such limits. A city court, having acquired jurisdiction, may send its process in aid of that jurisdiction beyond the city limits, and may send its final process outside of the city to enforce collection of its judgment. The doctrine that the jurisdiction of a city court for service of original process is confined to the city limits wherein the court is located, and that the General Assembly has no power to pass a law extending such jurisdiction beyond the city, was reaffirmed in the case of *Ladies of Maccabees v. Harrington*, 227 Ill. 511, 81 N. E. 533, which arose under the present Constitution. In these cases the courts were called courts of common pleas, city courts, or a recorder's court; but they were all municipal courts under various names, and were the same kind of courts as the municipal court of Chicago. It must be held that the General Assembly in proposing, and the people in adopting, the amendment, had in view the construction uniformly given by this court as to territorial limits of the city or municipal courts.

It is argued that the transfer of a cause under the municipal court act is merely a change of venue, and that a change of venue may be taken to a court which could not orig-

(169 Ind. 801)

inally have entertained the suit. The provisions of the municipal court act do not come within the purview of the act authorizing a change of venue in criminal cases, which can only be granted upon the application of the defendant, and it is clear that the transfer in this case was not a change of venue. Furthermore, the Constitution prohibits the enactment of any local or special law providing for changes of venue in civil and criminal cases. Other provisions of the Constitution are only affected or modified by the amendment of 1904 so far as necessary to give effect to that amendment, and the provision prohibiting local or special laws providing for changes of venue was not changed by implication by the amendment.

It is further argued that the decision of the court as to territorial jurisdiction of city courts should not be adhered to because inconsistent with what has been held in relation to justices of the peace. The Constitution provides that justices of the peace shall be elected in and for such districts as are or may be provided by law, and the law provides that they shall be elected in and for towns in counties under township organization and in election precincts of counties not under township organization. Their jurisdiction has always been recognized as extending throughout the county, and counsel contend that the rule of construction adopted as to city courts would require us to limit justices of the peace to their own towns or election precincts. If there were any inconsistency, it would not justify a departure from the doctrine as to territorial limits of the city courts adhered to for a great length of time and founded upon what we conceive to be good reasons. But we do not regard the decisions as inconsistent. By the Constitution of 1818, a competent number of justices of the peace were to be appointed in each county, whose powers and duties were to be regulated and defined by law. The Constitution of 1848 provided that there should be elected in each county, in such districts as the General Assembly might direct, a competent number of justices of the peace, who should exercise such jurisdiction as might be prescribed by law. In the case of *People v. Meech*, 101 Ill. 200, the court said: "At the time the Constitution was adopted, the territorial jurisdiction of justices of the peace was coextensive with their counties throughout the state, and has ever been since the organization of the government, and the Constitution adopts that division until a change shall be made, which it authorizes, with the limitation that when made the jurisdictional districts shall be uniform." It was held that each county in the state constitutes but one district, and we do not regard the decisions as inconsistent or in conflict with each other.

The judgment of the municipal court is reversed.

Judgment reversed.

SANDERSON v. STATE. (No. 20,952.)

(Supreme Court of Indiana. Nov. 22, 1907.)

1. CRIMINAL LAW—APPEAL—WAIVER OF ERROR.

Objections to instructions in a criminal case not discussed will be considered waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3012.]

2. SAME—VERDICT ON CIRCUMSTANTIAL EVIDENCE—CONCLUSIVENESS.

Where the circumstantial evidence is of such a character that two conflicting inferences may be drawn therefrom, one proving the guilt of accused and the other his innocence, the question is for the jury, subject to review by the trial court, and is not reviewable on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3080.]

3. SAME—PROOF OF CONSPIRACY—ACTS OF CO-CONSPIRATORS—ADMISSIBILITY.

Where, on a trial for homicide, there was prima facie evidence of a conspiracy between accused and co-conspirators to obtain the property of decedent, evidence that co-conspirators, prior to the homicide, assaulted decedent during difficulties arising from an attempt on their part to take property of decedent, was admissible, whether accused was present or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 989.]

4. HOMICIDE — EVIDENCE — MOTIVE — ADMISSIBILITY.

On a trial for homicide committed by accused and others conspiring to kill decedent, it is competent for the state to give evidence of prior assaults by them on decedent while trying to deprive him of his property, as tending to show the motive which prompted accused and his co-conspirators to commit the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 321.]

5. CRIMINAL LAW—EVIDENCE OF OTHER OFFENSES—ADMISSIBILITY.

Collateral crimes may be shown where they prove malice or motive entering into the offense charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 830-832.]

6. SAME—EVIDENCE—ACTS OF CONSPIRATORS—PRELIMINARY PROOF OF CONSPIRACY.

In prosecution for homicide, evidence held to make a prima facie showing of conspiracy so as to admit evidence of acts of co-conspirators.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1017.]

7. SAME—PROOF OF CONSPIRACY—EVIDENCE.

To prove that accused conspired with others to commit the crime charged, it is not essential to establish by direct evidence that he entered into the conspiracy, but the conspiracy may be inferred from circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1259-1262.]

8. SAME—DECLARATIONS OF CO-CONSPIRATORS—ADMISSIBILITY.

Where persons conspire together to commit an unlawful act or to commit an act by unlawful means, the declarations of any of them during the pendency thereof and in the furtherance of the common design are original evidence against any of the others.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 989.]

9. SAME—APPEAL—HARMLESS ERROR.

Where, if evidence admitted over objection had been excluded, the jury would still have been obliged to find a verdict of guilty, the error in admitting the evidence was not prejudicial, and the court on appeal must, pursuant to the ex-

press provisions of Burns' Ann. St. 1901, § 1964, disregard it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Criminal Law, §§ 3137, 3138.]

Appeal from Circuit Court, Wells County;
C. W. Watkins, Special Judge.

Ernest Sanderson was convicted of murder in the second degree, and he appeals. *At-Armad.*

Jay A. Hindman and Eichhorn & Matlack, for appellant. Jas. Bingham, Atty. Gen., Henry M. Dowling, Alex. G. Cavins, and E. M. White, for the State.

JORDAN, J. Appellant, together with Otto Cook, William Cook, Samuel Emery, Ollie Sanderson, and Clara Smith, was charged by an indictment returned by a grand jury of Blackford county, Ind., with having at said county on the 23d day of October, 1904, "feloniously, purposely, and with pre-meditated malice killed and murdered one Edward P. Sanderson" by shooting and mortally wounding him with a certain revolver then and there loaded, etc. Upon arraignment each of the defendants pleaded not guilty. Upon applications a change of venue was granted from the Blackford circuit court, and the cause was transferred to the Wells circuit court. In the latter court appellant was tried separately and apart from his codefendants. On October 4, 1905, the cause was submitted to a jury, and the latter, after hearing the evidence, the argument of the respective counsel, and the instructions of the court, retired to the jury room on October 18, 1905, and on the same day returned into court a verdict finding appellant guilty of murder in the second degree, and assessing his punishment at imprisonment in the state's prison for life. Over his motion for a new trial, assigning various reasons, judgment was rendered upon the verdict. From this judgment, he appeals, and the only error which he assigns is the overruling of his motion for a new trial.

The only points discussed and relied upon by his counsel for reversal are, first, that the judgment is not sustained by sufficient evidence; second, that the court erred in the admission of certain evidence. In the motion for a new trial 185 separate reasons, or grounds, are assigned. The first three of these are that the verdict is contrary to law, contrary to the evidence, and is not sustained by sufficient evidence. The reasons numbered from 4 to 9, inclusive, challenge certain instructions, but these grounds are not discussed, and therefore must be considered as waived. The remainder of the reasons assigned, numbered from 10 to 185, inclusive, relate to the competency of evidence offered by the state and admitted by the court over the objections and exceptions of appellant. This evidence was introduced to show particular acts and declarations of appellant's codefendants, William and Otto Cook and Ollie Sanderson, made before the

commission of the crime, and also acts or conduct of William and Otto Cook occurring subsequent to the murder of Edward P. Sanderson. It appears to have been the theory and contention of the state at the trial, and also in this appeal, that the above-mentioned codefendants and appellant had conspired together for the purpose of securing control and permanent possession of the property owned by the deceased, and that this conspiracy led up to or resulted in the perpetration of the murder. The evidence upon which the accused was convicted in part is circumstantial and in part consists of admissions or declarations made by him.

The evidence in the record is long, and the circumstances in the case are many and minute. Therefore it would be impracticable in this opinion to give a complete or full statement of the testimony given upon the trial. We, however, note some of the facts which there is evidence to establish. Edward P. Sanderson was murdered at Blackford county, Ind., on the night of October 23, 1904, about 9 o'clock. At the time of his death he was 46 years old, a farmer owning considerable property, and residing on a small farm which he owned, situated near Hartford City. As a matter of history connected with the case, it is shown that his father, Lemuel Sanderson, who died some years prior to the murder of his said son, some time after the death of the mother of Edward P., married Mrs. Cook, a widow. Appellant was a child by this marriage, and a half brother of the deceased. At the time of Mrs. Cook's marriage to Lemuel Sanderson she had three children, the fruits of a former marriage. These children were Ollie, William, and Otto Cook, all three of whom are codefendants in this action. Ollie Cook married a Mr. Smith. Clara Smith, one of the codefendants, is a daughter by that marriage. Subsequently, upon the death of Mr. Smith, her husband, she married the deceased, Edward P. Sanderson, and was his wife at the time of his death. For about four years prior to the winter of 1903-04 Ollie Sanderson resided in Hartford City, separately and apart from her husband, Edward P. Sanderson, who resided on his farm. She occupied property in Hartford City owned by her husband. Some time in 1904 she and her two children moved from Hartford City to the home of her husband. Subsequently she left him and moved to her own farm of about 40 acres, situated within a mile of the premises where the deceased resided at the time of his death. Appellant for a period lived with the deceased and his said wife, Ollie, and there is evidence going to show that during this time he and Ollie, his half sister, each entertained an ill feeling toward the deceased. In fact, it is shown that the latter was opposed to appellant living at his home, for the reason which he assigned that he and said Ollie were conducting and carrying on matters about the home and farm as they

d, and were insisting on selling prop-
 elonging to him. Some time about the
 of April, 1904, when ill feeling existed
 part of appellant against the deceased,
 by reason of and in respect to the sale
 erty, as hereinafter shown, appellant
 onversation with a witness who testi-
 the trial said that "Pres. Sanderson"
 ing the deceased) did not want him to
 at his house, and that, if he "did not
 cting the d—— fool because I am
 g there, we are going to do him up."
 same month Ollie Sanderson, the wife,
 l to sell some hay belonging to the
 ed. The latter was using this hay to
 be stock on his farm, and he objected
 sale. Appellant and Otto Cook under-
 haul the hay to market and sell it.
 s the deceased objected. As a part of
 me transaction, Otto Cook assaulted
 at the deceased, for which offense he
 rested and prosecuted before a justice
 peace and a fine assessed against him.
 ant, together with William Cook and
 Sanderson, attended the trial in the in-
 of Otto. After assaulting and beating
 eceased, the parties, including appellant,
 to have hauled the hay to Hartford
 nd sold it, over objections of the de-
 and upon returning from town after
 appellant cursed the latter and dared
 come out of the house, declaring that
 old beat his "head off." In April, 1904,
 ifman went to see the deceased in re-
 purchasing from him a steer. Appel-
 as present at the time and would not
 the animal to be sold, and on that
 n he said, "Pres.," meaning Edward P.
 son, who was generally called Preston,
 ot to support us." In May following
 eased was plowing a field belonging to
 Ayres, using his own team for that
 e. Ollie Sanderson, William and Otto
 ame to where he was at work for the
 e of taking from him the horses with
 he was doing the plowing. They ap-
 have failed in their mission, but in
 rnoon they returned and then unhitch-
 horses from the plow, and by force
 ossession of them, hitched them to a
 and hauled away certain household
 owned by Ollie Sanderson to her own
 situated on her farm a short dis-
 rom the home of the deceased, where
 n resided. At the time William and
 ok unhitched the horses and took pos-
 of them, and as part of the same
 tion William Cook assaulted the de-
 knocked him down, and severely in-
 im. On this occasion, in addition to
 from the home of the deceased the
 old goods, they also took chickens,
 and horses and other property which
 d to the deceased, and which at that
 ere on his farm. About October 21,
 William Cook received information
 e deceased intended to institute an ac-
 replevy this property from appellant

William Cook, Otto Cook, and Ollie Sander-
 son. On receiving this information, William
 Cook declared that he would go and "do up"
 the deceased. On the Saturday night preced-
 ing the murder, William Cook returned from
 Hartford City, and went immediately to Ol-
 lie Sanderson's home, which was in the
 vicinity, as heretofore shown, of the premises
 upon which the deceased then resided. Ap-
 ellant met William at Ollie's house on the
 morning of the day of the homicide, and the
 two appear to have spent the day together in
 consultation.

Early in the month of October, 1904, appel-
 lant loaned his 32-caliber pistol to a Mr.
 Emory, who was a near neighbor of Ollie
 Sanderson. A few days prior to the homicide
 appellant called upon Emory, and obtained
 this pistol. The murder, as previously said,
 was perpetrated on Sunday, October 23d,
 about 9 o'clock at night, and on the following
 morning blood was discovered near a culvert
 on a highway at the foot of a hill, known as
 Patterson's hill, in the neighborhood of the
 houses of the deceased and Mrs. Ollie Sander-
 son. On October 31, 1904, about noon, the
 dead body of the deceased was found in a
 pond known as Croninger's pond, which is
 just east of Hartford City, and about two
 miles from the house where the deceased re-
 sided at the time of his death. There was a
 strap around the neck of the body, and a
 stone weighing about 68 pounds was fastened
 to this strap with a halter chain. A witness
 on the trial testified that this chain looked
 like the same chain that he had seen in use
 at Ollie Sanderson's home to hitch horses.
 The body was taken from the southeast part
 of the pond at a point about 1½ squares east
 of the Lake Erie Depot, situated at Hartford
 City, and near the public highway running
 east and west. It was four feet from the
 bank, and was under about 18 inches of wa-
 ter, and when discovered there were two gun-
 shot wounds near the right temple and two
 scalp wounds on the back of the head. Both
 of the gunshot wounds were made by pistol
 balls and those on the back of the head were
 made by some heavy, blunt instrument. The
 gunshot wounds were made by balls from a
 32-caliber revolver. Both of the balls, or bul-
 lets, penetrated the skull into the brain. Ei-
 ther of these wounds would have produced
 instant death. At the inquest held upon the
 body, it was found that the lungs and other
 organs were in normal condition, and that
 the lungs contained no water, which, as wit-
 nesses testified, indicated that the deceased
 did not breathe after his body was thrown
 into or sunk in the pond.

On Sunday, the day of the murder, appel-
 lant and William Cook ate supper at the
 home of Ollie Sanderson, at which place they
 appear to have met on that day. After sup-
 per, they left the house, and there is evidence
 tending to show that they did not, or could
 not have, returned to Ollie's house before
 9 o'clock on that night. Witnesses who tes-

tified at the trial stated that they heard two shots fired on the Sunday night in question about 9 o'clock. These shots were in the direction of the house where the deceased lived, and were fired in quick succession. In addition to the blood found at the foot of the hill, there were drops of blood also found along the way leading from the point where blood was first discovered to Croninger's pond. About 9 o'clock in the forenoon of the day upon which the corpse of the deceased was discovered, but before it was found, appellant was seen sitting on a porch in front of the Lake Erie saloon in Hartford City. He remained there for about one hour, and then walked over to the Lake Erie Depot, in said city, and stood looking towards Croninger's pond. Beginning with Tuesday after the murder, William Cook did no work during that week, but on each day he was seen to go to the highway running past Croninger's pond, and look at the pond. Appellant took no part in the search that was made to find the body of the deceased; neither did Ollie Sanderson nor William or Otto Cook. On the morning of the day upon which the body was found, but some time prior thereto, Wright Peck met appellant and had a conversation with him at Hartford City. Peck inquired what he was doing, and appellant responded that he was not doing anything; said he could not work; that he did not feel like working; that he was bothered or troubled and uneasy; and further stated in the same conversation that, if "Pres." (meaning the deceased) was found dead, "Will Cook was gone." There is evidence to show that the stone which was attached to the body of the deceased had been taken from the highway near the foot of Patterson's hill, where the blood heretofore mentioned was found. Edward P. Sanderson worked at the home of Walter and Clara Ayers on Saturday, October 22d, leaving for his own house, which was about a quarter of a mile away, between 5 and 6 o'clock, and spent the night at his own house. A light was seen at his window. There is evidence to show that he was about his home on Sunday. He was there as late as 8 o'clock Sunday October 23d, for a light was seen in his kitchen by certain persons who testified at the trial. The deceased, on the date of the murder, was living alone. A short time after the finding of the body, appellant and his half-brothers Otto and William Cook met the sheriff of Blackford county at a saloon in Hartford City, and they requested that official to protect them against any violence on the part of the people. The sheriff proposed to take them to jail and confine them, which he did. There is evidence going to show that appellant was in the immediate neighborhood of the home of the deceased during the Sunday evening in question. On that evening it also appears that he had in his possession a 32-caliber revolver, the one which he had loaned to Mr. Emory, as hereinbefore stated.

Charles Kingsbury, who was confined in

the jail at Hartford City with appellant, on the trial testified that at a time when he and appellant were alone in the jail they had a conversation about breaking jail. The following is the material part of the evidence which this witness gave: "Q. At a time when you and Ernest [meaning appellant] were alone, you may tell the jury whether or not you had a conversation with him relative to breaking out of jail? A. Yes, we had a short conversation in regard to that. Q. Tell the jury what you said to him and what he said to you. A. Well, we were talking about breaking out of jail, in the first place, talking about getting in there, about having been arrested and put in there. I said I was in there for something I hadn't done, but I expected they would convict me because the evidence was strong against me. If I could get out without hurting anybody and get away, I believed I would go. Well, he says, he didn't know whether he wanted to go or not. He said the women folks (meaning Ollie Sanderson and Mrs. Smith) were upstairs in a separate part, and Otto and Bill (meaning Otto and William Cook) were over at Bluffton (in jail), and, if he would get out, then it would show they were guilty, and he says, 'By me staying, too, and all going together, probably they could get out of it.' Q. What further was said, Mr. Kingsbury? A. I asked him what he would do if he got convicted, and he said he had his revenge anyhow, and I looked around, and I says, 'You do not mean to say that you killed him?' 'No,' he says, 'but I helped to.'"

In addition to the facts which we have considered necessary to set out in our opinion, there are a number of other circumstances shown tending to prove facts favorable to the side of the state. The latter, however, in this case is not compelled to rely solely upon the circumstantial evidence, for, in addition to the numerous circumstances which point to the guilt of the accused, there are his own positive admissions or declarations to establish his guilt. But, did his conviction rest alone upon the circumstantial evidence appearing in the case, we would not be justified in asserting that it is not of such a character that two inferences might be reasonably deduced therefrom, one supporting the guilt of the accused and the other favorable to his innocence. In *Lee v. State*, 156 Ind. 541, 60 N. E. 299, this court said: "Where the circumstantial evidence in a case is of such a character that two conflicting inferences may be reasonably drawn therefrom, one favorable to or tending to prove the guilt of the accused, and the other favorable to his innocence, then, under such circumstances, it is not within the province of this court to determine which inference ought to have controlled the jury. The question in such a case manifestly becomes one of fact for the decision of the jury, subject to review by the trial court, and is not open to review on appeal." See *Deal v. State*, 140 Ind. 354, 39 N. E. 930;

American Varnish Co. v. Reed, 154 Ind. 88, 55 N. E. 224.

It is not our province to weigh the evidence in a case on appeal. This rule applies whether the evidence be direct or circumstantial, or both. *McGaughey v. State*, 156 Ind. 41, 59 N. E. 169; *Knox v. State*, 164 Ind. 226, 73 N. E. 255, 108 Am. St. Rep. 291; *Williams v. State*, 165 Ind. 472, 75 N. E. 875, 2 L. R. A. (N. S.) 248. But counsel for appellant, however, argue that we should reverse the judgment upon the evidence alone. In answer to this contention, it can be said that there is so much evidence in the record going to show the guilt of appellant that to disturb the judgment thereon would be wholly unwarranted. We are satisfied that the jury thereunder was fully warranted in finding appellant guilty.

Counsel for appellant argue that the trial court erred, to the prejudice of appellant, in permitting the state to prove that William and Otto Cook assaulted and beat the deceased upon the two occasions shown in our statement of the evidence. At the time Otto Cook perpetrated the assault during the difficulty which arose over taking away the hay of the deceased, appellant was present, aiding William and Otto Cook in attempting to obtain possession of the hay. While he was not an active participant in committing the assault, nevertheless he apparently acquiesced therein, and was present in the interest of Otto Cook before a justice at the time he was being prosecuted for the offense in question. Under the circumstances, therefore, he was not in a position to successfully complain of the admission of evidence in respect to the assault in question, which appears to have occurred as a part of the transaction of taking possession of the hay. It is true that appellant was not present at the time when William Cook struck and beat the deceased, which occurred at the time said Cook was attempting to take forcible possession of the horses of the deceased which were being used by the latter in plowing. The admission of the evidence in regard to this assault and battery is not, as counsel contend, permitting the state to establish the commission of one crime by proving another offense. The conspiracy or common design to wrongfully obtain the property of the deceased was then pending, and the acts of the alleged co-conspirators on that occasion, as claimed by the state, may be said to have been in furtherance of such common design, or at least were a part of the active prosecution thereof. Again, it was competent for the state to show the motive, or motives, which prompted appellant, and his co-conspirators to commit the murder. The theory of the state is that appellant and his co-conspirators were each and all influenced or actuated by the same motives in the perpetration of the crime, viz., ill or revengeful feelings which they had or entertained against the deceased. The tendency of the evidence in controversy, when

considered together with other evidence and circumstances in the case, was to prove such motive on the part of appellant and his co-conspirators. *Clem v. State*, 33 Ind. 418, 429. The rule is well recognized that collateral crimes may be shown where they tend to prove malice or motive, if such elements enter into the offense charged against an accused person. *Gillett*, *Indirect and Collateral Evidence*, § 57. Again, it may be said, we think, that the two assaults made by the Cooks appear from the evidence to have been a part of a system of conspiracy to secure possession of the property of the deceased. In respect to the rule applicable in conspiracy cases, when the acts of a conspirator, or conspirators, form a part of a system of the conspiracy in question, this court, in *Card v. State*, 109 Ind. 415, 9 N. E. 591, quoted with approval the following from Wharton on Criminal Evidence: "Conspiracy cases give signal illustration of the rule here stated. The acts of each conspirator emanate from him individually, yet, when they are part of a system of conspiracy, they are admissible in evidence against his co-conspirators, although each component act may constitute an independent offense. The reason for the rule in this and similar cases is that, when once a system is proved, each particular part of the system may be explained by the other parts which go to make up the whole." The trial court, in admitting the evidence of which appellant complains, manifestly was satisfied that there was a sufficient prima facie showing of the existence of a conspiracy upon the part of appellant, the two Cooks, and Ollie Sanderson, and upon this theory held the evidence to be competent as being in furtherance of such conspiracy. *Walton v. State*, 88 Ind. 9; *Williams v. State*, 47 Ind. 568; *Gillett on Criminal Law* (2d Ed.) § 311; *Musser v. State*, 157 Ind. 423, 61 N. E. 1. We cannot say that in so holding the court abused its discretion, for there is evidence tending to show that the state had at least made a prima facie case of the conspiracy. In fact, as the authorities affirm, a conspiracy may be inferred from the circumstances proven in the case. In order to prove that the accused person conspired with others, it is not essential to establish by direct evidence that he entered into the unlawful agreement or conspiracy. *Archer v. State*, 106 Ind. 426, 7 N. E. 225; *Gillett on Criminal Law*, supra; *Musser v. State*, supra. In the case last cited this court sustained as a correct exposition of the law the following statement: "Evidence in proof of conspiracy will generally be circumstantial, and it is not necessary for the purpose of showing the existence of the conspiracy for the state to prove that the defendant and some other person or persons came together and actually agreed upon a common design and purpose, and agreed to pursue such common design and purpose, in the manner agreed upon. It is sufficient if such common design or purpose is shown

* * * by circumstantial evidence." The general rule or doctrine asserted and sustained by the authorities is that where persons have conspired together to commit an unlawful act or to commit an act, although not unlawful in itself, but by means which are unlawful, the acts and declarations of any of the persons entering into such conspiracy done or made during the existence or pendency thereof, and in the furtherance of the common design or purpose, are original evidence against any or all of the other co-conspirators. *Wolfe v. Pugh*, 101 Ind. 293; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Musser v. State*, supra; *Gillett on Criminal Law*, supra. The basis of the rule upon which such evidence is admitted is that, where a combination or conspiracy of persons has been formed for an unlawful purpose, they may be said to have assumed an individuality in respect to the purpose or design in question and the conduct or acts of each are by law chargeable or imputed to all of such co-conspirators. 3 *Ency. of Evidence*, p. 417; *Gillett, Indirect and Collateral Evidence*, § 28; *Gillett on Criminal Law*, supra; *Card v. State*, supra; *Wolfe v. State*, supra; *Musser v. State*, supra. We conclude, for the reasons given, that the evidence in question was competent.

Counsel for appellant further complain of the admission of certain other evidence tending to show the acts or conduct of William and Otto Cook and Ollie Sanderson prior to the commission of the murder, and also certain acts or conduct of William and Otto Cook subsequent thereto, but before the body of the deceased was discovered. The contention of the state in regard to this evidence is that it was admissible under the principle or rule affirmed in *Musser v. State*, supra, and the authorities therein cited, but as to whether the state is correct in its contention in this respect we need not and do not determine, for the reasons hereinafter stated. Objections are also advanced relative to the admission at the trial of evidence other than that above stated. We pass without deciding the questions so raised, for the reason that we are satisfied that the admission of the controverted evidence was harmless and in no manner operated to the prejudice of the substantial rights of appellant. Hence, afford no grounds for reversal. *Binns v. State*, 66 Ind. 428.

The evidence in dispute, as we view it, is not of importance, nor influential in its character. Hence, under the circumstances, it may be presumed that it in no manner exerted a controlling influence over the verdict of the jury. If the particular items of which appellant complains had been excluded or eliminated, it is apparent, we think, in view of the remaining evidence, that the jury could not have done otherwise in the discharge of its duty than convict appellant. The case from our view, under the facts and the instructions of the court, was fairly tried and

determined upon its merits. Under section 1964, Burns' Ann. St. 1901, we are required to disregard "technical errors or defects or exceptions to any decision or action of the court below," which in our opinion do not prejudice the substantial rights of the defendant.

As we find no such error presented by the record, the judgment is therefore affirmed.

(169 Ind. 291)

TRUELOVE, Treasurer, v. CITY OF WASHINGTON. (No. 21,088.)

(Supreme Court of Indiana. Nov. 20, 1907.)

1. STATUTES—CONSTRUCTION.

In the interpretation of statutes, courts, though taking words in their ordinary sense, will look to the whole act, the several parts thereof, to the object to be accomplished, and to the legislative intent as shown by the speeches and history of the law in its progress through the General Assembly.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 234, 262, 293.]

2. MUNICIPAL CORPORATIONS — TAXATION — COLLECTION OF TAXES BY COUNTY TREASURER.

Act March 6, 1905 (City and Towns Act, Acts 1905, p. 239, c. 129) § 43, provides that all cities shall elect a city treasurer, except county seat cities of the first, second, and third classes. Section 195 (page 361) provides that in a county seat city of such classes, the office of city treasurer shall be abolished, and that the county treasurer shall be treasurer ex officio of such a city, and section 196 requires the county treasurer of a county having a city as its county seat, except in a city of the fourth or fifth class, to perform the duties required of the city treasurer. Section 197 (page 362) requires a city treasurer of a county seat city of the first, second, or third class, on the expiration of his term, to make settlement with the city clerk and pay over to the county treasurer all funds in his hands. Sections 200, 201, 202, 203, 204, and 206 (pages 364-368) prescribe the duties of the county auditor and county treasurer in the assessment and collection of taxes in all cities of the state, and section 208 (page 371), requires the county treasurer on the 1st of each month to receipt to the city clerk for the amounts collected during the preceding month, and that in a city of the fourth or fifth class he shall pay over such amounts to the city treasurer. Section 207 (page 370) fixes the compensation of the county auditor and county treasurer for their services performed for a county seat city of the first, second, or third class, but fixes no compensation for services for other cities. *Held*, that the act imposed on county treasurers the duty of collecting all regular taxes for all the cities of their respective counties, and, when collected, of turning the same over to the city treasurers, except that in a county seat city of the first, second, or third class the county treasurer was also ex officio city treasurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 2104.]

3. CONSTITUTIONAL LAW — PERSONAL, CIVIL, AND POLITICAL RIGHTS — CONSTITUTIONAL GUARANTIES.

Act March 6, 1905 (Acts 1905, p. 370, c. 129, City and Towns Act) § 207, providing compensation for the county auditor and county treasurer for their services required to be performed under that act for a city of the first, second, or third class, which is the county seat, but providing no compensation for services for a city of the first, second, or third class, which

a county seat, or for a city of the fourth class, is not in contravention of Bill of , § 21, declaring that no man's particular shall be demanded without just compen-

RE—CLASS LEGISLATION.

At March 6, 1905 (Acts 1905, p. 370, c. City and Towns Act) § 207, providing compensation for the county auditor and county clerk for their services required to be performed under that act for a city of the first, second, third class, which is the county seat, but giving no compensation for services for a city of the first, second, or third class, which is a county seat, or for a city of the fourth or fifth class, is not in contravention of Bill of , § 23, forbidding the grant to any citizen of citizens of privileges or immunities on the same terms shall not equally be granted to all citizens.

Appeal from Circuit Court, Daviess County; by Q. Houghton, Judge.

Agreed statement of facts between Hillary Truelove, as treasurer of Daviess County, and the city of Washington, to be submitted to the circuit court under Burns' Stat. 1901, § 563, praying that the court declare the act of March 6, 1905 (Acts 1905, c. 219, § 129), known as the "City and County Act." From the judgment, Truelove vs. City of Washington. Affirmed.

Attorneys, Allen & Hastings, for appellant. Gardiner, for appellee.

DAVIDSON, C. J. Hillary Truelove, as treasurer of Daviess county, of the one part, and the city of Washington, a city of the fifth class, of the other part, entered into an agreed statement of facts which they submitted to the circuit court as an agreed case under the provisions of section 563, Burns' Ann. Stat. 1901, praying the court to construe the act of March 6, 1905, entitled "An act concerning municipal governments, approved March 6, 1905," and known as the "City and Towns Act" (Acts 1905, c. 219, § 129), and particularly sections 207, 208, 209, inclusive, so far as the same relate to the duties of appellant as such county treasurer in the collection of taxes and other revenues for and on behalf of appellee city. The agreed case the court stated the following conclusions of law: First. "It is his duty to receive the tax duplicates in which the aggregate of all taxes, including city and county taxes, is carried out by the county clerk when delivered to him by such officer as provided by section 201 of the act." Second. "It is his duty to include in the tax duplicates by law to be given of the tax duplicates for collection the amount of the amount of taxes charged the defendant city of Washington for city taxes, upon each \$100 valuation of taxable property, and for such purposes upon each duplicate for said city for city purposes the same as he is required by law to receive and collect the taxes thereon for state, county, road, and other purposes, and all other taxes as required and provided in section

202." Third. "It is his duty to collect all delinquent city taxes of said city as provided by section 204." Fourth. "It is his duty on the first Monday in November in each year to make settlement with the county auditor for the amount of delinquent city taxes and certify with auditor statement as provided in section 205." Fifth. "It is his duty to keep account of all moneys received by him for the defendant city for taxes, current and delinquent, and pay the same to the treasurer of the defendant city as provided in section 208." It is a fundamental rule of interpretation of statutes that courts, while taking words in their ordinary sense, will look to the whole act, to the several parts thereof, to the object sought to be accomplished, to the legislative intent, as exemplified by the speeches and history of the law in its progress through the several respective branches of the General Assembly. *Walter A. Wood, etc., Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641; *Edgar v. Board*, 70 Ind. 331; *Stout v. Board*, 107 Ind. 343, 8 N. E. 222; *State v. Lowry & Lewis*, 166 Ind. 372, 17 N. E. 728, 4 L. R. A. (N. S.) 528; *Sutherland on St. Con.* § 239.

Two things should be fixed in the mind to begin with, namely (1) that neither convenience nor economy will be conserved by maintaining in cities constituting county seats two systems and two public offices and two officers for the collection and disbursement of taxes; and (2) it is necessary to the convenient and orderly dispatch of public business that all cities have a local treasurer, or other officers, to receive, hold, and disburse the taxes and other revenues of such city. With these facts before us, the construction of the statute, under review, presents neither violent conflict, nor puzzling ambiguity. In the 50 years following the adoption of our present Constitution, the laws relating to municipal government had become so numerous, repetitious, and confused that the Legislature of 1903 provided for the appointment of a commission to "compile, revise, and codify," among others, the statutes of the state relating to municipalities, "to improve, systematize, harmonize, and make such laws clear, and intelligible." The commission, composed of eminent lawyers, as a part of its report to the General Assembly in 1905, submitted a bill, containing what was proposed as a complete, efficient, and, so far as practicable, a harmonious system of government for cities and towns. In the scheme devised by the commission it is very clear that it was intended that in all county seat cities, being places where county treasurers are required to keep their offices, the office of city treasurer should be dispensed with, and that all duties conferred by the act upon treasurers of other cities should in such county seat cities be imposed upon county treasurers. The original bill, as proposed by the commissioner, and as introduced in the Legis-

lature, in defining the elective officers of cities, provided (section 43) that treasurers should be elected in all the cities of the state, except county seat cities, in which latter class the county treasurer should act as city treasurer. This section of the bill was amended by inserting the words "of the first, second, and third class" as they appear in the fourth line of section 43 of the statute (Senate Journal, p. 919), so as to restrict the nonelecting county seat cities to cities of the first, second, and third class, thus leaving treasurers to be elected in county seat cities of the fourth and fifth class. This legislative purpose is further manifested in an amendment made to section 195 by inserting the words "of the first, second, and third class" as they appear in lines 3, 12, and 17 of said section, also as they appear further in section 195 and 207 of the law. The amendments there mentioned are all the amendments made to the sections of the original bill now under consideration, which are at all material to the question before us. With the aid of this fact, we will now proceed to notice what appears to us as the true rendering of the law with respect to the duties of county treasurer. We are of opinion that it was intended by both the Codification Commission, while engaged in devising a governmental scheme for cities, which should be efficient, uniform, economical, and convenient, and the General Assembly in enacting the statute before us, to impose upon county treasurers the duty of collecting all regular taxes for all the cities of their respective counties, current and delinquent, and, when collected, to turn the same over to the several city treasurers, except that in county seat cities of the first, second, and third class, the county treasurer shall also be and act as city treasurer ex officio. This conclusion has been reached from the following considerations: Section 43 of said act makes it the duty of all cities of the state to elect a city treasurer, except county seat cities of the first, second, and third class, thus placing county seat cities of the fourth and fifth classes upon the same footing as to the election of a city treasurer, as noncounty seat cities. Requiring all cities but those excepted to elect city treasurers does not necessarily mean that such treasurers shall be charged with the duty of collecting the city taxes, and it is plain from the sections of the statute that follows that no such right or duty rests upon city treasurers, except as imposed upon the treasurer of cities of the fourth class which are not county seats, as provided by the act of March 9, 1907 (Acts 1907, p. 333, c. 196).

Section 195 provides that in cities of the first, second, and third class the office of city treasurer shall, upon the expiration of the term of the present incumbent, "be abolished, * * * and thereafter in every city of the first, second, and third class, which is a coun-

ty seat, the county treasurer of such county shall be treasurer, ex officio, of such city; and shall perform all duties in this act required to be performed by city treasurers; and wherever in this act, in relation to cities of the first, second, and third class, which are county seats, the term treasurer, or city treasurer, is used, such designation should apply to the county treasurer, acting as treasurer in any such city."

Section 196 further emphasizes the abolition of the office of city treasurer in county seats which come within one of the three highest classes, and directly and expressly imposes upon county treasurers the duty of collecting all the regular taxes in such cities of the state. It provides "that the treasurer of every county having a city as its county seat (except in cities of the fourth and fifth class) shall, upon the expiration of the term of the present incumbent, perform all the duties which by law or the ordinances of such city are required to be performed by the treasurer thereof, in the same manner, and with like effect, as such duties are required to be performed by the city treasurer." It further provides that such county treasurer, before assuming the duties of such city treasurer, shall take an oath to faithfully perform his duties, and execute a bond payable to the state, with surety to be approved by the common council, in a penalty prescribed by such council, conditioned that he will faithfully discharge the duties of his office so far as the same affect the city, and safely keep an account for all moneys received by him for such city.

Section 197 provides that, after the taking effect of this act, the city treasurer of all county seat cities of the first, second, and third class, upon the expiration of his term, shall make settlement with the city clerk and pay over to the county treasurer all funds in his hands.

Sections 200 to 208, inclusive, which provide the procedure in the assessment and collection of taxes in all cities of the state, make it plain that city treasurers have nothing to do with the collection of regular taxes, current or delinquent, beyond receiving the money from the county treasurer, after he has collected it from the taxpayers, except as otherwise provided by the act of March 9, 1907 (Acts 1907, p. 333, c. 196).

Section 200 enacts that "it shall be the duty of the auditor of the county in which any city is situated in each year to make out and deliver to the city clerk, in cities of the fifth class, and the department of finance in cities of every other class, a certificate showing the aggregate assessment of taxation for the current year of all taxable property in the city as returned by the assessor and fixed by the board of review. Such department of finance, or city clerk, shall lay such certificate before the common council at its next regular meeting, which shall pro-

ceed to levy a tax upon the property listed sufficient to meet the wants of the city for the ensuing year. The levy of the taxes so made by the common council (section 201) shall be forthwith certified to the county auditor, who shall proceed to compute the taxes for the city, as required to do for state, county, and township taxes, and enter the amount of tax chargeable to each person against the name of such person as it appears upon the tax duplicate of the county for such city, in proper columns where the taxes for state, county, and township with which such person is charged, is entered, and the aggregate set down in a column of totals, and "such duplicate shall thereupon be delivered to the treasurer of the county as now provided by law." Every such county treasurer (section 202) shall include in the notice required to be given by him of the receipt of the tax duplicate for collection a statement of the amount of taxes charged in such city for city purposes, and such notice shall be the only notice required for such facts. Such county treasurer shall collect all taxes shown upon the duplicate of such city for city purposes, the same as he is required to collect the taxes for state, county, and township purposes.

Such county treasurer, acting as city treasurer (section 203) shall, when making his annual settlement with the county auditor, as now required by law, make settlement with such auditor for the amount with which he is chargeable on account of city taxes. Immediately upon such settlement the auditor shall make out a statement in duplicate, showing the aggregate amount of all current and delinquent city taxes that have been collected by the county treasurer, as shown by the duplicate, one copy of which statement shall be delivered to the department of finance, or the city clerk, as the case may be, who shall charge the amount thereby to have been collected to such county treasurer as cash in his hands.

Section 204 provides that the county auditor shall make out a list of delinquent city taxpayers, as shown by the duplicate, which shall be delivered to the county treasurer, who shall be thereby empowered, and it shall be his duty to collect such delinquent taxes, in the same manner and with the same penalty and interest, as state, county, and township taxes are collected.

Section 205 provides for the settlement of the county treasurer with the county auditor for delinquent taxes collected on behalf of cities.

Section 206 provides for the sale, by county treasurers of the property of city delinquents, for a recovery of city taxes.

The system for the collection and lodging of regular city taxes with the city treasurers is concluded, and clearly indicated by section 208, the material part of which we quote:

"The treasurer of every county in the state shall keep an account of all moneys received by him for each city in such county, for taxes, current or delinquent, assessments, license fees and from all sources whatever; and on the first day of each month he shall receipt (that is, acknowledge in writing), to the controller of such city, in cities in which the office of controller has been created, and to the city clerk in all other cities, for the amounts collected by him as aforesaid for the preceding month, itemizing the moneys so by him collected, which amounts so receipted for shall at once be available for such city's use. In cities of the fourth and fifth classes, and in all other cities which are not county seats, such county treasurer shall pay over such amounts to the city treasurer of such cities respectively; and in cities of the first, second, and third classes, which are county seats, he shall pay such amounts on the warrants drawn on the city treasurer by the city controller of each of such cities respectively, and as otherwise provided in this act."

Section 207 in fixing the compensation of officers enacts that the county auditor, for all services required to be performed by him under this act, shall receive an annual salary in county seat cities of the first class of \$1,000, in such cities of the second class of \$500, and in such cities of the third class of \$400. The county treasurer for all services required of him in such cities of the first class shall receive \$8,500, in cities of the second class \$1,500; and in cities of the third class \$1,000, to be paid out of the funds of the city upon allowance of the common council; and, in addition to such salary, the treasurer shall be allowed 5 per centum of the amount of taxes collected by him. "For their services under this act, in cities other than cities of the first, second, and third class, which are county seats, county auditors and treasurers shall receive no compensation other than that allowed them by law, as such county officers."

The making of provisions for the collection of city taxes by county treasurers did not relieve municipal bodies from the necessity of having some public officer to discharge the usual and appropriate duties incident to the office of treasurer, such as the collection of license fees and other claims due the city, and to receive, hold, and disburse the various revenues provided for the maintenance of the city government. The Legislature recognized this continuing necessity, and having first, by section 43, provided for the election of city treasurers in all cities of the state except county seat cities of the first, second, and third classes, and provided, in section 195, that in the excepted cities the county treasurer shall act as treasurer ex officio, devotes sections 200 to 212, inclusive, solely to the defining and prescribing of the duties of all city and acting city treasurers.

But the collection of regular city taxes nowhere appears as one of their duties only in the excepted cities. Among other things, "they shall receive all moneys due to, or collected for any city," as taxes collected by the county treasurer. They shall pay all city warrants and obligations, redeem and cancel bonds and city orders, make reports, etc. In other words, they shall perform all the duties usual to the office of treasurer of a municipal corporation other than collect regular city taxes.

The system outlined and defined by the sections referred to for the collection of city taxes is reasonable and efficient, and there appears no just ground for calling in question the correctness of the court's conclusions of law, as set forth at the head of this opinion. Appellant, however, contends that, if the interpretation by the circuit court is correct, then section 207 of the statute is invalid as being in contravention of section 21 of the Bill of Rights, which affirms that "no man's particular services shall be demanded without just compensation," and likewise in conflict with section 23 of the Bill of Rights, which forbids the General Assembly the granting to "any citizen, or class of citizens, privileges, or immunities, which upon the same terms shall not equally belong to all citizens." In the exercise of its sound judgment the General Assembly, in creating a public office, and in defining the duties of the officer, may arbitrarily determine and fix the compensation to be allowed for the services required of such officer, either by a system of fees and allowances for specific items or by a lump salary for all; and any one accepting such office takes it cum onere, and impliedly undertakes to perform all the official acts there prescribed, and that may be subsequently prescribed and imposed upon it by the Legislature, without any compensation other than that granted by the statute. As said in *Yeager v. Board*, 95 Ind. 427, 430: "If the Legislature imposes burdensome or unremunerative duties, he must perform as required, or resign the office. Such duties are official, and not particular services, under the Constitution, which cannot be required without just compensation." See, also, *Falkenburg v. Jones*, 5 Ind. 296; *Bynum v. Board*, 100 Ind. 90; *Board v. Gresham*, 101 Ind. 53.

If it can be said that section 23 applies to public officers at all, or that public office is a privilege (see *Ferner v. State*, 151 Ind. 247, 250, 51 N. E. 360), the provision cannot be held to embrace the facts of this case because treasurers of cities of the first class and those of the fifth class are not of the same class, and do not have, or cannot therefore perform, duties identical in kind and extent. Section 207 is not obnoxious to the Constitution on the grounds claimed. We find no error.

Judgment affirmed.

(40 Ind. App. 554)

WORTHINGTON v. QUALKINBUSH. (No. 6,139.)

(Appellate Court of Indiana, Division No. 2
Nov. 22, 1907.)

1. JUSTICE OF THE PEACE—JURISDICTION—
TERRITORIAL LIMITS.

Under the express provisions of Burns' Ann. St. 1901, § 1498, the jurisdiction of a justice of the peace is limited to his township.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 146.]

2. SAME—PROCESS—SUBSTITUTED SERVICE.

Burns' Ann. St. 1901, § 310, provides that, when an individual has an office or agency in any county for the transaction of business, any action connected with such business may be brought in the county where the office or agency is located, and service on any agent or clerk employed in the office or agency shall constitute service on the principal. Held that, where a nonresident of the United States owned a farm in Indiana and maintained an office and resident agent thereon jurisdiction of such nonresident could be obtained by a justice of the peace in the township where the office was maintained by service of process on the agent.

Appeal from Circuit Court, Martin County; H. Q. Houghton, Judge.

Action by John Qualkinbush against Louis N. Worthington. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. T. Rogers, for appellant. Hiram McCormick and F. E. Gilkison, for appellee.

ROBY, J. The question for decision is whether jurisdiction of a nonresident of the state and of the United States, who owns a farm in this state and conducts the same by a resident agent and maintains an office thereon, can be obtained in a suit growing out of matters connected with such agency before a justice of the peace through service of process upon said agent. The jurisdiction of a justice of the peace is limited to his township. Section 1498, Burns' Ann. St. 1901.

Section 32 of "An act concerning proceedings in civil cases," approved April 7, 1881 (Acts 1881, p. 245, c. 38; section 310, Burns' Ann. St. 1901), is as follows: "When a corporation, company, or individual has an office or agency in any county for the transaction of business, any action growing out of, or connected with, the business of such office may be brought in the county where the office or agency is located, at the option of the plaintiff, as though the principal resided therein; and service upon any agent or clerk employed in the office or agency shall be sufficient service upon the principal; or process may be sent to any county, and served upon the principal." This is a civil action. It grows out of the business of such office. It is brought in the county where the same is located and in the proper township, and its facts bring it within the letter of the statute. *Rauber v. Whitney*, 125 Ind. 216, 25 N. E. 186. It is also within the reason. The agent who represents the appellant when a man is to be

o clear land, to plow, and to do other ought to represent him in a suit to for such services.
ment affirmed.

App. 552)

MOLT v. HOOVER. (No. 5,973.)

ate Court of Indiana, Division No. 2.
Nov. 22, 1907.)

EAL—REVIEW—HARMLESS ERROR—IN-
TIONS.

ere, in an action against the proprietor
spital for medical attention to a patient,
nurse hire and services of a consulting
in, plaintiff testified that he engaged the
without being requested to do so by the
tor, and paid her without being requested
after the proprietor had refused to pay,
cedes that he cannot recover for the serv-
he consulting physician, plaintiff was not
by an instruction eliminating any claims
se hire and for the consulting physician.

Note.—For cases in point, see Cent. Dig.
Appeal and Error, §§ 4219, 4220.]

L—WRITTEN INSTRUCTIONS—NECES-

e failure of the court to give all the in-
ns in writing, as required by Acts 1903,
c. 193, unless the parties consent that
ructions may be oral, is reversible error.
Note.—For cases in point, see Cent. Dig.
Trial, §§ 514-523.]

al from Circuit Court, Marion Coun-
C. Allen, Judge.

on by William F. Molt against Blanche
From a judgment of the circuit
or defendant, rendered on appeal from
ment of a justice of the peace, plain-
deals. Reversed.
11 N. E. 221.

. Bachelder, for appellant.

STOCK, C. J. This action was com-
In the court of a justice of the peace
gment rendered against the appellant,
as plaintiff below, for costs. From
dgment he appealed to the Marion cir-
urt. A trial in the court last named,
a jury, resulted in a verdict and judg-
or appellee.

only error assigned is the action of
rt in overruling appellant's motion for
trial. An amended complaint filed be-
e justice of the peace stated, in sub-
that the defendant was the owner,
tor, and manager of a maternity home
ng-in hospital in the city of Indianapo-
at from the 27th day of March, 1902,
e 24th day of April, 1902, the plaintiff,
request of the defendant, rendered
l attention to a woman then about to
fined in said maternity home, and at
uest procured a nurse for and had con-
physicians attend upon said woman;
e defendant is indebted to him in the
: \$181 for medical attention and for

nurse hire furnished as aforesaid. A bill
of particulars is filed with the complaint.
This complaint was the only pleading in the
cause.

The third, fourth, fifth, sixth, and seventh
reasons for a new trial are, respectively, that
the court erred in giving to the jury, re-
spectively, instructions numbered 2, 3, 4, and
5. These instructions, in substance, informed
the jury that under the statute of frauds
one cannot be held liable for the debt of
another, unless the promise to pay said debt
is in writing, signed by the person sought to
be charged; that, to entitle plaintiff to re-
cover, it must appear from the evidence that
there was a contract entered into between
plaintiff and defendant that the services were
in the first instance to be charged to the
defendant, and that they were to be rendered
on her account; that, unless the jury found
such contract to have been so entered into
by a preponderance of the evidence, the ver-
dict should be for the defendant, and the
fifth instruction that, if the jury found by a
fair preponderance of the evidence that the
said contract was so entered into, the verdict
should be for the plaintiff, and damages as-
sessed in such sum as would reasonably com-
pensate him for the services rendered. This
instruction limited plaintiff's right to recov-
er to services rendered by him alone, elim-
inating any claims for nurse hire and for the
attending physician. Appellant was not in-
jured by this omission, for he testified that
he had engaged the nurse without being re-
quested to do so by appellee, and paid her
without being requested to do so by appellee,
that he paid her after the appellee had refus-
ed to do so. Appellant virtually concedes
that he cannot recover for the services of the
consulting physician.

The eighth reason for a new trial is that
the court erred in not giving instructions
Nos. 4 and 5 to the jury in writing, that the
same were given in parol, and that the court
did not have the stenographer take the same
down in shorthand at the time of giving the
same, nor at any other time. They should
have been in writing. An act concerning
proceedings in civil procedure, approved
March 9, 1903 (Acts 1903, p. 338, c. 193),
provides that all instructions given by the court
shall be in writing. The failure to so give
them was reversible error. To the manner
of giving them and to their contents appellant
timely excepted. The statute contains the
provision that, if the parties consent thereto,
the court may instruct the jury orally. In
the case at bar no such consent was given.

For this error, the judgment must be re-
versed, and, as other questions presented are
not likely to arise upon a second trial, they
need not be considered.

Judgment reversed, with instructions to
sustain appellant's motion for a new trial.

(40 Ind. App. 508)

PITTSBURG, C., C. & ST. L. RY. CO. v. RICHARDSON. (No. 6,103.)

(Appellate Court of Indiana, Division No. 2. Nov. 19, 1907.)

1. CARRIERS—INJURIES TO PASSENGER—ACTS OF FELLOW PASSENGER—DUTY OF CARRIER.

It is the duty of a common carrier to protect a passenger from the unprovoked assault of a fellow passenger if there is reason to believe that it is threatened and can be prevented.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1125.]

2. SAME—KNOWLEDGE OF CARRIER—PLEADINGS—CONSTRUCTION.

In an action against a carrier for injuries to plaintiff, a passenger, through being shot by a fellow passenger, an allegation that defendant's brakeman "permitted" the shooting embraced the element of knowledge of the danger threatened or of the facts from which it might have been anticipated; the verb "permit" importing knowledge of the act permitted.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5315-5318; vol. 8, p. 7752.]

3. NEGLIGENCE—PLEADING—SUFFICIENCY.

A general averment of negligence is sufficient if a violation of duty is shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 174, 175.]

4. CARRIERS—INJURIES TO PASSENGER—NEGLIGENCE—ACTS OF FELLOW PASSENGERS—COMPLAINT—SUFFICIENCY.

In an action against a carrier for injuries to plaintiff, a passenger, through being shot by a fellow passenger, a complaint alleging that defendant's brakeman was in charge of the car in which plaintiff was riding at the time of the assault, and that he could have prevented the assault, but negligently permitted it, was not open to the objection that there was no averment that the brakeman was at the time acting within the scope of his employment; the duty to protect passengers from the assaults of other passengers being among the recognized duties of brakemen.

5. SAME—DEGREE OF CARE REQUIRED OF CARRIER—INSTRUCTIONS.

In an action against a carrier for injuries to plaintiff, a passenger, through being shot by a fellow passenger, plaintiff alleged that defendant's brakeman negligently permitted the assault, though he could have prevented it. *Held*, that an instruction that a carrier of passengers must exercise for their safety the highest care and diligence compatible with the nature of the carriage, that it owes the passenger the duty of warning and protecting him against danger known to the carrier, and that the carrier is responsible for the slightest negligence, if injury is caused thereby—was correct.

Appeal from Circuit Court, Floyd County; Wm. C. Utz, Judge.

Action by Robert Richardson, by his next friend, against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

M. Z. Stannard and McIntyre, Bullett & James, for appellant. E. B. Stotsenburg and J. H. Weathers, for appellee.

COMSTOCK, O. J. Action by appellee for personal injuries sustained while a passenger on appellant's train at the hands of a fellow passenger because of the negligence of

appellant's brakeman. Issues were formed upon the pleadings, and a trial had resulting in a verdict on which judgment was rendered in favor of appellee for \$250. Only the action of the court in overruling appellant's demurrer to the complaint for want of facts and its motion for a new trial are discussed.

The complaint, after alleging the minority of the plaintiff, the corporate capacity of appellant, and its operation of a line of railroad extending from the city of Louisville, Ky., to the city of New Albany, Ind., that said defendant daily ran a large number of passenger trains over its said road, carrying large numbers of passengers between said points, alleges that on the 12th day of March, 1905, plaintiff, Thomas Alexander, and one George Fredice, took passage about 11:30 p. m. in the same coach of one of defendant's passenger trains at said Louisville for New Albany, Ind.; that said Alexander was intoxicated and boisterous; that the brakeman and conductor, servants of the appellant, were in said coach and made no effort to remove said Alexander from the train; that when said train reached Silver street, in New Albany, the said Alexander stepped into the aisle of said coach by the side of the brakeman, and pulled from his pocket a pistol, from which pistol he unlawfully fired a shot out and toward the plaintiff, although the plaintiff had given him no provocation for said act. It alleges that the brakeman in charge of said train and in said passenger coach could easily have prevented the said Alexander from making said assault upon the plaintiff, but negligently and unlawfully permitted said Alexander to fire said shot at the plaintiff, and to commit an assault and battery upon him. It is further alleged that the shot struck plaintiff in the left arm, seriously wounding him. It sets out a particular statement of his injuries, and alleges that he was wholly without fault, and that his injury was caused wholly through the negligence of the defendant and its said employees in charge of said train.

The complaint is open to the objection urged against it, that it contains some matters that are evidentiary and others by way of recital and others that are conclusions of the pleader. These, of course, do not add to its sufficiency. It does, however, directly aver that while the plaintiff and one Alexander were passengers upon appellant's train that the brakeman could easily have prevented the assault, but that he negligently permitted said Alexander to shoot appellee at a time when he had given said Alexander no provocation; that plaintiff's injuries were wholly due to the negligence of the defendant and its employees in charge of said train. It is the duty of a common carrier to protect a passenger from the unprovoked assault of a fellow passenger if there is reason to believe that it is threatened and can be prevented. This duty springs from a condition created

by a third party, coupled with a knowledge by the carrier's servants that the condition exists, and with time enough to intervene between the acquisition of the knowledge and the infliction of the injury to enable the servant of the carrier to protect the passengers from the third party's misconduct. The verb "permit" imports knowledge of the act permitted, and the charge that the brakeman permitted the act of violence in question embraces the element of knowledge of the danger threatened or of the facts from which the danger may be anticipated. A general averment of negligence is sufficient if a violation of duty is shown.

The further objection is made that, while the complaint counts upon the negligence of appellant's brakeman, there is no averment that the brakeman was acting within the scope of his employment when the alleged omission of duty occurred. The duty to protect passengers from the assaults of other passengers is among the recognized duties of brakemen. It is alleged that he was in charge of the car as brakeman. He is charged with having neglected this particular duty. Considering all the allegations, we think the complaint complies reasonably with the rules of pleading. *Louisville, New Albany & Chicago Ry. Co. v. Kendall*, 138 Ind. 313, 36 N. E. 415.

Exception was taken to instruction No. 6, given to the jury at the request of appellee. It is as follows: "No. 6. The common carrier of passengers owes them not merely the duty of transportation, but also that of exercising for their safety the highest care and diligence compatible with the nature of the carriage. The carrier owes the passenger the duty of warning him and protecting him against danger when it is at hand and known to the carrier. Common carriers are required to exercise the highest degree of care to secure the safety of their passengers, and are responsible for the slightest neglect, if injury is caused thereby." It is conceded that this degree of care, if applied to a case where injury to a passenger has resulted from defective roadbed or equipment or neglect of duty in the selection of competent servants, would be correct, but that in the case at bar, when the injury arose from the act of a third party, and not the fault of the carrier, it is not applicable. The case of *Tall v. Baltimore Steam Packet Co.*, 90 Md. 248, 44 Atl. 1007, 47 L. R. A. 120, is relied upon. It supports appellant's position, but it is, as we believe, against the weight of the authorities. The *West Memphis Packet Co. v. White*, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427, was an action against a steamboat company for personal injuries to a passenger caused by the negligent use of a gun by another passenger. In an instruction the trial court said: "The defendants in this case were bound to exercise

the utmost care and vigilance for maintaining order and guarding the plaintiff, White, who was a passenger on board, against personal injury from whatever source arising, which might reasonably have been expected to occur in view of all the circumstances of the case and the number and character of the passengers on board the boat." In a preceding part of the instructions the court said that the defendant was liable "for injuries and losses arising from even the slightest negligence." Upon appeal the Supreme Court of Tennessee affirmed the judgment, citing from the leading case (*Flint v. Norwich & N. Y. Transportation Co.*, 6 Blatchf. [U. S.] 158, Fed. Cas. No. 4,873; s. c., 34 Conn. 554, s. c., 13 Wall. [U. S.] 3, 20 L. Ed. 556), in which Justice Shipman in submitting to the jury a case involving the liability of a steamer and its owners for an injury sustained by one passenger from the act of a fellow passenger said: "The defendants were bound to exercise the utmost vigilance and care in maintaining order and guarding the passengers against violence from whatever source arising which might reasonably be anticipated or naturally be expected to occur in view of all the circumstances and the number and character of the persons on board." The rule has been adopted in *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Pittsburg, Ft. Wayne & C. Ry. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Carpenter v. Boston & A. Ry. Co.*, 97 N. Y. 494, 49 Am. Rep. 540; *Galloway v. Chicago, M. & St. L. Ry. Co.*, 56 Minn. 346, 57 N. W. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468; *Pittsburg & C. R. Co. v. Pillow*, 76 Pa. 511, 18 Am. Rep. 424. Many cases might be cited to the effect that the law will not tolerate any negligence on the part of common carriers, although they are not insurers of the safety of their passengers.

The instructions, as a whole, were favorable to appellant. They told the jury that the railroad company was not an insurer of the safety of the plaintiff; that, if the evidence failed to establish that the defendant could have prevented Alexander from firing the shot, or if the defendant did not know, or have good reason to believe, that Alexander intended to fire the shot, in time to have taken the necessary steps to prevent him from so doing, the verdict should be for the defendant. There is evidence from which the jury could reasonably infer that appellant's brakeman had knowledge of Alexander's intention to shoot in time, and that he was near enough to him to have prevented his shooting. All the evidence is that he made no effort to prevent the shooting.

Affirmed.

(40 Ind. App. 524)

CLEVELAND, C., C. & ST. L. RY. CO. v. SCHNEIDER. (No. 6,118.)

(Appellate Court of Indiana, Division No. 2, Nov. 20, 1907.)

1. COURTS—RULES OF DECISION—STARE DECISIS.

Where a paragraph in a complaint demurred to was substantially the same as a paragraph in a complaint in another action based on the same occurrence on which a judgment had previously been sustained by the appellate court, the demurrer was properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 314-321.]

2. TRIAL—REQUESTS TO CHARGE—REFUSAL—OTHER INSTRUCTIONS.

It is not error to refuse requests to charge which are practically covered by instructions given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

3. SAME—INSTRUCTIONS—WEIGHT OF EVIDENCE—POSITIVE AND NEGATIVE STATEMENTS.

An instruction that the jury should give greater weight to the positive statement of a witness than to the negative statement of another witness was properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 439-466.]

4. SAME—REQUESTS TO CHARGE—REFUSAL—OTHER INSTRUCTIONS.

Where, in an action for injuries at a railroad crossing, the court defined plaintiff's duty to use his senses of sight and hearing to ascertain whether a train was approaching, and charged that the presence of an electric bell near the crossing would not relieve plaintiff from the duty of carefully looking and listening for any and all warnings of the approach of trains, a request to charge as to the effect of signals given in time for plaintiff to have avoided the injury if not within the time required by statute, though correct, was unnecessary and properly refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Circuit Court, Ripley County; Willard New, Judge.

Action by Anthony Schneider against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. J. Hackney, J. O. Cravens, and T. S. Cravens, for appellant. James H. Connelly and McMullen & McMullen, for appellee.

COMSTOCK, C. J. Action for damages for injuries alleged to have been sustained by plaintiff on a public highway at a crossing of said highway and the tracks of defendant company. Issues were formed on the third and fourth paragraphs of the complaint and answer thereto. A trial before a jury resulted in a verdict and judgment thereon in favor of appellee for \$600. With the verdict answers were returned to 85 interrogatories.

The errors assigned question the action of the court in overruling appellant's demurrer for want of facts to the third and fourth paragraphs, respectively, of the complaint, in overruling appellant's motion for judgment on the answers to interrogatories notwithstanding the general verdict, and in

overruling appellant's motion for a new trial. The record discloses that on the 28th day of February, 1905, the plaintiff was driving two horses hitched to a spring wagon, in which he and his wife, Kate Schneider, were riding; that he was driving upon a public street in the town of Sunmans, Ripley county, Ind., approaching the defendant's track, and that as he drove upon the track a train of defendant struck the plaintiff and his wife. In a separate action to recover for the injuries then and there sustained by appellee's wife, she sued and recovered judgment against appellant, from which judgment an appeal was taken to this court by the appellant. The judgment of the lower court was affirmed. 80 N. E. 985. That cause was tried on the second paragraph of this complaint. The facts alleged in said second paragraph and in the third paragraph of the case at bar are based upon the same occurrence, and are substantially the same. We need not set them out here. The fourth paragraph in the case before us seeks damages for the loss of plaintiff's personal property, the killing of his horses, and destruction of his wagon. The complaint in the former case was held good as against substantially the same objections that are urged to the present complaint, and, upon the same reasoning, we hold that the demurrer under consideration was properly overruled.

Between the answers to the 85 interrogatories propounded to the jury and the general verdict we find no irreconcilable conflict. Appellant's motion for judgment notwithstanding the general verdict was therefore correctly overruled.

Complaint is made of the refusal to give the third, seventh, eighth, and tenth instructions requested by appellant. Said third instruction advises the jury of the degree of care to be exercised by the appellee under the circumstances. It was practically covered by instructions 9 and 10 given. Said instruction 7 stated that if the jury found that the crossing in question was dangerous, and plaintiff was familiar with it, and that there was another safer crossing by which plaintiff could have crossed and with which plaintiff was familiar, then, while the plaintiff was not bound to relinquish his right to use the Main street crossing and to choose the safer crossing, it was the duty of the jury to determine whether under all the circumstances plaintiff used ordinary care and caution such as a person of ordinary prudence would use under the circumstances in using the more dangerous crossing. In view of other instructions given, appellant was not prejudiced by said action of the court. Said instruction 8 is to the effect that the jury should give greater weight to a positive statement of a witness than to a negative statement of another witness. It was correctly refused. Ohio & Miss. Ry. Co. v. Buck, 130 Ind. 304, 30 N. E. 19. Said instruction 10 advised the jury as to the effect of

signals given in time for appellee to have avoided the injury, although not given within the limits defined by the statute. The instruction might have been correctly given, but it certainly was not necessary for their information. For example, other instructions defined the duty of the appellee to use both his senses of sight and hearing to ascertain whether a train was approaching; that the fact that there was an electric bell near the crossing would not relieve him from the duty of carefully looking and listening for any and all warnings for the approach of trains.

Objections are made to other instructions, but they were passed upon in effect in *C. C. & St. L. Ry. Co. v. Kate Schneider*, supra, and need not be further referred to here.

It is insisted that the evidence fails to show that appellant owned or operated or controlled the engine or train that is alleged to have caused appellee injury. There was evidence fairly tending to sustain the verdict, including the fact which appellant now questions. We are not warranted in disturbing it. Judgment affirmed.

(40 Ind. App. 555)

NYCE v. SCHMOLL, City Treasurer, et al.
(No. 6,358.)

(Appellate Court of Indiana. Nov. 22, 1907.)

1. TAXATION—COLLECTION OF TAXES—INJUNCTION.

In a suit to enjoin the collection of taxes, it must be alleged and proved either that the property on which the tax is assessed is not subject to taxation or that the taxes have been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1250, 1251.]

2. SAME—PAYMENT—DISCHARGE.

The way to "discharge" a tax being to pay it, the property owner who once pays taxes on his property in good faith is thereby discharged from further liability for taxes thereon for the year for which the taxes paid were assessed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 985-990.]

3. SAME—PLACE OF ASSESSMENT—INJUNCTION.

Complainant having certain personal property in the hands of an agent in another county, the property was assessed to the agent where it was located, as authorized by 4 Burns' Ann. St. 1905, § 8421, exception 7, and taxes were duly paid thereon. Complainant, in making his returns in the city where he resided, reported the ownership of such property as so assessed. Held, that the taxes having been paid in good faith in the county where the agent resided and the property was located, complainant was entitled to an injunction restraining the back assessment of such property in the city and county of his residence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1230-1235.]

4. SAME—TAXES VOLUNTARILY PAID—RECOVERY.

A tax voluntarily paid on personal property in the hands of the owner's agent assessed in the county where the agent resided, as authorized by 4 Burns' Ann. St. 1905, § 8421, exception 7, cannot be recovered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 999, 1000.]

Appeal from Circuit Court, Miami County;
J. N. Tillett, Judge.

Suit by Harry Nyce against Andrew Schmoll, as treasurer of the city of Peru, and others. From a judgment for defendants on demurrer to the bill, complainant appeals. Reversed, with directions.

Loveland & Loveland, for appellant. Cox, Reasoner & Ward and H. H. Haag, for appellee.

WATSON, P. J. This is a suit to enjoin the collection of taxes, alleged to have been illegally assessed against appellant and extended upon the tax duplicate of the city of Peru, upon certain rights, credits, and choses in action, together with some money, for a period of 10 years, beginning with 1894 and ending with 1903.

The question is as to the sufficiency of the complaint, which alleges that appellant is a resident of the city of Peru, in Miami county, Ind.; that he owns certain personal property in the form of notes, mortgages, and other securities which is located in Fugit township, Decatur county, Ind., and is committed to the control and management of an agent residing therein; that the business of controlling and managing said personal property is distinct from all other business; that appellant never participated in, nor supervised, nor in any manner controlled the management of said business; that, upon the death of appellant's mother, one Orlando Hamilton was by the circuit court of Decatur county appointed the guardian of this appellant and his brothers, and thereupon, as such guardian, sold real estate in Cleveland, Ohio, realizing thereon upwards of \$20,000, and transferred the proceeds of the same and of other property to said Fugit township, and, after the division of said estate, continued as such guardian to invest and loan, manage, and control the appellant's share of said estate, and continued such loans and investments in said Fugit township throughout appellant's minority; that, when appellant attained his majority, and at the termination of said guardianship, he appointed and continued said Hamilton, as such agent, with the possession and control of all his moneys and securities; that he never, throughout the period of such agency, withdrew from the hands of such agent, or from his supervision, control, and management in said Fugit township, any of said money, notes, choses in action, or property whatever, excepting only such sums as, from time to time, appellant desired for personal use; that all moneys, property, rights, credits, and choses in action of appellant in the hands of said agent have been listed for taxation, and the taxes paid in said Fugit township; that since the year 1894 he has been assessed in Peru and has invariably reported that he owned and had such property in the hands of such agent in said county, and that in most instances he indorsed such statements on the assessment sheets in Peru; that on March 17, 1904, appellant was notified to

show cause why such personal property should not be listed for taxation in the city of Peru for the period beginning with 1894 and ending with 1903, or the same be listed and the taxes collected as the law provides; that at the request of appellant, the treasurer of such city promised to take no further steps in the matter before a second notice; that said personal property was placed on the assessment list without such second notice, and appellant was notified to pay said tax within 10 days or suffer a sale of his property; that under no construction can appellant be assessed for the year 1894, since in that year he did not become a resident of Peru until after the 1st day of June, the last day upon which property may be listed for taxation. The prayer is that said assessment be set aside and canceled; that the city treasurer be enjoined from collecting the tax; that the city clerk be enjoined from extending the same upon the tax duplicate, and that such as have been entered be expunged therefrom; that a restraining order be issued.

This action being in equity, in order to enjoin the collection of taxes it must be alleged and proved either that the property upon which the tax is assessed is not subject to taxation, or that said taxes have been paid. *McCrory v. Keefe*, 162 Ind. 534, 536, 70 N. E. 812; *Crowder v. Riggs*, 153 Ind. 158, 161, 53 N. E. 1019; *High, Injunctions* (4th Ed.) § 497. It has been said frequently in this state that the way to discharge a tax is to pay it. *Fell v. West*, 35 Ind. App. 20, 29, 73 N. E. 719; *Cullop v. Vincennes*, 34 Ind. App. 667, 72 N. E. 166; *Rinard v. Nordyke*, 76 Ind. 130; *Beard v. Allen*, 141 Ind. 243, 39 N. E. 665, 40 N. E. 654. It follows logically therefrom that "the property owner who pays once in good faith is thereby discharged." *Baltimore, etc., Ry. Co. v. Oregon Tp.* (Ind. App.) 81 N. E. 105. In the case of *Beard v. Allen*; supra, Judge Jordan, speaking for the court, said: "Nothing short of the payment of taxes, interest, and penalties can serve to discharge or release the property of the owner charged therewith from the liability imposed by the statute." The averments of the complaint negative any element of fraud. Appellant owned the securities in question. They were under the exclusive control of an agent, and were located, in fact, in a county apart from that of appellant's domicile. Said securities were all listed by such agent and the taxes paid thereon. Appellees were notified each year during said period that appellant owned such property, that the same was located in Decatur county, under the control of said agent, and that the taxes were there assessed and paid thereon. 4 *Burns' Ann. St.* 1905, § 8421, exception 7, provides that personal property under the control of an agent may be assessed to the agent at his domicile. The statute authorizes that the taxes be assessed, as was done in this case. The appellant has complied in good faith therewith.

The taxes have been paid, and, since they have been paid, the obligation has been discharged. The ground for the intervention of equity is thus established. The tax paid in Decatur county cannot be recovered for the reason that the payment was voluntarily made. *Simonson v. Town of West Harrison*, 5 Ind. App. 459, 32 N. E. 585; *Baltimore, etc., Ry. Co. v. Oregon Tp.*, supra; *Lima Tp. v. Jenks*, 20 Ind. 301; *Indianapolis v. Vajen*, 111 Ind. 240, 246, 12 N. E. 311; *Durham v. Montgomery Co.*, 95 Ind. 182, 183, and cases cited. Refusal to grant this injunction will therefore work an irreparable damage to appellant. He will be compelled to pay taxes on property which has been assessed and the taxes collected, without any available means of repairing the damage. This would be clearly inequitable. Appellant has done equity, and he is justly entitled to receive equity.

The judgment below is reversed, at the cost of appellees, with instructions to the court to overrule the demurrers and proceed with this cause not inconsistent with this opinion.

COMSTOCK, C. J., and ROBY, RABB, and HADLEY, JJ., concur. MYERS, J., not participating.

(40 Ind. App. 535)

CITY OF INDIANAPOLIS v. L. C. THOMPSON MFG. CO. (No. 6533.)

(Appellate Court of Indiana, Division No. 1 Nov. 20, 1907.)

1. APPEAL—MOTION TO DISMISS—IRREGULARITY—WAIVER.

If a party appears and files a brief prior to the hearing of a motion to dismiss the appeal, he thereby waives any objection to the form of the notice of the motion, especially where the point involved is jurisdictional, as it is the duty of the court to determine its jurisdiction, even without a motion in regard thereto.

2. SAME—JURISDICTION—DETERMINATION.

In determining the question of jurisdiction of the Appellate Court, the whole record may be examined, and, where a complaint averred that the proceedings before the board were for the vacation of a street and that said street was vacated and the evidence supports the averments, a determination by the court that the proceeding was to vacate the street is correct, even though the record of the board shows the proceedings to vacate were in contemplation of track elevation.

On petition for rehearing. Rehearing denied.

For former opinion, see 81 N. E. 1156.

HADLEY, J. Appellant has filed a petition for rehearing in the above cause, and urges as grounds therefor that this court did not pass upon a question raised by them in their reply brief on a motion to dismiss. The point suggested is that appellee failed to comply with rule 15, in that it did not give notice of the time of the hearing on said motion. The record shows that a copy of the motion to dismiss was presented to appellant on August 28, 1907, and service of the same was acknowledged by one of appellant's attorneys

of record. This motion does not specify the time at which the same shall be heard by this court. The motion was passed upon October 17th. On September 16th appellant appeared to said motion and filed brief thereon. It is true the notice of said motion is not in strict compliance with rule 15, but appellant had notice of the pendency of said motion, and prior to the hearing appeared thereto and presented its brief thereon, thereby waiving any objection to the form of the notice. Further than this, the question presented by the motion to dismiss was wholly jurisdictional, and it was the duty of this court to determine its jurisdiction at the threshold of the case whether any motion had been filed raising the question. Even though the notice was faulty, no good purpose could have been served in refusing to hear the motion when the court was compelled to pass upon the question without such motion, at least at the final hearing.

It is also urged that this court erred in its determination "that the complaint shows that the proceedings were for the vacation of the street; and the proceeding before the board of public works shows that it proceeded under the statute for the vacation of a street," for the reason that the proceedings of the board of public works were made exhibits to the complaint when they formed no part of the basis of the action, and hence cannot be considered as a part of the complaint. In considering a motion that assails the jurisdiction of this court, the whole record may be examined in determining the question. So, without reference to the exhibits, the complaint clearly averred that the proceeding before the board was for the vacation of Eleventh street and that said Eleventh street was vacated, and the evidence in the record clearly supports these averments and supports the statement objected to in the opinion. Even if the record showed that the proceedings in the vacation of this street were in contemplation of track elevation, it would not affect this proceeding.

Rehearing denied.

(40 Ind. App. 497)

HAMMOND, W. & E. C. ELECTRIC ST. RY. CO. v. BLOCKIE. (No. 5,929.)

(Appellate Court of Indiana. Division No. 1. Nov. 19, 1907.)

1. TRIAL—VERDICT—GENERAL AND SPECIAL FINDINGS—CONFLICT.

Unless the answers to special interrogatories are in irreconcilable conflict with the allegations of the complaint and the facts provable under the issues and all inferences that may be given thereto, a general verdict for plaintiff must stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

2. STREET RAILROADS—INJURIES TO PERSON ON TRACK—NEGLIGENCE.

Where a heavy train of work cars, without a fender in front of the motor car, was run at a high rate of speed along the streets of a city and over a crossing where another car was

standing loading and unloading passengers, and where the motorman in charge of the train knew of the presence of a child near the track and of the child's intention to cross the track in time to have stopped the train and avoided running over the child, and the motorman made no effort to stop the train, except to sound the gong, which may not have been heard, a finding of actionable negligence was warranted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 202.]

3. SAME—ACTIONS—TRIAL—FINDINGS.

A finding, in an action against a street railroad for injuries to a child on the track struck by a work train, that the child was about 5 years and 10 months old, of average intelligence, was not equivalent to a finding that the child was capable of exercising some care for her own safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 270.]

4. STREET RAILROADS—PERSONAL INJURIES—VERDICT AND FINDINGS.

An allegation in an action for injuries to a child struck by a work train of a street railway company that she was too young to be capable of appreciating danger or to have caution and discretion, and the answer to special interrogatories that at the time of the injury the child was 5 years and 10 months old, and of average intelligence and ordinary judgment for a girl of her age, are not in irreconcilable conflict so as to defeat a general verdict against the company; "appreciate" meaning to be sensible of, to distinguish.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 270; vol. 46, Trial, §§ 357-360.]

For other definitions, see Words and Phrases, vol. 1, p. 464.]

5. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INFANTS—SUI JURIS.

There is a time in the life of a child when the courts will refuse to say whether the child is conclusively presumed to be sui juris or non sui juris, and during such period the question of capacity is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 348.]

6. SAME—QUESTION FOR JURY.

Whether a child five years and ten months old is sui juris is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 348.]

Appeal from Superior Court, Lake County; H. B. Tuthill, Judge.

Action by Alice Isabell Marie Blockie, a minor, by her next friend, against the Hammond, Whiting & East Chicago Electric Street Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Crumpacker & Moran, for appellant. W. J. McAleer and N. L. Agnew, for appellee.

HADLEY, J. This is an action brought by appellee, by her next friend, against appellant for injuries sustained by being struck and run over by a work train operated by appellant. Upon issue joined trial was had by jury, which returned a general verdict in favor of appellee and answers to 72 interrogatories. Appellant moved for a judgment on the answers to interrogatories, which was overruled. The action of the court in overruling this motion is the only error assigned.

Counsel for appellant insist that their mo-

tion should be sustained for the reasons, first, that the answers to interrogatories showed that appellant was not guilty of any negligence that caused appellee's injury; second, that the complaint proceeds upon the theory that appellee was incapable of appreciating danger, and that the answers to the interrogatories show that she was capable of exercising some degree of care for her own safety, and that she failed to exercise any. The averments of the complaint bearing upon the question of negligence are, in effect, that appellant ran a heavily loaded work train at a reckless and careless rate of speed, 10 miles per hour, over a street crossing at a time when there was another car going in an opposite direction, standing on said crossing to receive and unload passengers, without sounding its gong or giving any signal of its approach at a time when appellant's servants knew of appellee's presence at said place; that appellant was negligent in using a train, the motor car of which was in front, and which motor car had no fender in front to prevent persons from being thrown underneath; that, by reason of the absence of such fender, appellee was, when struck by the car, thrown underneath said car and between the wheels thereof, and was thereby crushed and maimed. The averments of the complaint on the question of the capacity of said appellee are as follows: "That on said date the said plaintiff, Alice Isabell Marie Blockle, was a child five years of age, too young to be capable of appreciating danger or to have proper caution and discretion, active, bright, and intelligent, and had always been and was perfectly healthy." The answers of the jury to interrogatories on the question of negligence show the following facts: "That there was no fender on the front of defendant's motor car that struck appellee; that the presence of such fender would have prevented the injury by picking her up and throwing her to one side of the track; that the gong was sounded by the motor car as it approached the crossing; that, while the gong was sounded on such approach, yet under the circumstances the sounding of the gong could not prevent the injury; that an ordinarily prudent person would have expected a child so young as to be unable to appreciate danger to be upon the street at the time and place where appellee was injured; that a reasonably prudent person in the position of appellant's motorman on the motor car would have reasonably expected appellee to have run or gone from her position east of the north-bound passenger car around the hind end thereof to the place where she was injured; that the motor car was running at the rate of 10 miles an hour; that it ran 30 feet after it came in contact with appellee before it stopped; that said car could not be stopped in a shorter distance under all the circumstances; that the work car was running at an unusual rate of speed under the circumstances when it struck appellee; that

the motorman on the work car did not do all that a reasonably prudent person would have done under like circumstances to have prevented the injury by running too fast at the crossing, by omitting to slow up his train at the crossing, and failing to exercise the necessary vigilance and care for the safety of people coming from the east side of the north-bound car; that reasonable foresight on the part of the defendant and of a reasonably prudent man as a motorman would have prevented the accident; that appellant's motorman first saw appellee as she crossed the track in front of his car going towards the east track; that said motorman saw the appellee in time to have stopped his car before the appellee came in contact therewith. Also the following interrogatories were submitted and answered: "Q. 70. Was there anything in the surroundings or circumstances that would reasonably put the motorman of the work train on notice that some one was at or about to cross the street car tracks in front of his car on Chicago avenue, at the time of the injury? Ans. Yes. Q. 71. Did the motorman have any reasonable expectation that the plaintiff would or was about to cross the street car track in front of his car on Chicago avenue? Ans. Yes. Q. 72. Was there anything in the surroundings or circumstances that would reasonably put the motorman of the work train on notice that the plaintiff was apt to or about to cross the street car track in front of his car on Chicago avenue at the time of the accident? Ans. Yes." It is unnecessary to offer any discussion upon the proposition that these answers are not in irreconcilable conflict with the allegations of the complaint, together with all facts provable under the issues and all inferences that may be given thereto; and, unless such answers present such facts, the general verdict must stand. *City of Mishawaka v. Kirby*, 32 Ind. App. 233, 69 N. E. 481; *Princeton Coal Co. v. Roll*, 162 Ind. 115, 66 N. E. 169; *Albany Land Co. v. Rickel*, 162 Ind. 222, 70 N. E. 158. On the contrary, these answers affirmatively show facts fully warranting the jury in ascribing negligence to appellant. The running of a heavy train of work cars at a high rate of speed along the streets of a city over a crossing where another car was standing loading and unloading passengers without any fender in front of the motor car, the knowledge of the motorman of appellee's presence near the track, of her intention to cross in time to have stopped the car and avoided the accident, her immature years and lack of discretion, easily discernible, with no effort on his part to stop the car or check the speed thereof or avoid the accident, except the sounding of the gong, which may not have been heard on account of the intervening car—all presented a state of facts that warranted the jury to say that appellant did not exercise the care and caution that the law requires and humanity and prudence demand. *Citizens' St.*

R. Co. v. Hamer, 29 Ind. App. 426, 62 N. E. 658, 63 N. E. 778; Indianapolis, etc., Co. v. Pitzer, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

Upon the question of appellee's capacity, the answers to interrogatories show that appellee was injured on the 23d day of May, 1904; that she was six years old in July, 1904; that she was a bright girl and was of average intelligence, and ordinary judgment for a girl of her age at the time she was injured. It is contended by appellant that the theory of appellee's complaint was that appellee was non sui juris; that, since the answers to interrogatories show that she was capable of exercising some care for her safety, they are in irreconcilable conflict with the general verdict and the latter cannot stand. The question is hardly fairly put by appellants. The jury did not find that appellee was capable of exercising some care for her own safety. What the jury did find was that she was about 5 years and 10 months old, of average intelligence. This is not equivalent to saying that she was capable of exercising some care for her own safety; but, if we were permitted to presume the two statements were equivalent, yet this would not be necessarily in irreconcilable conflict with the allegations of the complaint. These averments were that she was too young to be capable of appreciating danger or to have caution and discretion. To appreciate the danger of coming in contact with a car means more than to know that such contact will injure. Webster defines "appreciate" as follows: "To be sensible of; to distinguish; as compared with estimate, it supposes a union of sensibility with judgment producing a nice and delicate perception." So, to be able to appreciate the danger of crossing a street car track in front of a moving car, a person must be capable of having at least some idea of the speed at which the car is moving and the distance it is likely to travel in a given time, and the distance such person may travel either running or walking, as the case may be, in the same time. We do not mean to say that this comprehension must be exact, but there must be sufficient mental capacity to form some idea of these matters; and we cannot say as a matter of law a child 5 years and 10 months old, of average intelligence, whatever that may mean, has such mental capacity. Neither do we say that such a child is non sui juris. It is unnecessary in passing upon this case to determine that question. By their general verdict the jury found appellee was incapable to the extent, at least, as averred in the complaint; and certainly this court cannot say that by finding she was 5 years and 10 months old and of average intelligence that the first finding is incorrect or thereby overthrown. There is a time in the life of a child when the courts refuse to say whether such child is conclusively presumed to be sui juris or non sui juris, and during

this period the courts all agree that the question of capacity is one of fact, to be determined by the jury. In the case of Cleveland, etc., Ry. Co. v. Klee, 154 Ind. 430, 56 N. E. 234, the court say: "A child nine years old has passed the age when the law conclusively affirms that he is incapable of negligence; and, on the other hand, he has not reached the age when the law definitely pronounces his conduct negligent or prudent by the rules applicable to adults. Regarding the conduct of a child between the age when he is conclusively presumed to be incapable of negligence and the age when he is conclusively presumed to be negligent under the same circumstances that would reveal an adult's negligence, the law is neutral. It lays down no conclusive presumption. Of such a child it cannot be said as a matter of law that his age shows him either incapable or capable of negligence. That question is to be determined as a fact in every such case." Citizens' St. Ry. Co. v. Hamer, supra. Whether appellee had passed the age at which we could affirm that she was non sui juris is immaterial. Certainly she had not attained the age at which we could affirm that she was sui juris. It was a question of fact for the jury, and the jury have declared in accordance with the allegations of the complaint and have foreclosed the question.

There being nothing in the interrogatories in irreconcilable conflict with the general verdict, the cause is affirmed.

(40 Ind. App. 508)

INDIANAPOLIS ST. RY. CO. v. HOFFMAN.
(No. 6,120.)

(Appellate Court of Indiana, Division No. 2.
Nov. 19, 1907.)

1. TRIAL—VERDICT—SPECIAL FINDINGS—MOTION FOR JUDGMENT.

In an action for injuries received in a collision with a street car, where answers by the jury to special interrogatories contain nothing regarding the speed of defendant's car, its negligence stands admitted as concerning its motion for judgment on the verdict, and the general verdict for plaintiff authorizes the presumption that the car was running at the highest speed within the averment of the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 849, 851.]

2. STREET RAILROADS — CROSSING TRACK — SPEED OF CAR—KNOWLEDGE—CONTRIBUTORY NEGLIGENCE.

In an action against a street railway for personal injuries, it appeared from answers to special interrogatories that it was not dangerous to cross the tracks from the north as plaintiff tried to do; that he did not see the car until he was near enough to the south track to be in danger; that, after seeing the car, he tried to get across, but was hindered and delayed by the wheels of his wagon catching on the track; that, when between the two tracks, he could, by using ordinary care, have seen and avoided the car; that he would not have known by the use of ordinary care before entering upon the south track that it was dangerous to cross because of the high speed of the car; that he tried to get off the track without crossing; that, when he started on the south track, the motorman could not avoid a collision because

of the high speed. *Held*, defendant's motion for judgment on the special findings was properly overruled as there was no finding that plaintiff knew the speed of the car or from which it could be presumed that he should have known it, and he cannot be contributorily negligent for not anticipating defendant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 207.]

8. HIGHWAYS — TRAVELER — ASSUMPTION — REASONABLE CARE.

A traveler upon a public highway has a right to assume within reasonable limits that others using it will exercise reasonable care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Highways, § 459.]

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Action by Wolf Hoffman against the Indianapolis Street Railway Company. From a judgment for plaintiff defendant appeals. Affirmed.

F. Winter and W. H. Latta, for appellant. W. J. Beckett and Wm. A. Johnson, for appellee.

ROBY, J. Judgment against appellant for \$1,500 on account of personal injuries. The jury with a general verdict returned answers to 30 interrogatories. Appellant's motion for judgment thereon was overruled, and error in such ruling is relied upon for reversal.

It is charged in the complaint that the plaintiff was in the exercise of due care driving along New Jersey street, in the city of Indianapolis, across the defendant's double-track street railway on Massachusetts avenue, and that he was struck and injured by a street car which the defendant negligently ran at a high and dangerous rate of speed. The answers to interrogatories contain nothing bearing upon the rate of speed at which appellant's street car was operated. Its negligence stands admitted, so far as this motion is concerned, and the general verdict authorizes the presumption that the car was running at the highest possible rate of speed within the averment. Appellant's position is that appellee, in the exercise of ordinary care, could have avoided the accident notwithstanding the negligent speed which it maintained. The answers show that appellee, when he was hurt, was in the act of crossing a double-track street railway from the north. He was a mature man, in full control of his horse. It was not dangerous to cross the tracks at the time and in the manner he tried to do, and it was not dangerous to enter upon the south track as he did. He did not see the car or know of its proximity and speed before he was near enough to the south track to be in danger. After seeing the car, he urged his horse forward to try and get across. He was hindered and delayed. The wheels of his wagon caught on the track. His view of the track was not obstructed when his horse approached the north track, and when it was between the two tracks he could "by using ordinary care have seen and avoided the car that struck

him." It is also found that he would not have known by the use of "ordinary care" before his horse entered upon, and while it was on the north track, and just before it entered upon the south track, that it was dangerous to try and cross the said south track; that he was prevented from knowing that it was dangerous to try and cross because of the high rate of speed of the car, and that he tried to get his horse off the track in some way except driving across, and when he first gave evidence that he was going to enter upon the south track the car was so close that the motorman could not stop it in time to avoid a collision on account of the high rate of speed.

The motion was correctly disposed of. There is no finding that appellee knew the speed of the approaching car, nor are facts found from which the conclusion that he should have known it irresistibly arises. The traveler upon a public highway has a right to assume within reasonable limits that other persons using it will exercise reasonable care in so doing. Appellee cannot be considered as contributorily negligent for failing to anticipate the negligence of the defendant. Indianapolis, etc., Co. v. Bolin (1907) 39 Ind. App. —, 78 N. E. 210; Union Traction Co. of Indiana v. Vandercook (1903) 32 Ind. App. 621, 69 N. E. 486. If appellee had been struck by a car run in a careful and proper manner, his failure to see and avoid it would deprive him of any right of action. Having been struck by a car run at a rapid and reckless rate, his failure to avoid it must be coupled with knowledge actual or constructive, not only of a car approaching along the track, but that it was running at a rate of speed which made it hazardous to cross, before the courts can say as a matter of law against a verdict that he did not exercise reasonable care under the circumstances. Any other holding would put a premium on negligence by car companies, making that which is the basis of liability a sure avenue of escape from liability.

Judgment affirmed.

(41 Ind. App. 109)

RADEBAUGH v. SCANLAN. (No. 6,147.)¹

(Appellate Court of Indiana, Division No. 2. Nov. 20, 1907.)

1. PLEADING—AIDED BY SPECIAL FINDINGS.

A special finding of facts does not take the place of and aid a complaint, demurred to for want of facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1459-1466.]

2. REFORMATION OF INSTRUMENTS — MISTAKE OF LAW

A mistake of law in thinking that a deed signed and acknowledged by the owner of land and his wife, without the wife's name appearing in the body of the deed, was sufficient to convey all their title and estate, authorizes a correction, as would a mistake of fact arising from the supposition that the name did appear therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 72.]

• Rehearing denied.

3. SAME—SUFFICIENCY OF COMPLAINT.

In view of the meaning of the words "sold," "attempt," and "convey," a complaint to correct a deed of R. and wife to G., from the body of which her name was omitted, contains, as required by Burns' Ann. St. 1901, §§ 341, 379, such allegations that a person of common understanding would know from them that the pleader intended to charge that R. and wife had contracted, for a valuable consideration, to transfer to G. all their title and estate in the property, and that they signed the deed meaning and intending thereby to effectually convey their title and estate in the property to G., and so is sufficient; it alleging that R. owned the land, and on a certain day he and his wife sold and attempted to convey it to G., that the deed was duly signed and acknowledged by them, but that by the mutual mistake of the parties and the notary the notary failed to insert the name of the wife in the body of the deed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, § 142.]

4. APPEAL—VARIANCE.

Variance between the allegation of a complaint to correct a deed of land belonging to R., signed and acknowledged by him and his wife, but from the body of which her name was omitted, that they sold the land, and the finding that R. sold it, is immaterial; and the complaint, which might after the finding have been amended in that respect, will be considered as so amended on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, § 3622.]

Appeal from Circuit Court, Rush County; Will M. Sparks, Judge.

Action by Elizabeth Radebaugh against Michael Scanlan. Judgment for defendant. Plaintiff appeals. Affirmed.

Megee & Kiplinger, for appellant. Smith, Cambern & Smith, for appellee.

RABB, J. The appellant brought this action in the court below for the partition of lot 24 in Smith & Carr's addition to the city of Rushville, claiming to be the owner of the undivided one-third thereof by virtue of her marital right as the wife and widow of John S. Radebaugh. The appellee filed several paragraphs of answer to this complaint, and also a cross-complaint, the cross-complaint alleging that on the 23d day of October, 1866, John S. Radebaugh was the husband of the plaintiff, and was at the time the owner of the lot in question, and that on said day said John S. Radebaugh and plaintiff sold and attempted to convey said real estate to one James Goddard; that the deed therefor was duly signed and acknowledged by the said John S. Radebaugh and Elizabeth Radebaugh, but that by the mutual mistake of the parties and of the notary who wrote the deed the notary failed to insert the name of the said Elizabeth in the body of said deed; that said deed and its acknowledgment are in the following words:

"This indenture witnesseth that John S. Radebaugh, of Rush county, in the state of Indiana, conveys and warrants to James Goddard, in Rush county, in the state of Indiana, for the sum of two thousand dollars, the following real estate in Rush county, in the state of Indiana, to wit: Town lots num-

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bered twenty-four (24) and twenty-five (25) in Mathew Smith's addition to the town of Rushville, and south half of town lot numbered two hundred (200) in West Rushville, as known and designated on the recorded plats of said additions to Rushville, and town lot numbered sixty-seven (67) in Roland T. Carr's addition to the town of Rushville, aforesaid. In witness whereof the said John S. Radebaugh has hereunto set his hand and seal this 23rd day of October, 1866.

"John S. Radebaugh. [Seal.]

her

"Elizabeth (X) Radebaugh. [Seal.]
mark

"State of Indiana, Rush County—ss.:

"Before me, Hugh M. Spalding, a notary public in and for said county, this 23d day of October, 1866, John S. Radebaugh acknowledged the execution of the annexed deed.

"Witness my hand and notarial seal.

"Hugh M. Spalding,

"Notary Public. [Seal.]"

"State of Indiana, Rush County—ss.:

"Before me, a notary public in and for said county, this 5th day of November, 1866, Elizabeth Radebaugh acknowledged the execution of the annexed deed.

"Witness my hand and official seal.

"John R. Mitchell,

"Notary Public. [Seal.]"

There is a prayer that the mistake be corrected, and the cross-complainant's title to the premises quieted. Appellant's demurrer to this cross-complaint was overruled and exceptions reserved and answers filed thereto, issues formed on the complaint, answer, reply, cross-complaint, and answer thereto, submitted to the court for trial, with the request from appellant that the court make a special finding of facts and state conclusions of law thereon.

A special finding of facts was made by the court and conclusions of law stated thereon favorable to appellee, to which conclusions of law the appellant at the proper time excepted, and a judgment in favor of appellee on his cross-complaint was rendered. The error assigned and relied on by appellant for the reversal in this court is the overruling of appellant's demurrer to the cross-complaint. Appellee contends that under the authority of Woodward v. Mitchell, 140 Ind. 400, 39 N. E. 437, no question as to the sufficiency of appellee's cross-complaint arises, for the reason that a special finding of facts was made by the court, and conclusions of law stated thereon, and that the special finding of facts takes the place of the cross-complaint, and the rights of the parties are to be governed by the facts as they appear in the special findings. So far as this case supports appellee's contention, it has been overruled by the case of Goodwine v. Cadwallader, 153 Ind. 204, 61 N. E. 939. While the case of Woodward v. Mitchell, supra, was not directly referred to in the case of Goodwine v. Cadwallader,

supra, the question decided and doctrine announced in the latter case are in square antagonism to appellee's contention. In the *Goodwine v. Cadwallader* Case, supra, it was sought to aid the complaint by facts appearing in the special finding. The court, by Monks, J., say in deciding that point: "Appellee insists that, there being a special finding of facts and conclusions of law thereon, such defect in the complaint is not available in this court. It is true that, where there is a special finding, the facts found may show that the action of the court in overruling a demurrer to a paragraph of complaint or answer was harmless. But this is only true where there is some other paragraph of the complaint or answer which is sufficient which the special finding follows and sustains. In other words, where the facts found and conclusions of law stated show they sustain and rest upon a good paragraph of a complaint or answer, and the judgment is rendered thereon, the error of the court in overruling a demurrer to other paragraphs of the complaint or answer is harmless, because the record affirmatively shows that the judgment rests upon the good, and not the insufficient, paragraph." The same rule is announced in the following cases: *Pittsburg, etc., Co. v. Moore*, 152 Ind. 348, 53 N. E. 290, 44 L. R. A. 638; *American Ins. Co. v. Replogle*, 114 Ind. 7, 15 N. E. 810; *McComas v. Haas*, 93 Ind. 280. The special finding of facts, the conclusions of law thereon, and the judgment of the court in this case being based solely on the appellee's cross-complaint, and appellant's demurrer for want of facts having been overruled thereto, the sufficiency of this pleading is necessarily presented by the record. The pleading shows upon its face that, unless the cross-complainant is entitled to a reformation of the deed set forth in the cross-complaint, the demurrer thereto should have been sustained. The case of *Parish et al. v. Camplin et al.*, 139 Ind. 1, 37 N. E. 607, is authority for the proposition that mistakes made in deeds and mortgages of the character sought to be corrected here may, upon a proper showing, be corrected.

Appellant contends that the cross-complaint under consideration, if good at all, must be upheld upon the ground that it seeks a correction of the deed from appellant and her husband to Goddard; that, unless this deed is corrected, the answer affirmatively shows title in one-third of the premises in her. Upon this premise she contends that the cross-complaint is bad, for the reason that it fails to allege a previous definite contract between the parties to the deed by which appellant and her husband were bound to execute to Goddard a deed for the real estate in dispute; that it fails to allege an intention on the part of the parties to the deed, or an intention on the part of the appellant, to make any different deed from the one she did sign, and which is set out in the cross-complaint; that it fails to allege that the parties were ignorant

of the alleged mistake, or, in other words, that the mistake was one of fact, and not of law; and that it fails to show that Goddard was a purchaser for value. To entitle a party to appeal to a court of equity for the correction of a mistake made in a deed of conveyance of real estate, of the character of the one involved in this case, it is essential that the complaint shall exhibit: (1) A previous contract between the parties to the deed, founded upon a valuable consideration, requiring the execution of a deed of the kind, character, and terms the plaintiff claims should have been made. (2) The execution of a deed substantially different in character and terms from the one the contract of the parties called for. (3) It must be shown that, in executing such deed, all the parties thereto meant and intended thereby to execute a deed in character and terms called for by the contract between them. (4) A mistake common to all of the parties to the deed, either as to the legal effect of the instrument they had executed, or a mistake of some fact with reference to the form, terms, or conditions contained in the instrument. It, however, was not necessary that the complaint should show that the mistake under which the parties labored was a mistake of fact. If all of the parties meant and intended by the deed in question to convey the entire interest of both the husband and wife to Goddard by the deed executed, and if they were laboring under the mistaken belief that the deed executed by them and received by the grantee did effect that purpose, then this mistake, although a mistake of law, clearly entitles the parties to a correction of the deed, to make it carry out their intentions. This is well settled in the case of *Parish et al. v. Camplin et al.*, supra, where the court, in deciding a question of this precise nature, say: "If this was a mistake of law, a mistake as to the legal effect of the deed, it was such an one as was common to all the parties affected. It has been said that whenever a mistake of law is common to all the parties, where they all act under the same misapprehension of law, and make substantially the same mistake concerning it, this is a sufficient ground, without any other incidents, for the interposition of equity. * * * Equity requires an amendment of the writing that will make the contract what the parties supposed it was and intended it should be, although their mistake is one of law and not of fact." Section 841, Burns' Ann. St. 1901, provides that the complaint shall contain "a statement of the facts constituting the cause of action in plain and concise language, and in such manner as to enable a person of common understanding to know what was intended." Section 379 (Burns' Ann. St. 1901) provides "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties." Having in

view these statutory rules for the construction of pleadings, we are to determine whether or not the complaint in this case contains such allegations that a person of common understanding would know from them that it was intended by the pleader to charge that a prior contract, for a valuable consideration, had been made between the parties to the deed in question, or either of them, and the grantee Goddard, for the conveyance by them to Goddard of all their title and estate to the premises in dispute; that such contract was founded upon a valuable consideration; that a deed for the premises was executed by the appellant and her husband to Goddard, as averred in the complaint, with the name of the appellant omitted from the body of the deed; that it was the purpose and intention of the appellant and her husband, and of Goddard, in the execution by the appellant and her husband of said instrument, and its reception by Goddard, to convey to Goddard all of the estate of both the appellant and her husband in and to the premises; and that at the time of the execution of said instrument all the parties thereto either believed that as a fact the name of the appellant was contained in the granting clause of the deed, or were laboring under the mistake of law that the deed, in the form as executed, was sufficient to convey the property to Goddard as the contract contemplated. The cross-complaint under consideration directly avers that John S. Radebaugh and Elizabeth Radebaugh (who was previously averred to have been the wife of John S.) sold and attempted to convey said real estate (previously described) to James Goddard. What would this language mean to a person of common understanding? The word "sale" is defined to be a contract for the transfer of property from one person to another for a valuable consideration. *Anderson's Law Dictionary*. This court in the case of *Micks v. Stevenson*, 22 Ind. App. 475, 478, 51 N. E. 493, quote the following definition from Kent with approval: "A sale is a contract for the transfer of property from one person to another for a valuable consideration, and these things are requisite for its validity, viz.: The thing sold which is the object of the contract; the price, and the consent of the contracting parties." The word "sold" imports a contract of sale for a valuable consideration. *Anderson's Law Dictionary*; *Reaves v. Ore Knob Copper Co.*, 74 N. C. 593. The word "attempt" is defined thus: To make an effort to effect some object; to make a trial or experiment; to use exertion for some pur-

pose; to perform an act toward accomplishing a purpose. It can only be made by an actual deed done in pursuance and furtherance of a design. *Anderson's Law Dictionary*; 3 Am. & Eng. Ency. of Law (2d Ed.) p. 249, and cases cited; *Prince v. State*, 35 Ala. 367. The word "convey," ordinarily speaking, means to transfer property from one person to another by means of a written instrument. When spoken with reference to real estate, it imports an instrument under seal. *Livermore v. Bagley*, 3 Mass. 510; *Abendroth v. Town*, etc., 29 Conn. 356; *Edelman v. Yeakle*, 27 Pa. 29; *Anderson's Law Dictionary*, p. 254. This being the plain meaning of the words that are used in the pleading under consideration, a person of common understanding must have known that the pleader intended to charge that John S. Radebaugh and Elizabeth Radebaugh had contracted, for a valuable consideration, to transfer to Goddard all their title and estate in the property in question, and that they had both signed the deed set out in the pleading, meaning and intending thereby to effectually convey their title and estate in said real estate to said Goddard. This being the plain import of the language used in the pleading, it fully answers all the objections that are urged against it. If Radebaugh and his wife sold, for a valuable consideration, the premises described in the complaint, and meant and intended to convey the same to Goddard, and he meant and intended to receive from them a conveyance of the property, but, through their mistake, the name of the wife was inadvertently omitted from the body of the deed, Goddard or his grantees would have the right to have the mistake corrected, and the deed made to conform to the purpose and intention of the parties to the same; and, if the rights of no third persons intervened, the mere lapse of time would not deprive him of his remedy.

The cross-complaint was sufficient to withstand a demurrer. No serious objection is pointed out to the special finding. It follows the cross-complaint. The only variation between the special finding and the cross-complaint is that the cross-complaint avers that John S. Radebaugh and Elizabeth Radebaugh sold the premises to James Goddard. The special finding says that John S. Radebaugh, the husband, sold the premises to Goddard. This is immaterial, and the pleading might have been amended after the finding, and will be considered as amended here in that respect.

The judgment is affirmed.

(40 Ind. App. 559)

AMERICAN BONDING CO. et al. v. STATE
ex rel. WHISLER. (No. 6,089.)(Appellate Court of Indiana, Division No. 1.
Nov. 22, 1907.)**1. TRIAL—FINDINGS OF FACT.**

In an action against a surviving partner's surety, a finding that the appraisal showed certain things was insufficient as a finding of an evidentiary fact only; it being the province of special findings to find ultimate facts.

2. PARTNERSHIP—DISSOLUTION—SURVIVING PARTNER—BOND—ACTION—FINDINGS.

In a suit against a surviving partner's surety, a finding that the appraisal of the firm assets showed certain property of a specified value was not a finding that the surviving partner received the amount of property shown in the inventory, nor that she should be charged with that amount.

3. SAME—PRESUMPTIONS.

Where, in a suit on a surviving partner's bond, other findings showed that the surviving partner was not charged with the amount of the inventory in calculating the amount she was charged with having converted, the contrary could not be presumed from a finding as to the amount of property shown by the inventory.

4. SAME—JUDGMENT.

In a suit on a surviving partner's bond, a judgment charging her with conversion could not be sustained where the findings failed to disclose with certainty the various amounts from which the sum actually converted could be ascertained.

5. SAME—PARTNERSHIP DEBTS—PAYMENT—PLEDGED INDIVIDUAL COLLATERAL.

Where, in a suit against a surviving partner's surety, the court found that prior to the death of the deceased partner the partnership became indebted to a bank and another, and that the partners pledged bank stock held by them individually to secure the loan, that the stock was thereafter sold and the proceeds applied to the payment of the debts secured and another firm debt, and the residue paid to the surviving partner, such finding was fatally defective for failure to find in what amount each of the partners held the stock; there being no presumption that interests in a large number of shares of stock are equal.

6. SAME—INDIVIDUAL PROPERTY—RIGHTS OF FIRM CREDITORS.

Where the surviving partner and the estate of the deceased partner were insolvent at all times after the dissolution of the firm by the death of the deceased partner, partnership creditors had no right to any part of the individual property of the partners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 340.]

7. SAME—RIGHTS AND DUTIES OF SURVIVING PARTNER.

A surviving partner is required to reduce the assets to money and apply the same, less expenses, to the partnership debts and pay the deceased partner's share of the surplus, if any, to his estate, and, in the payment of such debts, such surviving partner is free to choose when and whom she will pay, to assign all the property for the benefit of the creditors, to prefer any creditor, or to assign all the assets to one creditor, if the debt equals or exceeds the amount of such assets, to the exclusion of all other creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 516½-518.]

8. SAME—ACCOUNTING—ACTION ON BOND—CREDITS.

Where the surviving partner and the estate of a deceased partner were both insolvent, and the surviving partner in settling the firm's affairs used certain of the trust funds to pay pri-

vate debts, and out of her private funds paid partnership debts, she was entitled to credit for the partnership debts so paid, in an action on her bond given to secure her faithful performance of her duty as surviving partner and to account for all assets with which she might be justly chargeable as surviving partner; the alleged breach being that she received assets of the firm for which she failed to account.

9. SAME—MINGLING OF FUNDS.

Mingling of partnership and individual funds by a surviving partner does not constitute a conversion, as such surviving partner is not an ordinary trustee, having possession of the partnership assets by virtue of a statute or action of the court, but by virtue of his rights as member of the firm.

10. SAME—BOND—BREACH—FAILURE TO ACCOUNT.

Where a surviving partner gave bond to discharge her duties as surviving partner, and to fully account to the proper authority for all assets with which she might be justly chargeable as surviving partner, a conversion and breach of the bond arose only on her failure at the proper time to honestly account for such assets to the proper persons or authority, and not on commingling the firm assets with her own funds.

11. TRUSTS—TRUSTEES—PERSONAL FUNDS—USE—REIMBURSEMENT.

Where a trustee uses his own money for the purposes of the trust, he is entitled to reimbursement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 431.]

Appeal from Circuit Court, Wabash County; U. S. Lesh, Special Judge.

Action by the state, on the relation of David Whisler, as receiver, etc., against the American Bonding Company and others. From a judgment for plaintiff, defendants appeal. Reversed, with instructions to grant a venire de novo.

See 81 N. E. 1179.

Ayres, Jones & Hollett, for appellants. H. B. Shively and Frank A. Switzer, for appellee.

HADLEY, J. This was an action brought by the state, on the relation of David Whisler, receiver of the late copartnership of Lawrence & Co., against appellants, Elizabeth H. Mills and American Bonding Company of Baltimore, for recovery upon a bond executed by the said Elizabeth H. Mills as surviving partner of the firm of Lawrence & Co., principal, and said American Bonding Company of Baltimore, as surety, for alleged breaches thereof. Upon issue joined, the cause was submitted to the court, and upon request a special finding of facts and conclusions of law were made, upon which judgment was rendered for appellee. Exceptions were reserved by each of said appellants to each of said conclusions of law. Each of said appellants then filed a separate motion for a venire de novo and a separate motion for a new trial.

It is contended that the venire de novo of appellants should have been sustained, for the reason that the special finding of facts is imperfect, indefinite, and uncertain, in that the court did not find the amount of funds

of said trust with which appellant Mills should be charged. Item No. 2 of the finding shows that on April 9, 1901, she filed an inventory and appraisal of the partnership assets; that said appraisal showed the firm assets to be as follows:

The stock of merchandise appraised at	\$13,823 05
Accounts classed as good.....	2,366 98
Accounts classed as doubtful.....	498 92
Accounts classed as bad.....	194 61

Making a total of..... \$16,883 56

This is the only finding as to the value of the property or what she received out of the trust, except that No. 4 finds that up to February 15, 1902, she had collected of the choses in action \$787.35. It is well settled that it is the province of a special finding to find the ultimate facts, and the finding of evidentiary facts is not sufficient. *Minnich v. Darling et al.*, 8 Ind. App. 542, 36 N. E. 173; *Taylor v. Canaday*, 155 Ind. 675, 57 N. E. 524, 59 N. E. 20; *Perkins v. Hayward et al.*, 124 Ind. 450, 24 N. E. 1033. The finding that the appraisal showed certain things is not a finding of an ultimate fact, but of an evidentiary fact (*Hasselman v. Japanese, etc., Co.*, 2 Ind. App. 180, 27 N. E. 318, 28 N. E. 207), nor is it a finding that she received that amount of property; nor, in view of the other findings, necessarily a finding that she should be charged with that amount. It is true, as counsel for appellee state, that as a general rule a trustee is charged with the amount of the inventory and appraisal filed in the trust. But when, as in this case, the suit is for a breach of the bond and the other findings of the court show that the trustee was not so charged in making calculation to determine the amount converted, the rule falls, and there should be a definite finding somewhere of the amount of the partnership property she received and with which she should be charged. The court found that appellant Mills collected \$787.35 of the choses in action prior to February 15, 1902, but does not find that this was the whole amount she collected or with which she should be charged. The court also found that she had expended in the performance of her trust the sum of \$3,486.28, and that she had paid on the debts of the partnership out of the partnership's property \$3,855.25; that she paid on partnership debts \$596.90 out of an equity in lands she owned, and \$828.71 out of other lands owned by Jennie C. Lawrence and Elizabeth H. Mills jointly, \$17,366.62 out of the proceeds of the sale of bank stock owned by said Lawrence and Mills in their separate capacities and pledged as security for said debts, and \$652.71 on another partnership debt out of the same proceeds; that she expended \$800 to replenish stock; that the services of August C. Mills rendered said trust was \$1,500, and then finds she con-

verted to her own use of the trust funds \$6,257.52. How did the court arrive at this amount? It is urged that this amount is excessive. How is this court to determine that fact? With which of the above amounts did the court credit her? Certainly not all; and we cannot discover any combination of the above amounts together with the amount found to have been converted that will come anywhere near to amount of the appraisalment.

Counsel for appellee have endeavored to aid us in this search by suggesting that the court in its calculation deducted from the amount of her appraisalment the amount of \$2,273.16, the difference between the appraised amount of the choses in action and the amount of the same found to have been collected prior to February 15, 1902; and, taking the balance of the appraisalment left after this deduction as the amount with which she should be charged, and grouping together certain of the above amounts as credits, thus obtained the result found. But there is no finding that such a deduction should be made, and, to obtain the basis, we must go into the field of speculation and indulge in inferences. This, under the well-settled rules of law, we cannot do. *Crowder v. Riggs*, 153 Ind. 153, 53 N. E. 1019; *Craig v. Bennett*, 146 Ind. 574, 45 N. E. 792, and cases cited. Item No. 10 of the finding is in substance as follows: That prior to the death of said Jennie C. Lawrence the partnership of Lawrence & Co. became indebted to the Lawrence National Bank and to one Susan H. Eagle in various sums, which, when paid, amounted to \$17,366.62; that, when said loans were made by the said bank and the said Susan H. Eagle, there was pledged by the said Jennie C. Lawrence and the said Elizabeth H. Mills certain bank stock then held and owned by them in their individual capacities as collateral security for said loans; that in August, 1902, said bank stock so pledged with the knowledge and consent of said Elizabeth H. Mills was sold by said creditors for \$18,150. The money thus received was applied to the payment of the debts so secured in the sum first above stated, and in the payment of another partnership debt of \$652.71, the residue being paid to Elizabeth H. Mills. This item is indefinite and uncertain, in that it does not find in what amount each of said partners held the bank stock in question. Counsel for appellant contend that the finding that the two partners owned and held certain pledged bank stock in their individual capacities creates of necessity the presumption that they owned it jointly and equally. While it might be true that such a finding with regard to a single article of property that is indivisible, such as a house, a share of stock, or the like, this presumption would arise; yet when this language is applied to an aggregation of property such as a large

number of shares of stock, such a presumption does not necessarily follow. For the foregoing reasons, the special finding must be held insufficient to support the judgment.

While this determines the case so far as this appeal is concerned, there is a question presented that will necessarily arise on another trial and should be settled at this hearing. It appears that in the performance of her trust as surviving partner appellant Mills used certain of the trust funds in her private affairs and out of her private funds paid partnership debts; and appellants insist that she should have credit for the partnership debts thus paid. Appellee contends that, since the partnership debts were also her individual obligation, when paid, they were extinguished, and that, since a partner cannot be a creditor of his own partnership, he cannot be subrogated to the rights of a creditor whose debt he had paid; and therefore she was not entitled to reimburse herself out of the partnership fund, and should not be allowed credit for the amount of the partnership debts so paid out of her private funds. If the surviving partner was making this claim for her own benefit in a controversy between herself and the firm creditors, there might be some virtue in this contention; but here the court found that appellant Mills, as well as the estate of Jennie C. Lawrence and the firm of Lawrence & Co., were at all times after the death of Jennie C. Lawrence insolvent. Therefore the partnership creditors had no right or claim in or to the individual property of the partners. *Huff v. Lutz*, 87 Ind. 471; *Weyer v. Thronburg, Adm'r*, 15 Ind. 124. And the suit is not one wherein the surviving partner is claiming a benefit for herself, but is a suit upon the bond for a breach thereof; the alleged breach being that the principal received assets of the partnership for which she failed to account. There is no question of maladministration or fraud, and, as we view the law on the facts in this case, there can be no question of misapplication of funds, since it is not claimed that any of the debts paid by the surviving partner were not bona fide debts of the partnership. The condition of the bond of appellant bonding company in so far as it related to the question was that the principal should "discharge all and singular her duties as surviving partner, * * * and fully account to the proper authority for all money or other property with which she may be justly chargeable as surviving partner." Her duties as surviving partner were to reduce the assets to money, and apply the same, less expenses, on the partnership debts, and pay the surplus, if any, to the estate of decedent. In the payment of these debts, she was as free to choose when and whom she would pay as an individual or existing partnership would be. She could assign all the property for the benefit of all the creditors. *Winslow et al. v. Wallace*, Rec. 116 Ind. 317, 17 N. E. 923,

1 L. R. A. 179; *Patton v. Leftwich*, 86 Va. 421, 10 S. E. 686, 6 L. R. A. 569, 19 Am. St. Rep. 902; *State v. Mathews*, 129 Ind. 281, 28 N. E. 703; *First Nat. Bank v. Parsons*, 128 Ind. 147, 27 N. E. 486. She could prefer any creditor she chose. *Havens & Geddes Co. v. Harris*, 140 Ind. 387, 39 N. E. 49; *Emmerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. Ed. 49. She could turn all of the assets over to one creditor, if the debt of such creditor equaled or exceeded the amount of such assets, to the exclusion of all other creditors. *Courtland Forging Co. v. First Nat. Bank*, 141 Ind. 518, 40 N. E. 1070. All that the creditors of the partnership or the estate of the deceased partner could ask was an honest application of the amount received to the bona fide debt or debts of the partnership, and this is all the bond guarantees. The bond does not guarantee the payment of all the debts of the partnership; neither does it guarantee the payment of the debt or debts of any particular person or persons, nor the payment of a ratable proportion of all the debts, nor that the identical money received should be so applied.

Suppose, in this case, it should be found that appellant Mills had actually received out of the trust estate \$16,000, but that she had paid on the partnership debts and expenses of administration the sum of \$16,000. Wherein has she failed to the injury of the partnership creditors? Surely the creditors cannot be said to have been harmed. Is it material to the creditors if she took \$6,000 of the money received from the sale of trust property and bought sugar, flour, clothing, etc., for herself, and took \$6,000 of money received from the sale of her private property and paid on the partnership debts instead of the reverse? Is it more than a nominal breach of the bond, if breach at all, that she took money for her personal wants out of the right-hand drawer, which contained trust funds, and paid the same amount for the trust out of the left-hand drawer, which contained her personal funds? The firm creditors are entitled to receive the amount of the proceeds of the partnership assets, and the bond guarantees that they shall do so. The bond, however, does not agree to increase the amount of the assets. If, as in the case above put, the surviving partner has received \$16,000 of partnership funds and has paid out on partnership debts \$16,000, and, because she used \$6,000 of the partnership funds for her own use and replaced it with \$6,000 of her own funds, we should say the bond should be made to pay this sum, the creditors would then receive just that much more than the assets of the partnership, and just that much more than they had a right to expect or were entitled to receive from the partnership.

We do not base our holding upon the principles of substitution or subrogation. In our view these principles are not necessarily involved. A surviving partner is not an ordi-

nary trustee, as that term is generally understood. He does not have possession and dominion over the partnership assets by virtue of any statute or action of any court, but by reason of his own interest in the property and his rights and powers as a member of the firm. Our statutes do not confer any of these rights upon him, but are in limitation of his powers and protection of the funds arising from the partnership assets. A commingling of these funds with his individual funds is not a conversion, since he has an ownership in and control over them aside from the trust by virtue of his connection as partner. The conversion arises when he fails at the proper time to honestly account for them to the proper persons or authority. Until he so fails, there can be no breach of the bond. These propositions are supported by *State v. Mathews*, supra; *First Nat. Bank v. Parsons*, supra; *Havens & Geddes Co. v. Harris*, supra; *Patton v. Leftwich*, supra; *Knox v. Gye*, L. R. 5 H. L. 656; *Emerson v. Senter*, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. Ed. 49. It is a settled rule that, where a trustee uses his own money for the purposes of the trust, he is entitled to reimbursement. *Leach, Ex'r, v. Prebster*, 35 Ind. 415; *Skillen v. Jones, Adm'r*, 44 Ind. 136; *Hancock v. Minot*, 8 Pick. (Mass.) 29; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 318. In *Skillen v. Jones*, supra, appellant was acting in the dual capacity of surviving partner and executor of his deceased partner. On page 148 of 44 Ind., the court say: "The jury also found that the appellant was appointed executor on the 6th day of April, 1866, and continued to act until the 11th day of May, 1871; that during that time he paid debts against the estate to the amount of \$2,626.29 exceeding the amount of personal estate which came to his hands, leaving out whatever interest he had in the partnership business; and that no part of it had been allowed to him as such executor. That would be a proper item to be deducted from any amount for which he would be liable, on account of appropriating to himself the partnership effects. If he had paid debts against the estate out

of his own means, he would have the right to reimburse himself out of funds which might thereafter come to his hands. Or he might take of the funds in his hands as surviving partner, which on a final settlement and adjustment would belong to the estate of the deceased, and in his capacity of executor use it in payment of the debts against the estate, and, having done so, would be entitled to a credit for it." For the foregoing reasons, it is our conclusion that, where an insolvent surviving partner has applied private funds to the payment of partnership debts, she is entitled to credit for the amount so paid in accounting for the assets of said partnership in a suit on her bond for a breach thereof by way of conversion.

It is argued that under finding No. 10, above set out, that appellant Mills should be allowed credit for the amount paid on the partnership debts out of the sale of bank stock pledged to secure the same by appellant and Jennie C. Lawrence in her lifetime; but, as we have heretofore shown, this finding is too indefinite and uncertain as to the ownership of this stock to sustain a conclusion of law. So many supposable cases might be suggested under this finding in its present condition that we do not feel warranted in hazarding an opinion upon it. This and the other questions may not arise on another trial, and we do not decide them. The case of *Lyons v. Murray*, 93 Mo. 23, 8 S. W. 170, 6 Am. St. Rep. 17, cited by appellees as being of controlling force, is not analogous to this case. That was a suit in the nature of a creditors' bill by an individual judgment creditor of the surviving partner against a firm creditor to recover a fraudulent overpayment by such surviving partner to said firm creditor, in order to sequester the property of such surviving partner in fraud of his individual creditors. This is an entirely different case from the one before us, and upon the facts of that case the conclusions stated are not in conflict with our conclusions here.

Judgment reversed, with instructions to sustain the motion of appellants for a venire de novo.

(40 Ind. App. 542)

EDER et al. v. KREITER et al. (No. 5938.)
(Appellate Court of Indiana, Division No. 1.
Nov. 20, 1907.)

1. COUNTIES—ACTIONS BY TAXPAYERS—PARTIES—BOARD OF COMMISSIONERS.

The board of county commissioners, under the express provisions of Burns' Ann. St. 1901, § 7820, a body corporate and politic and as such vested with authority to prosecute and defend suits, is a necessary party to an action in equity by taxpayers on behalf of the county, on the refusal of the board to prosecute the same, to recover money unlawfully allowed an officer by the board.

2. SAME.

Where a board of county commissioners refuses to prosecute an action on a demand due the county, a taxpayer may maintain such action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 308.]

3. SAME — PLEADING — COMPLAINT — SUFFICIENCY.

A complaint in an action by taxpayers on behalf of a county to recover money unlawfully allowed an officer by the board of county commissioners, specifically naming in its title the commissioners, and alleging in the first paragraph that plaintiffs before bringing the suit demanded of defendants, naming them, constituting the board of commissioners, that they bring such action, but that defendants, constituting such board, refused to do so, and alleging in the second paragraph that plaintiffs filed in the county auditor's office a request to bring the suit, and demanded of defendants, except the officer who had received the money, that as the board of county commissioners they bring the action, and that they refused to do so, and setting out a copy of the demand addressed to the commissioners, naming them, was sufficiently explicit, as to both paragraphs, to inform a person of common understanding that the board of commissioners was a party to the action within Burns' Ann. St. 1901, § 341, providing that a complaint shall contain a statement of the facts constituting the cause of action in such manner as to enable a person of common understanding to know what is intended, and section 401, providing that the court must disregard any error in the pleadings not affecting the substantial rights of the adverse party.

4. SAME—STATUTORY PROVISIONS.

Burns' Ann. St. 1901, § 7848c, providing that any taxpayer within 60 days after the allowance of any claim, after demand on the board of commissioners and refusal by them, may in his own name maintain an action for the benefit of the county for the recovery of any illegal allowance made by the board, does not abrogate the right of a taxpayer to proceed in equity to recover money allowed a county officer in violation of section 6548, forbidding the board of commissioners to allow any county or other officer any money out of the treasury, except where the statutes confer clear authority to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, § 308.]

5. CLERKS OF COURTS — COMPENSATION AND FEES.

Burns' Ann. St. 1901, § 6530, provides that circuit court clerks shall make a quarterly report, that they shall pay to the county treasurer the amount shown by the report, and that such amount shall be kept as a separate fund to be known as the "clerk's fund." Section 6532 provides that the clerk's salary shall be paid quarterly, the amount of such quarterly allowance, not exceeding the quarterly salary due, to depend on the fees collected and turned into the county treasury to the credit of the "clerk's fund." Section 6533 provides that any balance due on his salary at the close of his term of

office shall be paid to the clerk out of the fees earned by him and afterwards collected by his successor. Sections 7913 and 7914 authorize the board of commissioners to make repayment to county officers for overpayments by them through inadvertence, mistake, or any other cause. A county clerk, at the request of the central committee of a political party and under their promise to pay the fees therefor, issued "first naturalization papers" to persons applying therefor at the committee's direction. On the committee's refusal to pay the fees, the clerk himself paid them to the treasurer to the credit of the "clerk's fund." Thereafter he filed a claim against the county for the fees so paid by him, which was allowed by the county board. *Held*, in an action by taxpayers, on the county's behalf, to recover such allowance, that it not appearing that the fees collected by the clerk and paid to the treasurer and the fees earned by him and collected by his successor, together with such naturalization fees, exceeded his salary, the clerk was not within sections 7913 and 7914, since, unless the amount of such fees exceeded his salary, he was not injured by the payment made by him.

6. SAME—NATURALIZATION FEES PROPERTY OF COUNTY.

Naturalization fees taxed by a circuit court clerk under Burns' Ann. St. 1905, § 6519, requiring circuit court clerks to tax, on behalf of the county, each applicant to whom naturalization papers are issued the fee therein prescribed, are the property of the county.

7. COUNTIES — ACTIONS — FINDINGS — SUFFICIENCY.

Findings in an action by taxpayers on behalf of a county to recover money unlawfully allowed an officer by the board of commissioners, that the taxpayers in writing demanded of the board that they prosecute the action, and that the board did not make any record with reference to the demand either that they would comply therewith or that they refused to do so, but that the members thereof, while in session, stated verbally that they would not take any action with reference to the demand, were sufficient, though the greater part of the latter finding was evidentiary only, to show the ultimate fact that the board refused to institute the action, entitling the taxpayers to do so.

8. SAME—COUNTY BOARD—PROOF OF PROCEEDINGS.

Though the acts of a board of county commissioners in its judicial capacity can only be proven by its record, acts in its administrative capacity may be proven by parol, and hence the allowance of claims and the exercise of the right to refuse to institute an action against an officer to recover money alleged to have been unlawfully allowed him by the board, being within its administrative capacity, may be shown by parol.

Appeal from Circuit Court, Porter County; Wm. Johnston, Special Judge.

Action by Frederick Kreiter and others, taxpayers of Lake county, on behalf of the county, against George M. Eder and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Crumpacker & Daly, for appellants. Bruce & Bruce and J. H. Conroy, for appellees.

MYERS, J. Appellees, taxpayers of Lake county, brought this action for and on behalf of the county against appellants to recover \$300, money alleged to belong to the county and received by appellant George M. Eder, and by him converted to his own use. A complaint in two paragraphs answered by a general denial formed the issues, submitted

to the court for trial, resulting in a judgment for \$300 against Eder in favor of Lake county. Each paragraph of the complaint was tested by a demurrer, which was overruled. A demurrer was sustained to Eder's second and separate paragraph of answer, averring that the cause of action set up in the complaint did not accrue within 60 days prior to the commencement of the action. The venue was changed to Porter circuit court, where the trial was had, and special findings of fact made and conclusions of law stated thereon. Errors assigned and argued relate to the action of the court in overruling Eder's demurrer to each paragraph of the complaint, the sustaining of appellee's demurrer to Eder's second paragraph of answer, and that the court erred in its conclusions of law. Both paragraphs of the complaint are challenged on the ground that neither directly averred (1) that the board of commissioners was a party to the action; (2) that the parties constituting the board were such at the time the action was begun; and (3) that the parties upon whom the demand was made by appellees to bring suit constituted the board of commissioners at that time.

1. It is clear neither paragraph was carefully drawn, but the question is: Does each paragraph, when separately considered, state facts sufficient to withstand a demurrer for want of facts? This controversy grew out of the allowance and payment out of the county funds of a claim filed by Eder against the county on August 20, 1903, showing that on December 5, 1896, and for five years continuously theretofore, he was the clerk of said county, and as such officer, during the months of October and November, 1896, did at the special instance and request of divers persons, namely, the chairman of the Republican central committee and its officers, naturalize 300 foreigners without cost or expense to such applicants, but at the cost and expense of said central committee and its officers, who agreed to pay the same, and from whom he expected compensation therefor; that on December 5, 1896, in making out his quarterly report to the commissioners of said county, he paid to the county out of his own private funds the sum of \$300, the same being the expense for naturalizing said foreigners, and for which he expected to be reimbursed by said parties agreeing to pay the same; that he has not been paid said sum; that said parties never intended to pay the same; that at the time of filing the claim the clerk's fund had \$1,100 out of which said sum was asked to be paid. This was an action in equity, and the board of county commissioners was a necessary party in order that the rights of the county might be determined and the relief granted awarded to it as a party to the record. *Pomeroy's Equity Jurisprudence*, § 1095. The board of commissioners is "a body corporate and politic" (section 7820, *Burns' Ann. St.* 1901),

and as such, by a specified corporate name, is vested with primary and exclusive authority to sue and collect demands due the county, except where the law provides otherwise (*Shilling v. State ex rel. Board*, 158 Ind. 185, 62 N. E. 49; *Board v. Kimberlin*, 108 Ind. 449, 454, 9 N. E. 407); but, where such boards refuse to prosecute an action for such demands, then a taxpayer may maintain such an action (*Zuelly v. Casper*, 160 Ind. 455, 67 N. E. 103, 63 L. R. A. 133; *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 245, 75 N. W. 964, 69 Am. St. Rep. 915; *Webster v. Douglas Co.*, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870; *Zuelly v. Casper*, 37 Ind. App. 186, 76 N. E. 646).

The action was begun on April 12, 1904, and the complaint alleges a demand on the board of commissioners and a refusal of the board to institute proceedings to collect the money alleged to belong to the county and illegally held by Eder. The title or introductory portion of the complaint specifically names the commissioners, and the first paragraph states that "the plaintiffs complain of the defendants, and say * * * that prior to the bringing of this suit, on the 28th day of March, A. D. 1904, and the 4th day of April, A. D. 1904, the plaintiffs did then and there demand of the defendants, Samuel A. Love, Oscar A. Krinbill, Mathew J. Brown, constituting the board of commissioners of Lake county, in the state of Indiana, that they, as such commissioners of said county, bring and prosecute an action to recover said \$300 from the said defendant George M. Eder, but the said defendant, constituting said board of commissioners, refused to do so." In the second paragraph, it appears that "the plaintiffs complain of the defendants, and allege * * * that the plaintiffs on the 28th day of March, A. D. 1904, filed in the office of the county auditor of said county of Lake their written request to bring suit to recover the said sum from the said George M. Eder; that on the 4th day of April plaintiffs demanded of the said defendants, except the defendant George M. Eder, that as the board of county commissioners of said county they bring and prosecute said action to recover said sum so wrongfully held by the said George M. Eder, and said defendant commissioners refused to do so." Then follows a copy of the demand addressed to "Samuel A. Love, Oscar A. Krinbill, and Mathew J. Brown, Board of Commissioners of Lake County, Indiana." In considering the claimed defects in the complaint, sections 341, 401, *Burns' Ann. St.* 1901, must be kept in mind; for under these sections a pleading will be sufficient if the facts are stated in language comprehensible to a person of common understanding, and the defect therein pointed out "does not affect the substantial rights of the adverse party." But this test for the construction of pleadings does not extend to relieve a plaintiff from stating in plain and

concise language all the facts necessary for him "to prove in the first instance, under an answer of general denial, to show that he is entitled to judgment." *Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 414, 69 N. E. 138, 63 L. R. A. 948. It has been held that, where the parties are named in the title of the action, allegations in the body of the complaint which identify them by reference is sufficient. *Cosby v. Powers*, 137 Ind. 694, 37 N. E. 321. In the case at bar, the persons constituting the board were named not only in the title, but in the body of each paragraph of the complaint. The allegations were sufficiently explicit to inform a person of common understanding that the board of commissioners was a party to the action. This is all that the statute requires.

2. In support of the second error, appellant insists that the statute (section 7848c, Burns' Ann. St. 1901) provides the only remedy to be pursued by the citizens and taxpayers in cases of this character; that they must act within 60 days after an allowance is made; that the statute abrogates their right to proceed in equity. We cannot agree with appellant's theory in the construction of this statute. If the Legislature had intended it to operate as a limitation of the time in which citizens and taxpayers might prosecute actions for the purpose of recovering back into the county treasury money paid on illegal allowances to officers or other persons, it certainly would not have left the matter to inference. The language of this statute is permissive in character. It contains no words which negative a taxpayer's right in such matters to adopt any remedy known to the law. Whether it was the purpose of the Legislature "to provide a broader remedy than that afforded in equity" we are not concerned, as it is certainly true that the language used does not evidence an intention on the part of the Legislature to abrogate the doctrine of equity affording relief at the instance of a taxpayer for money belonging to the county if paid on account of illegal allowance. *Kimble v. Board*, 32 Ind. App. 377, 391, 66 N. E. 1023. The board of commissioners is a creature of the statute. "It has no authority beyond that expressly given by the statute." *State v. Trueblood*, 25 Ind. App. 437, 446, 57 N. E. 975. It has no power or authority to allow any county or other public officer "any sum of money out of a county treasury except when the statutes confer the clear and unequivocal authority to do so." Section 6548, Burns' Ann. St. 1901. The allowance by the board of an unauthorized or illegal claim is an act in defiance of the statute, and is unlawful and void, and its payment may be recovered on the theory that it is not a payment by the county. Section 6548, *supra*; *Board v. Heaston*, 144 Ind. 583, 41 N. E. 457, 43 N. E. 651, 55 Am. St. Rep. 192; *Board v. Buchanan*, 21 Ind. App. 178, 51 N. E. 939. Therefore in our opinion in this class of cases, in the ab-

sence of a statute by its terms negating the right of a taxpayer to proceed in equity, he is not precluded from adopting that remedy. *Board v. Harrington*, 1 Blackf. 200; *Kimble v. Board*, *supra*; *Zuelly v. Casper*, *supra*.

3. Lastly, appellant contends that the court erred in its conclusions of law. Under this head, it is argued that the charge to be made by the clerk of the circuit court for naturalizing foreigners belonged to such clerk as his own; that payments made by officers that are not due and owing to the county may be recovered back; that the acts of the board of commissioners can only be proven by its record; that the special findings do not show a refusal by the board to institute an action against Eder prior to the time it was commenced by appellee. The special findings of fact show that Eder was clerk of the Lake circuit court from November, 1891, until November, 1899; that during the year 1896, at the direction of the officers of the Republican central committee of Lake county, 300 unnaturalized foreigners in said county applied to Eder, as such clerk, for what is known as "first naturalization papers"; that by virtue of an agreement between said officers of said committee and Eder, and at the special instance and request of said committee, and its promise and agreement to pay the costs of issuing said papers, said Eder issued to said applicants papers of naturalization; that the statutory charge amounted to \$300; that nothing was said to said applicants about paying therefor, nor was any money collected from said applicants, or any other person by Eder on account of such services; that after the issuing of said papers by Eder, as clerk, said committee refused to pay the bill therefor, and on December 5, 1896, after said committee had declined to pay said sum of \$300, said Eder, out of his own private funds, paid to the treasurer of Lake county, to the credit of the clerk's fund, \$300 to cover the cost of naturalizing said foreigners, and the only money paid to said county on account of said services; that the money so paid was appropriated and used by the county; that on August 20, 1903, Eder filed in the office of the auditor of said county a claim against the county for the return of the money so paid by him; that on September 9, 1903, at the regular meeting of the board, the claim was allowed and a warrant ordered drawn for its payment. The warrant was drawn and delivered to Eder, who presented the same to the treasurer of the county, who paid it out of the county funds; that Eder received the money and has ever since retained the same.

(1) There is no claim that the original payment by Eder was made by him through inadvertence, mistake, or ignorance of any fact, nor that such payment, in fact, affected the amount of his salary, which he would otherwise have received. He paid \$300 into the "clerk's fund" (section 6530, Burns' Ann. St. 1901), out of which his annual salary of

\$3,000 (section 6491, Burns' Ann. St. 1901) was paid. Under the law (section 6532, Burns' Ann. St. 1901) his salary was payable quarterly upon the order of the commissioners. The amount of his quarterly allowance, not exceeding the quarterly salary due, depended upon fees collected and turned into the county treasury to the credit of the "clerk's fund." Any balance of his salary due and unpaid at the close of his term of office was payable only out of fees earned by him during his term of office, and afterwards collected by his successor. Section 6533, Burns' Ann. St. 1901. It does not appear from the findings that the fees collected by Eder, as such clerk, and paid to the county treasurer, and the fees earned by him and collected by his successor, together with the \$300, exceeded his salary. If it did not, he could not have been injured by the \$300 payment voluntarily made by him. He cites sections 7913, 7914, Burns' Ann. St. 1901, as authorizing the action of the board in allowing his claim, and in support of his right to retain the money received on such allowance. The rule is that, where a party relies on a right given by statute, he must bring himself clearly within its provisions. The statutes cited by Eder authorized the board of commissioners to make repayment out of the proper funds of the county to county officers for overpayments to such commissioners by such officers "through inadvertence, mistake, or any other cause." In the case at bar there is no finding that the claimed overpayment was made through inadvertence, mistake, or other cause found to be unconscionable, unjust, or inequitable if retained by the county, for, as we have pointed out, such claimed overpayment may have been returned by the county in the way of payment on his salary. With this view of the case, Eder was not within the rule that payments made by county officers that are not justly due and owing to the county may be recovered back.

(2) By the fee and salary act in force June 28, 1895 (section 6519, Burns' Ann. St. 1901), it was the duty of Eder, as clerk, to tax and charge each applicant to whom naturalization papers were issued a fee of \$1. This fee is specifically designated in the statute as an item to be taxed and charged on behalf of the county, and, under the ruling of the Supreme and this court, it was the property of the county. *State v. Flynn*, 161 Ind. 554, 69 N. E. 159; *Board v. Given* (Ind. Sup.) 80 N. E. 965; *Starr v. Board*, 40 Ind. App. —, 79 N. E. 390.

(3) On the question whether the special findings show a refusal of the board to institute an action against Eder, our attention is called to the following special findings: (6) That appellees on April 4, 1904, in writing demanded of the defendants constituting the said board of commissioners, as such board, that they prosecute an action against Eder to recover said \$300 so held by him. (7) "That the said board of commissioners did not at the time make any record with reference to said demand and that no record was made by them that they would comply with the demand, or that they would refuse to comply with the demand; neither was any record made by them that they declined to take any action with reference to said claim, that in truth and in fact the said board of commissioners did not take any action with reference to said claim, but the members thereof while in session stated verbally that they would not take any action with reference to said demand, but said verbal statements were not made a matter of record by said board, or any one acting for them, and there is no record of said board showing any action by them on said demand or any refusal by them to take any action upon said demand." Before appellees would be entitled to a conclusion of law in their favor, the special findings must show the ultimate fact that the board of commissioners refused to institute the action against Eder, and afterwards begun and prosecuted by appellees. While the greater part of what is designated as finding No. 7 is evidentiary only, it does appear that "the members thereof [speaking of the board of commissioners] while in session stated verbally that they would not take any action with reference to said demand." It practically amounted to a refusal to institute the proceedings against Eder, and was sufficient.

(4) In regard to the board speaking only by its record, it may be said that, when it acts in a judicial capacity, appellant correctly states the rule. But in the allowance of claims, and in the exercise of the right to refuse to institute the action against Eder to recover back into the county treasury money belonging to the county, it acted in an administrative capacity, and as to such acts the same may be shown, by parol. *McCabe v. Board*, 46 Ind. 380; *Board v. Heaston*, supra; *Tucker v. State ex rel.*, 163 Ind. 408, 71 N. E. 140.

Judgment affirmed.

SCOTT v. SMITH. (No. 6,427.)¹
(Appellate Court of Indiana, Division No. 2,
Nov. 20, 1907.)

1. ADMINISTRATORS—REMOVAL—WASTE.

Under the express terms of Burns' Ann. St. 1901, § 2400, par. 2, waste of the estate's money is ground for the removal of an administrator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 245.]

2. JUDGMENT—VACATING—FRAUD—POWER OF COURT.

It is always the duty and within the inherent power of a court to purge its records of fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 665.]

3. ADMINISTRATORS — REMOVAL — MISCONDUCT—EVIDENCE.

In a proceeding to remove an administrator on petition of a nonresident son of intestate, charging fraud and waste, evidence of the conduct of the administrator in regard to meeting petitioner on his return was relevant to the charge of bad faith.

4. SAME.

In such proceeding it was improper to exclude a written statement of the estate's condition, delivered by the administrator to petitioner.

5. WITNESSES—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT—WAIVER.

Though, under Burns' Ann. St. 1901, § 505, making physicians incompetent to testify as to communications made to them by patients, the right to waive the statute inures to the patient's personal representative, in a proceeding to remove an administrator he may not waive the privilege as to a communication made to a physician by decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 781.]

6. SAME—CLAIMANTS AGAINST ESTATE.

In a proceeding to remove an administrator, based on his allowance of a claim for services to the intestate, the claimant was not a competent witness to establish the justness of the claim, being incompetent, under Burns' Ann. St. 1901, § 506, to establish such a claim against the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 625-630.]

7. ADMINISTRATORS—MANAGEMENT OF ESTATE—DEGREE OF CARE.

An administrator must exercise such care and diligence in discharging his duty as ordinarily prudent men exercise respecting their own affairs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 359.]

Appeal from Circuit Court, Hancock County; Samuel A. Wray, Special Judge.

Petition by Charles E. Scott against James L. Smith to remove him as administrator. From a judgment for the administrator, and an order denying a new trial, petitioner appeals. Reversed and remanded, with directions for a new trial.

Jas. E. McCullough and Wm. C. Welborn, for appellant. Wm. W. Cook and Chas. H. Cook, for appellee.

ROBY, J. This is a proceeding for the removal of an administrator. A petition therefor was filed by the son of the decedent, a denial thereto filed, trial had, a special finding of facts made, and conclusions of law

stated thereon against the petitioner, who excepted to the conclusions of law, filed a motion for a new trial, and excepted to the action of the court in overruling it, and presents such rulings for review by assignment.

It is charged in the petition that James L. Smith, William L. Lewis, and Nancy J. Morris conspired together for the purpose of unlawfully converting a large part of the estate of Newton W. Scott, who is averred to have departed life in Hancock county, intestate, on August 31, 1905, leaving a personal estate of more than \$3,100, and leaving surviving no widow, and but one child, the petitioner, who resided at Stamps, Ark.; that all debts and expenses of the last sickness and burial of decedent did not amount to more than \$250, and that in pursuance of such conspiracy said Lewis, who is a brother of Mrs. Morris, made an affidavit of death in which he stated that the decedent was the father of one son, "whose whereabouts or residence is unknown and cannot be ascertained," when in fact said residence was known or could have been easily ascertained; that in pursuance of said conspiracy letters of administration were procured to issue to appellee Smith; that in further pursuance thereof a fraudulent claim for \$1,600 was filed against said estate by Mrs. Morris, and the same was allowed by said administrator, without making any examination to ascertain whether it was a just claim, and solely to create color of authority under which to pay said sum to her. It is also charged that said parties concealed the death of his father from the petitioner, and that he first learned of such death March 11, 1906; that on the 13th of March he left his home for Greenfield; and he sets out circumstances apparently tending to establish the charge of bad faith otherwise made. He further avers that the administrator has committed gross waste by paying \$100 to an attorney who rendered no services to said estate, by paying \$1,000 to Mrs. Morris, by loaning her \$200, and by failing to inventory all the money in possession of the decedent at his death.

The effect of this pleading was to charge, first, fraud; second, waste. Waste is a statutory ground for the removal of an administrator. Section 2400, par. 2, Burns' Ann. St. 1901; *Lucich v. Medin*, 8 Nev. 93, 104, 93 Am. Dec. 376; *Estate of Pike*, 45 Wis. 391; *Winship v. Bass*, 12 Mass. 201; *Hake v. Stotts*, 5 Colo. 140. Fraud, says Lord Coke, "avoids all judicial acts, ecclesiastical and temporal." It is always the duty and within the inherent power of a court to "purge its records of fraud." *Ferguson v. State*, 90 Ind. 38, 47; *Lutz et al. v. Mahan et al.*, 80 Md. 233, 30 Atl. 645; *Raborg v. Hammond* (1827) 2 Har. & G. (Md.) 42; *Hawkins v. Robinson* (1826) 3 T. B. Mon. (Ky.) 143.

The special finding is made up principally of evidentiary matter, which, in view of the fact that a new trial will be directed, need not at this time be reviewed.

¹ Superseded by opinion in Supreme Court, 35 N. E. 774. Rehearing denied.

Newton Scott, the decedent, whose age is not stated, had been a soldier in the Mexican War and was in receipt of a pension at the time of his death, which occurred on August 31, 1905. He died intestate, and left surviving no wife and one child, Chas. E. Scott, who resided in Arkansas. The decedent at his death lived with his niece, Nancy J. Morris, and had lived with her since June, 1898, in pursuance to an agreement to take him for \$3 a week for his board, at which rate he paid all during the time until his death. He left \$2,627.17 cash in the house. Mrs. Morris, the morning after Mr. Scott's death, handed said sum to Mr. Smith, by whom it was kept until his appointment, when he charged himself with it. He filed application for letters on September 5th and his bond on September 6th. When letters issued to him on September 9th, Mrs. Morris filed a claim for \$1,600 against the estate for "washing, mending, care, and attention" from June 17, 1898. On October 14th the administrator allowed such claim. He made no investigation of the claim except that he talked with the claimant, did not notice that it was "stale" in part, and did not take the opinion of his lawyer or any one else upon the subject.

Mrs. Morris' brother made an affidavit of death in connection with the appointment of an administrator in which he stated that deceased was the father of one son, "whose whereabouts or residence is unknown and cannot be ascertained." The evidence indicated that such residence might have been ascertained. It was also shown that of the funds in his hands the administrator paid to Mrs. Morris \$1,600 and to an attorney \$100. It is not shown that any services were rendered by the attorney justifying the payment of such sum.

The court erred in excluding evidence of the conduct of the administrator in regard to meeting the petitioner upon his return. The evidence called for was relevant to the charge of bad faith. The court also erred in refusing to admit a written statement of the condition of the estate, delivered to the petitioner by the administrator at a subsequent time.

The court erred in permitting a witness, who attended decedent as a physician, to tes-

tify as to matters learned by him in that capacity. The right to waive the statute covering privileged communications inures to the representative. Here the suit is against the administrator in his individual capacity. As an individual he is without power to waive such privilege. Section 505, Burns' Ann. St. 1901; *Towles v. McCurdy*, 163 Ind. 12, 15, 71 N. E. 129; *Heuston v. Simpson*, 115 Ind. 62, 17 N. E. 261, 7 Am. St. Rep. 409.

The appellee called Mrs. Morris as a witness, and she was permitted to testify over objections that she filed the \$1,600 claim against the estate in good faith, believing that it owed her that amount. She also testified in detail as to the care and attention given by her to the decedent, and made the basis of said claim. It is certain that, if her claim had been resisted by the administrator, she would not have been a competent witness to establish it. Section 506, Burns' Ann. St. 1901. It is also settled that on a trial on exception to his report, taking credit for the payment of such sum, she would not be competent. "To adjudge him competent to establish the claim, contested as it here was, would be to permit that to be done by indirection which could not have been directly done." *Clift v. Shockly* (1881) 77 Ind. 297. The considerations which operate to render the claimant incompetent to testify for the administrator, when the integrity of the claim is questioned by an exception to his report, are equally applicable where the integrity of the claim is attacked as a reason for his removal. Upon the authority of *Clift v. Shockly*, supra, and the cases following, the witness must be held to be incompetent. *Taylor v. Duesterberg*, 109 Ind. 165, 9 N. E. 907; *Bowen v. O'Hair*, 29 Ind. App. 466, 64 N. E. 672; *Thornburg, Adm'r, v. Allman*, 8 Ind. App. 531, 534, 35 N. E. 1110.

The duty of an administrator is to exercise such diligence and care in discharging his duty as ordinarily prudent men exercise in reference to their own affairs. *Cooper, Adm'r, v. Williams*, 109 Ind. 270, 9 N. E. 917.

Judgment reversed, and cause remanded, with instructions to sustain appellant's motion for a new trial and further proceedings in accordance herewith.

(40 Ind. App. 528)

ROBERTS v. FT. WAYNE GAS CO. et al.
(No. 3,914.)(Appellate Court of Indiana, Division No. 1.
Nov. 20, 1907.)**MINES AND MINING—OIL AND GAS LEASE—
PROVISIONS FOR RENT—COMPLAINT.**

Under a lease of land for the purpose only of drilling and operating for gas and oil, providing that the rental shall be one-sixth of the oil, and, "if gas is found in sufficient quantities to market the same," the consideration to the lessor shall be \$100 per annum in advance for each gas well drilled, and that operation shall be commenced and four wells completed within four months from date, or all paid for after that time, and that, if the lessee fail to perform such work or to pay the rent, he shall, in lieu thereof and in full for damages for his default, pay annually during the term \$100 for each of such wells—where the lessee seasonably drills four wells, no rent is payable therefor, except for the time that they produce gas in marketable quantity, though they produce it in such quantity when first drilled, so that a complaint for gas rent must aver that the wells were so producing gas during the period for which rental is claimed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 209.]

Appeal from Circuit Court, Grant County;
H. J. Paulus, Judge.

Action by Joseph A. Roberts against the Ft. Wayne Gas Company and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Chas. T. Parker, for appellant. Cantwell & Lemmons and A. R. Long, for appellees.

WATSON, P. J. Appellant, plaintiff below, sought to recover certain rentals claimed under a certain lease entered into between appellant and appellee gas company, and assigned by said gas company to appellee Robert Sutton, excepting and reserving to itself "four ten-acre tracts to be located by it in a square form." To appellant's amended complaint, in one paragraph, appellees demurred separately. Judgment was rendered sustaining the demurrers, from which this appeal was taken.

The complaint, as amended, alleges that "the Ft. Wayne Gas Company is a corporation, organized and doing business under the laws of Indiana"; that on June 19, 1902, appellant leased to appellee gas company certain described real estate in Fairmount township, Grant county, Ind., particularly describing the same, and approximating the number of acres included therein, "for the purpose of drilling and operating for natural gas and petroleum oil"; that said lease was for a term of 10 years from date. The agreement is inserted in the complaint, and is alleged to be substantially as follows. It sets out the parties to the contract, and specifies that said lease is for "all that certain tract of land situated in Fairmount township, Grant county, and state of Indiana, bounded and described as follows, to wit: (HI) above described 129 acre tract of real estate." Then follow the provisions that appellees, their

heirs and assigns, are to hold the premises "for the said purpose only" for a term of ten years from date, "and for so much longer at the election of the lessee, as the rental herein agreed upon shall be paid as herein provided for, and as much longer as oil or gas is found in paying quantities." The rentals were to be one-sixth of the oil, and, if "gas is found in sufficient quantities to market the same, the consideration in full to the party of the first part shall be one hundred dollars (\$100.00) per annum in advance for each and every gas well drilled on the above described land." It is further provided that "operation on the above-described premises shall be commenced and four wells completed within four months from the date hereof, or all paid for after October 1, 1902."

* * * It is also agreed between the parties hereto that in case said lessee shall fail to do and perform the work hereinbefore mentioned, or to pay the rent as herein agreed, such failure shall not forfeit its right to hold said leased premises for the above term; but, in lieu thereof and in full payment for all damages resulting to the lessor by reason of such default, said lessees are to pay annual rental for said premises during the term herein specified of one hundred dollars for each well above specified, the rent shall become due semi-annually in advance, upon the first day of January and July, and shall be paid within ten days from the maturity thereof at the Citizens' Exchange Bank, Fairmount, Indiana, or this lease be null and void." The instrument then sets out that said lessee, by giving a 10 days' written notice, and paying the rent due at the expiration of the 10 days, and \$5 additional in full of all damages and rents due said lessor from said lessee, may terminate said contract. Provisions are made against drilling wells nearer than 300 feet to house, barn, or orchard, and for the use of gas by said lessor for domestic purposes. The instrument concludes with the agreement that all the conditions of the contract shall extend "to their heirs, executors, successors, and assigns." It is then averred that appellees agreed to pay appellant \$100 per annum in advance for every gas well drilled on said premises; that they would drill at least four wells thereon within four months from date, and, if not, all were to be paid for after October 1, 1902; that they were to be paid for the term of 10 years, semi-annually, in advance, on the 1st day of January and July, providing said lease should not be reconveyed and surrendered to lessor; that lessee took possession of the premises under said grant, drilled four gas wells before October 1, 1902, in which gas was found in sufficient quantity to market the same, which gas was found in said wells, and transported and marketed by lessees; that one oil well was drilled on said premises; that lessees have never surrendered, canceled, reconveyed, or released

of record said lease, but still hold possession of the premises thereunder; that said rental has been demanded, is past due, and unpaid; that lessees have failed to pay the installments of well rental due July 1, 1904, and January 1, 1905; that there is due \$400 in rentals, and a total of \$450.

Appellees insist that the appeal should be dismissed for the reason that appellant's brief does not comply with clause 5 of rule 22 (55 N. E. vi) of the rules of this court. It is pointed out that there is a specific incorrect statement of the record, in that the description of the land, as set out in appellant's statement of the record, is not that given in the lease itself. If a substantial effort is made in good faith to comply with the rules, the court may disregard the defects in the brief. *Stamets v. Mitchenor*, 165 Ind. 672, 675, 75 N. E. 579; *Hay v. Bash*, 37 Ind. App. 167, 169, 76 N. E. 644. Where all the matter of record necessary to a full consideration is not set out in appellant's brief, the court will consider the question raised if the omitted parts are set out in appellees', since rule 22 is satisfied by the joint act of the parties. *Chicago, etc., Ry. Co. v. Wysor Land Co.*, 163 Ind. 288, 289, 69 N. E. 546; *Tipton, etc., Power Co. v. Dean*, 154 Ind. 533, 534, 73 N. E. 1082; *Chicago, etc., Ry. Co. v. Walton*, 165 Ind. 642, 646, 74 N. E. 988. For these reasons, we think that the defects in appellant's brief should be disregarded, and the questions in issue considered.

Appellees insist that the complaint is bad on demurrer because it does not aver "that the wells in question produced or contained any gas at any time during the period for which rental is claimed." In order to determine this question, it is necessary to consider more in detail the provisions in the instrument pertaining to the agreed rentals. The lease is for a term of 10 years, "and" so much longer, at the election of the lessee, as the rentals be paid as provided, "and as much longer as oil or gas is found in paying quantities." The appellees agreed, in consideration of the grant, to give appellant one-sixth of all the petroleum oil discovered on the premises. The terms concerning the operations for gas were as follows: "It is further agreed that if gas is found in sufficient quantities to market same, the consideration in full to the party of the first part shall be one hundred dollars (\$100.00) per annum in advance for each and every gas well drilled on the above described land." The lessees obligated themselves to begin and complete four wells within four months from date (June 19, 1902), "or all paid for after October 1, 1902." In order to prevent a forfeiture of the contract, the instrument then further provides that failure by the lessees "to do and perform the work hereinbefore mentioned, or to pay the rent as herein agreed," shall not forfeit the right to hold the leased premises for the agreed term, but that lessees

shall pay, in full compensation of all damages to lessor, an annual rental for the premises, during the term, of \$100 for each well above specified.

Appellant contends that the annual payment of \$100 for each of the four wells specified was a provision to protect the lessor in the absence of an agreed acreage rental. This seems to be an afterthought. The provision to prevent a forfeiture applies to two conditions: (1) Failure to perform the work mentioned in the agreement; and (2) failure to pay the agreed rent. As to the first, no question is raised, for it is averred in the complaint and admitted by the demurrer that the four wells were begun and completed within the stipulated period. The only question is whether there has been a breach of the condition to pay the agreed rent whereby appellant's right to the annual payment of \$100 for each of the wells specified is perfected. Reference to the paragraph setting out the rentals shows that the rent for gas wells as agreed upon is \$100 per annum for each well "if gas is found in sufficient quantities to market same." The rent for the said wells became due on a condition—i. e., finding a marketable quantity—and appellant claims that, such an amount having once been found, the rental price per well is then binding for the remainder of the term. This agreement was for the sole purpose of operating for oil and gas. The parties did not contemplate, and, in fact, they provided against, the taking of any other profit from the estate by the lessees. The uncertainty of finding any oil or gas is provided for by making the rent conditional upon a marketable quantity being found. It is not consistent with reason to say that the parties did not contemplate paying for wells in which gas was not found in marketable quantity, but that they did intend that wells, once productive, should be paid for after they became nonproductive, when the sole return for the money expended was to be gas. The rent to be paid was in return for a profit to be taken from the land; that profit being gas. If the profit became exhausted, then the obligation to pay the agreed amount ceased.

Thornton, in the Law Relating to Gas and Oil (section 249), says: "So thoroughly embedded in the law pertaining to the production of oil and gas is the idea that all liabilities and rights must turn upon a productive field or lease that a failure of a gas or oil well may stop the accruing of periodical rent, even when the express language of the lease makes no reference to a cessure of payment in case the well should become exhausted. Thus, where the lease was to run 20 years, and for each gas well a rent of \$500 per annum was to be paid, and before the end of the second year the well, without fault of the operators, was flooded with salt water and ceased to produce gas, it was held that

the third year's rent could not be collected, for the reason that there should be read into the lease this implied agreement or understanding that the well to be paid for at the stipulated price was not only to be a gas well but to remain a gas well, and that when it ceased to produce gas it ceased to be a gas well." If this were a contract to sell all the gas and oil under the leased premises, for a stipulated amount for each well, in a lease or instrument, then appellant's contention would be tenable; but the instrument sued on is a lease to take a profit from the land, and, when the profit becomes exhausted, the liability to pay the consideration therefor is abrogated. *Moon v. Pittsburg Plate Glass Co.*, 24 Ind. App. 34, 39, 56 N. E. 108; *Ridgely v. Conewago Iron Co.* (C. C.) 53 Fed. 988; *McConnell v. Lawrence Nat. Gas Co.*, 30 Pittsburg L. J. 346; *McKnight v. Manuf. N. Gas Co.*, 146 Pa. 185, 23 Atl. 164, 28 Am. St. Rep. 790; *Williams v. Guffy*, 178 Pa. 342, 35 Atl. 875; *Ohio Oil Co. v. Lane*, 59 Ohio St. 307, 52 N. E. 791. The provision in the instrument requiring four wells to be completed within four months was a stipulation for the reasonable development

of the premises. Lessees were not bound to drill more than four wells, but the penalty would have attached had they drilled fewer than that number within the agreed time. Likewise, if more than four wells had been drilled, each producing the required amount of gas, lessees would have been liable, under the contract, for the rental sum of \$100 per annum for each well so drilled. Lessor failed to include an acreage rent in the agreement. This court cannot insert a new term into the contract. That proposition is elementary. It must determine the intent of the parties from the instrument itself. The liability to pay rent for the gas wells was intended to be dependent upon the wells producing and continuing to produce a marketable quantity of gas, and, if they did not, as the author well says, "they ceased to be gas wells." There is no averment in the amended complaint that any of the wells in question were producing gas at any time during the period for which rental is claimed in this action. Such an averment was necessary to make out appellant's cause of action.

The demurrers were properly sustained.
Judgment affirmed.

(230 Ill. 174)

HAKE et al. v. PEOPLE. ANDERSON v. SAME. SPORKA v. SAME.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. INJUNCTION — VIOLATION — CONTEMPT — PETITION.

Where a contempt of court consists in a violation of an injunction issued in a pending proceeding by one bound thereby, the injunction order need not be set out in the petition to punish for contempt, as the court will take judicial notice of all orders previously entered in the case.

2. CONTEMPT.

A proceeding in civil contempt may be commenced by petition or affidavit in the court which issued the order, the violation of which forms the basis of the contempt proceedings, but the alleged contempt need not be set out with the same particularity as in a criminal information or indictment, but the rules applicable to other chancery pleadings will control.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 143-146.]

3. SAME—HEARING—EVIDENCE.

On the hearing of a civil contempt, the court is not confined to the evidence offered by the defendants' sworn answer, but may hear affidavits or any other proper testimony to enable it to determine the truth of the matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 184.]

4. SAME—PARTIES.

A civil contempt proceeding may be carried on in the name of the original complainant in the chancery cause wherein the order was entered, violation of which forms the basis of the contempt proceedings, or in the name of the people on the relation of the complainant, regardless of whether the case was commenced by affidavit or petition or docketed in the name of the complainant or the people.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, §§ 137-139.]

5. INJUNCTION—VIOLATION—CONTEMPT—PROCEEDINGS.

Civil contempt proceedings for the violation of an injunction issued in a chancery case is in all its procedure essentially a civil chancery proceeding conforming itself in its pleadings, character, and quantity of proof required, and in its course through the appellate tribunals to the rules and practice applicable to other chancery proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 503.]

6. SAME—REVIEW.

A contempt proceeding against parties for violating an injunction issued in a chancery proceeding, restraining them from interfering with the petitioner's business, or inducing his employes by threats, etc., to refuse or fail to do their work or leave his employment, and from preventing any person from entering his employment, is a civil or remedial contempt proceeding, and not a criminal case, and hence may be brought up to the Supreme Court on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 517.]

7. SAME—VIOLATION AND PUNISHMENT — REVIEW.

In a civil contempt proceeding for the violation of an injunction issued in a chancery court, the Supreme Court is not bound by the findings of the trial court nor by the affirmance of the judgment by the Appellate Court as to the facts, but will not reverse, unless the finding is against the clear preponderance of the testimony.

8. SAME—PROCEEDINGS — EVIDENCE — SUFFICIENCY.

In a civil contempt proceeding for the violation of an injunction issued in a chancery cause, evidence held to sustain the decree finding that defendants violated the injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 514.]

9. SAME—PUNISHMENT.

It cannot be urged that the punishments inflicted upon parties adjudged guilty of violating an injunction issued in a chancery cause are unconstitutional because in excess of those prescribed in the Criminal Code for the same acts constituting the violation of the injunction; the punishment in such cases lying entirely within the discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 521.]

10. SAME—DISCRETION OF COURT.

The appellate courts are exceedingly adverse to interfering with the exercise of the discretion of the trial court regarding the punishment for violations of its injunction orders.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 517.]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; M. Kavanagh, Judge.

John Hake and others were found guilty of contempt of court by the superior court, and, from a judgment of the Appellate Court affirming the order finding them guilty, they appeal. Affirmed.

This is an appeal from a judgment of the Appellate Court for the First District affirming an order of the superior court of Cook county finding John Hake, Charles Anderson, and Frank Sporka guilty of contempt of court, and sentencing each of them to imprisonment in the county jail for four months.

The following statement of the case is made by the Appellate Court for the First District, and, upon examination and comparison, we find the statement full and accurate, and accordingly adopt it as a correct statement in this case:

"M. Born & Co., a corporation, organized under the laws of Illinois, filed its bill in the superior court for an injunction against the United Garment Workers of America, the Chicago Coat Seam Pressers, Local Union 150 of the United Garment Workers of America, the Brotherhood of Custom Cutters and Trimmers to the Trade, Local Union No. 21 of the United Garment Workers of America, District Council No. 6 of the United Garment Workers of America, Local Union No. 194 of the United Garment Workers of America, and other local unions of the United Garment Workers of America, and divers individuals, officers of said unions, and averred that the complainant was engaged at 337 Franklin street, Chicago, Ill., in the manufacture of coats and vests, and employed a great number of men and women; that before the filing of the bill it had employed in its business organized labor affiliated with the United Garment Workers of America and its several affiliated local unions; that on November 18, A. D. 1904, the said union in-

augured a strike against complainant for the purpose of dominating and controlling the employment of skilled coat and pants workers, bushelmen, pressers, and trimmers in the city of Chicago, and for the purpose of prohibiting other workmen and workwomen, and those affiliated with the said union or unions, from working at their trade in the city of Chicago; that prior to November 18th the complainant's employes were members of the different unions; that thereafter they left complainant's place of business and gathered around said place of business for the purpose of intimidating the complainant's employes who remained at work; that as said persons went to and from their work they were stopped and interfered with by said defendants, who had instituted a system of picketing; that the defendants named in the bill, and others who are unknown to the complainant, continued to surround complainant's place of business and are still maintaining said picket line, by reason whereof complainant's employes have refused to continue to work; that some of complainant's employes are willing to continue to work, but are afraid to do so, by reason of which complainant is prevented from carrying on its business; that complainant has requested its employes to continue to work; that said employes have tried to do so, but were intercepted by said pickets and compelled by threats and intimidation to desist therefrom; that the defendants named in the bill have combined and conspired for the purpose of inflicting injury upon the business of the complainant; that, in furtherance of the said purpose, the defendants caused a system of picketing to be maintained and established around complainant's plant since the commencement of the said strike, and have intercepted persons who remained in complainant's service, persons going to and from complainant's factory for the purpose of obtaining employment, and that the employes of complainant have been assaulted either by said defendants or persons in combination with them, and that personal injuries have been inflicted upon some of the employes of the complainant; that the effect of said picketing and assault has been to terrify the employes of complainant and make them afraid, and by reason thereof persons have been unwilling to enter the service of complainant, and complainant has been deprived of the services of a large number of persons who would otherwise have taken employment from it; that, if said picketing and assaults are continued, irreparable loss and damage to complainant's business will result; that the picketing system has been and is under the direction and instigation and advice of the United Garment Workers of America and its officers, for the purpose of injuring complainant's business and terrifying its employes and coercing complainant to make a settlement with them, whereby a renewal of a closed shop agreement in the wholesale tailoring industry should be executed by the

complainant; that persons associated with the defendants are surrounding complainant's place of business and are engaged in altercations with complainant's employes as they pass in and out of its place of business; that these employes are called vile names, such as 'scabs,' and opprobrious epithets, and that threats are being used against them; that said defendants' associates are intimidating and terrifying complainant's employes in numerous ways, by reason of which many of said employes are about to leave complainant's employment, and will do so if the said system of picketing is continued; that in the course of its business complainant had, prior to the filing of this bill, entered into numerous contracts with divers persons in Chicago and throughout the United States to manufacture and sell clothing, and that in many of said contracts time is the essence of the contract; that the contracts are very valuable—the exact value complainant is unable to determine—that it will be obliged to use every possible facility to complete its contracts within time; that various orders will be canceled and will result in losses of patrons and profits to complainant, and complainant will be unable to complete contracts and carry on its business unless the defendants are restrained from interfering with its said business in the manner aforesaid, and complainant will sustain irreparable loss and injury; that complainant's business requires skilled mechanics, and that, if those are prevented from working by defendants and the co-conspirators, the complainant's business will be crippled and perhaps destroyed, and great loss will come to the complainant; that said loss will arise from the cost of protecting contracts partially finished, in loss of trade and profits, damages for unperformed contracts, and loss of patrons; that said loss cannot be estimated in money; that there are many elements of loss which will occur which cannot be determined or fixed in money value; that the continuance of said conditions will destroy complainant's good will in the business which complainant has built up through many years of toil; that the conspiracy of the defendants, with others unknown to the complainant, has prevented complainant from carrying on its business, and, if continued, the complainant will be required to cease doing business; that during the past few years numerous strikes have occurred in various manufacturing industries in Chicago, and that it is common report and knowledge that numerous deadly assaults have been committed by strikers; that the effect of all this is to cause fear amongst mechanics and employes of complainant; that mechanics now engaged by complainant were employed with knowledge of and continued in the employment of complainant with knowledge of said strike; that they are working in opposition to the wishes of the officers and members of the defendant union; that said persons desire to continue in the employ of

complainant without interference of the defendants and their associates; that the pickets single out and identify said employes and ascertain their home and address and the routes they travel to and from their labor, in order to waylay and assault said employes of complainant; that they fear they will be identified, pointed out, and waylaid by the defendants; that some of the former employes are not actively engaged in the strike, but waiting for the strike to be settled that they may return to work; that said employes would not have quitted complainant's employment had they not been fearful of being assaulted and waylaid and beaten as the result of such picketing; that others who have desired to enter complainant's employment have been deterred by reason of said system of picketing, and so complainant's employes are intimidated and coerced to leave complainant's business and employment; that such loss and injury to complainant's business, resulting from the proceedings of the defendants, are without remedy except in equity. The bill prays for an injunction restraining defendants from in any unlawful manner interfering with, hindering, obstructing, or stopping any of the business of complainant or its agents, in the city of Chicago or elsewhere, and also from entering upon the grounds or places where the employes of complainant are at work for such unlawful interference, and from unlawfully inducing, by threats, force, or violence, any employes of complainant to refuse or fail to do their work or to leave the service of complainant, and from preventing any person from entering the employment of complainant, etc. The bill is supported by the affidavit of William A. Kirchberger, secretary and treasurer of the complainant.

"On March 18, 1905, the complainant, M. Born & Co., filed a petition in the cause setting up the filing of the bill of complaint; that an injunction was issued; that after the filing of the bill and issuing of the injunction the injunction was personally served upon Robert Noren, S. J. Stern, Mrs. Anna Sorenson, and upon the officers and business agents of Local Union No. 21, and upon other business agents and officers of other local unions; that printed copies of said injunction, in large type, were immediately placed and posted in conspicuous places, and upon the buildings and entrances to the different branches of the establishment of complainant, and at the entrance ways to the meeting places of the different local unions, some of whose members are engaged in the strike; that from the issuance of said injunction until the 27th day of February, 1905, upon which date the said injunction was modified, there was little picketing and little or no violence or other unlawful interference with the business of the petitioner or with its employes then at work; that since the modification of the injunction picketing has been going on; that members of the local union

patrol the streets near the places of business of petitioner; that the officers and agents, particularly Robert Noren, of the general executive board of defendant union, business agent of different affiliated unions, and also Mrs. Ellen Lindstrom, business agent of said affiliated unions, and also G. H. Alexander, president of its affiliated unions, Anna Sorenson, business agent of its affiliated unions, and S. J. Stern, an officer of the district council, have advised strikers that the modification of the injunction permitted picketing of petitioner's place of business and other wholesale tailors, and said modification also permitted the congregating of pickets upon the streets and alleys; that said persons above named have urged and incited the assembling of strikers in large numbers before the places of business of petitioner, and have continually incited and urged the congregating of such pickets in such manner and for the purpose of threatening the employes of petitioner; that said last-named persons have been personally present in crowds of strikers, and have gone among such strikers and urged them to intercept the employes of petitioner, and urged personal violence, which is set forth in the petition; that on March 14, 1905, a large crowd, including such last named persons and also Albert Pettelkan, — Braglin, Frank Kreston, Ernest F. Albrecht, Charles Anderson, J. B. Scott, William Dohney, Frank Sporka, William Bodett, Ralph Ferrero, W. Hankinson, H. Hovander, and — Hake, numbering 400 or 500 people in all, assembled upon the streets, alleys, and approaches to petitioner's place of business for the purpose of making and demonstrating against petitioner's business and for the purpose of intimidating the employes of petitioner as they were leaving its place of business, and that said crowd of strikers, including all the parties above named, hollered and jeered at the employes of petitioner as they were leaving its place of business, and said employes were frightened and intimidated by said threatening attitudes and actions of said defendants; that one James Sweet, a cutter of petitioner, who was employed by petitioner, while leaving its place of business, was followed by one Charles Anderson, with five or six other strikers, to Franklin street, near Van Buren, in the city of Chicago; that Charles Anderson pointed out said Sweet to the crowd and shouted, 'There is Jim Sweet, the cutter; give it to him'; and that one of the other men who was with Charles Anderson seized said Sweet by the neck and threw him upon the ground, and that thereupon Anderson, with five or six other men, struck said Sweet; that another one of the crowd struck him, and that among said crowd so assaulting and beating said Sweet was a man by the name of James B. Scott.

"Petitioner further shows that on the 14th of March, 1904, as Philip Zuck, one of petitioner's employes, with several other em-

ploÿes of petitioner, was leaving his work, said crowd followed said employ es, and three of said strikers slugged and struck said Zuck a great number of times and bruised him so that so that he had to be assisted back to petitioner's place of business, and thereafter, while he was returning to his home, said S. J. Stern, in company with a number of others, followed said Zuck; that with Stern was one Braglin; that said Braglin was stopped and prevented from assaulting said Zuck.

"Petitioner further represents that upon the 14th day of March, 1905, William Kirchberger, secretary and treasurer of petitioner, and one William Jungstrom, an employ e, were leaving the business establishment of petitioner when a crowd of pickets followed said Kirchberger and Jungstrom, and when they had gone around the corner one of said strikers motioned to the other strikers, and one short man with a tan overcoat, whose name is unknown, but who petitioner prays may be made a party to the petition when discovered, struck Jungstrom with his fist on the back of his head, knocking said Jungstrom forward, and that one of said strikers struck said Kirchberger a glancing blow in the face, breaking his glasses and knocking off his hat, and that among said strikers so assaulting said Kirchberger and Jungstrom was W. Dohney and ——— Hake, and the said strikers commenced to knock the said Kirchberger and Jungstrom about until a sergeant of police came up and dispersed the crowd, and thereafter said Kirchberger and Jungstrom returned to their place of business; that later Kirchberger started home, whereupon said strikers, including said Ellen Lindstrom and G. H. Alexander, followed said Kirchberger, calling him 'scab,' and that said Alexander pointed out said Kirchberger to the crowd and motioned to the crowd to follow said Kirchberger, whereupon a man by the name of Hake, who was with said Alexander and Lindstrom, struck said Kirchberger a blow in the stomach with his fist, knocking said Kirchberger in the arms of a policeman.

"The petitioner further shows that all of said above-named persons were present in said crowd of strikers on said 14th of March, 1905, in front of and upon the streets leading to petitioner's place of business, and that they, each of them, took part in the threatening of the employ es of the petitioner and in the acts of Alexander and Noren, Stern, Sorenson, Lindstrom, in advising said strikers and the members that the modification of the injunction permitted picketing the petitioner's place of business, and in inciting said pickets and strikers to the acts of violence above set forth; that said acts constituted a violation of said injunction and a contempt of court, and that all the parties so engaged, as aforesaid, knew of the issuance of the injunction and of the terms thereof, and that the violation of said injunction and con-

tempt of the order of this court was knowingly and willfully committed by said named persons; that the petitioner annexes certain affidavits to the petition, setting forth specific acts of violence, and makes them a part of the petition. The petition prays that said persons be ruled to appear by a short day and answer the petition, and show cause why they, and each of them, should not be adjudged guilty of contempt of court and punished accordingly. Attached to said petition are the affidavits of William A. Kirchberger, James Sweet, J. W. Scharff, Philip Zuck, William M. Jungstrom, Harry S. Beaumont, Michael Zuck, Maurice Feldman, Robert Seligman, and Joe Kevarik.

"Appellant Frank Sporka filed an answer to the rule to show cause, denying the averments of the petition and affidavits. Appellants Charles Anderson, William J. Dohney, and John Hake filed similar answers.

"On the hearing, in addition to the petition and affidavits in support thereof, and the respective answers and affidavits in support thereof, the court heard and considered oral testimony of witnesses as to the acts complained of, and on April 3d the court entered an order finding appellants guilty as charged in the petition and affidavits, and committing each of appellants to the county jail of Cook county for a period of four months or until discharged by due process of law, and discharged the other respondents to the petition.

"The cases are consolidated by agreement of parties for the purpose of hearing in this court."

William J. Dohney did not appeal from the judgment of the Appellate Court.

Jacob C. Le Bosky, John J. Scristeby, and Daniel L. Cruice (William Slack, of counsel), for appellants. Wheeler, Sibley & Isaacs, for the People.

VICKERS, J. It is first insisted by appellants that the petition fails to state a case of contempt and that the evidence fails to establish such case, in that there is a failure to set out the order of injunction, or any modification thereof, in the petition. This contention is based on a failure of the petitioner to recite at length in the petition the injunctive order. The petition merely recites that "complainant filed its bill of complaint against the Garment Workers of America, and certain other affiliated local unions, on the 28th day of November; that an injunction was issued herein, as will more fully appear, reference thereunto being thereby especially had." If the contempt proceeding had been an original action instituted for the purpose of punishing a contempt which did not arise in connection with a pending cause, the pleading and the order would necessarily have to contain a statement of all the facts constituting the contempt; but, where the contempt consists in the violation of some order of the court in a pending pro-

ceeding by one who is bound by such order, either as a party or otherwise, there is no necessity for setting out the previous order of the court in the petition. The court wherein the proceeding is pending will take judicial notice of all orders previously entered in the cause. The only matter about which the court was not fully advised was the alleged acts of appellants upon which the charge of contempt was based. The proceedings here for contempt were incidental to the general relief sought by the original bill. If the injunctive order had been recited in the petition, it might have been said that the bill upon which such order was entered also should have been set out. Both the bill and the order for the injunction were before the court, and no necessity existed for again reciting them at large in the petition.

There is a distinction to be noted, in several respects, between practice in contempt proceedings in a court of chancery and proceedings to punish contempts in a court at law. Where the proceeding is in a court of equity, the contempt is punished as an incident to the enforcement of orders and decrees made in furtherance of the remedy sought. In cases of common-law cognizance, the contempt usually consists in some act in disregard of the power and dignity of the court, and which has a tendency to interrupt or disturb the due administration of justice. In cases of common-law jurisdiction for contempt the defendant is tried upon his answer made to interrogatories filed. No other evidence is heard. If the answers prove false, the remedy is by indictment for perjury, but, if the party purges himself of the contempt by his answer, he will be discharged. In a proceeding for contempt for violation of orders in chancery the court will hear affidavits pro and con, and may also avail itself of any other legal evidence that will aid the court to determine the question according to right and justice.

Contempt proceedings are sometimes classified as criminal contempts and remedial contempts, and by some writers and judges they are classified as contempts cognizable in a court of equity and common law contempts, but whatever terms are employed to describe the two classes of contempt proceedings no confusion need exist as to the identity of the two classes and their respective characteristics. The earliest case which we have been able to find in this state where the difference in the procedure in the two classes of contempt cases is clearly pointed out is *Crook v. People*, 16 Ill. 534. That was a proceeding against Crook and others for a contempt in violating an injunction, and was therefore a remedial contempt, and cognizable in the court of equity that had issued the injunction. One of the questions there presented was whether the defendant should be discharged upon his answer. This court in disposing of that question, on page 537, said: "In *Underwood's Case*, 2 Humph. (Tenn.)

48, the court lays down the proper distinction between the course of practice in courts of law and equity, and mere contempts, and acts that are treated as contempts for the enforcement of orders and decrees, as part of the remedy sought. 'In cases of common law the defendant will be discharged if by his answer to interrogatories filed he make such a statement as will free him from the imputed contempt, and that opposing testimony will not be heard,' and 'in cases in chancery the truth of the defendant's statement in reply to interrogatories filed may be controverted on the other side and the whole matter be inquired into and ascertained by the court.' And this is fully sustained in the *Case of Yates*, 4 Johns. (N. Y.) 372, where the judgment is held conclusive of the contempt upon a habeas corpus and a strong doubt expressed of a power to revise upon appeal or writ of error. *Id.* 353. Lord Mansfield recognized the same distinction in *The King v. Vaughn*, 2 Douglass, 516, where he states the practice in chancery to be to take testimony on both sides. 4 Black. Com. 288. Blackstone notes, also, the distinction that exists as to the nature and object of proceeding as for a contempt. Where the contempt is by a party to the suit and committed by disobedience to any rule or order, such as payment of costs or money, the proceeding for contempt is in the nature of a civil execution on the decree, to enforce payment by personal process. Proceedings for contempt for breach of injunction are of a kindred nature, to preserve the subject-matter of the dispute in the same condition it is, or such condition as will enable the court to administer full relief and justice eventually. 4 Black. Com. 285. See *Dane's Abrid.* c. 220, art. 4; 1 Harrison, Chancery, 202."

In *Buck v. Buck*, 60 Ill. 105, the proceeding was against the appellant by attachment for contempt in not complying with a decree of the circuit court of Kane county in a suit for divorce ordering him to support and educate an adopted child of the parties. Interrogatories were filed, to which the defendant made answer, and the court ruled that notwithstanding the answer the defendant must purge himself of the contempt in open court. The ruling of the court in requiring the defendant to be sworn and in hearing other evidence than the answer of the defendant was assigned as error, and in disposing of that assignment of error this court, on page 106, said: "A difference obtains between the practice, in this respect, in courts of law and in courts of equity. In the former, if the defendant clears himself by his answer, he will be discharged and the complaint totally dismissed; whereas, in the courts of equity, after the party has answered the interrogatories, his answer may be contradicted and disproved by the adverse party. The attachment for this species of contempt, the disobedience of an order to pay money, is to be looked upon rather as a civil execution for

the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. 4 Black. Com. 288; *Crook v. People*, 16 Ill. 534. It is a singular mode of trial, admitted in this particular instance of contempt, where ordinary rules governing criminal trials do not apply, and we see no sufficient objection in this case to the adverse party having resort to the testimony of the defendant, as might be done in a civil case. No replication to the answer was necessary, as claimed. The practice of the courts of chancery recognizes no such thing as a replication to an answer to interrogatories filed in such a proceeding as this. We hold there was no error in this ruling of the court."

Leopold v. People, 140 Ill. 552, 30 N. E. 348, was a bill in chancery filed for the settlement of the affairs of a partnership. The court appointed a receiver, and ordered the several partners to turn over to the receiver all of the partnership assets under the control of the respective partners. Subsequently, by an intervening petition of a creditor, it was brought to the notice of the court that Henry and Charles M. Leopold had refused to obey the order and refused to appear before the master to whom the cause had been referred and submit to an examination, as ordered by the court. Upon a hearing the court gave them an opportunity to still obey the order and be discharged, but they refused. They were each fined \$200 and ordered to stand committed until the fine was paid, unless sooner discharged by order of the court. The judgment was affirmed by the Appellate Court, and in this court a motion was made to dismiss the cause for want of jurisdiction, the argument being that it was a criminal action, and for that reason no appeal would lie from the Appellate Court to this court, or, it was argued, if the cause be not criminal, no appeal lies to this court without a certificate of importance from the Appellate Court, the judgment being less than \$1,000. In disposing of that motion this court, speaking by Mr. Justice Wilkin, said (page 556 of 140 Ill., and page 349 of 30 N. E.): "The proceeding in the superior court was to compel obedience to an order made in a chancery proceeding for the benefit of the creditors of the insolvent firm, and is therefore a civil action, though in some respects carried on as a criminal proceeding"—citing *Crook v. People*, supra, and *Buck v. Buck*, supra. The motion to dismiss the appeal was overruled on the ground that it was a civil action in chancery, and that an appeal in that class of cases would lie from the Appellate Court to this court without reference to the amount involved. The judgment of the Appellate Court was affirmed.

People v. Diedrich, 141 Ill. 665, 30 N. E. 1038, was a contempt proceeding growing out of the violation of an injunction which had been issued to restrain the infringement upon the rights of complainants as owners of a

patent known as the "Ruttan furnace." The court had perpetually enjoined Diedrich from manufacturing or being interested in the manufacture of the particular kind of furnace in question. Afterwards an affidavit was filed charging Diedrich with violating said injunction by manufacturing, advertising, selling, and offering for sale said Ruttan furnaces. Diedrich appeared and filed his answer under oath, denying that he had been guilty of a breach of said injunction, and thereupon moved to discharge the rule against him. This motion was overruled, and the cause referred to a master to take and report the evidence. To his report exceptions were filed by the defendant, which were overruled, and an order entered imposing a fine of \$300 upon the defendant, from which an appeal was taken to the Appellate Court. The decree was there reversed and the cause remanded, with directions to discharge the rule, and from this judgment of the Appellate Court the people appealed to this court. Diedrich entered a motion in this court to dismiss the appeal on the ground that the proceeding was criminal, and was therefore not appealable on behalf of the people. In disposing of that question this court, again speaking by Mr. Justice Wilkin, on page 669 of 141 Ill., and page 1039 of 30 N. E., said: "Prosecutions for contempt are of two kinds. When instituted for the purpose of punishing a person for misconduct in the presence of the court or with respect to its authority or dignity, it is criminal in its nature. When put upon foot for the purpose of affording relief between parties to a cause in chancery it is civil—sometimes called 'remedial.' Numerous authorities could be cited in support of this distinction, but the decisions of this court leave no doubt on the subject"—citing *Crook v. People*, supra, *Buck v. Buck*, supra, and *Leopold v. People*, supra. "Though sometimes entitled in the name of the People *ex rel.*, etc., it may properly be in the names of the parties to the original bill. People *ex rel.* v. Craft, 7 Paige (N. Y.) 325. The right to appeal is in either party, as in other cases in chancery. The motion to dismiss this appeal will accordingly be overruled."

In the late case of *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, a similar ruling was made and the authority of the cases above cited reaffirmed. That was a bill for an injunction by the Kellogg Switchboard & Supply Company against certain labor organizations, seeking to enjoin them from unlawfully interfering with the employes of the complainant. A petition was afterwards presented charging a violation of the injunction by O'Brien and others, and upon a hearing the court found O'Brien and others guilty of contempt, and imposed a fine of \$100 each upon them. Subsequently another petition was filed charging said O'Brien and others with again violating the writ of injunction, and on the hearing of that petition some of the defendants were

fined and others were committed to the county jail for periods ranging from 10 to 60 days. An appeal was prosecuted to the Appellate Court, where the judgment below was affirmed, except the sentence of Mashek was reduced from 60 to 30 days. The cases were appealed to this court, and it was earnestly urged that the proceeding was criminal in its nature, and that, therefore, the defendants should have been discharged upon their answer. In disposing of that contention, on page 368 of 216 Ill., and page 113 of 75 N. E. (108 Am. St. Rep. 219), this court said: "It is again insisted with much earnestness that this proceeding is criminal in its nature, and therefore the defendants below were entitled to be discharged upon their sworn answer, and, if their answer was not sufficient, they could only be punished after they had been tried and convicted by jury. Proceedings for contempt of court are of two classes—those which are criminal in their nature, and those which are designated as purely civil remedies. When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act and to vindicate the authority and dignity of the people, as represented by their judicial tribunals. In such cases the application for attachment may be made in the original cause, yet the contempt proceeding will be a distinct case, criminal in its nature. Cases of this kind are clearly distinguished from cases where the parties to a civil suit, having the right to demand that the other party do some act for their benefit, obtain an order from a proper court commanding the act to be done, and upon refusal the court, by way of executing its orders, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant and not in the public interest, merely. If imprisonment is ordered, it is not as a punishment, but to the end that the other party to the suit may obtain a remedy for the advancement of his own private interest and rights which he could not otherwise maintain. *Loven v. People*, 158 Ill. 159, 42 N. E. 82; *Crook v. People*, 18 Ill. 534; *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348."

In *Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, it was held that an alleged contempt committed out of the presence of the court, in violation of an injunction, might be brought to the attention of the court by

an affidavit setting out the facts, and that a petition is unnecessary; but, if a petition is filed for that purpose, it need not have the particularity of an indictment, and is sufficient if it apprised the defendant of the charge made.

In *Flannery v. People*, 225 Ill. 62, 80 N. E. 60, which was another case of contempt for the violation of a "strike injunction," it was held that a contempt proceeding for the violation of a writ of injunction might be commenced either by petition or affidavits, and it was there held that it was sufficient if, either by petition or sworn statements, the matter complained of is brought to the attention of the court. It was also held in the *Flannery* Case that the degree of proof required to establish a remedial contempt was the same as is required in any other civil proceeding, and that the rule requiring proof beyond a reasonable doubt, which obtains in criminal cases, had no application to contempt proceedings in chancery.

From the foregoing review of the authorities in this state the following rules applicable to civil contempt may be deduced: Such proceedings may be commenced by petition or affidavit filed in the court having jurisdiction of the cause wherein the order was entered, the violation of which forms the basis of the contempt proceeding. Whether commenced by petition or affidavit, the alleged contempt need not be set out in the petition or affidavit with the same particularity as is required in a criminal information or indictment. The rules in this regard applicable to other chancery pleading will control. It is not necessary to set out in detail the prior orders and proceedings in the cause in which the contempt is committed, since the court will take judicial notice of its own orders and records in the cause. On the hearing of a civil contempt, the court is not confined to the evidence afforded by the defendant's sworn answer, but may hear affidavits, or any other proper testimony, to enable the court to determine the truth of the matter according to justice and equity. The cause may be carried on in the name of the original complainant in the chancery case, or in the name of the people on the relation of the complainant. Regardless of how the case may be commenced—that is, whether by affidavit or petition—and regardless of how the case is docketed—that is, whether in the name of the complainant or the people of the state of Illinois against the contemnor—the case is, from its inception to its conclusion, in all of its procedure essentially a civil chancery proceeding, conforming itself, in its pleadings, character, and quantity of proof required, and in its course through the appellate tribunals, to the rules and practice applicable to other chancery proceedings.

It would be foreign to our purpose and entirely outside the case in hand to attempt to elaborate the rules of law applicable to

the other class of contempts, known as criminal or common-law contempts. We will content ourselves by referring to a few cases where criminal contempts have received the consideration of this court. *Clark v. People*, Breese, 340, 12 Am. Dec. 177, is perhaps the first case of that character which came before this court. *Stuart v. People*, 3 Scam. 395, is an illustration of a criminal contempt for publishing an article in the Chicago American derogatory to a court concerning a murder case then pending for trial in said court. The leading case in this state is *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528, where a criminal information was filed in this court by Washington Bushnell, then the Attorney General of the state, against Charles L. Wilson, as proprietor, and Andrew Shuman, as editor, of the Chicago Evening Journal, charging the defendants with having published a certain scandalous and libelous article respecting this court in connection with the case of *Rafferty v. People*, 66 Ill. 118, which was then pending in this court on a writ of error, involving a charge of murder. The article, which is set out in the information, reflected upon the integrity of this court, and the defendants were found guilty and adjudged to pay a fine into the state treasury. *Dahnke v. People*, 163 Ill. 102, 48 N. E. 137, 39 L. R. A. 197, is a case of criminal contempt, where the contempt consisted in locking the judge out of his courtroom during an interval of the sessions of his court, and it was held a criminal contempt, which was not justified by the order of the county commissioners.

We do not deem it necessary to pursue the discussion of the distinction between the two classes of contempt cases further. The cases above cited, illustrative of each class, together with the authorities cited in them in this and other jurisdictions, seem to us to establish the distinction so clearly that there can be no doubt, under the authorities, that the case at bar must be regarded as a civil or remedial contempt proceeding. Appellants, in effect, admit that this is true by bringing this case here by appeal instead of by writ of error. This court has no jurisdiction of a criminal case by appeal. If, as appellants contend, it is a criminal case, it should have been brought up on writ of error; but, as we have seen, it is not in any sense a criminal case. Hence it is properly brought here by appeal.

Appellants insist that the facts are open for our consideration, and that the evidence does not support the decree of the court below. It is true that in this class of cases this court is not bound by the finding of the trial court nor by the affirmance of the judgment by the Appellate Court as to the facts, but the same are open for determination in this court. But this court will not reverse because the finding is not supported by the evidence, unless the finding is against the

clear preponderance of the testimony. Upon looking into the evidence, we find that these appellants are each accused of assaulting and beating certain employes of M. Born & Co., in violation of the injunctive order of the court; that appellant Anderson is accused in connection with an attack upon James Sweet, and appellant John Hake is charged in connection with an attack upon William A. Kirchberger, and appellant Sporka is accused of striking a man by the name of Jungstrom. All of the assaulted parties were employes of M. Born & Co., and that they were assaulted and beaten for no other assignable reason than that they were employes of M. Born & Co. appears from the uncontradicted evidence of the record. The only question about which any controversy can arise is as to the identity of the parties who committed the assaults. Upon this question there is a conflict of evidence. While this is true, there is positive and direct evidence in the record connecting each of appellants with the assault charged against him. We are of the opinion that the evidence clearly preponderates in favor of the finding of the court below, and that there is no reason for disturbing the decree because it is not supported by the evidence.

All of the other assignments of error, except one, hereinafter specifically mentioned, have been disposed of adversely to the contention of appellants by the authorities above cited, and to take them up and discuss them in detail would be merely to reiterate what we have already said.

It is finally urged by appellants that the punishment inflicted upon each of them is unconstitutional and void, in that it is disproportionate and oppressive. Appellants cite a number of provisions of the Criminal Code where certain offenses, such as assault and assault and battery, are defined, and the punishment fixed by a fine of not less than \$3 nor more than \$100; and, from this and other statutes supposed to bear some sort of analogy to the offenses committed by appellants, the argument is drawn that the punishment inflicted upon appellants is unconstitutional and void because it is a greater punishment than the criminal statutes imposed for like offenses. For the reasons already pointed out, these several statutes have no application whatever to the appellants' case. The law is well settled that a court of chancery may impose a fine alone for the violation of an injunction, and commit the party until the fine and costs are paid, or, in its discretion, may fix a definite period of imprisonment, either with or without a fine. The court granting the injunction is necessarily invested with large discretion in enforcing obedience to its mandate, and upon proceedings for attachment for its violation the extent of the fine and imprisonment to be inflicted as a punishment for the contempt rests in the sound legal discretion of the court itself. Courts of appellate juris-

diction are exceedingly averse to interfering with the exercise of such discretion, and will not ordinarily reverse the action of the inferior courts in such matters. High on Injunctions, § 1458, and cases there cited.

There is no reversible error in this record, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(230 Ill. 299)

BROWN v. CRAGG et al.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 5, 1907.)

1. ATTORNEY AND CLIENT—PARTNERSHIP OF ATTORNEYS—ACTIONS BETWEEN PARTNERS—EVIDENCE—SUFFICIENCY.

In a suit to require defendant, a member of a law firm, to account to his copartners for corporate stock, alleged to have been issued to him in consideration of services performed, and to be performed for the corporation by him as a member of the firm, and hence a part of the partnership earnings, evidence examined, and held to show that it was not acquired by him in the course of the partnership business or in consideration of services either performed or to be performed by him as a member of the partnership.

2. SAME—BURDEN OF PROOF.

In such case, the burden was upon those making this contention to prove their case by a preponderance of evidence.

3. SAME—INDIVIDUAL PROFITS.

Where a member of a law firm rendered services to a corporation in which he was a stockholder, which were not of a legal nature and did not come within the scope of partnership business, his partners cannot complain if it did not interfere with business of the firm.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; M. Kavanagh, Judge.

Bill by George L. Cragg against Charles A. Brown and another to require defendant Brown to account to his copartners for stock issued to him as a part of the partnership earnings in which defendant Belfield filed a cross-bill. From a decree of the superior court, dismissing the cross-bill and part of the original bill, defendant Brown appeals. Reversed and remanded, with directions to dismiss the bill and cross-bill.

The appellant and appellees are lawyers, and prior to March 1, 1902, were partners practicing their profession in Chicago, under the name of Charles A. Brown, Cragg & Belfield. On February 28, 1902, the partnership was dissolved by the retirement of appellee Belfield, and thereafter the firm, consisting of the other two members, continued the practice of law under the firm name of Charles A. Brown & Cragg. The Stromberg-Carlson Telephone Manufacturing Company of Illinois had been a client of the firm existing prior to March 1, 1902. During the latter part of 1901 and in 1902, negotiations were carried on by the stockholders of that company, which resulted in a transfer of all the shares of the stock of the corporation to Eugene H. Satterlee and Thomas W. Finucane.

The purchasers soon after organized a corporation under the laws of New York, known as the "Stromberg-Carlson Telephone Manufacturing Company of New York," to which were transferred all the property, business, and good will of the Illinois corporation. After the New York corporation was organized, in April, 1902, 340 shares of its preferred stock and 993 shares of its common stock were issued to the appellant. Soon after the bill in this case was filed in the superior court of Cook county by the appellee Cragg against the appellant and appellee Belfield, to require appellant to account to his partners for the stock so issued to him as a part of the partnership earnings. It was alleged in the bill that appellant had rendered important and valuable services to the Illinois corporation, and to some of its officers and stockholders and others interested in the reorganization of said corporation, and especially to Satterlee and Finucane, which services related to the reorganization of the corporation and business of the said Illinois corporation, and to the promotion and organization of the New York corporation, and that on March 22, 1902, the appellant entered into the following contract:

"Agreement made this 22d day of March, 1902, between Charles A. Brown of Chicago, Illinois, and the Stromberg-Carlson Telephone Manufacturing Company, a corporation organized under the laws of the State of Illinois and having its principal office at Chicago, witnesseth: That the said Brown hereby covenants and agrees to and with the said company as follows: First. That he will for a period of five years, beginning April 1, 1902, devote his services to the interests of said corporation. Second. That he will not for a period of five years, beginning April 1, 1902, accept employment of any character hostile to the interests of said corporation. Third. That the engagement for services shall extend to any partnership of which the said Brown shall be a member during the life of the contract. Fourth. That the charges for services shall be at the rate of five dollars (\$5) an hour for the time actually devoted to the service of the Stromberg-Carlson Telephone Manufacturing Company, and at the rate of fifty dollars (\$50) for each application for patent, provided that in special cases this rate may be modified by mutual consent upon prior notice. It shall be paid for by the Stromberg-Carlson Telephone Manufacturing Company in addition to payment for services. Fifth. Said Brown further agrees with said The Stromberg-Carlson Telephone Manufacturing Company that it may assign all its interest in this contract, subject to all the obligations of said corporation, to any corporation hereafter organized for the purpose of taking over the capital stock and property of the said corporation; and he covenants that he will fulfill for such corporation any and all his obligations under this instrument not performed by him prior to the date of said as-

signment. Sixth. And the said The Stromberg-Carlson Telephone Manufacturing Company hereby covenants and agrees to pay said Brown each month the service charges for the preceding month, together with all disbursements, for and during the five years hereinbefore mentioned, and further covenants and agrees that said Brown shall have complete and exclusive charge of all the patent work, including patent litigation and patent soliciting, of the Stromberg-Carlson Telephone Manufacturing Company, and of its successors and assigns, for and during the period of five years provided for herein.

"In witness whereof the said Brown has hereunto affixed his hand and seal, and the said The Stromberg-Carlson Telephone Manufacturing Company has caused its seal to be hereto affixed and the instrument to be signed by its duly authorized directors, the day and year first above written.

"Charles A. Brown,

"The Stromberg-Carlson Telephone Manufacturing Co.,

"By A. L. F. Stromberg, Pres."

The bill further alleged that on the same day appellant also entered into the following contract:

"Agreement made this 22d day of March, 1902, between Charles A. Brown, of Chicago, party of the first part, and Thomas W. Finucane and Eugene H. Satterlee, of Rochester, New York, parties of the second part.

"Witnesseth: Whereas said parties of the second part are promoting the organization of a company to be incorporated under the laws of the state of New York, to take over the capital stock or the property, or both, of the Stromberg-Carlson Telephone Manufacturing Company of Chicago, the capital of which said proposed New York State corporation is to consist of fifteen thousand (15,000) preferred shares and fifteen thousand (15,000) common shares, of the par value of one hundred dollars (\$100) each; and whereas, said parties of the second part deem the contract, a copy of which is hereto annexed, to be essential to the success of the said proposed new company and of assistance in the organization thereof: Now, therefore, it is agreed that in consideration of the execution and delivery by party of the first part of the said contract to parties of the second part, execution and delivery of which is hereby acknowledged by parties of second part, parties of second part shall deliver to party of first part 340 preferred shares and 993 common shares of the capital stock of said new company. In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

"Charles A. Brown. [Seal.]

"Thomas W. Finucane. [Seal.]

"Eugene H. Satterlee. [Seal.]"

It was alleged that the "service contract," as the first contract above set forth is called, is the contract mentioned in the second, call-

ed the "stock contract," that the stock mentioned in the latter was issued to the appellant, and that large dividends have been paid him thereon, and he has appropriated both stock and dividends to his personal use and has not accounted for the same to the firm, to whom they belong. The prayer is for an accounting and distribution.

The appellant, in his amended answer, denies that he rendered to the said Illinois corporation, its officers, or stockholders, or to Satterlee and Finucane, valuable services or gave advice in regard to the reorganization of said corporation or its business or in regard to the promotion and organization of the New York corporation. He admits the execution of the two contracts and the issue to him of the shares of stock, but denies that the consideration therefor was the execution of the so-called service contract or any services rendered or to be rendered by appellant, as a member of said firm, to any parties mentioned in the bill, or that either party considered or intended said shares of stock to be such consideration. He further alleged that he and his wife and father-in-law had been stockholders in the Illinois corporation, and that the 993 shares above mentioned had been bargained for in exchange for the stock of the Illinois corporation previously held by himself and his wife and father-in-law, together with certain personal obligations from said Illinois corporation to him; that the shares of preferred stock were purchased by him for cash and paid for with his personal means; that all of the arrangements for the acquisition of this stock by himself and wife were long prior to the execution of the contracts mentioned. Belfield filed a cross-bill, similar in its allegations to the original bill. Upon a hearing a decree was entered dismissing the cross-bill, and so much of the original bill as related to the shares of stock. The decree found that appellant had a right to charge the stockholders who sold their stock to Satterlee and Finucane for legal services rendered in connection with such sale, and that a reasonable charge for such services would be \$9,500, which should be divided between appellant and appellee Cragg. The present appellees appealed from this decree to the Appellate Court, where appellant assigned cross-errors. The Appellate Court affirmed the decree dismissing the cross-bill, but held that the stock was partnership property obtained during the existence of the partnership of appellant and appellee Cragg, and should be distributed according to their interests under the partnership agreement. To review the judgment of the Appellate Court, a further appeal has been prosecuted to this court.

Henry S. Robbins and Louis Spahn, for appellant. John Maynard Harlan and Henry M. Bates, for appellee Cragg. Conrad H. Poppenhusen and Joseph L. McNab (S. S. Gregory, of counsel), for appellees.

DUNN, J. (after stating the facts as above). The question for determination is whether the stock in controversy was the property of appellant Brown individually, of Charles A. Brown & Cragg, or of Charles A. Brown, Cragg & Belfield. The answer depends upon whether or not it was acquired by appellant in the course of the partnership business, in consideration of services either performed or to be performed. The evidence is voluminous, and cannot be discussed in detail within the reasonable limits of an opinion. We have carefully read it, and shall refer to the salient points, not particularizing the testimony of individual witnesses.

The evidence shows that Alfred Stromberg was born in Sweden, and came to this country at the age of 22 years. He was a practical workman of an inventive turn of mind, and previous to the formation of the Illinois corporation was employed upon line systems of telephones, and worked as a mechanic. Carlson had been a fellow workman. After they had worked together for some time, they formed a corporation for the manufacture of electrical merchandise and telephone apparatus for independent companies throughout the United States. The corporation was organized under the laws of Illinois several years prior to the filing of the bill herein, and had a capital stock of \$50,000, of which one-half was paid in cash and the balance by the assignment of patents to the company. The business of the corporation grew rapidly; the annual sales increasing from about \$87,000 in 1895 to \$925,000 in 1900. During all of this time the corporation was hard up for money with which to carry on its affairs. Neither Stromberg nor Carlson had any money at the start, and the various stockholders did not have enough capital to keep pace with the rapid increase in business. Before appellant was admitted to the bar, he had been connected with the American Bell Telephone Company and with the Western Electric Company, and had managed a manufacturing plant of the latter company. After his admission to the bar he made a specialty of trade-marks, copyrights, and patent law with reference to telephones. He made a success of his business, and soon became an expert. After his admission to the bar, and before and after the formation of the various firms of which he was a member, he held stock in different corporations, as did also his partners, Cragg and Belfield. Each devoted more or less time to the affairs of the corporations in which they were, respectively, interested. This was no secret among the members of the firm, and was evidently considered as the private business of the respective parties and apart from the firm's business. In 1898 the appellant purchased 40 shares of the stock of the Stromberg-Carlson Company and later became a director. During its rapid growth and ever-increasing

demands for money he signed the bonds of the company, became surety for it, and furnished money for its pay-rolls and running expenses, besides advising its officers in the management of its affairs. He was the only stockholder in the corporation of any considerable financial ability. In 1901 Stromberg and Carlson, together with the appellant and his wife and father-in-law, owned over three-fourths of the stock of the corporation, appellant and his family having more than one-fifth. Owing to the magnitude of the business of the corporation and the insufficiency of its capital, it was necessary to make some arrangement which would make a larger amount of cash resources available for its use. Appellant and Stromberg and Carlson were desirous of selling their stock. In the fall of that year Eugene H. Satterlee and Thomas W. Finucane, of Rochester, N. Y., learned that it was necessary for the corporation to have assistance in the way of increased capital, and in December, or in January, 1902, they went to Chicago and there talked with Stromberg with reference to obtaining control of the corporation by the purchase of stock. They then had an interview with Stromberg, Carlson and appellant, and discussed the proposition of buying a majority or two-thirds of the stock, but finally decided that they would have to have all of it. Stromberg told them that he could get it on the basis of \$15 for one invested in the stock of the old corporation, and this Satterlee and Finucane agreed to pay. In pursuance of this agreement Stromberg, Carlson and appellant obtained options from all the stockholders of the Illinois corporation but one, to whom Stromberg personally had to pay \$4,000 bonus for his stock. After all of the stock had been purchased, the contracts set out in the statement preceding this opinion were executed, the New York corporation was organized, and the shares of stock in it were issued as mentioned in those contracts.

There is nothing in this transaction indicating that the part which appellant took in the affair was in the nature of legal services or in the performance of those duties which came within the scope of the partnership business between him, Cragg, and Belfield. It was apparently nothing more nor less than a concerted effort among the heavy stockholders of the corporation to sell their stock, each helping the other to accomplish this end. The appellant was not employed by the other stockholders to sell their stock, and there were no legal services required of him or any other person on their behalf. He simply obtained from them an option, running to himself, for the purchase of their stock at the rate of \$15 for one invested. The options were really for the benefit of Satterlee and Finucane, and it was so understood by the stockholders, who were told by appellant that he was selling his stock at the same price. There was no intimation on the part of appellant or any stockholder, so far

as the evidence shows, that appellant was the agent or attorney of any stockholder or was to be paid for the taking of these options or the sale of the stock. Satterlee and Finucane were under no obligation to pay appellant for obtaining the options. He was a seller and they were buyers. Appellant, Stromberg, and Carlson were obliged to procure all the stock for Satterlee and Finucane in order to sell their own. The Illinois corporation was under no obligation to pay appellant, for he did not render it any service. This transaction concerned not the corporation, but the stockholders. The New York corporation was not organized until April, and there can be no claim that it owed appellant for any services. There is no evidence that he rendered any service in the organization of that company and no claim that he acted as a promoter thereof. The part performed by appellant in the whole transaction is not shown to be anything more than was to be expected of him as an owner of stock dealing with a prospective purchaser. Though much time was consumed in negotiations, appellant's partners have no cause to complain, if it did not interfere with the business of the firm. *Metcalf v. Bradshaw*, 145 Ill. 124, 33 N. E. 1116, 36 Am. St. Rep. 478; *Northrup v. Phillips*, 99 Ill. 449. The appellant was familiar with the business of the Illinois corporation, its assets and liabilities, the validity of its patents, the condition of its litigation, the probable liability from infringements and on bonds given to indemnify its customers and the users of its apparatus. The details of all these matters were essential to be considered by the purchasers of the stock whose value was affected by them. The discussion of these details between the seller and buyer and negotiation and correspondence about them necessarily consumed much time, but the seller could not charge the buyer therefor, nor could he charge another stockholder who profited thereby in the sale of his own stock, unless he had a contract with such stockholder for that purpose; and no such contract is shown. As to services performed by appellant on behalf of Stromberg, it is apparent that appellant was as much indebted to Stromberg in the transaction as Stromberg was indebted to appellant. No contract is shown by either to pay the other. They were working together for the common end of selling the stock of both.

Under the facts as they appear in this record, we are unable to see why appellant should be required to account to the members of his firm for profits made in his private business with reference to this stock, any more than he should be required to account for any other private transaction in which he might have engaged, apart from the business legitimately transacted within the scope of the partnership agreement. There were no services rendered by appellant for which he had a claim against any one and for

which this stock could have been delivered to him. Even if appellant, Stromberg, and Carlson received this stock as a bonus, in addition to the price received by the other stockholders for their shares, and divided it among them, that is no reason why a partner of one of them in another enterprise should share in the stock.

In regard to the question whether the stock was issued to appellant in consideration of services to be thereafter performed, if the so-called "stock contract" and "service contract" had not been executed, no question would have arisen concerning the stock received by the appellant. Stromberg, Satterlee, and appellant testify in regard to the stock contract. Their testimony is to the effect that after the agreement for the sale of the stock had been made by Satterlee and Finucane with Stromberg, whereby the latter was to go into the new company and have a large interest therein, he entered into a service contract with the New York company for 10 years. Satterlee never had any conversation with appellant in regard to this stock, and the agreement with Stromberg was that the stock was to be issued to the latter in consideration of the covenants of his service contract and of his acting as a director of the New York corporation. There was never any understanding that appellant was to receive any of the stock in consideration of his executing the service contract or as a retainer for future legal services. Afterward, Stromberg voluntarily agreed to turn over to appellant the shares which were issued to appellant, in appreciation of the latter's friendship and the invaluable aid which Stromberg and his company had always received in the time when their necessities were great and their resources small. The stock contract was executed as a matter of form, to provide for the issue directly to appellant of the stock Stromberg intended for him, instead of its issue to Stromberg and assignment by him to appellant.

The burden of proof was upon appellees to prove their case by a preponderance of the evidence. It is manifest that the stock contract does not truly state the agreement between the parties as to the consideration. All who were acquainted with the circumstances attending its execution agree in this; and, while their evidence is at variance with the writing itself, we think the statement of the consideration contained in the contract is overcome. The circumstances of the transaction, in view of all the evidence and in spite of some contradictory statements and of the evasions and want of frankness of appellant and Stromberg, do not indicate that the stock was issued to appellant as a retainer for future services. It satisfactorily appears that it was not issued for past services in the scope of the partnership business. The appellees have therefore no right to call upon appellant to account to them for its value.

Though the bookkeeper testified that the books showed that the appellee Cragg had overdrawn his account \$1,007.86 on September 18, 1902, such evidence is insufficient to sustain appellant's claim that a decree for that amount should be rendered in the appellant's favor. The books themselves were not offered in evidence, nor was proof offered of their contents nor any evidence of their correctness.

The judgment of the Appellate Court and the decree of the superior court will be reversed, and the cause remanded to the superior court, with directions to dismiss both the bill and cross-bill, at the cost of the appellees, except \$350 of the receiver's fees to be paid by the appellant.

Reversed and remanded, with directions.

(230 Ill. 214)

PEABODY COAL CO. et al. v. NORTHWESTERN ELEVATED R. CO.

(Supreme Court of Illinois. Oct. 23, 1907.

On Rehearing, Dec. 4, 1907.)

1. EMINENT DOMAIN—ELEVATED RAILROAD—EFFECT OF FRANCHISE.

The provision of an elevated railway company's franchise forbidding the company, in passing over the tracks of existing steam railroads, to use any space less than 20 feet above the upper surface of the steam railroad rails, is a limitation upon the elevated railway company's right to exercise the power of eminent domain conferred by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 35-48.]

2. STREET RAILROADS—ELEVATED—HEIGHT OF SUPERSTRUCTURE.

An elevated railway franchise regulating the height of the superstructure over the "tracks of all existing steam railroads" includes all tracks over which ordinary cars or trains used in operating a steam railroad are propelled in transporting freight and passengers, and applies to private switch tracks connected with the main line of a railroad.

3. SAME.

The provision of an elevated railway franchise regulating the height of the superstructure over the "right of way" and tracks of existing steam railroads is not inapplicable to private switch tracks because the title to the tracks and the ground over which they pass are in the same owner, and the boundary of the strip used for railroad purposes has not been fixed; "right of way" in the ordinance meaning the way occupied and used for the track and operation of trains, and its width in this case being determined by necessity, and being no greater than the space needed for the safe and convenient operation of trains.

4. EMINENT DOMAIN—WHO MAY OBJECT.

Under the provision of an elevated railway franchise regulating the height of the superstructure over steam railroad tracks and rights of way, any person having property interest in a track or right of way to be crossed may object to a violation of the provision, and hence, where the elevated road attempts to cross private switch tracks connecting with a railroad, an objection by the owner of the switch tracks is proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 146.]

5. SAME—CROSS-PETITION—RIGHT TO DISMISSAL—WAIVER.

Where an elevated railway company petitioned to condemn land for a right of way, by filing a cross-petition, the owner of the land did not waive the right to a dismissal of the proceeding because the company purposed violating a provision of its franchise regulating the height of its superstructure over steam railroad tracks, where the owner was not apprised of such purpose until after filing the cross-petition and the motion was promptly made upon the purpose appearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 519.]

Carter, J., dissenting.

On Rehearing.

6. APPEAL—REHEARING—PETITION—RE-ARGUMENT—VIOLATING RULE.

A petition for rehearing will be stricken, where it elaborately reargues questions disposed of in the opinion, under the Supreme Court rule (204 Ill. 18, 68 N. E. ix) providing that such petition shall state concisely the points supposed to have been overlooked or misapprehended by the court and that no argument will be permitted in support of the petition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 3227-3229.]

7. SAME—RIGHT TO FILE SECOND PETITION.

Where a petition for a rehearing is stricken for violation of the Supreme Court rule, leave to file another petition will be denied.

Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Petition to condemn land by Northwestern Elevated Railroad Company against Peabody Coal Company and Meacham & Wright Company and others; the coal company and North Side Lumber and Timber Company filing cross-petitions. From a judgment for petitioner, defendants coal company and Meacham & Wright Company appeal. Reversed and remanded, with directions. Petition for rehearing stricken, and motion for leave to file second petition denied.

On February 21, 1906, the Northwestern Elevated Railroad Company, the appellee, filed its petition in the circuit court of Cook county against the Peabody Coal Company and the Meacham & Wright Company, the appellants, the John E. Burns Lumber Company, and Sarah C. Turner, trustee of Mary E. Turner, to condemn a strip of land 25 feet in width for right of way through a tract of land containing about eight acres, owned by the said coal company, in the city of Chicago. The petition was on March 22, 1906, amended by making the North Side Lumber & Timber Company a defendant. A cross-petition was filed on April 12, 1906, by the Peabody Coal Company, alleging that it was the owner of the whole of said tract of land; that it was used as a coal distributing and storage yard and for other purposes requiring the use of railway terminal facilities; that said premises were especially adapted for said purposes and constituted a single, unbroken tract of land; and that all of said tract not included in the strip sought to be taken would be greatly and irreparably damaged and injured by the construction and

operation of said road. On April 19, 1906, the North Side Lumber & Timber Company filed a cross-petition. On June 1, 1906, the court entered an order directing the petitioner to file, on or before July 5, 1906, detailed plans of the structure of said elevated railroad that it proposed to erect over and across said tract of land, and thereafter, on June 8, 1906, upon the filing of said plans, each of the defendants except the John E. Burns Lumber Company filed in said court a motion to dismiss the petition on the ground that it appeared from the plans filed therein by petitioner that it proposed to construct its railroad over the right of way and tracks of the existing steam railroad located upon the property sought to be condemned, in such a manner as to leave clear headroom of less than 20 feet, contrary to the terms of the ordinance of the city of Chicago granting to petitioner the right to occupy the streets of the city, and in support of said motions filed the affidavit of one Frank J. Hibbs, which stated, among other things, that in March, 1902, the Chicago & Northwestern Railway Company constructed, with the consent of and by agreement with the Peabody Coal Company, tracks connecting the property of said coal company with the main line of said railroad, and that said tracks had been maintained and used by said railway company for the purpose of delivering coal and other merchandise for the benefit of said coal company and its tenants and lessees; that said tracks, at and prior to the time of the passage of said ordinance, were, and at all times since have been, used as a part of the right of way and track of a steam railroad; that from the plans and drawings filed by petitioner herein it appears that the proposed structure for which it seeks to acquire the right of way will cross a portion of the aforesaid tracks at a height that will not leave, when constructed, to exceed 15 feet clear headroom between the lower chord of the girders of the superstructure and the surface of the rails upon said railroad now in use upon defendant's property. Attached to the affidavit is a copy of the ordinance mentioned aforesaid, and in further support of the motions were offered the drawings referred to by Hibbs in his affidavit. In opposition to the motions petitioner filed the counter affidavit of Clarence A. Knight, which stated that the tracks of the Peabody Coal Company sought to be crossed were not a part of the right of way of the Chicago & Northwestern Railway Company, and that from the west line of the right of way of said company to and through the said coal yards the tracks were not owned by said railway company. Upon a hearing the motions were denied, and at the same time the court found, and counsel for petitioner admitted, that the lowest portion of the longitudinal girders of the said proposed structure at the point where it crossed the said railroad track on the property of said coal company was less than 20 feet from the

surface of the ground, and when constructed would leave not to exceed 15 feet clear headroom between the lower chord of the girders of said superstructure and the surface of the rails upon said railroad tracks.

During the trial a number of stipulations were filed by the petitioner, by one of which it stipulated that its railroad should be built substantially as provided by the ordinance passed by the city council of the city of Chicago on January 16, 1905. In another it stipulated that it would rearrange the plan of its structure proposed to be erected on said premises in such a manner as to provide for an open space 65 feet in length, running lengthwise beneath said structure and 17 feet 9½ inches from the surface of the ground to the lowest point of the longitudinal girders extending over said 65-foot space. At the close of all the evidence each of the defendants except the John E. Burns Lumber Company again moved the court to dismiss the petition on substantially the same grounds as urged by them in their former motions. The motions were denied, and the said defendants then separately moved the court that petitioner be required, as a condition precedent to granting it the right to condemn the said property or any part thereof, to agree to comply with the terms and conditions of the said ordinance by building the structure for its said road so as to give twenty feet clear space over the right of way and tracks of the steam railway on said premises, and that the further hearing of the case and the entry of the verdict and final judgment be postponed until petitioner made such agreement, which motions were also denied.

From the record it appears that the tract of land owned by the Peabody Coal Company through which petitioner is seeking to obtain a right of way is in the shape of a right-angled triangle, with its apex to the south. It is bounded on the west by Lincoln avenue, on the north by Grace street, and on the east by the right of way of the Chicago & Northwestern Railway Company; the west line of the tract being the hypotenuse, and the east line being the longer leg of the triangle. The entire tract contained about 300,000 square feet, the strip sought to be condemned about 16,700 square feet, the portion of the tract east of the proposed railroad about 180,000 square feet, and the portion west about 100,000 square feet. A large part of said tract was used by the said coal company as a retail coal yard, which supplied a district surrounding it with a radius of about two miles. Parts of the remaining portion of the tract were leased to the Meacham & Wright Company and to the John E. Burns Lumber Company. The lease of the Burns Lumber Company, however, had been assigned to the North Side Lumber & Timber Company. Both leases were subject to termination, at the option of the coal company, at the end of any year. Sarah C. Turner was the trustee in a deed of trust made by the Peabody Coal

Company to secure a loan. From the main line of the Chicago & Northwestern railway a track was built connecting with several tracks in the coal yard, one of which extended west almost to the line of Lincoln avenue and was crossed by the proposed line of said elevated road. Over this track, and others in the yard, coal and other freight were delivered by the Northwestern Railway Company from its road. About four blocks south of the coal yard the proposed line crosses the tracks and right of way of the Northwestern Railway Company. A large number of witnesses testified. The jury viewed the premises and returned a verdict for \$13,083 as compensation for the property taken and damages to the remainder. The North Side Lumber & Timber Company was awarded \$827, and the other defendants \$12,256 of this amount. After overruling the motions of defendants for a new trial and in arrest of judgment, and their objections to an entry of an order of the court authorizing petitioner to take possession of the property, or any part thereof, pending any appeal unless petitioner agreed to build its structure in such manner as to leave 20 feet of space above the track in question, the court entered judgments upon the verdict. A separate judgment was entered in favor of the North Side Lumber & Timber Company, and that company did not appeal. From the judgment as to the remaining defendants, the Peabody Coal Company and the Meacham & Wright Company appeal to this court, and urge as grounds for reversal: (1) The court erred in overruling the motions of defendants to dismiss the petition; (2) the court erred in passing on instructions; (3) the court erred in passing on objections to evidence offered.

Horace Kent Tenney and Arthur W. Underwood, for appellants. Clarence A. Knight and William G. Adams, for appellee.

SCOTT, J. (after stating the facts as above). Appellee was granted permission by the city of Chicago to occupy the streets with its structure by an ordinance, which contained, among other provisions, the following: "No part of the girders on the superstructure shall be less than fourteen feet above the present established grades of streets and alleys, and wherever the said elevated structure crosses or passes over the right of way and tracks of all existing steam railroads the clear head-room between the lower chord of all of said girders and the surface of the rails on all of said railroads or their present or hereafter established grades and from out-to-out of their right of way shall not be less than twenty feet." Shortly after the passage of the ordinance, and before the beginning of this proceeding, appellee filed in the office of the city clerk its acceptance of all the terms, provisions and conditions of the ordinance. The ordinance forbade to appellee, in passing over the right of way and tracks of existing steam railroads, the use

of any space less than 20 feet above the upper surface of the rail of the steam railroad. No such prohibition is found in the eminent domain act. The ordinance, when accepted, became a limitation upon the right of appellee to exercise the power of eminent domain conferred by the statute. *Tudor v. Rapid Transit Railroad Co.*, 154 Ill. 129, 39 N. E. 136; *Id.*, 164 Ill. 73, 46 N. E. 446, 36 L. R. A. 379. Appellee could not, by the exercise of that power, after accepting that ordinance, acquire the right to use any space for its superstructure over the tracks and right of way of a steam railroad which was less than twenty feet above the surface of the rail.

The steam railroad track on the premises of the appellant coal company, and which appellee's structure will cross, is a private switch track owned by the coal company and located upon its ground. The switch track connects with the main line of the Chicago & Northwestern Railway Company, but that company has no right to use the track, or the ground over which it passes, except by virtue of an existing license from the coal company, which, so far as appears from the evidence, may be revoked by the licenser at any time, and it is urged by appellee that for this reason the track in question does not come within the language above quoted from the ordinance, because, as it is said, the word "of," where it precedes the words "all existing steam railroads," means "in the relation of ownership or possession," and that the right of way and tracks referred to therefore are only those owned by "existing steam railroads," and that as the switch track and the ground upon which it rests are not owned by a "railroad" they are not covered by the ordinance. The term used in the ordinance is not "of railroad companies" or merely "of railroads," but is of "all existing steam railroads," and was evidently intended only to identify the right of way and tracks mentioned in the ordinance, by indicating the character of the road of which they formed a part. We think the word "of," as there used, was not intended to denote ownership. The principal purpose of the ordinance in providing for this space was, no doubt, to insure the safety of those traveling upon and operating trains on the steam railroads, and the end to be attained by the ordinance is just as important in the case of a private switch track over which trains pass, as in the case of a switch track which, with the underlying right of way, is owned by the railroad company engaged in running trains thereon. It is clear that the ordinance includes all tracks and rights of way over which the ordinary cars or trains used in operating a steam railroad are propelled for the purpose of transporting freight or passengers.

The title to the tracks in the coal yard and to the ground over which they pass are in the same owner, and the boundaries of the strip used for railroad purposes, or which

might rightfully be used by the company or person running trains over this switch, have not been fixed. It is urged that the quoted provision of the ordinance is not applicable because there is here no "right of way" in the ordinary meaning of that term as used in condemnation proceedings. We think the term in the ordinance does not have such a restricted significance. It means the way occupied and used for the track and the operation of trains. Its width in the present case must be determined by necessity, and is no greater than the space needed for the safe and convenient operation of trains over this track.

It is then urged that no one but the Northwestern Railway Company should be permitted to raise this question. That company has a mere license to use the tracks, which is of little or no value, while to the coal company the right to use the tracks for moving freight thereon in railroad cars is of great value. We think this objection may be made by any party having a property interest in the track or right of way which the elevated railroad is to cross.

In pursuance of an order of the circuit court, appellee filed detailed plans and drawings showing the height, width, and method of construction of the elevated railroad structure which it proposed to erect upon the coal company's property, and from which it appeared that 20 feet of space would not intervene between the surface of the switch tracks and the lower portion of appellee's superstructure. Appellants thereupon entered a motion to dismiss the petition, for the reason that the plans did not provide the necessary space above the rails of the switch track. Appellee insists, upon the authority of *Ward v. Minnesota & Northwestern Railroad Co.*, 119 Ill. 287, 10 N. E. 365, that the coal company, having theretofore filed a cross-petition, thereby waived its right to move to dismiss the petition, and that for this reason the motion was properly denied. In that case appellants sought a reversal for the reason that there was no proof that the petitioner was a corporation, and it was held that this question could not be raised after the filing of the cross-petition. It was there said that by filing the cross-petition "it admits petitioner has the right to exercise the right of eminent domain." This statement was made with reference to the contention that the petitioner was not a corporation. That was a preliminary question, which should have been presented to the court prior to the filing of the cross-petition. The cross-petition in this case was filed before the detailed statement of the plans was filed. The cross-petitioner was not at that time advised, by anything appearing of record, that appellee proposed to proceed in any manner other than that contemplated by the ordinance. The motion was promptly made upon the filing of the documents which showed the purpose of appellee, and was there-

fore in apt time. The Meacham & Wright Company filed no cross-petition, and for this reason appellee's objection does not apply to that company's motion to dismiss.

It is unnecessary to consider other errors assigned. The judgment from which this appeal was prosecuted will be reversed, and the cause will be remanded. The judgment relating to the property of the North Side Lumber & Timber Company will not be disturbed.

Reversed and remanded.

CARTER, J., dissents.

On Rehearing.

VICKERS, J. (orally). The petition for rehearing in this case will be stricken from the files, because it is in violation of the rules of this court, in that the petitioner has elaborately reargued the questions involved which have been argued in the original briefs and are disposed of in the opinion of the court. It is to be regretted that attorneys, in the preparation of petitions for rehearing, disregard the rule of this court which forbids any argument in a petition for rehearing. The rule is clear and explicit, and no one need fail to understand it. It is published on page 18 of volume 204 of the Supreme Court Reports (68 N. E. 4x), and is as follows: "Application for a rehearing in any case shall be made by petition to the court, signed by counsel, stating concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the original abstract and brief relied upon. In no case will any argument be permitted in support of such petition. This rule will be strictly enforced, and any petition in violation thereof will be stricken from the files."

This rule is a salutary one, and tends to promote the fair and orderly dispatch of the business of the court. One reason upon which the rule rests is that the party against whom the petition is filed has no opportunity to reply to any argument that may be contained in the petition unless a rehearing is granted. To permit one party to make an argument to which the other has no opportunity to reply would be manifestly unfair to the successful party. Each party is afforded ample opportunity to argue the case before it reaches the rehearing docket. The rule is intended to compel parties to develop all the points and arguments before the case is submitted, and prevent them from holding in reserve some new point or argument to be brought forward for the first time in the petition for rehearing, in case they are beaten. The rule provides that the penalty for its violation is that the petition shall be "stricken from the files."

In this case the party whose petition is stricken has tendered another petition for rehearing and asked leave to file it. This motion will be denied. This application is

presumably made in anticipation that the first petition would be stricken. If the petitioner had complied with the rules in his first petition, no occasion would have arisen for filing another. To permit a party who has filed a petition in violation of the rules to file another would, in effect, nullify the rule itself. If a party may file a second petition for rehearing after a former one is stricken from the files because in violation of the rules, the only penalty suffered is the loss of the labor and expense in the preparation of the second petition. The spirit of the rule is that when a party violates it his petition shall be stricken from the files and his right to a rehearing is thereby lost. We cannot entertain a motion to file a second petition for rehearing where the first has been stricken because in violation of the rules of this court.

The petition for rehearing will be stricken from the files, and leave to file the second will be denied. The remaining order in this case will be modified.

Petition stricken.

(230 Ill. 130)

MARINER et al. v. INGRAHAM et al.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 4, 1907.)

1. JUDICIAL SALES—DECREE—MODIFICATION.

A decree directed the sale of certain real estate, but stayed its execution until further order of the court and until application by some of the parties showing that they could not agree on the time of such sale, and were unable themselves to make the sale. On a subsequent application for execution of the decree, it was proved that the time was as favorable as it would be likely to be soon; that petitioners, as administrators of the estate of one of the parties in interest, had held the estate open for 15 years waiting for a sale of the property; and that they could not close the estate without such sale, and that defendants refused to consent to a present sale or to fix any definite time for the same. *Held*, that the court properly modified the decree so as to provide for a sale at the expiration of six months after advertising the property.

2. SAME—TERMS.

Where a decree provided that real estate should be sold for one-third cash, and the balance in one, two, and three years, the court did not err in so modifying the order as to allow the purchaser to pay all cash on the approval of the sale, or to defer such payments at his option.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Judicial Sales, § 38.]

3. APPEAL—REVIEW—SUBSEQUENT APPEAL—LAW OF THE CASE.

Where a decree authorizing a judicial sale was entered in accord with the mandate of the Supreme Court on a prior appeal, and authorized the parties in interest to purchase in case they overbid other buyers, the decree was res judicata as to their right to bid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4353-4379.]

Appeal from Appellate Court, First District, on Appeal from the Circuit Court, Cook County; E. F. Dunne, Judge.

Petition by Harriette A. Ingraham and others for a sale of certain real estate, in which defendants Ephraim Mariner and others were interested under a former decree. From an order directing a sale and modifying the decree (127 Ill. App. 542), defendants Ephraim Mariner and others appeal. Affirmed.

See 127 Ill. App. 550.

On January 2, 1889, Granville S. Ingraham was the owner of 100 acres of land in the south part of Chicago, bounded by Seventy-Ninth street on the north, Wentworth avenue on the west, Eighty-Fourth street on the south, and State street on the east. On the same day he entered into a contract with A. J. Cooper, as follows:

“Articles of Agreement between G. S. Ingraham and A. J. Cooper:

“This article of agreement, made this second day of January, 1889, between Granville S. Ingraham of Hyde Park, Cook county, state of Illinois, of the first part, and A. J. Cooper of the same place, of the second part, witnesseth:

“The said Granville S. Ingraham owns one hundred acres of land, be the same more or less, all of which he puts in as capital stock at \$1000 per acre, making the capital stock \$100,000. The said land is situated in section 33, township 38, range 14, third principal meridian. It is bounded on the north by Seventy-Ninth street, on the west by Wentworth avenue, on the east by State street and on the south by Eighty-Fourth street. The said A. J. Cooper, of the second part, being desirous of taking an interest in the land, agrees to make a loan of \$30,000 (thirty thousand dollars) at his own expense; also agrees to pay interest on the said loan and six per cent. on the balance of capital stock to the said Granville S. Ingraham. The six per cent. on the balance is not required to be paid until the sale of said land, then that amount to be added to the capital stock. Said Ingraham agrees that said loan may be placed on the above described lands, and in default of the payment of interest on said loan, when due, being made by said A. J. Cooper, of the second part, he (A. J. Cooper) forfeits all interest in said described land. All taxes or expenses paid by either party shall also draw six per cent. interest. And be it further understood that there shall be no commissions charged for selling or looking after said lands. It is also mutually agreed to sell said lands whenever regarded as most advantageous to both parties. The said Ingraham, of the first part, agrees to give to said Cooper, of the second part, half of the profits, after adding all expenses and interest to the \$1000 (one thousand dollars) per acre of said land. Be it further agreed that the \$30,000 loan, and interest on the said loan, shall be paid whenever said land shall be sold. We further agree to each pay half of the two and one-half per cent. commission on the \$30,000

loan, to be adjusted when the property shall be sold.

"Dated Hyde Park, Jan. 2/89.

"G. S. Ingraham.

"A. J. Cooper."

Pursuant to this agreement, Cooper procured the loan of \$30,000, for which Ingraham gave his note and a lien on the land as security. On June 12, 1891, Cooper transferred his interest in the aforesaid contract to Ephraim Mariner and J. Platt Underwood, appellants herein, who thereby succeeded to his rights and incurred his obligations under the original contract. On December 20, 1892, Granville S. Ingraham died, leaving a last will and testament, which was admitted to probate in the county court of Cook county on December 28, 1892, and letters testamentary thereon were issued to appellees, Harriette A. Ingraham, Henry V. Freeman, and John F. Gilchrist. May 8, 1898, the executors filed a bill for the purpose of obtaining a construction of the foregoing agreement. The issues as made up were referred to the master and were heard on exceptions to the master's report. On July 6, 1900, a decree was entered in the cause, from which the executors of the will of Granville S. Ingraham (appellees herein) appealed to this court. For a full statement of that litigation we refer to the case of *Ingraham v. Mariner*, 194 Ill. 269, 62 N. E. 609. The court, in reversing the decree of the court below, used the following language: "The decree of the court below is affirmed in all respects, except so far as it allows interest paid by Cooper and his assignees upon the \$30,000 to be deducted from the proceeds of the sale. In this respect the decree is reversed. Accordingly the decree of the circuit court is reversed and the cause is remanded to that court, with directions to change and modify its decree in the respect hereinbefore indicated." The mandate of this court was filed in the circuit court, and thereupon, on April 15, 1902, the court rendered a decree modifying the decree of July 6, 1900, in accordance with the opinion of this court. Among other orders in that decree was the following: "Inasmuch as it has been stipulated herein between the parties in this case that the best time for the sale of said premises has not yet arrived, and that it would not be advantageous to the parties to have a sale made at once nor until the further order of the court as to the time of making such sale, the court therefore directs the master that such sale shall not be made in the execution of this decree until the further order of this court, and upon the application of some of the parties in interest herein showing that the parties in interest cannot, between themselves, agree upon the time of such sale and are unable themselves to make such sale. If the parties themselves make such sale, the proceeds shall be paid to such master and be distributed according to the provisions of this decree."

April 9, 1904, appellees filed their petition

in the circuit court of Cook county, in which they show the decree and order of sale entered by said court on April 15, 1902. The petition then sets up that appellants have declined to make a sale of the land or to agree upon a time for the master to make one, or to pay any part of the taxes and assessments which have been paid by appellees, amounting to \$2,500 per annum, and since Ingraham's death amounting to a total of \$62,000; that appellees are unable to continue paying taxes and the property may be sold for taxes; that the present is as good a time to sell as can reasonably be expected; that appellees cannot distribute Ingraham's estate until this property is sold; and that legatees now threaten to compel such distribution, it being 12 years since Ingraham's death. The petition further alleges that appellants, having refused to contribute toward the carrying charges, have no equitable right to object to a sale; that the terms of sale described by the decree were one-third cash, and the balance in one, two, and three years, but appellees are advised that conditions may arise making it desirable to give the purchaser the right to pay all cash; that should appellants, or should appellees themselves, become purchasers, it would be superfluous for them to pay in money, which the master would have to repay them, and that the receipt from appellants or appellees for such proceeds as go to them should be accepted in lieu of cash. Appellees ask for such modification in the terms of sale for the purpose of obtaining a higher price. They make appellants defendants, and pray for a modification of the decree and for an order instructing the master to proceed with the sale. The petition was amended June 8, 1904, by alleging a levy of special assessments against the land amounting to \$12,965.10, payable in 10 installments, which the executors have no means of paying.

Appellants filed their joint and several answers June 21, 1904. They denied the material allegations in the petition, and set up that a sale at that time would benefit appellees only and would entirely extinguish the interest of appellants. They further insist that a present sale cannot be made which might be regarded as most advantageous to both parties. They also insist that, if appellees must sell, they shall sell their interest in the estate only, and that appellees have no equitable right to and have given no sufficient reasons for forcing a present sale. They object to the modification of the decree as to the terms of the sale.

The cause was referred to the master June 25, 1904, and on February 27, 1905, he filed his report, in which he finds the issues for appellees and recommends that the order of sale be made. Appellants filed exceptions to the master's report. The cause was heard, and on March 22, 1905, the court overruled the exceptions, confirmed the master's report, and decreed, in substance, that the mas-

ter, on the expiration of six months from the entry of the decree, should proceed to advertise and sell the land at public auction to the highest bidder, and that the purchaser, should he so elect, might pay the whole or part of the deferred payments in cash, at the time of the confirmation of the sale or later, instead of paying one-third cash and the remainder in one, two, and three years; that in the event that either Mariner or Underwood should purchase he should not be required to pay to the master the amount of the \$30,000 incumbrance, but the master might take a receipt for that sum in cash. A like provision is made in respect to appellees, should they become the purchasers, as to any amount which might be due to them after the payment by them, in cash, of the \$30,000 and costs of sale. From this decree the appellants prosecuted an appeal to the Appellate Court for the First District, where the decree of the court below was affirmed, and by their further appeal they have brought the record to this court for review.

Scott, Bancroft, Lord & Stephens, for appellants. E. A. & W. K. Otis, for appellees.

VICKERS, J. (after stating the facts as above). The modified decree of the circuit court entered pursuant to the mandate of this court contains an order to the effect that the land in question shall be sold, but it directs the master not to proceed with such sale "until the further order of the court and upon the application of some of the parties in interest herein showing that the parties in interest cannot, between themselves, agree upon the time of such sale and are unable themselves to make such sale." Appellees filed the petition herein, alleging that appellants had declined to make a sale or to agree upon a time for the master to make one. In this connection they further allege that Ingraham's estate is no longer able to pay the carrying expenses of the land, so that it may be sold for taxes; that the appellees are unable to distribute Ingraham's estate, although he had, at the time of the filing of this petition, in 1905, been dead 12 years and that legatees threaten to compel distribution.

If the decree of April 15, 1902, be allowed to stand, the land must be sold; the question of the time of such sale only remaining to be determined. The appellees by their petition seek to hasten the determination of that question. In order to do this, they must, according to the terms of the decree, show that the interested parties cannot, "between themselves, agree upon the time of such sale and are unable to make such sale." Have appellees followed the petition with proof sustaining their allegations in this regard? We have only to look to the admissions of appellants, made on the witness stand, for proof that appellants refuse to consent to a sale at

this time or to fix upon a definite time for the same. They insist that this is not a favorable time to sell. As to this the evidence is conflicting, but we think the weight of the evidence supports the contention that conditions, while not as favorable now as in 1891 or 1892, are as favorable as they are likely to be soon. The evidence shows sales of other acre property in the southern portion of the city and that some of these sales were at good figures. A number of improvements are being made in that locality, factories are being built in the vicinity of the land, street car lines extend along one edge of it, steam railroads pass within from one-half to three-quarters of a mile of it in different directions, and the belt line passes near it on the south. The activities going on in the section of the city and country surrounding the land in question indicate that the present is a reasonably favorable time for the sale of this property. The decree of the circuit court herein directs the master to proceed with the sale upon the expiration of six months from the date of the decree. This would afford ample time for advertising the property, and for procuring bidders at such sale. We do not think the court erred in entering the decree and ordering the sale to proceed.

We do not see wherein the modification allowing the purchaser to pay all cash on the approval of sale or to defer such payments, at his option, can work harm to any one, and we find no error in the ruling of the trial court in this regard.

Appellants have, as plaintiffs in error, sued out a writ of error for the purpose of bringing to this court for review the decree entered in the circuit court on April 15, 1902, and that case has been consolidated with the case at bar on the hearing.

It is alleged that the decree of April 15, 1902, is erroneous in prescribing the order of payment in making distribution; that the provision that the parties should bear any loss pro rata, and the order allowing appellees to become purchasers at the sale, are also erroneous. A comparison of the decree of April 15, 1902, with that of July 6, 1900, shows that they are in all essential particulars identical except as to the provision concerning the payment of interest on the \$30,000, which was modified in accordance with the mandate of this court. In prescribing the manner of distribution, the decree follows the views expressed in *Ingraham v. Mariner*, supra, using the language of this court in substance. The expressions "first," "second," "third," and "fourth" at the beginning of the distributive clauses in the decree are mere enumerations of payments to be made, and are not intended to give priority to any claim. The decree contemplates that all the items enumerated shall be paid in full if the proceeds of the sale shall afford sufficient funds, otherwise the losses shall be

borne pro rata. The court committed no error in this particular.

The contention that Ingraham's executors should not be allowed to become purchasers at this sale is not well taken. The parties are placed upon an equality in this regard by the decree; both or either being allowed to become purchasers if they overbid other buyers. The decree of July 6, 1900, contained the same provision, and the question is res judicata and is not open for review in this court.

The decree of April 15, 1902, made pursuant to the mandate of this court, and the decree of March 22, 1905, ordering the master to proceed with the sale of the land in question, are affirmed.

Decrees affirmed.

(230 Ill. 118)

SHEDD et al. v. SEEFELD et al.

(Supreme Court of Illinois. Oct. 23, 1907.

Rehearing Denied Dec. 4, 1907.)

1. RECEIVERS—LIABILITIES—DETERMINATION—UNLIQUIDATED CLAIMS—EQUITY JURISDICTION.

Where interveners contracted with a receiver of warehouse property for the storage of their apples, and thereafter appeared in the equity suit, where the receivership proceedings were pending and submitted their claim for unliquidated damages caused by the receiver's failure to properly care for the apples as he had agreed to do, the court had jurisdiction to determine the claim and provide for the payment thereof out of the property in the hands of the receiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 288.]

2. JURY—TRIAL BY JURY—RIGHT—EQUITY CASES.

The right of trial by jury, considered as an absolute right, does not extend to equity cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 35-65.]

3. APPEAL—ADMISSION OF EVIDENCE—EQUITY CASES—PREJUDICE.

Any error, in the admission or exclusion of evidence in an equity case, is immaterial if there is competent evidence in the record sufficient to sustain the decree, and the evidence which ought to have been considered would not, if considered, have changed the result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4033.]

4. SAME—FINDINGS OF TRIAL COURT.

While the findings of the trial court approved by the Appellate Court are not conclusive on the Supreme Court in a chancery proceeding, they will not be reversed unless they are clearly against the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3973.]

Appeal from Appellate Court, First District, on Writ of Error to Circuit Court, Cook county; Thomas G. Windes, Judge.

Bill by John Druecker against E. A. Shedd and another to have a deed declared a mortgage, consolidated with a creditor's bill by F. A. Smith and others, creditors of Druecker for the same purpose. After the appointment of a receiver, Joachim Seefeld and another applied to intervene for the purpose

of establishing a claim against the receiver. From a decree in favor of interveners (126 Ill. App. 375), Shedd and others appeal. Affirmed.

On May 22, 1899, and prior thereto, John Druecker was conducting a warehouse business on certain premises situated in the city of Chicago. On the above date he executed a conveyance in fee of said premises to E. A. Shedd, of Chicago, and Benjamin F. Harris, Jr., of Champaign, Ill., for an expressed consideration of \$70,000. Afterwards John Druecker filed his bill in chancery to have said deed declared a mortgage, and on May 23, 1901, F. A. Smith and others, creditors of Druecker, filed a bill for the same purpose: theirs being in the nature of a creditors' bill. The two cases were afterwards consolidated. The property has been described in these proceedings and in said deed as wharfing lots 3 and 4 in block J, opposite lots 4 and 5 in block 8, in the original town of Chicago, also 40 feet south of and adjoining said lot 4 in block J. On June 11, 1901, E. J. Piggott was appointed receiver for said property known as the "Druecker Warehouse." On November 21, 1902, Piggott resigned and Rawson Waller was appointed receiver in his stead. Waller conducted said warehouse business until March 21, 1903, when, pursuant to decree and order of court, the said property was turned over to Shedd and Harris. The order of the court entered March 21, 1903, provided as follows: "It is further ordered that the receiver file his account within 30 days, and shall on March 23, 1903, turn over the possession of said premises, and the business thereon, to said Shedd and Harris on reasonable request, the same to be subject to the receiver's certificate and all indebtedness, liquidated and unliquidated, incurred by him or them, and said property shall be held by said E. A. Shedd and B. F. Harris, Jr., subject to all existing liens against said receiver and exreceiver and subject to claims and liens to be hereafter adjudicated, which shall be paid by said Shedd and Harris when and as established by this court, and said receiver shall make full report to the court, and the court reserves all matters relating to the receivership and administration thereof for further consideration and disposition." On March 21, 1903, Joachim Seefeld and Charles F. Seefeld, appellees herein, by leave of the court, filed an intervening petition in said cause, naming E. J. Piggott, receiver, Rawson Waller, receiver, E. A. Shedd (one of the appellants herein), and B. F. Harris, Jr., as defendants. On December 29, 1903, Albert M. Johnson (the other appellant herein) filed his petition in said cause, alleging that he had succeeded to all the rights and interest of said B. F. Harris, Jr., in the property in question by virtue of a certain quitclaim deed to the same from said Harris and wife, and prayed for leave to intervene in this suit and to answer the petition of J. Seefeld and

C. F. Seefeld, instant. The intervening petition of the Seefelds alleged that on September 20, 1902, they entered into a contract with E. J. Piggott, receiver, to store 4,000 barrels of apples in cold storage, at a specified rate; that pursuant to such contract they shipped 21 car loads or 3,693 barrels, of apples to said receiver for storage; that said receiver received notice of the arrival of each of said cars in Chicago; that it then became the duty of the receiver to place said apples in cold storage within 24 hours of receipt of such notice; that it was also his duty to keep said apples at a temperature of 30 to 33 degrees (Fahrenheit) above zero; that said receiver disregarded his duty in these matters; that he allowed said apples to remain in the railroad yards more than 24 hours before placing them in cold storage, thereby allowing said apples to go into what is called a second sweat, which blisters them, so that their market value is reduced, and they become what is known as "second-grade peddler's stock"; that the receiver failed to keep the temperature between 30 and 33 degrees, Fahrenheit; that the said receiver carelessly and negligently conducted said warehouse by allowing water to accumulate and stand on the floors and by allowing the building to become damp and foul, so that the barrels of apples were covered with mud and dirt; that by reason of being allowed to stand on the railroad tracks until they were blistered and burned by going into said second sweat before being placed in cold storage, and by reason of the temperature not being kept between 30 and 33 degrees, said apples became badly rotted, and it was necessary to resort and repack each of said barrels before they could be sold; that the apples were from the best orchards, carefully selected and packed; that the natural shrinkage in apples is 10 per cent., but the shrinkage in these apples was 25 per cent. An accounting and general relief are prayed for in the petition. Answers and replications were filed, and the issues were tried upon the oral testimony of witnesses heard in open court, together with documentary evidence submitted, and the deposition of one witness who was too sick to appear in open court. On February 18, 1905, the court rendered a decree in favor of the appellees for the sum of \$3,888.34, and made the same a lien upon the warehouse property described in the pleadings. The case was taken to the Appellate Court for the First District under a writ of error, and that court affirmed the decree of the court below. The case now comes here on appeal from the Appellate Court.

Oliver & McCartney, for appellants. Atwood, Pease & Loucks, for appellees.

VICKERS J. (after stating the facts as above). Appellants' first and most serious contention is that the circuit court of Cook

county sitting in chancery had no jurisdiction to try this cause, for the reason that appellees' claim is for alleged damages growing out of a tort and is cognizable only in a court of law. The precise question presented by this assignment of error has not been decided by this court, so far as we have been able to find, and no case is cited by either side which we regard as an authoritative decision of the question. Appellants insist that the case of *Brown v. Wabash Railroad Co.*, 96 Ill. 297, is an authority supporting their contention. We do not so regard it. The *Toledo, Wabash & Western Railway Company* was being operated by Jacob D. Cox as receiver, appointed by the concurrent orders of the court of common pleas of Lucas county, Ohio, the circuit court of Cass county, Ind., and the circuit court of Vermillion county, Ill., and, while so operating, Roberts, a fireman, was killed through the alleged negligence of the receiver. Under an order of the court, the railroad and all of its property and equipment had been sold and passed into the ownership of the Wabash Railway Company. A provision in the decree under which the property was sold required the purchaser to assume and pay all liabilities incurred in respect to said railroad or its business by the receiver during the pendency of the legal proceedings relating to the receivership and the subsequent sale. Assuming that this provision in the decree created a lien upon the property in the hands of the Wabash Railway Company, the administrator of Roberts filed an original bill in equity against the Wabash Railway Company in the Sangamon county circuit court to ascertain and establish his damages resulting from the death of Roberts and for an order requiring the Wabash Railway Company to pay it. This court, while conceding the existence of the lien, held that a court of equity would not by an original action take jurisdiction of a case involving a question of unliquidated damages arising from a tort. That case decides the familiar doctrine that a court of chancery is not the forum in which to settle purely legal questions. No question was there presented or decided as to the jurisdiction of a court of chancery, under whose direction a trust fund is being administered by its receiver, to determine any legal matter that may arise ancillary to the due administration of the trust property. A careful examination of that case shows that it has no application to the question involved in the case at bar.

Knickerbocker v. Benes, 195 Ill. 434, 63 N. E. 174, relied on by appellees, is a case substantially like the case at bar in its facts, and this court upheld a judgment growing out of a tort against a receiver where the damages had been ascertained and assessed by the chancellor, but no question was there raised or decided in respect to the procedure. It appears to have been conceded by the par-

ties that the circuit court wherein the receivership was being administered properly took jurisdiction to determine the claim for damages. While this case is not a direct authority on the question here involved, it at least shows that a court of chancery did in that case take jurisdiction to hear and determine a matter sounding in damages growing out of a tort, and that its judgment has been affirmed by this court.

Appellants rely with great confidence on *Palys v. Jewett*, 32 N. J. Eq. 302, as supporting their position. That case was a suit against the receiver of a railway company for damages alleged to have been sustained by the plaintiff by reason of the negligence of the employees of the receiver in the management of a train of cars. The case was heard before the vice chancellor, who found for the receiver. The report of the case which we have seen does not show how the case was brought into court. The decision of the vice chancellor is reversed on the merits, and the cause is remanded, with directions to enter a judgment in favor of the plaintiff for \$3,000. From the report of the case it appears that the plaintiff, and not the receiver, was protesting against the trial of the case without a jury. In the course of the opinion, on page 317, it is said: "These observations constitute a pointed reaffirmation of the proper rule of practice as promulgated by Lord Eldon, establishing plainly, as they do, that in this class of cases the chancellor will not undertake to decide a purely legal question against the person who demands from him a trial at law." From this quotation we infer, though the report does not so show, that the petitioner or plaintiff in that case had applied to the chancellor for leave to bring his action at law, which being denied, he was compelled to submit his case to the vice-chancellor. We reach this conclusion more readily from the fact that in *Potter v. Spa Spring Brick Co.*, 47 N. J. Eq. 442, 20 Atl. 852, that court, in commenting on its earlier decision of *Palys v. Jewett*, said: "*Palys v. Jewett* was a proceeding by a person who had been injured by a railway train run by a receiver of the court, for redress in damages for such injury, and the opinion of the learned Chief Justice in the Court of Errors and Appeals was based on the supposed fact (32 N. J. Eq. at pages 318, 319) that the petitioner had asked this court for leave to proceed at law, or at least for a trial by jury, and had been refused, and so was forced, against his will, to submit his case, in all its parts, to the determination of this court." There are other expressions in the *Palys* Case from which it is clear that the learned Chief Justice had in mind cases where the party was drawn, against his will, to litigate legal questions in a court of chancery. It is stated in that case, as a reason why the court would consider the case on its merits, that no appeal had been taken from the order refusing a trial by jury.

Further commenting on the *Palys* Case, the court wherein it was decided, 10 years later. In *Potter v. Spa Spring Brick Co.*, supra, said: "These cases (*Palys* and others) do not apply to a case where a party who has a cause of action against a receiver of this court comes voluntarily into the court and by his petition asks the court not to permit him to sue at law but to do him justice according to his own notion of what is just, submitting himself to the jurisdiction of the court and offering to do what the court deems equitable. And I am of opinion that in such a case it is competent for this court to hear and deal with his complaint, and that it does not lie in the mouth of its receiver to object to such assumption of jurisdiction."

It thus appears that *Palys v. Jewett*, supra, when carefully examined in the light of the subsequent case by the same court, cannot be regarded as an authority supporting appellants in the case at bar. Here, appellees voluntarily came into the court of chancery, not demanding a jury, but offering to submit their cause to the court for decision. No question as to the jurisdiction of the court to hear the case was made by either party in the court below, and no request was made for a jury. Under such circumstances, the practice has been, so far as we are able to ascertain from the adjudicated cases, for the court wherein the receiver was appointed to take jurisdiction and determine all matters ancillary to the proceeding, regardless of the character, importance, or complexity of the questions involved. When a court of chancery appoints a receiver to take charge of the property and affairs of a corporation or other person, the receiver becomes, in a sense, the mere ministerial agent of the court. His possession of the property is the court's possession, and it has often been adjudicated a contempt of court to bring a suit, or otherwise interfere or intermeddle with the receivership affairs, unless leave is obtained for that purpose from the court wherein the receivership is being administered. So complete and exclusive is the jurisdiction of the court appointing the receiver that it is held by many high authorities, among them the United States Supreme Court (*Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672), that a judgment rendered against a receiver by another court without leave to bring the suit is void for the want of jurisdiction. This court has not gone to that extent. The rule established by this court in *Mulcahey v. Strauss*, 151 Ill. 70, 37 N. E. 702, is, that while it is a contempt of court to bring suit against a receiver without leave, and the court appointing the receiver may attach for contempt or enjoin the proceeding, the failure to obtain leave does not oust the other courts of the state of jurisdiction. This rule is, however, subject to an exception in cases where the purpose of the suit is to deprive the receiver of his possession of the property

of the receivership. In such cases the judgment is void unless leave is obtained to prosecute such suit. *St. Louis, Alton & Springfield Railroad Co. v. Hamilton*, 158 Ill. 366, 41 N. E. 777. When, in furtherance of justice, it becomes necessary for a court of equity to lay hold of the affairs of an insolvent or failing debtor and appoint a receiver to manage, operate, or wind up his affairs, it would be a strange restriction upon the powers of such court if it could adjust only such questions arising in the course of the administration as are ordinarily cognizable in a court of equity. The jurisdiction of the court of equity having attached in the first instance to protect the equitable rights of creditors, it will be retained to do complete justice and fully administer upon the property, and in so doing a court of chancery may, if it sees proper to do so, adjust claims against the property arising either out of tort or contract and determine the amount thereof, and make all proper orders in respect to the time and manner of their payment.

We perceive no reason why the practice in this state should not conform to and be governed by the same principles that are applied in the federal courts, and especially as the practice existed in those courts prior to the passage of the act of Congress approved March 3, 1887 (chapter 373, § 3, 24 Stat. 554 [U. S. Comp. St. 1901, p. 582]), which act permits suits at law to be brought against a receiver appointed by a federal court without obtaining leave from the court making the appointment. The rule adhered to by the Supreme Court of the United States is thus stated by Mr. Justice Woods in *Barton v. Barbour*, *supra*: "Such is not the course and practice of courts of equity in administering a trust estate. The costs and expenses of the trust are allowed by the court upon a reference to its own master. If the adjustment of the claim involves any dispute in regard to the alleged negligence of the receiver or any other fact upon which his liability depends, or in regard to the amount of damages sustained by a party, the court, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law or direct the trial of a feigned issue to settle the contested facts. The claim of the plaintiff, which is against the receiver for a personal injury sustained by her while traveling on the railroad managed by him, stands on precisely the same footing as any of the expenses incurred in the execution of the trust, and must be adjusted and satisfied in the same way." We find nothing in the adjudicated cases in this state opposed to the doctrine of *Barton v. Barbour*, and it is supported by the weight of authority outside this state and seems to be well grounded in sound reason.

Appellants insist that the effect of sustain-

ing the jurisdiction of chancery in cases of this character is to deprive the party of the constitutional right to a trial by a jury. The answer to this contention is that the right of trial by jury, considered as an absolute right, does not extend to cases of equitable jurisdiction. 5 Pomeroy's Eq. Jur. § 171, and cases there cited. If appellants' argument is sound on this point, there would be many cases of equitable jurisdiction that courts of equity could not settle, because, as an incident to the main controversy, some matter would arise in which the parties would be entitled to a jury if the same matter should arise as a distinct transaction in a court of law. In bills to foreclose mortgages, for an accounting, and relating to partnership affairs, and in many others, matters frequently arise for determination which, if they stood alone and disconnected with other circumstances which give a court of equity jurisdiction, would be properly cognizable in a court of law and triable by a jury. But it is the constant practice of courts of chancery to adjust all questions arising between the parties relating to the subject-matter of the litigation which are brought into issue by the pleadings, regardless of whether such matter is legal or equitable in its character. We have no doubt of the jurisdiction of the circuit court of Cook county, sitting as a court in chancery, to hear the evidence and adjudicate upon appellees' claim and to make a final order for its payment.

The other assignments of error do not require elaborate discussion. It is urged that the court erred in the exclusion and admission of testimony. This being a chancery proceeding, any error in this regard is unimportant if there is competent evidence in the record sufficient to support the decree, and the evidence which ought to have been considered would not, if considered, change the result. *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. 189, and cases there cited. Without intimating any dissatisfaction with the rulings of the trial court in this regard, we are content to rest our conclusion on the ground that the competent evidence in the record is quite sufficient to support the decree, and that no evidence excluded could have led to any different result.

Other assignments of error relate to questions of fact, such as that the decree is excessive, and that there is a failure of the evidence to support the findings. While the finding of the court below, and its approval by the Appellate Court, are not, in a chancery proceeding, binding on this court, still we will not reverse a decree unless it is clearly against the evidence. After a careful examination of the evidence, aided by the exhaustive briefs and the oral arguments of counsel, we are unable to find any reason for disagreeing with the trial and Appellate Courts on the questions of fact involved.

Finding no error in this record, the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

(230 Ill. 93)

WILCOXON v. WILCOXON et al.

(Supreme Court of Illinois. Oct. 23, 1907.

Rehearing Denied Dec. 4, 1907.)

1. EQUITY—LACHES.

August 19, 1879, decedent leased property to his children, complainants and defendant, and they formed a partnership to manage the property, making defendant trustee. June 20, 1881, decedent deeded the property to complainants, defendant not knowing thereof until December 27, 1887. March 1, 1888, defendant refused to act further as trustee. February 27, 1890, complainants brought this suit to dissolve the partnership and for an accounting, and the cause was continued from time to time pending defendant's suit to cancel the deed and decedent's codicil, which was decided against defendant November 9, 1896. February 17, 1897, he answered denying complainant's right to relief. March 6, 1899, complainants dismissed the bill. January 29, 1900, defendant sued for equitable relief on the theory the deed was in fraud of his rights, and October 25, 1902, it was finally adjudged that defendant, complainant in that suit, was barred by laches. December 7, 1903, through his efforts, this suit was redocketed, and April 30, 1904, he filed a cross-bill asking substantially the same relief as in his suit of January 29, 1900. *Held*, that defendant's delay in bringing to the court's attention the grounds relied on for equitable relief in his cross-bill bars his right to recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 204–209.]

2. JUDGMENT—CONCLUSIVENESS.

Whether the decree in defendant's second suit bars the same claim for cause of action on this suit, or not, it is an estoppel as to those matters in issue upon the determination of which the decree was rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

3. COURTS—APPELLATE JURISDICTION.

Where, after the reversal of a decree in the Appellate Court, defendant presented issues involving a freehold, a subsequent appeal was properly taken to the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 557.]

4. EQUITY—LACHES—APPLICATION OF DOCTRINE—PLEADING.

The equitable doctrine against the enforcement of stale demands is not a rule of pleading, and the absence of diligence is equally fatal to recovery whether it appears in a cross-bill or an original bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 191–196.]

Hand, C. J., and Cartwright and Scott, JJ., dissenting.

Appeal from Circuit Court, Stephenson County; O. E. Heard, Judge.

Bill by Mitchell H. Wilcoxon and others against Thomas D. Wilcoxon. From a decree sustaining a supplemental bill and dismissing the original bill and defendant's amended cross-bill, he appeals. Affirmed.

In 1879 Thompson Wilcoxon was the owner of the Wilcoxon Opera House block and the Post Office block, in the city of Freeport.

These properties were of the approximate value of \$50,000 and were incumbered for \$25,000. On the 19th of August, 1879, he, with his wife, Cynde Wilcoxon, entered into articles of agreement with their children, Thomas Wilcoxon, Mitchell H. Wilcoxon, Mary D. Proctor, and Martha E. Lemon. The agreement was in the nature of a lease, by which Thompson Wilcoxon and his wife leased the said real estate to their children from that date until June 1, 1884, a period of about five years. There was a covenant in the lease on the part of the lessees by which they agreed "to assume all of the indebtedness now existing against the estate of said parties of the first part, together with such additional indebtedness as shall be incurred in the erection and completion of said Post Office block, to the extent of all the revenues arising from the rental of said buildings (except as herein provided) during the term of said lease." And it was provided in the lease that after retaining out of the income of said properties a sum not exceeding \$300 for each of the lessees per year, the lessees would apply the remainder of said income on payment of the principal sum of the indebtedness against the property, less taxes, interest, insurance, and expenses. There were other covenants and agreements in the lease which it is not necessary to notice here. On the same date appellant and appellees entered into an agreement by which they formed a partnership for the purpose of managing the property leased from their father. By the terms of this agreement appellant was constituted trustee and agent for the partnership, and was authorized to lease the premises, pay all the expenses mentioned in the lease, together with the sum of \$300 each to the partners, and to pay out the funds remaining in his hands upon the principal of the indebtedness on said property. He was also required to keep accurate accounts of his acts and doings and to make reports of the same to the other parties to the lease. For his services as such manager he was to receive the sum of \$200 per year in excess of the \$300 above mentioned. The partnership agreement provided that it should remain in full force for the period of five years from its date, unless otherwise ordered by the parties. Afterwards, on the 26th day of August, 1880, a supplemental agreement was entered into between the parties to the partnership agreement, which provided that in view of the fact that their father, Thompson Wilcoxon, had ceased to receive certain income which he enjoyed at the time the lease was made, he should be paid \$100 per month out of the general fund arising from the rental of the properties held by said parties under the lease above mentioned, and in case of the death of Thompson Wilcoxon the said sum was to be paid monthly to his widow. The expressed purpose of the lease and the partnership agreement was to reduce and pay off the indebtedness of Thompson Wilcoxon as rapidly as possible,

and not to secure to the lessees an income for their immediate use except \$300 per year to each of them, since they were equally interested, as prospective heirs, in relieving their father's estate of its burden of indebtedness. Appellant immediately entered upon the discharge of his duties as trustee under the partnership agreement.

In the year 1852 Thompson Wilcoxon made his will and devised all his property, without qualification, to his wife. In the same year Abigail M. Wilcoxon, aunt of appellant and appellees, who was the owner of 480 acres of land in Stephenson county, with other property, made her will devising her estate to Thompson Wilcoxon. On June 19, 1880, Abigail Wilcoxon added a codicil to her will, devising to Thomas Wilcoxon a life estate in her estate with remainder in fee to his sons. On January 3, 1881, Thompson Wilcoxon added a codicil to his will, to the effect that in case he should not predecease his wife his property should be divided equally among his children, with the further condition that if Abigail M. Wilcoxon should change her will, making any of his children or their heirs beneficiaries instead of Thompson Wilcoxon, then an amount equal to that received by such child from the estate of Abigail Wilcoxon should be deducted from the child's interest in the estate of the testator, and, if the amount so received by such child from Abigail M. Wilcoxon's estate should equal or exceed one-fourth of the total valuation of the aggregate amount of both estates, then such child, or his or her heirs, should receive no part of the estate of the testator. On June 20, 1881, Thompson Wilcoxon and Cynde Wilcoxon, his wife, executed a warranty deed conveying the Opera House and Post Office blocks to appellees. Appellant insists that he had no knowledge of the execution of this deed, and he continued to discharge his duties as manager of the affairs of the partnership. Upon the expiration of the lease, June 1, 1884, it was by mutual consent continued from year to year until the death of Thompson Wilcoxon, on December 17, 1887. On December 27, 1887, at a meeting of the heirs of Thompson Wilcoxon, appellant was apprised of the existence of the deed to appellees, and this he claims was his first information in regard to it. On December 30, 1887, Abigail M. Wilcoxon deeded to appellant the 480 acres of land in Stephenson county, reserving to herself a life estate in the same. Appellant continued to manage the opera house and the post office property until March 1, 1888, when he refused to further act in such capacity, but he continued to occupy an office in the building.

January 24, 1889, appellant filed his bill in the circuit court of Stephenson county to set aside the deed by Thompson Wilcoxon and wife to appellees, dated June 20, 1881, and to annul the codicil to the will of Thompson Wilcoxon, which was executed January 3, 1881, and to set aside the probate thereof.

On February 27, 1890, appellees filed the original bill in this suit, praying for a dissolution of the partnership and an accounting of the partnership funds. April 24, 1890, the appellant filed his demurrer to the bill. The case was by consent of parties continued from time to time, pending the determination of the suit of appellant to set aside the deed and the codicil to the will of Thompson Wilcoxon, which cause reached its final determination in this court adversely to the appellant November 9, 1896. See *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369. Appellant filed his answer in this cause August 17, 1897, denying that complainants were entitled to the relief sought. To this answer the appellees filed replication on September 27, 1897. The matter was referred to the master to take and report proofs, with his findings, and to state an account, but before the master filed his report thereon appellees dismissed their bill March 6, 1899. On March 8, 1899, appellant filed his motion to set aside said order of dismissal, which motion was on March 29, 1899, denied by the court. January 29, 1900, the appellant filed his bill in the circuit court setting up the lease and partnership agreement, and alleging various grounds of complaint, and praying for relief in the alternative. The prayer of this bill was as follows: "That an account may be taken of all and every of said copartnership dealings and transactions, and also an account of all of the moneys received from and paid out on account of said property, said indebtedness, and the matters and things mentioned and enumerated in said copartnership agreement and said lease, under and by virtue of said agreement and said lease, by the several parties thereto; that said copartnership may be dissolved; that said defendants may, as to the court shall seem most equitable and appropriate, either be decreed to pay complainant all moneys expended or appropriated by him or on his account for the benefit and improvement of said property and estate and in the erection and completion of said building therein mentioned, together with reasonable and adequate compensation for his services and labors rendered and performed under said agreement and said lease, and all damages by him sustained by reason of said fraud and said violation of said agreement and said lease, together with legal interest on said moneys, or that they, said defendants, may be decreed and be declared to hold said property purchased and acquired by virtue of said deed as trustees, for the mutual and equal benefit of all the parties to said copartnership agreement, and that they pay to complainant a one-fourth part of the net proceeds of the rents, issues, and profits of said property after the payment of all the expenses of managing and caring for said property: that the complainant be declared to be entitled to a one-fourth interest in said property, and all the benefits, advantages,

and emoluments arising or growing out of said property, upon his contributing his pro rata share of the purchase money paid for said property and bearing his pro rata share of the expenses arising or growing out of the ownership, management, and care of said property, which complainant is ready, willing, able, and offers to do; that said defendants may be decreed to pay the complainant whatever may, upon the taking of said account, appear to be due him, complainant being ready and willing and able and offering to pay to the said defendants whatever shall, upon the taking of said account, appear to be due them. Complainant offers to do any and all things that may to the court seem meet and just, and prays that pending the disposition and termination of the cause said defendants, and each of them, may be enjoined from selling, transferring, mortgaging, or otherwise disposing of or encumbering said property described in said deed or any part thereof, and that the complainant may have such other and further or different relief in the premises as equity may require and to the court shall seem meet."

The relief prayed for in said cause was denied and the bill dismissed by the court on the ground of laches. The ruling of the circuit court in this regard was affirmed in this court on October 25, 1902. See *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229. On December 26, 1902, at the instance of the appellant, a writ of error issued from the Appellate Court for the Second District to review the order of the court dismissing the original bill herein on March 6, 1899, on motion of appellees and without the consent of the appellant. On October 23, 1903, the Appellate Court reversed the decree and remanded the cause for further proceedings, and on December 7, 1903, the cause was re-docketed in the circuit court. See *Wilcoxon v. Wilcoxon*, 111 Ill. App. 90. Thereupon appellant filed an amended answer and a cross-bill, to which a demurrer was afterwards sustained. On April 30, 1904, he filed an amended cross-bill, in which the relief prayed for is identical with that prayed for in his bill of January 29, 1900, except that instead of praying for an injunction, as in that bill, he prays for the appointment of a receiver. A comparison of the allegations of the bill of January 29, 1900, with those in appellant's amended cross-bill herein, shows that in all essential particulars they are identical in substance, in meaning, and in language, except wherein the amended cross-bill recites legal proceedings which had not occurred at the time the bill was filed, January 29, 1900. On June 6, 1904, appellees filed a general and special demurrer to the amended cross-bill, which demurrer was sustained on June 29, 1904, and the amended cross-bill was dismissed for the want of equity. On December 7, 1904, appellees, by leave of the court, filed a supplemental bill, in which they show the filing by appellant of

his bill of January 29, 1900, and the proceedings thereon, resulting in its dismissal and the affirmance by this court of the said decree of dismissal. They show the writ of error proceedings in the Appellate Court to review the order of the circuit court in dismissing the original bill herein, and the re-docketing of this cause in the circuit court in pursuance of the remanding order of the Appellate Court. In fact, this supplemental bill shows substantially all the litigation between the parties hereto, up to the time of the filing of the amended cross-bill and its dismissal upon demurrer. Appellees allege in their said supplemental bill that the proceedings had on appellant's bill of January 29, 1900, in *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229, amounted to an adjudication of the matter herein, and that the dismissal of the appellant's amended cross-bill was, in effect, an adjudication also. Appellees prayed that appellant be denied the relief or either alternative asked for in his amended answer, and prayed for a dismissal of their original bill herein. Appellant answered said supplemental bill, denying that either of said proceedings amounted to an adjudication, and also questioned appellees' right to maintain the supplemental bill. A replication was filed to the answer, and the issues as made up were referred to the master, who found the facts substantially as above stated, and who recommended, as conclusions of law, that the supplemental bill should be sustained. Appellees and appellant both objected to the master's report, and the objections were overruled, and the court dismissed the original bill for want of equity, at appellant's costs. The principal error insisted on by appellant in this court is that the court erred in sustaining the supplemental bill and in dismissing the original bill and the amended cross-bill of appellant.

H. T. Wilcoxon, for appellant. J. A. Crain, for appellees.

VICKERS, J. (after stating the facts as above). This case is between the same parties and involves substantially the same matters that were litigated and determined in the case of *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229. In that case Thomas Wilcoxon, appellant herein, filed an original bill against appellees herein, seeking to have himself adjudged the owner of a one-fourth interest in the Opera House block and the Post Office block, on the ground that appellees and appellant were partners at the time the title was conveyed to appellees by their father, and that the title so taken by appellees should be held to inure to the benefit of the four partners, or, in the alternative, appellant prayed that the court should decree that the taking of the deed in appellees' names, and their failure to record the same or otherwise give notice to appellant of such conveyance, was such a fraud upon appellant as in equity should release him from his contract to look

after and manage the property for \$200 per year, and that he should, upon an accounting, be allowed what his services were reasonably worth. The nature of the so-called partnership agreement and the prayer of appellant's original bill, filed in 1900, are set out fully and accurately in the statement that precedes this opinion. It is admitted here, as it was in appellant's original bill, that he was informed that his father had conveyed the Opera House block and the Post Office block in December, 1887. It will be borne in mind that the case at bar was commenced by appellees for a dissolution of the partnership and for a general accounting against appellant February 27, 1890, and remained on the docket of the circuit court until March 6, 1899, when it was dismissed. It remained off the docket and out of court until December 7, 1903, when it was reinstated on a mandate from the Appellate Court for the Second District, and on that day, by an amended answer and cross-bill, appellant for the first time in this suit brought to the attention of the court the same grounds for equitable relief which formed the basis of his original suit commenced January 29, 1900.

As throwing some light upon the history of the controversy between these parties, it may be mentioned that on January 24, 1889, appellant filed a bill in the circuit court of Stephenson county to set aside the deed made by his father to appellees, and also to annul the codicil to the will of Thompson Wilcoxon and to set aside the probate thereof. This case was finally determined in this court, resulting in a judgment sustaining both the deed and the codicil to the will, November 9, 1896. See *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369. While the parties were engaged in litigating the question of the validity of the deed and codicil, the present suit was not brought to a hearing, but was continued from time to time by the circuit court. After the final disposition of the bill to set aside the deed and codicil, appellant, on August 17, 1897, filed his first answer in the case at bar. No cross-bill was filed by appellant at that time, nor did he by his answer claim any interest in the freehold nor allege any fraud against appellees, although he had, by his own admission, full knowledge of all the facts upon which he now relies, since December, 1887. After some other unimportant steps were taken in this case, appellees, on March 6, 1899, voluntarily dismissed their bill, over the objections of the appellant. This case was then apparently abandoned by all of the parties, and appellant turned his attention to his original bill, filed January 29, 1900. It was in this original bill of 1900 that the appellant first sought equitable relief on the theory that the conveyance to his partners by his father was in fraud of his rights as a partner, and that the title should be held to inure to him to the extent of his interest in the partnership.

After a rehearing was denied in this court in appellant's suit of 1900 and he had been defeated on the ground of laches, this cause being reinstated under a mandate from the Appellate Court in December, 1903, appellant filed his answer and cross-bill in the case at bar, setting out the same grounds of equitable relief relied on in his original suit of 1900.

Much of appellant's brief is devoted to a discussion of the question whether the suit of 1900 is a bar to the relief appellant seeks in this case. We do not deem it necessary to examine into and determine whether all of the elements of an estoppel by judgment are present here. It seems clear that there is an identity of the subject-matter of the suit and of the parties thereto, and that the thing decided is the same matter which the appellant is insisting on against the same parties in the present action. It is true that in the case at bar appellees, by their original bill, prayed for an accounting and a dissolution of the partnership, but appellees had long since voluntarily abandoned their original bill and dismissed the same out of court, and only came back when compelled to do so by the judgment of the Appellate Court. Appellees are not insisting on any accounting or other relief against appellant, and they are only in court for the purpose of resisting appellant's alleged cause of action against them. There is therefore no substantial difference, so far as the live questions between the parties are concerned, in this case and the suit of 1900. Independently of the question as to whether the judgment in the suit of 1900 can be set up as a bar or estoppel against the same claim or cause of action in this suit, there is no question that the former judgment is an estoppel as to those matters in issue or points controverted upon the determination of which the decree was rendered.

Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Riverside Co. v. Townshend*, 120 Ill. 9, 9 N. E. 65; *Stone v. Salisbury*, 209 Ill. 56, 70 N. E. 605. In the suit of 1900 between these parties the appellant's right to equitable relief on the ground relied on in his bill then and in his answer and cross-bill now was held barred by his laches. It was also determined in that case that the pendency of this suit did not excuse his delay, for the reason that up to the time of the rendition of the decision in that case appellant had not interposed any pleading under which the relief sought by his bill of 1900 could have been obtained. This appears fully from the opinion of this court in *Wilcoxon v. Wilcoxon*, 199 Ill. 244, 65 N. E. 229, and the whole matter is fully brought before the court by the supplemental bill filed by appellees in this case.

If argument were required to show that appellant had not raised the issue as to the inuring of the title under his father's deed to appellees to him, we would call attention to the fact that appellant sued out a writ of er-

ror from the Appellate Court and took this case there to have the order of dismissal reviewed. If the issue now involved as to appellant's interest in the freehold had been in the case then, the Appellate Court would have had no jurisdiction. After the reversal by the Appellate Court appellant then presented issues by his pleadings involving a freehold, and hence the present appeal is properly brought to this court. There was no such question in this case until December, 1903.

We therefore find that appellant took no steps, by way of cross-bill or otherwise, to obtain relief on the theory that he was, in equity, one-fourth owner in these premises, or that appellees had been guilty of a fraud in concealing from him the existence of the deed, notwithstanding full information of these facts came to him on the 27th day of December, 1887. Leaving out of view for the time being the litigation under the bill of 1900, we thus see that we have a period of about 15 years after appellant discovered his rights before he took any action for equitable relief. There is no difference in the application of the equitable doctrine of laches whether it is interposed against relief sought by an original bill or by cross-bill. The equitable doctrine against the enforcement of stale claims is not a rule of pleading. It is one of the fixed doctrines of courts of equity that nothing can call forth this court into activity but conscience, good faith, and reasonable diligence, and the absence of any of these elements is equally fatal to a recovery, whether they appear in a cross-bill or in an original bill. A cross-bill, when filed to obtain affirmative relief, like an original bill, should set forth equitable grounds of relief and show a state of facts upon which a court of equity could be called upon to act if the same grounds were presented in an original bill. *Gage v. Mayer*, 117 Ill. 632, 7 N. E. 97; *Story's Eq. Pl.* (10th Ed.) § 628. There is no excuse offered by appellant which in equity can relieve him from the imputation of laches in this case that has not already been adjudged insufficient by this court in the former case. We regard his situation even worse now than it was when this matter was before us on the former occasion.

Without deciding whether appellant is barred under the doctrine of *res judicata* by virtue of the former decree, we hold that appellant's delay in bringing to the attention of the court the grounds relied on for equitable relief in his answer and cross-bill in this case is a bar to his right of recovery.

The decree of the circuit court will be affirmed.

Decree affirmed.

HAND, C. J., and CARTWRIGHT and SCOTT, JJ., dissent.

(230 Ill. 170)

HILT v. SIMPSON et al.

(Supreme Court of Illinois. Oct 23, 1907.
Rehearing Denied Dec. 4, 1907.)

1. WRIT OF ERROR—EQUITY—FINDING—REVIEW.

Where an equity suit was heard on evidence given by witnesses in open court, the findings will not be reversed, unless clearly against the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3970-3978.]

2. TRUSTS—CONSTRUCTIVE TRUSTS—EVIDENCE.

Where land was conveyed to defendant by his father, subject to a parol agreement that defendant on the father's death should convey the land to complainant and her sister, defendant held the land as a constructive trustee for his sisters, within *Hurd's Rev. St.* 1905, c. 59, § 9, providing that such trust need not be in writing, but may be proved by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, §§ 15-24.]

Error to Circuit Court, Madison County; B. R. Burroughs, Judge.

Bill by Hattie Simpson and another against Charles E. Hilt and others. From a judgment for complainants, defendant Charles E. Hilt brings error. Affirmed.

This is a bill in chancery, filed by Hattie Simpson and Orilla Bonham against Charles E. Hilt and others, to establish a resulting or constructive trust in certain real estate conveyed to Charles E. Hilt by Joseph Hilt December 18, 1903. The circuit court of Madison county, upon hearing, sustained the bill and entered a decree finding that Charles E. Hilt was a trustee of the legal title for the use of complainants, and ordered a conveyance of the legal title to the complainants in equal parts. Charles E. Hilt sues out this writ of error to obtain a review of the cause by this court. Joseph Hilt was the father of five children—three sons, Charles E., Stephen, and Henry Hilt, and two daughters, Hattie Simpson (née Hilt) and Orilla Bonham (née Hilt). Prior to June 10, 1890, Joseph Hilt was the owner of a farm, located in Madison county, of 100 acres, valued at about \$9,000 or \$10,000. He also owned a 12-acre tract of land, which is designated as the "St. Jacobs property." This piece of land is valued at about \$3,500. On June 10, 1890, Joseph Hilt conveyed the 100-acre farm to his three sons by way of gift, reserving the rents and profits during his natural life. Prior to December 18, 1903, Joseph Hilt resided on the 12-acre tract with Amanda J. Hilt, who was his third wife. The evidence shows that it was the fixed purpose of Joseph Hilt to make a distribution of his property among his five children, that in pursuance of this purpose he had conveyed the 100-acre farm to the three sons, and that he retained the St. Jacobs property with the intention ultimately of giving it to his two daughters. The evidence shows that Joseph Hilt caused a will to be prepared, in which he devised the St. Jacobs property to the daughters; but for some reason the will was

never fully executed. In the year 1903 domestic troubles arose between Joseph Hilt and his wife, which finally resulted, on December 18, 1903, in a separation, and in consideration of \$500 paid her the wife released Joseph Hilt from any further liability for her maintenance and from paying any debts that might be made by her. It was also understood that Amanda J. Hilt would join her husband in a conveyance of the St. Jacobs property to any one whom he might designate. Philip Baer, a lawyer residing at St. Jacobs, was the confidential friend and adviser of Joseph Hilt. On the day of the separation Joseph Hilt consulted with his attorney in regard to a conveyance of the St. Jacobs property in such way that Joseph Hilt could retain the control of the property and enjoy the rents and profits thereof during his life, and that the two daughters would succeed to the remainder at his death. Joseph Hilt requested Mr. Baer to take the title in his name and hold it for the daughters. This Mr. Baer declined to do, and told him to make some other arrangements. Joseph Hilt then said he would see Henry, and later he said he would see his son Charles, and afterwards he conveyed the property in question to his son Charles, with the understanding that Charles should deed it to his sisters after his father's death. At the time the deed was executed two mortgages were made by Charles E. Hilt and his wife—one to secure a note of \$250 and the other a note of \$2,750. The \$250 note and mortgage were made to Mr. Baer to secure a loan to Joseph Hilt, made to raise a part of the money paid to Amanda J. Hilt in settlement of her claim for maintenance. This \$250 note was subsequently paid by Joseph Hilt. The \$2,750 note was retained by Joseph Hilt as a sort of security that Charles E. Hilt would carry out his agreement. Soon after the execution of these several instruments, Joseph Hilt, being without any home of his own, went to reside with plaintiff in error, Charles E. Hilt. About six weeks after its date the \$2,750 note was canceled by Joseph Hilt. Joseph Hilt remained in the family of his son Charles until his death, which occurred on March 4, 1905. After the death of his father Charles E. Hilt was called on to convey the St. Jacobs property to his two sisters, defendants in error, and, while he admitted to many persons that he received the title to these premises with the understanding and promise on his part that he would convey it to his sisters after his father's death, he has neglected and refused to execute the trust, denies the same now, sets up title in himself, claims that the deed was made in consideration that he would support his father during his lifetime, and pleads and relies on the statute of frauds.

L. P. Zerwick, J. Paul Carter, and Dill & Pfingsten, for plaintiff in error. B. G. Wag-

goner (D. H. Mudge, of counsel), for defendants in error.

VICKERS, J. (after stating the facts as above). This case was heard on evidence introduced in open court. The judge who tried it saw the witnesses and had opportunities of determining their credibility that are not open to us. Under such circumstances this court will not reverse a case on the evidence unless the finding is against its clear weight. *Fabrice v. Von Der Brelle*, 190 Ill. 460, 60 N. E. 835; *Van Vleet v. De Witt*, 200 Ill. 153, 65 N. E. 677; *Dowle v. Driscoll*, 203 Ill. 480, 68 N. E. 56; *Village of St. Anne v. Coyer*, 223 Ill. 96, 79 N. E. 54. Such is not the state of this record. We have read all of the evidence, and we are entirely satisfied with the conclusion reached by the court upon the facts.

Plaintiff in error insists that his defense under section 9 of chapter 59 of Hurd's Revised Statutes of 1905 is valid, even conceding that the weight of the evidence establishes a parol promise on his part to hold the title in trust and to convey to his sisters on the death of their father, because there is no written evidence of such trust as required by the statute. Assuming the facts to be as found by the court below, plaintiff in error's position cannot be sustained. The section of the statute relied on by plaintiff in error is as follows: "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; or else they shall be utterly void and of no effect: provided, that resulting trusts or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol." Under the facts found, this case falls under the proviso in the above statute as construed by this court in *Stahl v. Stahl*, 214 Ill. 131, 73 N. E. 319, 68 L. R. A. 617, 105 Am. St. Rep. 101, and previous decisions of this and other courts, cited and reviewed in the above case. This case cannot be distinguished in principle from *Stahl v. Stahl*, supra, and the line of cases upon which that decision rests. In that case, as in this, the ancestor made a conveyance to one of her children, with the understanding that the grantee would divide and distribute the estate equitably between the brothers and sisters of the grantee. After the death of the grantor, the grantee conveyed to another of his brothers, who had full notice of the fiduciary relations between the mother and the first grantee. Upon a full review of the cases it was there determined by this court that the facts presented a case in which a court of equity may properly raise a constructive trust and convert the holder of the legal title into a trustee for the benefit of all the children of the de-

ceased mother. If the authorities in this state were again reviewed by us, it would be but a repetition of what we have already said in our former decision upon a state of facts essentially like the facts in that case.

For the reasons given in *Stahl v. Stahl*, supra, and upon the authority of that case, the decree of the circuit court of Madison county is affirmed.

Decree affirmed.

(230 Ill. 204)

ILLINOIS CENT. R. CO. v. STEWART.

(Supreme Court of Illinois. Oct. 23, 1907.

Rehearing Denied Dec. 4, 1907.)

1. MUNICIPAL CORPORATIONS—SIDEWALKS—POWER TO ESTABLISH.

Municipal corporations can establish the grade of sidewalks within their limits, and determine the location and character of the walks and the material to be used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 723.]

2. RAILROADS—STREET CROSSINGS—MAINTENANCE.

A railroad is under a statutory duty to maintain its crossings in a reasonably safe condition, and cannot justify a negligent performance of this duty on the ground that a certain crossing was put in under the mandate of a city ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 959.]

3. TRIAL—INSTRUCTIONS.

The refusal of an instruction, covered by other instructions given, is not error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659.]

Appeal from Appellate Court, Third District, on Appeal from Circuit Court, McLean County; T. M. Harris, Judge.

Action by Harry Stewart against the Illinois Central Railroad Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant again appeals. Affirmed.

This is an action on the case, commenced by Harry Stewart against the Illinois Central Railroad Company in the circuit court of McLean county, to recover damages for a personal injury sustained by appellee by a fall upon a sidewalk at a crossing over the tracks of the appellant company at Main street in the village of Heyworth. A verdict and judgment in the circuit court against the railroad company for \$1,300 has been affirmed by the Appellate Court for the Third District, and from that judgment the railroad company has appealed to this court. Appellant has two railroad tracks running north and south through the village of Heyworth, and crossing Main street in said village. Prior to the injury a sidewalk five feet in width, constructed of boards, was located on the north side of Main street and across the two tracks of the railroad company. In 1904, the village authorities determined to replace the board sidewalk on the north side of Main street with a concrete sidewalk eight feet in width, and with this in view passed an ordi-

nance changing the grade of Main street, and providing that the property owners fronting on said street should build said sidewalk within 30 days after publication of the ordinance, and upon failure of such owners to build the walk that the village should construct it and collect the cost thereof by special tax. The railroad company refused to allow the village authorities to construct any walk across that portion of the right of way occupied by its tracks and the space between the tracks; but it was agreed that the village should construct a sidewalk across the remainder of the right of way and that appellant would pay for it. In October, 1904, appellant constructed a plank crossing eight feet in width across its tracks, extending from west to east, from the ends of the ties on the west side of the west track to the ends of the ties on the east side of the east track, at the grade fixed by the ordinance. This new section of plank crossing was put in before the old board walk had been removed on the portion of the crossing extending beyond the ends of the new walk, and when completed the new walk was three or four inches higher than the old walk, and its north line was about two feet south of the north line of the old walk; in other words, the new walk was out of line with the old walk two feet south, on the north side. On the night of October 11, 1904, about the hour of 7 o'clock, appellee, a boy about 16 years of age, who resided in the country, was passing over the sidewalk on the old sidewalk, going west. He was not aware that any change had taken place in the sidewalk, and when he came in contact with the elevated new walk he struck the elevation with his foot, and was thrown down, and both bones of his forearm and his wrist were broken.

Charles L. Capen (John G. Drennan, of counsel), for appellant. Lillard & Williams and N. W. Brandlean, for appellee.

VICKERS, J. (after stating the facts as above). Appellant first insists that it built the walk in question under the mandate of the village ordinance, and that, inasmuch as it complied with the ordinance as to the width and grade, it is not liable, and that, if any liability exists, it is against the village, and not against the appellant. It is undoubtedly within the power and the duty of municipal corporations to establish the grade of sidewalks within their limits, and to determine the location and character of the walks to be constructed and the material to be used. It appears that the village of Heyworth had passed an ordinance providing for the construction of a concrete sidewalk at the place in question on Main street. The appellant did not construct a sidewalk of the character required by the ordinance, in so far as the material used is concerned. The ordinance of the village only authorized the construction of a concrete sidewalk. It is true that

there is evidence tending to show some members of the village board verbally consented to a substitution of a plank walk across appellant's tracks; but it cannot be seriously contended that such consent operated as a repeal of the ordinance in so far as it applied to appellant's right of way. But we do not regard this circumstance as of controlling importance, since it was not the substitution of plank for concrete material that caused the injury. If a concrete walk had been constructed of the same width and elevation, the injury might have occurred in the same manner that it did. In other words, we do not regard the unauthorized substitution of planks for concrete as being a distinct ground of liability. Appellant was under a statutory duty, wholly independent of the ordinance, to maintain its crossings in a reasonably safe condition, and it cannot justify the negligent performance of this duty on the ground that the crossing was put in under the mandate of the city ordinance. It was the plain duty of the appellant to obey the mandate of the statute, and if it negligently failed to observe that duty, and in consequence appellee was injured, it will not be permitted to set up the defense that its disregard of the statute was at the mandate of the village. We would not be understood as holding that appellant was not under obligations to comply with all reasonable and valid ordinances passed by the municipality. On the contrary, it was the duty of the appellant to comply with the ordinance and at the same time observe its statutory duty to the public. If, as a matter of fact, the sidewalk constructed by the appellant was a dangerous obstruction to persons walking along the sidewalk in the observance of due care, it cannot be said that the city ordinances authorized appellant to erect a dangerous obstruction in the sidewalk and leave it there. The city ordinance in question cannot be so construed, and, if it could, the ordinance would have to be held invalid in so far as it purported to legalize acts which are forbidden both by statute and the common law.

Appellant insists that leaving the perpendicular step in the sidewalk is not actionable negligence, that appellee was not in the exercise of ordinary care for his own safety, and that the damages are excessive. These are all questions of fact, which are conclusively settled adversely to appellant's contention by the decision of the Appellate Court.

Appellant complains of the refusal of a number of instructions offered by it. These instructions, except Nos. 13 and 14, present, in various forms, appellant's contention in reference to its justification under the ordinance, and what has already been said in disposing of that contention sufficiently shows that in our opinion the court did not err in refusing these instructions. Instructions Nos. 13 and 14, which were refused by the court, relate to the care and caution that should be

exercised by a person in passing along a street or sidewalk, and sufficient reason for refusing to give these instructions is found in the fact that the court instructed the jury very fully upon the duty of appellee to exercise reasonable care for his own safety in other instructions given for appellee. This question is fully covered by instructions 10, 11, and 12 given on behalf of the appellant. There was no error in refusing any of the instructions asked by appellant.

Appellant contends that the court erred in giving instructions Nos. 2 and 3 on behalf of appellee. These instructions are not open to the objections made to them.

Finding no reversible error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(230 Ill. 196)

GLANZ et al. v. MILLER.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 4, 1907.)

1. PARTITION—TAX DEEDS—VACATION DECREE.

Where, in partition, complainant was entitled to the vacation of certain tax deeds held by defendants because of defects in the proceedings, but defendants did not show the nature and extent of the interests of each of them under such deeds, the decree properly left the matter open, and was not objectionable for failure to find the specific amounts due to each of the holders of the tax titles or their grantees.

2. SAME—PARTIES.

Where, in partition, there was no evidence that S. made any claim to an interest in the premises, or could have done so, he was not a necessary or proper party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, §§ 118-129.]

3. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Where certain tax deeds were found to be void because of defects to which the testimony of an alleged incompetent witness did not refer, the admission of his evidence was not prejudicial to the claimants thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

Error to Superior Court, Cook County; W. M. McEwen, Judge.

Action by Edward Mathias Miller against Louis D. Glanz and others. From a judgment for complainant, certain defendants bring error. Affirmed.

Jacob Glos and John R. O'Connor, for plaintiffs in error. Sherman C. Spitzer, for defendant in error.

DUNN, J. Edward Mathias Miller filed his bill in the superior court of Cook county for the partition of certain lots in the village of Des Plaines, of which he was tenant in common with Louis D. Glanz and Edward M. Swain, and for the cancellation of 13 tax deeds made to Jacob Glos for portions of the premises. Jacob Glos, Emma J. Glos, August A. Timke, and R. S. Barber, who were

interested in the tax deeds, were made defendants, and answered, denying the allegations of the bill. There was a decree setting aside the tax deeds, upon payment of the amount found by the decree to be equitably due, and ordering a partition of the premises. This writ of error is prosecuted by the above-named defendants interested in the tax deeds to reverse that decree.

Various conveyances, including a trust deed of the premises embraced in the tax deeds, had been made by the plaintiffs in error. Judgments had been recovered against some of them, and it was impossible from the evidence produced to ascertain the respective rights of those interested in the various sales. The decree finds the several amounts due on account of the respective sales, the offer of the complainant to pay such amounts, and the refusal thereof. It thereupon directs the complainant to pay into court the sums so found due, for the use of the defendants, respectively, interested in the several sales, as their interests might thereafter be determined. The plaintiffs in error insist that the decree should have found the specific amounts due to each of the several holders of the tax titles or their grantees. There was no question as to the right of the complainant to have the tax deeds set aside on account of the defects in the proceedings to obtain them. He could not, and the defendants did not, show the nature and extent of each defendant's interest. The decree left the matter open, so that, upon a showing being made, the parties entitled to the money could easily secure it. We think this provision of the decree was proper. *Glos v. Hanford*, 212 Ill. 261, 72 N. E. 439; *Glos v. Ault*, 221 Ill. 562, 77 N. E. 939.

It is objected that Sherman C. Spitzer was the real party in interest, at least as to a part of the premises, and should have been a party to the suit. This claim is based on Swain's testimony as to the manner in which he acquired title. Swain, Glanz, and Miller had the legal title at the time the bill was filed. Swain testified that he claimed the absolute ownership in his own right. There was no evidence that Spitzer made any claim to an interest in the premises, or could have done so, and on the facts appearing he was not a proper party.

The third ground of error presented is that one of the solicitors of Glanz and Swain testified on the hearing. The decree found all the tax deeds void on account of defects to which the testimony of this witness did not refer. His testimony might all be stricken from the record without affecting the decree in that respect. There was no controversy over the question of possession, and his testimony on that point was uncontradicted. In other respects his testimony was immaterial.

A motion was made by defendant in error to strike the certificate of evidence from the record, and was taken with the case. It is

a grave question if that motion should not be sustained; but we have preferred to dispose of the case on its merits, and the decree will be affirmed.

Decree affirmed.

(230 Ill. 343)

DEADMAN et al. v. YANTIS et al.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 5, 1907.)

1. WILLS—CONSTRUCTION—ESTATE DEVISED.

Testator devised certain land to his wife for life, and directed that during her life his daughter and her two children named should live on the land and enjoy the rents and profits thereof, and at the wife's death the land should go to the daughter and such two children and their survivors and heirs and assigns forever. *Held*, that the widow acquired a life estate in the land, and that the daughter and her children and their survivors took a vested fee-simple title in remainder.

2. SAME—VESTED ESTATES.

Where the title of tenants in fee became vested on the death of their testator, it was subject to the law of conveyance, partition, and sale on execution for the debts of the owners.

3. PARTITION—PROPERTY SUBJECT—INTERESTS OF REMAINDERMEN.

Remaindermen owning an interest in land subject to an unexpired life estate are entitled to partition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 41.]

4. EXECUTION—PROPERTY SUBJECT—VESTED REMAINDER.

A vested remainder is subject to levy and sale on execution against the remainderman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 79, 142.]

5. SAME—INCUMBRANCES—SALE OF REMAINDER—EXECUTION.

A remainderman's interest, which is not contingent, though incumbered by a homestead, may be levied on and sold subject to the homestead right of the testator's widow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 79, 142.]

6. PARTITION—REMAINDERS.

The interest of remaindermen, if not contingent, though subject to the homestead right of the testator's widow, may be partitioned among the heirs, subject to the right of dower and homestead of the widow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, § 41.]

7. JUDGMENT—ESTOPPEL.

Where a remainderman was properly served in a suit for partition, but did not appear nor contest complainant's title to the property, such remainderman, while continuing to hold her share of the proceeds of the sale, was estopped by the judgment to claim that the complainant had no interest in the property, though the partition proceedings were irregular.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 260.]

8. PARTITION—TITLE OF CLAIMANTS—LACHES.

Where a remainderman who was a party to a prior partition suit took no steps to set aside a master's deed therein for more than 10 years after the deed was made, and offered no defense to such suit, she was barred by laches from thereafter claiming an interest in the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partition, §§ 111-113.]

9. SAME—IRREGULARITIES—RIGHT TO COMPLAIN.

Where testator's widow was entitled to a life estate in an entire tract devised, that the court in partition erroneously limited such life estate to 80 acres of the tract was not a defect in the proceedings of which the remainderman could complain.

10. EXECUTION—PURCHASER—OBLIGATION—BONA FIDES OF DEBT.

A purchaser of land at an execution sale is not required to look beyond what is disclosed on the face of the record to ascertain if the judgment was founded on a bona fide debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 769, 780.]

11. JUDGMENT—VACATION—FRAUD.

A judgment fraudulently obtained after the debt has been paid is voidable only at the instance of the party aggrieved, when relief is applied for in apt time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 722, 723.]

12. SAME—LACHES.

A bill to set aside a judgment as obtained by fraud after the debt was paid, not brought until more than 10 years had expired after the judgment was recovered, was barred by laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 735, 736, 743.]

13. MORTGAGES—DEED ABSOLUTE ON FACE—BURDEN OF PROOF.

The burden of proof is on the party alleging that a deed absolute on its face was intended as a mortgage to establish the fact by clear and convincing evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 95, 96.]

14. SAME—ABSOLUTE DEED WITH PAROL DEFEASANCE.

An absolute deed with a parol defeasance is valid, and the party entitled to the equity may maintain a bill to redeem, if the fact can be established by the quantity of proof which the law demands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 83.]

15. SAME—PAROL DEFEASANCE—EXTINGUISHMENT.

A parol defeasance may be extinguished by parol.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 94.]

16. SAME—REDEMPTION—LACHES.

Where the legal title is conveyed to secure a loan, no action is necessary to divest the right to redeem, which may be lost by limitation or laches.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1749, 1822-1824.]

17. SAME—CONVEYANCE TO THIRD PERSON.

Where a deed absolute was intended as a mortgage, and the party entitled to redeem makes a sale to a third person and directs the holder of the deed to convey the premises to such purchaser, the latter takes title divested of the condition of defeasance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 94.]

18. SAME—LACHES.

Where a remainderman conveyed his interest by a deed to another as security, and later induced the grantee to convey the land to Y., to whom such remainderman had sold it, the remainderman was barred by laches 12 years after such conveyance to claim that the deed to Y. was in fact a mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1749.]

Appeal from Circuit Court, Shelby County; Truman E. Ames, Judge.

Bill for partition by Elzina Deadman and others against Cordella Yantis and others. From a decree dismissing the original bill and cross-bills filed by Mary J. Dixon, who by amendment was made a complainant, and by John W. Dixon, they appeal. Affirmed.

This is an appeal from a decree of the Shelby county circuit court dismissing, for want of equity, a bill for partition filed by Elzina Deadman against Cordella Yantis and others. Mary J. Dixon, who was a defendant in the original bill, was by amendment made complainant. John W. Dixon, another defendant, filed an answer confessing the material allegations in the bill, and subsequently filed a cross-bill setting up certain facts and praying relief, which will be more fully stated hereinafter.

The original bill alleged: That William Claridge was the owner of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 15, the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 14, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 14, township 12 N., range 4 E., in Shelby county, at the time of his death, which occurred May 29, 1880; that said Claridge died testate, and his will was duly probated in Shelby county; that by his last will William Claridge devised the 200 acres of land above described to his widow, Elizabeth M. Claridge, during her lifetime, with remainder in fee to his daughter, Mary Jerusha Dixon, and her two children, John William Dixon and Elzina Dixon (now Elzina Deadman), in equal parts, as tenants in common. The clause of the will which is supposed to vest the above interests in the parties is the third, and is as follows: "Third—I do give, devise and bequeath unto my wife, Elizabeth M. Claridge, for and during her natural life, my home farm on which I now live, consisting of two hundred acres, described as follows, to-wit: The north half of the southeast quarter of section 15, and the north half of the southwest quarter of section 14, and the southeast quarter of the southwest quarter of section 14, all in township 12, north, range 4, east, in Shelby county, in the state of Illinois; and it is my will and desire, and I do direct, that during the life of my said wife my said daughter, Mary Jerusha Dixon, and her children, William Dixon and Elzina Dixon, shall live upon said home place and enjoy the use and rents and profits thereof, and at the death of said wife I will and devise said home place to my daughter, Mary Jerusha Dixon, and her said children, William Dixon and Elzina Dixon, and the survivors of them, and to their heirs and assigns forever." The bill alleges that on the 9th of January, 1905, the widow, Elizabeth M. Claridge, died, and that by virtue of said will the title to the real estate thereupon became vested in Mary Jerusha Dixon and her two children, John W. Dixon and Elzina Deadman, as tenants in common, each owning one-third undivided interest, and it is aver-

red that the title in fee did not vest in Mary J. Dixon and her two children prior to the death of the life tenant. Cordelia Yantis, John W. Yantis, E. A. Richardson, George D. Chafee, and others, were made defendants, and as to the interest or claim of defendants above named it is charged that "they claim some interest in or to said premises, or a part thereof, as grantees, mortgagees, judgment creditors, or tenants, which said interests, and each of them, if any there are, are illegal and void and constitute a cloud upon the title" of the parties in interest. There is no other averment in the original bill respecting the interests or claims of the defendants than the general statement above quoted. The bill concluded with the usual prayer for partition.

Cordelia and John W. Yantis filed a joint and several answer to said bill, admitting the ownership and death of William Claridge, and that the lands were devised as stated in the third clause of the will. There defendants, however, contended for a somewhat different construction of the clause of the will devising the lands in question. The answer denies that the title did not vest under the will until the death of the life tenant, and charges that by the will the fee vested in Mary J. Dixon and her two children subject to the life estate of Elizabeth Claridge. The answer denies that Mary J. Dixon and her children, or either of them, have any interest whatever in said real estate, and avers that Cordelia Yantis owns all of said real estate in fee simple, and that the title of Cordelia Yantis was obtained in the following manner: On February 17, 1890, John W. Dixon and wife conveyed, by warranty deed, his undivided interest in said premises to George D. Chafee, and that on February 17, 1892, Chafee conveyed the same premises to Cordelia Yantis; that on October 2, 1891, the said John W. Dixon conveyed, by quitclaim deed, all his interest in the premises to E. A. Richardson, and on May 19, 1892, said Richardson conveyed the said premises to Cordelia Yantis. The answer then alleges a recovery of a judgment in favor of J. J. Chrissberry against John W. and Mary J. Dixon, and, by virtue of an execution on said judgment levied upon the interest of Mary J. Dixon, Cordelia Yantis obtained a sheriff's deed, under said sale, September 29, 1894, to the interest of Mary J. Dixon in the premises. By the conveyance aforesaid it is alleged that Cordelia Yantis became the owner in fee simple of a two-thirds interest in said land, subject only to the life estate of the widow, Elizabeth Claridge. The answer then avers that on October 1, 1894, Cordelia Yantis, as owner of a two-thirds interest in fee, filed her bill for partition against Elzina Deadman, and avers that such proceedings were had in that case as resulted in a decree of the circuit court of Shelby county finding that Cordelia Yantis was the owner of two-thirds, and Elzina Deadman the owner of the remaining

one-third. The answer shows that commissioners were appointed in that proceeding, who found the lands not susceptible of division and partition and assigned the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 14 and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 12, being 80 acres of the 200 acres, to Elizabeth Claridge in full of her interest in the whole. The answer shows that the lands were appraised in separate tracts at \$3,200; that the sale was had on November 30, 1894; that Cordelia Yantis bought the same for \$3,275; that the master issued a certificate of sale to her, which was by her assigned to C. W. Steward, upon which a master's deed was issued April 1, 1895, conveying to Steward the whole of said premises, including the 80 acres set off to the widow, subject, however, to her life estate in said 80 acres; that the sale was afterwards approved by the court; and that Elzina Deadman received, in full of her one-third interest, \$1,078.41, and receipted for the same. The answer charges that Elzina Deadman had been duly served with process and had full knowledge of all of said proceedings, and that she received and receipted for the proceeds of said sale, and that the purchaser, Steward, went into possession of 120 acres of said land; the widow being in possession of the other 80. It is alleged that by virtue of said partition proceeding and sale said Steward became the owner in fee simple of the whole of said tract, subject to the life estate in 80 acres, and that he went into possession and remained in open and notorious possession from thence until he conveyed the same; that afterwards the widow leased the said 80 acres to said Steward; and that under the said lease said Steward was in possession of the 80 acres and of the 120 acres as owner. It is averred that said Steward made valuable and lasting improvements upon said premises after he obtained said deed and before the commencement of this suit; that on June 10, 1904, said Steward, in consideration of \$5,000, conveyed the whole of said premises to Cordelia Yantis, subject to the rights of the widow therein; that Cordelia Yantis succeeded to the immediate possession of said premises and has been in possession all of the time until the bringing of this suit, and still is in possession of same. It is averred that said Steward and Cordelia Yantis paid all of the taxes assessed upon said premises under claim and color of title made in good faith, and that such payment of taxes was made for more than seven successive years preceding the filing of the bill. The answer claims title by limitation, and sets up the laches of Elzina Deadman in bringing this suit as a bar to the same. By an amendment to her answer Cordelia Yantis alleges that she made valuable and lasting improvements on the land after she obtained the deed from Steward.

John W. Dixon filed a cross-bill, in which he claimed to be the owner of a one-third undivided interest in the premises, and charg-

ed that Mary J. Dixon and Elzina Deadman were the owners of the other undivided two-thirds interest therein. He charges in his cross-bill that his undivided interest is subject to a certain indebtedness due to John W. or Cordella Yantis, secured by a mortgage upon his interest, brought about as follows: On February 17, 1890, John W. Dixon borrowed from George D. Chafee \$500 and executed to Chafee a mortgage in the form of a deed for said premises to secure a note for said amount; that on October 2, 1891, he became indebted to E. A. Richardson in the sum of \$100, and executed to him a mortgage in the form of a deed upon said premises to secure said debt; alleges that on February 17, 1892, said Chafee and Richardson were desirous of receiving their money, and John W. Dixon arranged with John W. Yantis for the money to pay said indebtedness, and Chafee and Richardson were to transfer said security to Yantis; that in pursuance of this arrangement Chafee and Richardson, at the request of Dixon, and by arrangements with John W. Yantis, conveyed said premises to Cordella Yantis; avers that said Yantis paid the indebtedness to Chafee and Richardson and advanced to Dixon the further sum of \$400, making a total of about \$1,200; that John W. Dixon executed his notes to said Yantis for said amount and received from said Yantis bond for a deed for the reconveyance of said premises upon the payment of said indebtedness; alleges that he has made payments in money and property to a large amount, and that there is not to exceed the sum of \$600 now due on said indebtedness; prays for an accounting and offers and tenders to pay whatever may be found to be due upon such accounting; and asks that the conveyance to Cordella Yantis be held as a mortgage, and that he be allowed to redeem therefrom. Cordella Yantis and John W. Yantis answered the cross-bill, in which they deny that the transaction by which the title was conveyed to Cordella Yantis was a loan, or that the deed was a mortgage, and reasserted, as in their previous answer to the original bill, that the transaction was a sale, and that the deed was an absolute conveyance made in pursuance thereof. The answer sets up possession, payment of taxes, making of valuable improvements, and insists that John W. Dixon is estopped, by reason of laches, from claiming any rights in the premises.

After replications were filed the cause was referred to a special master to take the proofs and report his conclusions, both of law and fact. The master reported that the original bill and cross-bill were not sustained by the proof, and that the equities were with defendants as to both bills, and recommended a decree dismissing them. Elzina Deadman filed 62 objections to the findings of the master as respects the original bill, and John W. Dixon filed 23 objections to the find-

ings on the cross-bill, all of which were overruled by the master, and the case was heard in the circuit court on exceptions to the master's ruling. The circuit court overruled all exceptions and entered a decree dismissing both the original and cross bills.

The evidence in this case is very voluminous and need not be set out in this statement. The testimony bearing upon such questions of fact as are necessary to be determined will be set out and discussed in the opinion.

R. M. Peadro and Braz D. Tull, for appellants. Walter C. Headen, George B. Rhoads, and Dove & Dove, for appellees.

VICKERS, J. (after stating the facts as above). Under the third clause of the will of William Claridge there can be no doubt that the testator intended that his wife, Elizabeth M. Claridge, should have the 200 acres of land in controversy during her natural life, and that his daughter, Mary J. Dixon, and her children, John W. and Elzina, and the survivors of them, should have a vested fee-simple title in remainder, subject only to the life estate of the widow. The title of the tenants in fee being vested upon the death of the testator, it became subject to the laws of conveyance, partition, and sale on execution for the debts of the owners. That reversioners and remaindermen owning interests in fee in land subject to an unexpired life estate are entitled to partition is well-established law in this state. *Scoville v. Hilliard*, 48 Ill. 453; *Hartmann v. Hartmann*, 59 Ill. 103; *Drake v. Merkle*, 153 Ill. 318, 38 N. E. 654; *Ruddell v. Wren*, 208 Ill. 508, 70 N. E. 751; *Miller v. Lanning*, 211 Ill. 620, 71 N. E. 1115; *Dee v. Dee*, 212 Ill. 338, 72 N. E. 429. It is equally well established that a vested remainder is subject to levy and sale on execution against the remainderman. *Rallsback v. Lovejoy*, 116 Ill. 442, 6 N. E. 504; *Springer v. Savage*, 143 Ill. 301, 32 N. E. 520; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; *Brokaw v. Ogle*, 170 Ill. 115, 48 N. E. 394. In the case last above cited it is held that the remainderman's interest incumbered with a homestead may be levied upon and sold subject to the homestead right of the widow, and that such premises are subject to partition among the heirs, subject to the right of dower and homestead estate of the widow. The rule appears to be otherwise with respect to contingent remainders. *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120.

Since it is contended that the titles of Mary J. and John W. Dixon and Elzina Deadman were divested at different times and by different methods, it will be necessary to consider the case as applicable to each of these parties separately.

First, as to the interest of Elzina Deadman. The evidence shows that the partition

proceeding set up in the answer of John W. and Cordelia Yantis was regularly conducted and resulted in a decree for the sale of the premises; that there was personal service upon Elzina Deadman, as shown by the return of the sheriff of Moultrie county and by the finding of the court in the decree; that in pursuance of the decree a sale was had, and the premises brought approximately their appraised value; that Cordelia Yantis became the purchaser at the sale and received a certificate of purchase, which she assigned to C. W. Steward, upon which a master's deed was issued to Steward April 1, 1895. The evidence also shows that Steward immediately took possession of 120 acres of the land in question and continued to hold the same until June 10, 1904, when he conveyed the premises to Cordelia Yantis. Elzina Deadman made no defense to this bill for partition. Without regard to the validity of the Yantis title to the two-thirds interest which she claimed in that suit as against Mary J. and John W. Dixon, it is clear that, so far as Elzina Deadman is concerned, she is bound by that decree, and will not be heard to say in this or any other suit that Cordelia Yantis had no title. If she desired to question the title of Cordelia Yantis to the interest she claimed, she should have done so in the original partition suit between herself and Cordelia Yantis. Having failed to question her title in that suit, she will not be heard now to say that Cordelia Yantis had no interest, and that the shares claimed by her belonged to other persons. She is estopped by the adjudication in that case from asserting the nonexistence of the Yantis title, which was directly involved and passed on in that litigation. She received the proceeds of her one-third interest, which she has held from the time distribution was made and still holds the same, and does not, by her bill, offer to restore the same to the purchaser at the sale. After the receipt of her share of the proceeds of the sale, Elzina Deadman remained silent when in conscience she should have spoken; now equity will debar her from speaking when in conscience she ought to remain silent. Relying on his title obtained with a knowledge of this appellant, the purchaser took possession and has expended large sums of money in improvements and taxes, and it would be highly inequitable, if not positively fraudulent, to permit his title to be disturbed by one whose silence justified a belief that her claim had been abandoned.

Conceding the existence of irregularities in the partition proceeding, there is, in our opinion, such a want of diligence in applying for relief that a court of equity cannot grant it without relaxing its respect for some of the elementary maxims that have ever controlled in the administration of equitable remedies. The summons in the partition case was served on Elzina Deadman on the 2d day of October, 1894, and the master's deed was

executed on April 1, 1895. She filed her bill in this case on November 1, 1906. There was therefore a delay of more than 10 years from the date of the master's deed and more than 11 years from the service of the summons, and since she offered no defense her acquiescence may well be said to date from the service of the summons. No circumstances exist to shield her from the rule that "equity aids the diligent—not those who slumber on their rights." The scope and effect of this rule, irrespective of any statutory limitation, was stated by an eminent English chancellor as follows: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands when the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence." This salutary rule has been constantly applied by courts of equity in this state from its earliest history down to the present time, and our Reports abound in cases illustrative of its application. In administering their remedies, courts of equity, while sometimes adopting the statutory period of limitation, by analogy have never regarded themselves bound down by any hard and fast rule, but, looking at the parties, their relation to each other, and the surrounding circumstances, have determined the question of diligence in each case according to equity, having due regard for these elementary principles upon which their jurisdiction rests.

This much we have said on the assumption that the partition proceeding was so irregular as to give rise to some equities in favor of this appellant had she applied to the court in due season and in a proper manner, but we fail to find any such irregularities. It is probably true that the court erred in circumscribing the life estate of Elizabeth M. Claridge to 80 acres, when, under the will, she was entitled to a life estate in the entire 200 acres. But even if this should be granted, the life tenant did not complain, but accepted what was awarded her and enjoyed it as long as she lived. Perhaps 80 acres was all she wanted. At all events, this error, if error it was, did the tenants in fee no harm, but was an advantage to them by clearing off the life estate from 120 acres, thereby enhancing the value of the fee. If there is any other irregularity in the partition proceeding, it has not been pointed out, and we have been unable to discover it. We can scarcely conceive of a case in which the complaining party has so little to commend her to the favorable consideration of a court of equity. There was no error in dismissing the original bill so far as Elzina Deadman was concerned.

As to the case of Mary J. Dixon: It will be remembered that Mary J. Dixon is the mother of Elzina Deadman and John W. Dixon. The evidence shows that Mary J. Dixon became surety for her son, John, on

certain notes upon which suit was brought, resulting in a judgment for \$177 against Mary J. Dixon, and by virtue of an execution issued upon said judgment her interest in the 200 acres of land was sold to Cordelia Yantis, and that Illinois W. Hess, who had a judgment against John W. and Mary J. Dixon for \$200, after the expiration of 12 months and within 15 months from the sheriff's sale, redeemed the premises and assigned his judgment and certificate of redemption to Cordelia Yantis, to whom a sheriff's deed was issued for the undivided interest of Mary J. Dixon in 1894. After the sheriff's deed was issued, Mary J. Dixon never took any steps to set aside the sale or redeem therefrom, but appears to have abandoned all claim to any interest in the premises until this suit was brought by her daughter, Elzina Deadman, and she was brought in first as a defendant, and afterwards, by amendment, made a complainant in the original bill. The principal objection made to the judgment against Mary J. Dixon upon which her interest in this farm was sold is a claim that the debt had been paid by the sale of lumber and ties off the land before suit was brought, and that the judgment was therefore based upon a groundless claim. There is some testimony tending to show that a sufficient amount of timber was removed from the premises and sold to the Chicago & Eastern Illinois Railroad Company, through Richardson, to have paid the debt in full, but the evidence is not at all clear upon this point. We do not deem this a question of controlling importance, and hence will not set out and discuss the evidence bearing upon that question. If it was established that no debt in fact existed at the time the suit was brought and judgment rendered, the judgment would simply be voidable on the ground of fraud. The purchaser at an execution sale is not required to look beyond what is disclosed upon the face of the record to ascertain if the judgment was founded upon a bona fide debt. The judgment thus fraudulently obtained is not absolutely void, but is only voidable, at the instance of the party aggrieved, when relief is applied for in apt time. Mary J. Dixon has failed to pursue her remedy with that diligence that is required to give her a standing in a court of equity. All that has been said upon this question in disposing of the case of Elzina Deadman applies to the case of Mary J. Dixon, and for the reasons there given there was no error in dismissing the bill as to her.

The case as to John W. Dixon: By his cross-bill John W. Dixon alleges that his deeds to Chafee and Richardson were intended to secure the grantees for certain indebtedness due from him to them, and that their deeds to Cordelia Yantis were given to secure a loan made for the purpose of obtaining money to liquidate the Chafee and Richardson debts. So far as the deed executed to Chafee is concerned, the evidence sat-

isfactorily shows that it was made as security for a debt of \$500, and the same may be said with reference to the conveyance made by Dixon to Richardson; but, when these parties conveyed to Yantis, the evidence does not support the contention of John W. Dixon that the conveyance to Yantis was likewise intended as a mere security for a debt. Upon this subject E. A. Richardson testifies that John W. Dixon told him that he wanted to sell his interest and straighten up his debts; that Richardson made an agreement with Yantis by which Yantis was to furnish the money to pay Chafee and Richardson and some other claims against Dixon and give Dixon \$400 in cash and take a deed to his interest in the premises; and that this arrangement was consummated. He testifies that the conveyance to Yantis was an absolute conveyance of all interest that John W. Dixon had, and that there was no agreement that Yantis would reconvey to Dixon upon the payment of the amount of money furnished to him by Yantis. Chafee testifies that he made a deed to Yantis in pursuance of some arrangement made by Dixon and Yantis; that he did not know the details of the understanding between them. Yantis testifies that he bought Dixon's interest outright and paid for it, and that Chafee and Richardson made the deeds to Cordelia Yantis, his wife, by the mutual consent of all the parties. He contradicts the claim of John W. Dixon that he agreed, either in writing or otherwise, to reconvey the premises to Dixon upon the repayment to him of the money that he had advanced. John W. Dixon is the only witness who testifies to the alleged agreement to reconvey. He says that he executed his note to Yantis at the time the deed was made, and that a bond was executed to him by Yantis, but was not signed by Mrs. Yantis. He claims that he left the bond with Yantis, and that he has never had possession of it since. This is substantially all the evidence bearing upon the question involved. The burden of proof is upon the party alleging that a deed absolute on its face was intended only as a mortgage to establish such fact by clear and convincing evidence. *Knowles v. Knowles*, 86 Ill. 1; *Bailey v. Bailey*, 115 Ill. 551, 4 N. E. 394; *Keithley v. Wood*, 151 Ill. 566, 38 N. E. 149, 42 Am. St. Rep. 265; *Burgett v. Osborne*, 172 Ill. 227, 50 N. E. 206; *Williams v. Williams*, 180 Ill. 361, 54 N. E. 229; *Heaton v. Gaines*, 198 Ill. 479, 64 N. E. 1061.

Appellants insist that having established that the conveyances to Chafee and Richardson were mortgages, and Yantis having accepted conveyances from them with notice of the character of title in the grantors, the latter will be held to hold the title subject to the same defeasance that existed in the original conveyances, and authorities are cited to sustain the proposition that having established the character of mortgages in these conveyances they will ever be treated as mortgages. Under the established law of

this state, a deed absolute with a parol or verbal defeasance is valid, and the party entitled to the equity may maintain a bill to redeem if the fact can be established by that quantity of proof that the law demands. *Tillson v. Moulton*, 23 Ill. 648; *Hallesy v. Jackson*, 66 Ill. 139; *Pearson v. Pearson*, 131 Ill. 464, 23 N. E. 418. While a condition of defeasance may rest in a parol or verbal agreement between the parties, it may be extinguished in the same way. When the legal title is conveyed to secure a loan, no action is necessary to divest the right to redeem. The entire legal title is passed by the deed. *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650. The right to redeem may be lost by limitation or laches. Where a deed has been made which was intended as a mortgage, and the party having the right to redeem makes a sale and directs the holder of the legal title to convey the premises to the purchaser, such purchaser will take the title divested of the condition of defeasance. *Maxfield v. Patchen*, 29 Ill. 39; *Carpenter v. Carpenter*, 70 Ill. 457; *West v. Reed*, 55 Ill. 242; *Cramer v. Wilson*, 202 Ill. 83, 66 N. E. 809. The preponderance of the evidence shows that John W. Dixon made a sale to Yantis, and that the conveyance was made in pursuance of such arrangement and by his direction. There is here also a want of diligence on the part of John W. Dixon to assert his rights. The deeds to Mrs. Yantis were made in 1892, and there is no satisfactory explanation given why 12 years should be allowed to elapse before any attempt was made to set up his right to redeem.

Our conclusion is, upon the whole case, that neither Elzina Deadman, Mary J. Dixon, nor John W. Dixon has any title, rights, or interests in the premises involved, and that there was no error in dismissing the original and cross bills for want of equity.

The decree of the circuit court of Shelby county will be affirmed.

Decree affirmed.

(230 Ill. 105)

CHICAGO TERMINAL TRANSFER R. CO. v. REDDICK.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 5, 1907.)

1. MASTER AND SERVANT—DEATH OF SERVANT—FELLOW SERVANTS—QUESTION OF LAW OR FACT.

Whether two servants in the employ of a common master are fellow servants is usually a question of fact; but, if there is no controversy as to the facts and the conclusions to be drawn therefrom, the question may become one of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1062.]

2. SAME—VICE PRINCIPAL.

If a master has conferred on one member of a class of workmen carrying on a particular branch of his business authority to control the movements of the men under his charge, the servant, while in the exercise of such authority,

stands in the place of the master, and is not a fellow servant to those under his direction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 422, 448.]

3. SAME—RAILROADS—SWITCHING CARS.

Defendant's railroad yardmaster had directed D., the foreman of one switching crew, to clear a specified switch track, and had directed intestate's foreman, K., who was in charge of another crew, to place certain cars on such track. K., with knowledge of the directions given to D., but without informing himself as to whether D.'s crew had cleared the track, ordered intestate to cut off certain cars of a train and kick them by a flying switch onto such track. Intestate mounted one of the cars for such purpose and was killed by a collision between the cars so cut off and one which had been left on the track by D. Held, that K. was not intestate's fellow servant with reference to such operation, but a vice principal, and that the master was liable for his negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 428, 442.]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Theodore Brentano, Judge.

Action by James Reddick against the Chicago Terminal Transfer Railroad Company. From a judgment for plaintiff by the Branch Appellate Court, First District, defendant appeals. Affirmed.

Jesse B. Barton, for appellant. James C. McShane, for appellee.

HAND, C. J. This was an action on the case commenced by the appellee in the superior court of Cook county, against the appellant, to recover damages for the death of his intestate, John Russler, alleged to have been occasioned by reason of the negligence of one Frank J. Kennedy, who was in the employ of the appellant as the conductor (or foreman) of a switching crew of which Russler was a member. The case was submitted to the jury upon a declaration containing two counts, to which the general issue was filed. The jury returned a verdict in favor of the appellee for \$8,500, which judgment has been affirmed by the Branch Appellate Court for the First District, and a further appeal has been prosecuted to this court.

At the close of all the evidence the appellant made a motion for a directed verdict, which motion was denied, and the sole contention made in this court as a ground of reversal is that the court erred in denying said motion, as it is said it clearly appears from the undisputed evidence that John Russler and Frank J. Kennedy, by reason of whose negligence it is averred said Russler lost his life, were fellow servants. It appears from the evidence that two switching crews were working in the yards of the appellant; that Frank J. Kennedy was the foreman of one crew and James Doyle the foreman of the other crew; that shortly before 3 o'clock on the morning of October 30, 1903, when Doyle and Kennedy were both present, the appellant's yardmaster directed Doyle, who with his crew was working in the west part of the yards, to remove the cars from track No.

7, and Kennedy, who with his crew was working in the east part of the yards, to collect certain cars and place them on track No. 7. The Kennedy crew consisted of an engineer, a fireman, and Kennedy, who was conductor or foreman, and two switchmen Russler and Hitzelberger. Shortly after said orders had been given to Doyle and Kennedy, the engine of the Kennedy crew had hold of a train consisting of 23 cars, 4 or 5 of which cars Kennedy directed to be placed upon track No. 7. Hitzelberger lined up the switches for track No. 7, and Kennedy gave the engineer the signal to back up the train. As the rear end of the train passed Kennedy and Russler, Kennedy directed Russler to cut off the cars, which were located upon the rear end of the train, which were to be placed upon track No. 7. Russler mounted the east car to be cut off, as it passed him, and made the cut. The train was moving rapidly, with a view to kick the cars desired to be left upon track No. 7 onto that track. At the time the flying switch was made Doyle had failed to remove one of the cars from track No. 7, which was left standing near the east end of that track, and as the cars which Russler had cut from the train, and upon the east one of which he was riding, went in upon track No. 7, the west car of the cut came in contact with the car standing upon track No. 7, with the result that Russler was thrown from the car upon which he was riding to and upon the track, and was run over and killed by the rear end of the train from which the cut had been made, which continued to move in the same direction as the cut. It was dark, the train was moving rapidly, and Russler had no knowledge that a car was standing upon track No. 7 at the time he made the cut in obedience to the order of Kennedy, and the negligence relied upon to justify a recovery was the act of Kennedy in ordering the cut of cars which he had ordered Russler to make to be kicked in upon track No. 7 without knowing that Doyle had removed the cars from said track and that the track was unobstructed. The fact that such neglect of Kennedy constituted actionable negligence is not controverted.

The question whether two servants in the employ of a common master are fellow servants is usually a question of fact. *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 207 Ill. 9, 69 N. E. 620. If, however, there is no controversy as to the facts and the conclusions to be drawn therefrom, such question may become a question of law. *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921. It has, however, been held by this court that if the master has conferred upon one member of a class of workmen carrying on a particular branch of his business—such as the conductor of a switching crew—authority to control or direct the movements of the men under his charge, while in the exercise of such au-

thority such servant stands in the place of the master, and the relation of fellow servants does not exist between such servant and the men over whom he exercises such authority while he is in the exercise of such authority, although at other times the relation of fellow servants may exist between such servant and the other employes of the common master. *Illinois Southern Railway Co. v. Marshall*, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297; *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288; *Chicago, Rock Island & Pacific Railway Co. v. Strong*, 228 Ill. 281, 81 N. E. 1011. At the time Kennedy directed Russler to cut the cars from the moving train which were to be kicked in upon track No. 7, Kennedy clearly was a vice principal of the appellant, and Russler was bound to obey his command, or refuse so to do at his peril. Kennedy knew that cars had been standing upon track No. 7 a very short time before he gave the order to Russler, and, although he knew Doyle had been directed to remove the cars from track No. 7, it was actionable negligence on his part to order the cut to be made by Russler and the cars to be kicked in upon said track without being informed whether said track had been cleared of cars by Doyle.

We are of the opinion the evidence found in this record fairly tends to show that Kennedy was acting as the vice principal of the appellant at the time he gave such negligent order to Russler and caused the cut of cars upon which he knew Russler was riding to be thrown in upon track No. 7, and that the relation of fellow servants did not exist between Kennedy and Russler at the time Russler lost his life, and that the trial court did not err in declining to take the case from the jury.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(230 Ill. 230)

PEOPLE ex rel. RASTER v. HEALY, State's Attorney.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. QUO WARRANTO—INFORMATION IN NATURE OF QUO WARRANTO—NATURE OF REMEDY.

An information in the nature of a quo warranto is a civil remedy when used for the protection of private rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 1.]

2. SAME—DISCRETION OF PUBLIC PROSECUTOR.

Where an individual seeks relief of a private nature under Hurd's Rev. St. 1905, c. 112, § 1, providing that, when a person unlawfully holds an office in a corporation created by the state, the Attorney General or state's attorney, either of his own accord or at the instance of an individual, may petition the court for leave to file an information in the nature of a quo warranto, the only discretion vested in the prosecuting officer is to determine whether the documents presented to him are in proper legal form, and whether evidence is presented sufficient to establish the person's prima facie right to the relief.

3. SAME.

The arbitrary discretion possessed by the Attorney General at common law to determine as to the institution of quo warranto proceedings still exists where the proceedings are brought by the people and involve no individual grievance of the relator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 37.]

4. MANDAMUS—ACTS OF PUBLIC OFFICERS—REFUSAL TO SIGN PETITION FOR QUO WARRANTO.

Mandamus is the proper remedy to compel a public prosecutor to sign and file a petition for leave to file an information in the nature of a quo warranto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 146.]

5. QUO WARRANTO—PROCEDURE.

In applying for leave to file an information in the nature of a quo warranto, a petition ready for filing when signed, together with an affidavit by a person familiar with the facts, containing a full statement thereof drawn so that perjury may be assigned thereon if materially false, should be addressed to the court and presented to the prosecuting officer, who, if he signs the petition, should present it with the affidavit for the consideration of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quo Warranto, § 35.]

6. SAME—AFFIDAVIT IN SUPPORT OF PETITION—SUFFICIENCY.

An affidavit in support of a petition for leave to file an information in the nature of a quo warranto to test the right of a person to an office, which avers that the board of directors of a corporation consists of ten persons, that the by-laws provide that a majority shall constitute a quorum, that upon the resignation of the treasurer five members of the board (naming them) held a meeting and attempted to elect a treasurer, and that as a result thereof a certain person claims to have been elected treasurer, is sufficient.

Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Mandamus by the people, on the relation of Edwin O. Raster, to compel John J. Healy, as state's attorney, to sign a petition for leave to file an information in the nature of a quo warranto. From a judgment for respondent, petitioner appeals. Reversed and remanded, with directions.

On May 15, 1906, the relator, Edwin O. Raster, filed in the circuit court of Cook county a petition for mandamus against John J. Healy, state's attorney of that county, praying for a writ commanding him to sign a petition for leave to file an information in the nature of a quo warranto against one Horace L. Brand, charged with having usurped the office of treasurer of the Illinois Publishing Company.

The petition for mandamus alleges that on April 2, 1906, relator presented to appellee a petition, with relator's affidavit in support thereof, which petition was addressed to the circuit court of Cook county, and prayed leave to file an information in the nature of a quo warranto against Horace L. Brand, and that at appellee's request both relator and the respondent in said petition, so presented to appellee, appeared before appellee,

who gave them a hearing and afterward refused to sign said petition; that appellee made no objection to the sufficiency of the same in law, and suggested no other way in which relator could have his rights judicially determined; that on May 10, 1906, relator presented a similar petition and affidavit to William H. Stead, Attorney General for the state of Illinois, and requested him to sign said petition, but he refused, giving as his sole reason therefor that the appellee had refused to sign the first-mentioned petition, and that he would not act on a similar petition in reference to the same subject contrary to the action of the state's attorney. The petition for mandamus sets out in full section 1 of chapter 112 of Hurd's Revised Statutes of 1905, and alleges that it was the duty of appellee, under the above statute, to sign the petition presented, and that because of his refusal to do so the people were deprived of their only adequate remedy against the usurpation of office of said respondent, Horace L. Brand, in violation of the laws and Constitution of the state of Illinois.

The facts alleged in the petition presented to appellee for his signature, as they appear from the petition in the case at bar, are substantially as follows: That the Illinois Publishing Company is an Illinois corporation; that the treasurer is an officer of said corporation; that on November 23, 1905, the office of treasurer became vacant through resignation; that since such resignation no person has been legally elected to said office, but since that time one Horace L. Brand unlawfully has assumed said office; and that petitioner believes the foregoing allegations can be established by proof. From the affidavit of relator attached to said petition presented to appellee, it appears, as shown by the petition in this case, that he (relator) is secretary of the Illinois Publishing Company, and that he is also a member of its board of directors; that on November 20, 1905, a special meeting was called by the president of said company for November 23, 1905; that at such meeting the resignation of W. R. Michaelis as treasurer of the company was presented, and an attempt was made to elect Horace L. Brand to fill the vacancy; that the board of directors consisted of ten members; that there were but five directors present, including Brand, and he received but five votes; that as a result thereof he assumed to have been elected treasurer, and since that time has acted as treasurer; that the by-laws of the company require six directors to constitute a quorum, and provide that the election of officers shall occur at the first regular meeting of directors after the annual stockholders' meeting in each year, and that the board of directors shall consist of ten members; that at the annual meeting held for the annual election of officers on January 15, 1906, Horace L. Brand and W. R. Michaelis were both nominated for treasurer, and, each having received five votes,

the presiding officer announced that there was no election.

To the petition for a writ of mandamus a general and special demurrer was interposed by appellee, which was sustained by the court and the petition dismissed. From the judgment of the circuit court appellant brings this case to this court by appeal, and urges as grounds for reversal, first, the court erred in construing section 1 of the statute of the state of Illinois entitled "An act to revise the law in relation to quo warranto," approved March 23, 1874, in force July 1, 1874, being section 1 of chapter 112 of Hurd's Revised Statutes of 1905; second, if the construction given by the court to that section be correct, then the court erred in not holding that section to be unconstitutional.

Richberg & Richberg, for appellant. Rosenthal & Hamill (Charles Goodman, of counsel), for appellee.

SCOTT, J. (after stating the facts as above). This controversy involved the construction of section 1 of chapter 112 of Hurd's Revised Statutes of 1905, which reads: "That in case any person shall usurp, intrude into, or unlawfully hold or execute any office or franchise, or any office in any corporation created by authority of this state (or any person shall hold or claim to hold or exercise any privilege, exemption or license, which has been improperly or without warrant of law issued or granted by any officer, board, commissioner, court, or other person or persons authorized or empowered by law to grant or issue such privilege, exemption or license), or any public officer shall have done, or suffered any act which, by the provisions of law, works a forfeiture of his office, or any association or number of persons shall act within this state as a corporation without being legally incorporated, or any corporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation, or exercises powers not conferred by law, or if any railroad company doing business in this state shall charge an extortionate rate for the transportation of any freight or passenger, or shall make any unjust discrimination in the rate of freight or passenger tariff over or upon its railroad, the Attorney General or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction, or any judge thereof in vacation, for leave to file an information in the nature of a quo warranto in the name of the people of the state of Illinois, and if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition, and order the information to be filed and process to issue. When it appears to the court or judge that the several rights of divers parties to the same office or franchise, privilege, exemption

or license, may properly be determined on one (1) information, the court or judge may give leave to join all of such persons in the same information, in order to try their respective rights to such office, franchise, privilege, exemption or license."

It is contended by the appellee that this statute vests the state's attorney of the proper county with an arbitrary discretion in reference to seeking leave to file an information in the nature of a quo warranto in the name of the people, that in the exercise of that discretion he cannot be controlled by the courts, and that he may refuse to seek the leave for any reason which to him seems sufficient or may refuse when no reason at all can be assigned for so doing; while appellant argues that in a case such as that now before us, where the proposed individual relator has a personal and private interest in the litigation which he desires to set on foot and where the interest of the public is purely or largely theoretical, the only discretion vested in the legal representative of the people is a discretion to determine whether the documents presented to him by the individual are in proper legal form, and whether the party seeking the institution of the suit presents evidence of such facts as establish his legal right to the remedy to be afforded by judgment against the respondent in the quo warranto proceeding.

Originally a proceeding of this character was by writ of quo warranto against any one who claimed or usurped any office, franchise, or liberty to inquire by what authority he supported his claim, in order to determine the right. Later the practice was changed, and an information in the nature of a writ of quo warranto succeeded the former method. 3 Blackstone's Com. 262, 263. By the common law the proceeding in quo warranto was employed exclusively as a prerogative remedy, to punish a usurpation of franchises or liberties granted by the crown, and never as a remedy for private citizens desiring to test the title of persons claiming to exercise a public franchise or desiring to establish a private right. In England the information, as a means of investigating and determining civil rights between parties, owes its origin to St. 9 Anne, c. 20, which authorized and required the proper officer to file the information by leave of court, upon the relation of any person desirous of prosecuting the same, against any person usurping or intruding into any municipal office or franchise in the kingdom. High on Extraordinary Legal Remedies (3d Ed.) § 602. That statute, however, having been passed in the year of our Lord 1710, has never been in force in this state. It will be observed from examination of section 1, supra, that the proceeding is made the vehicle for the assertion of many rights, both private and public, which could not have been vindicated by this method at the common law. As originally used, the proceeding was criminal in character, and the offender, upon con-

viction, was liable both to fine and imprisonment as well as ouster from the franchise or liberty which he had wrongfully usurped. Under our statute the proceeding is, in fact, a civil remedy when used for the protection of private rights, and, in the event of a judgment in favor of the defendant costs may be awarded against the relator. Chapter 112, § 6, supra.

By the common law, and in England prior to the passage of the statute of Anne, arbitrary discretion was lodged in the Attorney General to determine whether he would move, and that discretion could not be controlled or reviewed. *Attorney General v. Ironmongers' Co.*, 2 Beav. 314; *Attorney General v. Wright*, 3 Beav. 447; *People v. Attorney General*, 22 Barb. (N. Y.) 114; *People v. Fairchild*, 8 Hun (N. Y.) 334; *In re Gardner*, 68 N. Y. 467; *Everding v. McGinn*, 23 Or. 15, 35 Pac. 178. In extending the scope of this proceeding, the Legislature of this state has not by express words changed or altered the common law so far as the discretion vested in the Attorney General or state's attorney is concerned, but the character of the discretion possessed by these officers must be determined, to some extent, by consideration of the rights which the lawmaking power has committed to that discretion. By the common law the information in the nature of a quo warranto was solely a prerogative remedy. No suit was ever prosecuted by that remedy at the instance of a private person or for the assertion of a private right. It was used only where a wrong had been done, or was alleged to have been done, to the king, and it was therefore the rule that only the king, or his representative, should determine whether a suit should be brought to enforce the right of the king. Where jurisdiction is given the courts to enforce the rights of private individuals by this method, it is manifest that the power to determine whether the suit should be brought should not be lodged in the legal representative of the sovereign power, when, as here, the right of the citizen is substantial and the concern of the state with regard to the litigation is practically or entirely theoretical. In such case, the reason for the rule having failed, the rule itself should fail. This is well illustrated by cases of one class which are constantly arising in this state. These are cases where it is charged by the owner of realty that his property has been wrongfully included within a drainage district, and he has attempted to have that question determined upon an application made for a judgment and order of sale against his property for the collection of a tax or assessment imposed by the drainage authorities. In such instances this court has invariably held that he could not raise the question in that way, but that he must resort to an information in the nature of a quo warranto for the purpose of determining whether or not the corporation is engaged in exercising

powers not conferred by law. *Shanley v. People*, 225 Ill. 579, 80 N. E. 277, and cases there cited. It is manifest that it would be a mere travesty to say, as was said in the *Shanley Case*, that in such case the action of the corporate authorities "can only be reviewed in a direct proceeding by quo warranto," and then to say that whether or not application shall be made for leave to file an information in the nature of quo warranto for the purpose of reviewing the action of the commissioners rests solely in the arbitrary discretion of the legal representative of the people, who has no interest in the welfare of the proposed relator, and who may give weight to the fact that it is for the benefit of a large number of property owners who are properly within the district that he should refuse to permit the use of his name, and who may regard that as a sufficient reason for declining to act. It is against the policy of our law that the arbitrary power to determine whether the individual shall have the privilege to be heard in the courts in the assertion of his private right should be lodged in any tribunal or officer not a court or judicial officer as distinguished from a nonjudicial or quasi judicial officer.

Appellee urges that it cannot consistently be held that the state's attorney has an arbitrary discretion as to whether he will seek leave to file the information where no interest is involved save that of the public, and that he has no discretion where the interest of a private individual is concerned, for the reason that such discretion as he has is conferred upon him by the following words from the statute: "The Attorney General or state's attorney of the proper county, either of his own accord or at the instance of any individual relator, may present a petition to any court of record of competent jurisdiction"—which words apply alike to cases in the prosecution of which the people of the state alone are interested and to cases in which no substantial right is to be asserted except the right of the relator, and in which the interest of the public is purely or entirely theoretical. It is urged that any such construction would result in holding that the word "may," in the language last quoted, means "may" in cases where only the public interest is at stake, and means "shall" where private interests are involved; and it is said to be an anomaly to hold that the same word in the same sentence of a statute may mean one thing when applied to one class of cases and another thing when applied to another class of cases. We do not think this situation presents any serious difficulty. When the Legislature extended the right to private individuals to assert private rights by this proceeding, it is apparent that it was intended that they should have an opportunity to seek redress for their wrongs by making application to a court, or judge thereof, for leave to file an information. The duty resting upon the state's at-

torney to sign and present a petition for leave to file an information in the nature of a quo warranto where evidence of facts is properly presented to him by a proposed relator which shows prima facie that the relator is legally entitled to the relief, in reference to a private right, which would be afforded him by a judgment in his favor in a quo warranto proceeding, is an absolute one. It follows, therefore, that where he declines to act for any reason other than that the facts, evidence of the existence of which is presented to him, do not warrant the relief which the proposed relator seeks, or that the petition and affidavit or affidavits presented to him are not in proper legal form, his declination is an abuse of his discretion, conceding that his construction of the statute be correct, and such an abuse of discretion as amounts to a refusal on his part to exercise his discretion at all and to a refusal to perform the duty enjoined upon him by the law.

In *Village of Glencoe v. People*, 78 Ill. 382, 389. It was said: "The discretion vested in the council cannot be exercised arbitrarily for the gratification of feelings of malevolence or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment and not by passion or prejudice. When a discretion is abused and made to work injustice, it is admissible that it shall be controlled by mandamus." In *Illinois State Board of Dental Examiners v. People*, 123 Ill. 227, 241, 13 N. E. 201, 202, the following language was used: "But, if a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere where it is clearly shown that the discretion is abused. Such abuse of discretion will be controlled by mandamus. A public officer or inferior tribunal may be guilty of so gross an abuse of discretion or such an evasion of positive duty as to amount to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law. In such a case mandamus will afford a remedy. Tapping on Mandamus, 66 and 19; Wood on Mandamus, 64; *Lynah v. Com'rs of the Poor*, 2 McCord (S. C.) 170; *People v. Perry*, 13 Barb. (N. Y.) 206; *Arberry v. Beavers*, 6 Tex. 457, 55 Am. Dec. 791." To the same effect are statements found in *People v. Commissioners*, 176 Ill. 576, 52 N. E. 334, and *People v. Van Cleave*, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795. Courts of last resort in our sister states have frequently found themselves confronted with the same difficulty which we are now considering, where Legislatures have extended the scope of the remedy by quo warranto to include the enforcement of private rights, but have failed to impose by express words a positive duty upon the Attorney General or state's attorney to proceed at the instance of the individual relator, or have failed to provide that the proceeding may be in-

stituted without the co-operation of those officers. It has sometimes been held that the arbitrary discretion of the public prosecutor still exists as at common law, and that if he refuses to lend his name to the proceeding the individual relator is without remedy, even though the refusal of the officer results from political, selfish, or other improper considerations. In other states relief for the relator has been suggested by various methods, not substantially different, so far as the result to be obtained is concerned.

In the case of *Bank of Mt. Pleasant, 5 Ohio (Hammond) 250*, it was held: "If in a proper case the prosecuting attorney decline to make application for the rule, the court will order him to make it peremptorily or direct it to be made by another person, according to circumstances."

In *State v. Berry*, 3 Minn. 190 (Reprint Ed.), it was held that the discretion of the Attorney General was not exclusive or absolute, and that the relator's right to have the application made was an absolute one, upon a probable or prima facie case being made out to the Attorney General; that the discretion as to whether the suit should be brought in such case was with the court or judge alone; and that in determining whether to permit the filing of the information the court or judge could give notice to the defendant and hear both sides of the question, "which advantages are not possessed by the Attorney General." It was further held that the papers there presented made a sufficient case, and the issuance of a writ of mandamus requiring the Attorney General to make application was directed. In *State ex rel. v. Dahl*, 69 Minn. 108, 71 N. W. 910, it was said that under some circumstances it might, in the exercise of a sound judicial discretion, become the duty of the court to permit an information in the nature of a quo warranto to be filed by a private person, even where he had no personal interest in the question distinct from the public interest, notwithstanding the Attorney General had refused to give his consent to such filing.

In *State v. Delleseleine*, 1 McCord's L. (S. C.) 52, in discussing this question, the court expressed the view "that the Attorney General may, in any case, apply to the court for directions, and that the court, although, perhaps, it cannot order, may aid him with its advice. There may be many cases where it would seem peculiarly proper and some where it would be absolutely necessary that it should be done. The Attorney General may stand in such relation to the party against whom an information is required as not to be able to trust his own judgment or in such that it ought not to be trusted by the state. Such a proceeding might be required against the Attorney General himself, in which case he could not act."

In *Lamoreaux v. Attorney General*, 89 Mich. 146, 50 N. W. 812, where the Attorney

General claimed an arbitrary discretion, the court said: "If the Attorney General and prosecuting attorney can refuse, for no good reason, to file an information of this kind upon the relation of one who claims that he was legally elected to an office, or of any elector, citizen, and taxpayer who is interested in the due administration of public affairs, then it may happen that, if both of these officers belong to the same political party as the incumbent of the office, they would for that reason refuse to move in the matter, and keep in any county office for the full term a person not legally elected or legally qualified to hold it. The law, of course, presumes that every public officer will do his duty without fear or favor or partisan bias, and this is found to be the general rule; but the current history of our day is full of instances of such intense party feeling that persons are frequently applying to the courts—the last resort—for the protection and enforcement of rights denied to them for partisan and political reasons only. * * * The courts ought not to consent to any holding which will put the power arbitrarily and without remedy or redress into the hands of any one, two or three men to prevent a candidate for office from establishing his election to any office, or any citizen from inquiry, in good faith, into the rights of any person to hold an office. This would certainly be the result of the position taken by the Attorney General." In *Cain v. Brown*, 111 Mich. 657, 70 N. W. 337, mandamus was entertained, without question, to compel the prosecuting attorney to file an information in the nature of a quo warranto, but the writ was there denied for the reason that the prosecutor was justified in considering the evidence presented to him insufficient.

In *People v. Ridgley*, 21 Ill. 66, and in *People v. Waite*, 70 Ill. 26, it was said that our quo warranto statute was a substantial copy of the statute of Anne. The question now before us was not considered by the court in those cases, and they are therefore not in point. The English statute just referred to provides that "it shall and may be lawful to and for" the proper officer, by leave of court, to file or "exhibit" the information (12 Pickering's Stat. at Large, 190), while our statute provides that the Attorney General or state's attorney "may present a petition" to the court, or the judge thereof, for leave to file the information. The statute of Anne does not expressly require the officer of the crown to file the application for leave, and yet *Rex v. Trelawney*, 3 Bur. 1616, and *Rex v. Wardroper*, 4 Bur. 1964, hold that under that statute the officer is without discretion in the matter, but must apply at the instance of the private relator, and that the only discretion is in the court; and in *State v. Elliott*, 13 Utah, 200, 44 Pac. 248, it was said that "except when changed by statute the rule of procedure is practically the same in

this country as in England" under the statute of Anne.

It is contended by appellee, however, that the question has been foreclosed in this state by the decisions of this court in *Hesing v. Attorney General*, 104 Ill. 282, and *Porter v. People ex rel. Greeley*, 182 Ill. 516, 55 N. E. 349. We think that is a misapprehension, which results from the application of words used by the court in those cases to facts not then before the court and in nowise given consideration at that time. In the case in 104 Ill. the relator had no private interest in the controversy as distinguished from the interest of the public, and it is said: "His being relator did not convert a purely public suit into a private one, and entitle him, as against the Attorney General, to prevent its dismissal." And it was very properly held, applying the common-law rule, that the Attorney General might dismiss the proceeding if he saw fit so to do, and that the court would not control his actions in that respect. In the *Porter Case* an information in the nature of quo warranto had been filed in the name of Charles S. Deneen, state's attorney of Cook county, upon the relation of certain individuals, but the state's attorney's name had been used without his consent. Upon the motion of the prosecutor to finally dispose of the proceeding by dismissal, the petition was dismissed "as far as the rights of the people only are concerned, but so far as the private rights of the said relators are concerned, and in all other particulars, said motion is denied," and the order attempted to reserve jurisdiction of the petition and proceeding. In that case it was held by this court that a quo warranto proceeding cannot be instituted in this state except by the Attorney General or the state's attorney of the proper county; and it was further held that the mere fact that petitioners sought redress for private injuries did not authorize them to prosecute the action in their own names, and it was said that for such purpose they might not use the name of the state's attorney without his consent. In that case the court seems to have considered the failure of the relators to seek permission of the Attorney General to use his name, after the state's attorney had refused to sign the petition, as a significant fact. The question of the propriety of a resort to mandamus to require the state's attorney or the Attorney General to proceed in a case where the relator had a personal and private right and the interest of the public was largely or entirely theoretical was not before the court for consideration.

It is, of course, true that in many cases where the individual relator has a private and personal interest in the suit which he seeks to set on foot the public also has a substantial interest therein. No injury can result to the public in such instances, however, by requiring the prosecutor to proceed, for the reason that the court, or the judge

thereof, when the petition for leave to file the information is presented, is vested with a sound legal discretion to be exercised in determining whether leave to file the information should be granted, and the court or the judge thereof may, in the exercise of that discretion, fully protect the rights of the public, and may under some circumstances, where the public weal demands, refuse leave to file the information although the clear legal right of the relator is established. *McPhail v. People*, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306. The rights and interests of the public being thus fully protected by a sound legal discretion lodged in the court, or the judge thereof in vacation, it is manifest that there is no occasion for the exercise by the state's attorney or Attorney General of a discretion to be used for the same purpose and for no other purpose.

The discretion possessed by the Attorney General at the common law is no doubt now possessed by the Attorney General or state's attorney in all cases which are, in fact, prosecutions on the part of the people and which involve no individual grievance of the relator. One such case is where the wrong is the usurpation of an appointive public office to which, in the event of judgment of ouster, no particular individual will have a right to succeed; and another example is where the object is to secure a judgment ousting a corporation from the enjoyment of all the franchises which it exercises. In cases, however, where the proposed relator has an individual and personal right, distinct from the right, if any, of the public, which is enforceable by a proceeding in quo warranto, and where he presents to the state's attorney a proper petition for his signature with evidence of the facts necessary to establish the right, it is the duty of that officer to apply for leave to file an information in the nature of a quo warranto, and, if he refuses when the matter is properly presented to him, he may be compelled by mandamus to sign and file the petition for leave.

The practice which may be followed by one who desires to become relator is to present to the state's attorney a petition addressed to the court, or to the judge thereof in vacation, for leave to file an information in the nature of a quo warranto, which petition should be so drawn as to be ready for filing when the signature of the state's attorney is thereto attached. As was suggested in *Cain v. Brown*, supra, the affidavit or affidavits accompanying the petition must be full and positive and must be made by a person or persons knowing the facts, and be drawn in such manner as that perjury may be assigned thereon if any material allegation contained therein is false. The affidavit or affidavits accompanying the petition, after being inspected by the state's attorney, should, in case he sign the petition, be presented with it for consideration by the court, or judge thereof, in determining whether to grant the

leave asked. The practice pursued by the state's attorney in this case is not a proper one. Upon the petition being presented to him, he caused the actual parties to the controversy, by their attorneys, to appear before him, and heard them on the proposition as to whether he should sign and file the petition. This practice has, we understand, been long pursued in certain counties of this state, and we have no doubt that the public prosecutor of Cook, in this particular instance, proceeded as he did believing in good faith that this practice was the correct one. In our judgment the law of this state does not authorize him in any case to conduct a hearing of this character, and he should not have considered the views of the respondent named in the petition or those of his attorneys.

Appellee urges that it is doubtful whether quo warranto is the proper remedy in this instance, as merely private interests are here involved. We think an inspection of section 1, supra, dispels this doubt, as it expressly gives the remedy in any case where any person usurps or unlawfully holds any office in any corporation created by authority of this state.

Appellee also argues that mandamus will not lie in this instance for certain other reasons. His views, in so far as based on such other reasons, are shown to be erroneous by the case of *People ex rel. v. Harris*, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304.

To the petition for a writ of mandamus, there were attached as exhibits the unsigned petition for leave to file a petition in the nature of a quo warranto, and with it the affidavit of Edwin O. Raster, the proposed relator, made in support of that petition, both of which had been presented to the state's attorney. We have examined that affidavit, as abstracted, and think it fully meets the requirements of the law in reference to affidavits of this character. It appears from that affidavit that Raster is secretary and a member of the board of directors of the corporation; that the board of directors consists of ten persons; that by the provisions of the by-laws of the corporation a majority of the board of directors shall be required to constitute a quorum for the transaction of business; that on November 23, 1905, Walter R. Michaelis, who was the treasurer of the corporation, resigned; that on the day last mentioned five members of the board of directors (naming them) met and attempted to hold an election for treasurer of the corporation; that Horace Brand, as a result thereof, claimed, and claims, to have been elected treasurer in place of Michaelis. It is made evident by the affidavit that such election was invalid and illegal because a quorum of the directors was not present at that meeting, and it further appears from direct and positive allegations of fact contained in the affidavit that said Brand has never at any time been properly or legally elected as treasurer of the corporation, but that he has intruded

into and unlawfully held the office of treasurer of the corporation since the time of his alleged election on November 23, 1905. Upon consideration of the petition for leave, and the affidavit accompanying it, to which we have just referred, it became the duty of the state's attorney to sign the petition and present it, with the affidavit, to the court or to a judge thereof in vacation.

The judgment of the circuit court will be reversed and the cause will be remanded to that court, with directions to overrule the demurrer to the petition for a writ of mandamus.

Reversed and remanded, with directions.

(230 Ill. 198.)

**MERCHANTS' & FARMERS' STATE BANK
et al. v. DAWDY et al.**

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 5, 1907.)

**1. CONTRACTS—CONSIDERATION—ADJUSTMENT
OF RESPECTIVE RIGHTS.**

The adjustment of the respective rights of representatives of a decedent is a sufficient consideration for an agreement to exchange deeds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 328-330.]

**2. VENDOR AND PURCHASER—CONSTRUCTIVE
NOTICE OF TITLE—ACTUAL POSSESSION OF
LAND.**

Actual possession of land is notice equal to the record of a deed under which the person in possession claims, and a purchaser takes subject to the title of such person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 540-562.]

**3. TRIAL—OBJECTION TO EVIDENCE—SUFFI-
CIENCY.**

A general objection to the introduction of the record of a deed without showing the loss of the original, that it was incompetent and irrelevant, is not sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 191-210.]

Appeal from Circuit Court, Moultrie County; W. G. Cochran, Judge.

Bill by the Merchants' & Farmers' State Bank and another against Rebecca Dawdy and others. From a decree granting inadequate relief, complainants appeal. Affirmed.

Job Evans died intestate in March, 1870, owning 215 acres of land in Moultrie county, including the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 17 and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 20, all in township 13, range 5, upon which he resided with his family. He left surviving him Rebecca Evans, his widow, and a daughter, Eliza, who soon after married W. A. Short. In 1888 these two 40-acre tracts were sold by the sheriff under execution issued upon a judgment rendered by the circuit court of Moultrie county against W. A. Short, Eliza E. Short, and others. No redemption having been made, the sheriff executed to James H. Johnson a deed for the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 17, and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 20, containing 60 acres, and to William Elder a deed for the S. $\frac{1}{2}$ of the N.

W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 20, containing 20 acres. The dower and homestead of Rebecca Evans in the estate of Job Evans were never formally assigned. In 1871 she married Joseph Winskill, and soon after, together with her husband, made a quitclaim deed to the daughter for 135 acres, being all the land which had belonged to her husband, except the two 40-acre tracts above mentioned. She continued to reside upon the 80 acres until 1891, when she moved to Sullivan, where she has since resided. In the meantime she was divorced from Winskill and married Andrew J. Dawdy, who has since died. On January 29, 1906, she executed to her nephew, Z. T. Deeds, a deed for said two 40-acre tracts in fee simple, subject to a life estate in herself. The appellant the Merchants' & Farmers' State Bank of Sullivan having succeeded to the title of William Elder to the 20 acres under his sheriff's deed, and the appellant Almond Nicholson to the title of James H. Johnson to the 60 acres under his sheriff's deed, they filed a bill in the circuit court of Moultrie county, praying for the assignment of dower to the said Rebecca Dawdy, the cancellation of her deed to Z. T. Deeds as a cloud upon their title, and for the perpetuation of evidence in regard to a prior deed in their chain of title not necessary to be further noticed here. The defendants answered, averring, among other things, that soon after the death of Job Evans his widow and daughter divided his land, so that the widow became the owner of the 80 acres and the daughter the owner of all his other lands, each free from any claim of the other; that Rebecca, the widow, conveyed to the daughter, Eliza, the part so set apart to her, and that Eliza promised to deed to Rebecca her part of the land; that each took possession of the portion so set apart to her; and that Rebecca Dawdy has ever since been in the exclusive, open, adverse possession of the said 80 acres, claiming to be the owner thereof. Upon a hearing of the cause the court ordered that certain testimony be perpetuated, and as to all other relief decreed that the bill be dismissed for want of equity. To reverse that decree, complainants have appealed to this court.

E. J. Miller, for appellants. John E. Jennings and Harbaugh & Thompson, for appellees.

DUNN, J. (after stating the facts). If Job Evans' widow and daughter agreed to divide his land by exchanging deeds, so that the widow should become the owner in fee of the 80 acres involved in this suit and the daughter of the rest of the land, a consideration of any other question in the case is unnecessary. It is manifest that some agreement was made between them. The daughter married about six months after her father's death, and her mother a few months later. Soon after

the latter event the mother made a quitclaim deed to the daughter of 135 acres, and from that time the daughter was in the exclusive possession and control of that part of the land, while the mother remained in the exclusive possession and control of the remaining 80 acres. Both Mrs. Dawdy and W. A. Short, the daughter's husband, the daughter being dead at the time of the hearing, testified that Mrs. Dawdy was to have the 80 acres as her own and was to have a deed for it.

It is objected to the testimony of these witnesses that it was incompetent and did not prove anything, because it consisted largely of statements of conclusions, instead of facts and conversations, and was given in response to leading questions which were objected to. A large part of the testimony is justly subject to this criticism, and the force of all of it is, in consequence, very much weakened. But it must be considered that Mrs. Dawdy was an uneducated woman, past 71 years old, testifying to events which occurred 35 years before she was a witness. It is not surprising that very little even of the substance of conversations or important circumstances can be narrated by her. But, disregarding the incompetent testimony of these witnesses, enough remains to satisfactorily show, if it is true, that the mother and daughter agreed upon a division of the land by which each should be the owner of her portion free from any claim of the other. Without regard to the \$900 which Mrs. Dawdy testified she had invested in the land, the adjustment of the respective rights of the parties was a sufficient consideration for the agreement to exchange deeds. In 1884, after the sheriff's sale under which appellants derive their title, Mrs. Short and her husband made a quitclaim deed of the premises to Andrew J. Dawdy. Short testified that Dawdy agreed to redeem from the sheriff's sale if they would make him a quitclaim deed. Mrs. Short was not present; but, when Short told her about it, she claimed she had no interest in the land, but consented to make the deed. It is probable they thought, no deed having been made, that the sheriff's sale would convey the title to the purchaser.

There is some evidence in the record of statements by Mrs. Dawdy indicating that she claimed only a life estate in the land, and expected it, after her death, to go to Johnson. It is true that the record title of 60 acres was in Johnson, and it is not unnatural that she should be apprehensive of the effect of such condition upon her rights, should hesitate to make repairs, and should declare that she was going to have it as long as she lived, and they could do with it what they wanted after she died. It was for the court to determine to what extent her testimony was discredited by her statements, and we cannot say, under all the circumstances, that the court erred in finding that the agreement

for the division of the land was made as averred in appellees' answer. Mrs. Dawdy has been in the exclusive possession of the premises in controversy since the death of Job Evans in 1870. Her possession was notice to all persons of all her rights therein. Actual possession of land is notice equal to the record of a deed under which the party in possession claims. A purchaser is bound to inquire by what right or title the party in possession holds, and he will take subject to that title, whatever it may be. *Joiner v. Duncan*, 174 Ill. 252, 51 N. E. 323; *Coari v. Olsen*, 91 Ill. 273. The title taken by appellants and their grantors through the sale under execution against Mrs. Short was, therefore, subject to the contract between Mrs. Short and her mother, to the same extent as if that contract had been in writing and duly recorded.

It is urged that it was error to admit in evidence the record of the deed from Mrs. Dawdy to her daughter for the 135 acres without showing the loss of the original. The objection made to the introduction of the record was that it was incompetent and irrelevant. If the specific objection now urged had been made, the original would no doubt have been produced or its absence explained. The general objection will not avail where, if made specific, the objection might be obviated. *Rich v. Trustees of Schools*, 158 Ill. 242, 41 N. E. 924.

We find no error in the record, and the decree will be affirmed.

Decree affirmed.

(230 Ill. 157)

CITY OF CHICAGO v. CHICAGO TELEPHONE CO.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. MANDAMUS—SUBJECTS OF RELIEF—PERFORMANCE OF CONTRACTS.

A city ordinance, prescribing as conditions on which it would permit use of its streets by a telephone company that the company should make a semiannual report of the business done for the previous six months and pay to the city 3 per cent. of its gross receipts, constitutes, on acceptance by the telephone company, a mere contract between it and the city, not involving the performance of acts in the nature of duties to the public, and hence mandamus will not lie to compel performance of such conditions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 272.]

2. TELEGRAPHS AND TELEPHONES—RIGHTS IN THE USE OF STREETS.

Where a telephone company, authorized to use the streets of a city on its consent and under such conditions as may be imposed, is by ordinance granted such consent, the grant by the city is a license, and not a franchise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 6.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Petition by the city of Chicago for mandamus to compel the Chicago Telephone Com-

pany to file with the comptroller of the city a statement of its gross receipts and to pay into the city treasury 3 per cent. thereof. From a judgment of the Appellate Court, First District, affirming a judgment of the circuit court dismissing the petition, plaintiff appeals. Affirmed.

This is an appeal from the judgment of the Appellate Court for the First District, affirming the judgment of the circuit court of Cook county dismissing appellant's petition for a writ of mandamus. The appellant's amended petition prayed that appellee be required forthwith to file with the comptroller of the city a true statement of the gross receipts of appellee from all its business done for the six months next preceding January 1, 1905, within the limits of Chicago as the limits existed during the said six months, the same to be sworn to by Arthur D. Wheeler and Charles E. Moseley, president and secretary, respectively, of appellee. It was prayed in the petition that at the time of filing the statement appellee be compelled to pay into the city treasury 3 per cent. of said gross proceeds. Demurrer was sustained to the petition, and appellant elected to stand by its petition, whereupon the same was dismissed. Appellant prosecuted an appeal to the Appellate Court for the First District, where the judgment was affirmed; and by its further appeal, appellant brings the case to this court.

The petition alleges that appellee was organized on or about January 14, 1881, under the general laws of Illinois relating to corporations; that appellee was authorized by its charter to construct and operate telephone and telegraph lines and do a telephone and telegraph business; the adoption by the city of an ordinance authorizing appellee to construct its lines of wire in said city; and that section 6 of said ordinance is as follows: "6. Compensation—Service Rates—Use of City—Rights Reserved. The said Chicago Telephone Company shall file with the comptroller of the city, on the 1st days of January and July of each year, a statement of its gross receipts from the telephone business done by said company within the city of Chicago for the six months next preceding such statement, which statement shall be sworn to by the president and secretary of said company, and at the time of filing said statement the said company shall pay into the city treasury three (3) per cent. on such gross receipts, and said company, during the term for which this ordinance was granted, shall not increase to its present or future subscribers the rates for telephone service now established; and provided, also, that with the acceptance hereinafter required there shall be filed by said company a schedule showing the rates charged by said company for telephone service at the date of the passage of this ordinance within the limits of the city of Chicago. And the said company shall connect its wires with the mayor's office, department of public

works, fire department, police department building department, city collector's office, city clerk's office, health department, and law department, and place and keep one telephone in each of said places, free of charge to the city, so that said telephones may be used in connection with all wires under control of said company connected with its exchange in the city of Chicago; and said company shall also rent to the city of Chicago telephones for the sole use of the police and fire alarm system of the city of Chicago at an annual rental not to exceed five (\$5) dollars per annum for each telephone: Provided, however, that nothing in this ordinance contained shall be construed or taken as preventing the city of Chicago, whenever it shall be authorized to do so, from passing an ordinance regulating the rates to be charged by telephone companies for the rental of telephones or for the licensing of telephone companies, it being the intention of this ordinance that the city of Chicago shall in no way surrender any rights it may have, or may hereafter acquire, to license telephone companies or to regulate the prices to be charged for telephones, but upon such licensing or upon such regulation of such prices, then the provisions of this section as to payment of revenue and furnishing of telephone facilities to the city of Chicago shall cease to be binding upon said company: Provided, also, that nothing in this ordinance contained shall be construed as preventing the city of Chicago from granting an ordinance to any other telephone company."

It is further alleged that appellee accepted the ordinance in writing, as was thereby required, and filed a bond in compliance with the ordinance; that since January 10, 1889, until now, appellee has constructed, operated, and extended its telephone lines, under the authority of said ordinance, in the streets, alleys, and public grounds of the city, and thereby conducted its telephone business; that it was appellee's duty to file, semiannually, a sworn statement of the gross receipts from all its business with the comptroller, and at the same time pay 3 per cent. of such gross receipts into the city treasury; that the appellee filed in the office of the city clerk a schedule of the rates charged by it within the city limits; that by means of a telephone line constructed under the ordinance it was enabled to place telephone instruments with its subscribers, from which it derived and is deriving large profits; that appellee's sole right to carry on its business in the city of Chicago is derived from the said ordinance and the consent of the municipal authorities contained therein; that appellee's duty to file a statement of the gross receipts of the business done by it within the city limits for the previous six months relates to the limits "as those limits existed during said period of six months"; that, notwithstanding its legal duty, the appellee, from January 10, 1889, until July 15, 1904, prepared and filed, semiannual-

ly, false and misleading statements of its gross receipts from business done within said city; that none of said statements included "all the gross receipts from all the telephone business" done by appellee within the city limits "as the city limits existed during the six months next preceding the date on which each of said statements was required by the said ordinance to be filed"; that none of the said statements dealt with the receipts from any business done outside the limits of the city as they existed on January 10, 1889, although since that date said city limits had been greatly extended by the annexation of adjacent cities, towns, and other territories; that none of the statements include either the receipts from long-distance business or "toll charges"; that at the dates of the filing of these statements appellee paid 3 per cent. of the amount therein given as its gross receipts to the city, which accepted these payments in ignorance of the fact that they were not 3 per cent. of all the gross receipts from the business within the city limits for the previous six months; that the city and its successive comptrollers were deceived in accepting all of the said payments by the peculiar and cunning wording of the statements which accompanied them.

Certain parts of the petition were expunged by the trial court. The court below sustained the demurrer upon two grounds: First, that the ordinance set out by appellant in its petition constitutes, in substance, a contract between the parties, and that a writ of mandamus will not issue to enforce a mere contract; second, that mandamus will not be awarded where it is sought for the enforcement of a mere abstract right and will not definitely fix the rights of the parties, even though the right of the petitioner, under the contract, is clear.

MacLay Hoyne (James Hamilton Lewis and Knight & Hoyne, of counsel), for appellant. Holt, Wheeler & Sedley, for appellee.

VICKERS, J. (after stating the facts as above). The most important question presented for consideration in this case is whether or not appellant is entitled to the writ of mandamus for which it prays, requiring appellee to file a true statement of its gross receipts from all business within the present city limits and to pay into the city treasury 3 per cent. on such gross receipts. It is insisted by appellee that the ordinance upon which appellant bases its claim of right to the writ of mandamus prayed for constitutes a contract between appellant and appellee, and that, such being the case, mandamus will not lie. It is conceded by appellant that mandamus is not the proper remedy to enforce contractual relations, and this principle is well settled. We are therefore brought directly to a consideration of the ordinance with a view of ascertaining whether such ordinance has, in effect, the binding force of law or whether it constitutes a contract.

82 N.E.—39

It is the well-settled law in this state that where there is a grant, and an acceptance by a corporation of an ordinance involving the performance of acts in the nature of duties or services to the public as a condition of the grant, the corporation accepting the franchise may be compelled by mandamus to perform the duty so enjoined. *People v. Suburban Railroad Co.*, 178 Ill. 504, 53 N. E. 349, 49 L. R. A. 650; *Rogers Park Water Co. v. Fergus*, 178 Ill. 571, 53 N. E. 363, and cases there cited. But in each of these cases mandamus was awarded to compel the respondent to discharge some duty owing to the public, and not to a municipal entity, and where a clear right was thought to exist. There is a clearly drawn distinction between cases of that class and cases in which the duty or obligation is owed primarily to the municipality. In *People v. Suburban Railroad Co.*, supra, it was sought to compel respondent to comply with the express provisions of an ordinance having in it provisions which created a duty to the public to be performed by the company for the benefit of the public. The writ was there awarded, commanding the company to sell tickets to passengers good to stations in River Forest at the same rate as to stations in the town of Cicero, as the ordinance required, and it is evident that this was a duty owing to the public in general and not particularly to the municipality as such. In *Rogers Park Water Co. v. Fergus*, supra, a writ of mandamus was awarded fixing water rates, as provided by an ordinance of the city of Chicago enacted subsequently to the annexation of Rogers Park, which was accepted by the water company and under which ordinance it had laid its pipes and previously operated its waterworks. In this case, also, the company's primary duty lay to the public as such. Evidently in neither of the cases above cited was the obligation contractual. No individual had in either case a contract with the respondents, but the public did have certain rights under the ordinances which respondents were bound to regard. The failure on the part of respondents to regard these clear rights was the basis of the petition for mandamus, and the writ was properly awarded.

But in the case at bar the public has no relations, through the ordinance, with appellee, either contractual or otherwise. It cannot be said that an individual citizen has an interest in the filing of the statement at all. Nor can he have any interest in the payment of the 3 per cent. required by the ordinance to be paid into the city treasury, except the general interest that the sum so paid would be applied on the payment of municipal indebtedness and thus tend to decrease the burden of taxation. It cannot be seriously contended that there exists in this a right so clear that it is enforceable by mandamus. The ordinance in this case prescribes certain conditions upon which the city of Chicago, as a

municipal entity, is willing to permit appellee to use its streets, and parts of these conditions are that appellee shall make, semiannually, a report of the business done by it with the city limits for the previous six months and pay into the city treasury 3 per cent. of such sum. Appellee accepted this ordinance, and from that time forth it became a contract between the parties. A franchise emanates from the government or sovereign power, and where a corporation is created by law, with power to use the streets of the city, upon the consent of the city, under such conditions as may be imposed, and by ordinance such consent is prescribed or privilege granted, the grant by the city is a license, and is not a franchise. When such license is accepted by the corporation, a valid and binding contract is created with the municipality, to compel the performance of which mandamus will not lie. *Chicago City Railway Co. v. People*, 73 Ill. 541; *Chicago Municipal Gaslight & Fuel Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616, and cases cited; *City of Belleville v. Citizens' Horse Railway Co.*, 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; *People v. Central Union Telephone Co.*, 192 Ill. 307, 61 N. E. 428, 85 Am. St. Rep. 338; *People v. Block*, 203 Ill. 363, 67 N. E. 809; *City of Chicago v. Rothschild & Co.*, 212 Ill. 590, 72 N. E. 698.

Having reached the above conclusion, it is unnecessary to consider other assignments of error. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(230 Ill. 108)

ELGIN, J. & E. RY. CO. v. HERATH.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 5, 1907.)

1. MASTER AND SERVANT—INJURIES TO EMPLOYÉ—QUESTION FOR JURY.

Evidence in an action for the death of plaintiff's intestate, a car repairer, caused by the pushing of other cars against the car on which he was at work, *held* to warrant submission to the jury of the question of defendant's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1050.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a car repairer, having charge of a gang of four, went to work on a car without putting up a flag or otherwise giving notice that he and the other men were working on the car, and without taking any precaution to keep watch for cars or engines, the railroad company was not liable for his death resulting from pushing other cars against the one on which he was at work, and his duty to use reasonable care for his safety was not affected by the fact that he may not have been a foreman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 732-742.]

3. SAME.

Due care and caution by an employé are essential to a recovery for his death against the employer, though other servants may have been negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 674-677.]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Will County; A. O. Marshall, Judge.

Action by John R. Herath, administrator of the estate of Thomas H. Menary, deceased, against the Elgin, Joliet & Eastern Railway Company. From a judgment of the Appellate Court, Second District, affirming a judgment of the circuit court for plaintiff, defendant appeals. Reversed and remanded.

O'Donnell & Donovan (Knapp, Haynie & Campbell, of counsel), for appellant. Barr, Barr & Barr, for appellee.

CARTWRIGHT, J. This is an action on the case, brought by appellee, as administrator of the estate of Thomas H. Menary, deceased, in the circuit court of Will county, to recover from appellant damages resulting to the widow of said Menary from his death while in the employ of appellant as a car repairer in its yards at East Joliet. The original declaration consisted of one count, to which the plaintiff, by leave of court, added two other counts; but they all made the same charges. They alleged that Menary was in the employ of the defendant in the work of repairing cars; that on July 21, 1904, he was repairing a car on a track in the defendant's yards, which in one count was called the "wire mill track" and in the other counts a "switch track"; that he was in the exercise of due care for his own safety, and that defendant negligently pushed other cars upon the track against the car on which he was at work, and injured him so that he died. The plea was the general issue, and there was a verdict for \$8,000. On hearing a motion for a new trial the court required the plaintiff to remit \$1,000 and entered judgment for \$7,000. The Appellate Court for the Second District affirmed the judgment. A further appeal was prosecuted to this court, and the assignment of error presented for our consideration is that the circuit court erred in denying the defendant's motion, at the close of the evidence, for a peremptory instruction directing a verdict of not guilty.

The following facts were proved and not controverted: On July 21, 1904, Thomas H. Menary had been in the employ of defendant as a car repairer in its yards in East Joliet for six months. There were about 200 men employed in the yards, and they were divided into gangs of 4. Charles H. Emerson was the general foreman of the yards. Menary, Louis Johnson, and two Swedes who were unable to speak English constituted one of these gangs. Menary was supplied by Emerson with a book in which to keep a record of the work done by that gang and the time taken in each piece of work. Emerson told Menary where to work and what to do, and Menary directed the other men, who were required to work as he told them. Menary had no power to hire or discharge men, but the others were required to

obey him, and in case of disobedience by any of them he would report to Emerson. Defendant had in its yards repair tracks for repairing cars in bad order. There were two such tracks for heavy repairs, which were called "sill tracks," and there was another track for light repairs. Cars were not put in on the sill tracks except at night. On either of the repair tracks the rule was never to come in with a car and set it so as to strike another. When a car was brought in in bad order, the men were required to "spot the car," as it was called, so as not to run against another car. The track where the accident occurred was known as the "wire mill track," and was about three blocks from the repair tracks, and the above rules did not apply to it. It was used for the storage of cars, and cars that were in bad order were put in there at any time in the usual way—sometimes every day and at other times once in two or three days. On the morning of the accident, about 8 o'clock, Menary, with his gang, was working on one of the regular repair tracks, when Emerson came to them and told them to come over with him to the wire mill track—that he had something there for them to do. Emerson went with them over to a track, and pointed out a box car, and told Menary to strip that car down and load it on a flat car. Menary told the other men of his gang to go ahead, and told them what to do. Emerson left, and went back to the repair tracks, three blocks away. There was a flat car standing about four feet from the box car, toward the switch connection with the other tracks, and no sign or signal was put up to indicate that the men were about the box car, and no provision was made for keeping any watch for engines or other cars. The four men went to work dismantling the car, unloading it on the flat car. One of the Swedes was with Menary at the end next the flat car, and the other one was with Johnson at the other end of the car. They had the coupler down and the bolster off, and had taken out some things underneath, and Johnson, with his assistant, was at the other end of the car taking out the brake beam. The end of the car where Menary was at work had been jacked up, and Johnson came around the car and asked Menary if he could have a jack. Menary said, "All right!" and Johnson stooped over, and when he looked up saw an engine backing up toward the flat car, and pushing four coal cars, and moving slowly. Johnson told Menary to look out, but the first coal car struck the flat car and pushed it against the box car, causing Menary's death.

There were two essential elements of the cause of action alleged in the declaration, both of which must be proved to entitle plaintiff to a verdict: First, that Menary was in the exercise of due care for his own safety; and, second, that the defendant was guilty of the negligence charged. If there was an entire lack of evidence fairly tend-

ing to prove one of these essentials, the defendant was entitled to have the instruction given. In considering the question the court was not authorized to weigh conflicting evidence and determine on which side the preponderance lay, and there was evidence fairly tending to prove the charge of negligence against the defendant. There was evidence on the part of the plaintiff that there was no signal, by bell, whistle, or otherwise, of the approach of the engine with the cars, and there was no one on the first car, which was being pushed down toward where the men were working. There is no statutory requirement that a bell shall be rung or whistle sounded in doing switching work in railroad yards, unless in approaching a street or highway, and there was no evidence that there was any rule or custom in these yards to give warnings or signals of that kind. Neither was there any evidence of any regular custom to have a brakeman ride on the cars; the evidence being that sometimes there was a brakeman on the first car and sometimes not. When the coal cars were set in on this occasion, the switchman was walking on the right-hand side of the cars, and they were moving about as fast as a man would ordinarily walk. The switchman testified that there was not anything to indicate that men were working on the track, and that he saw nothing to indicate their presence. There was also evidence for defendant that if any repairs were made on that track a flag was put up as a warning, and there was a red flag lying on a pile of ties by the side of the track, between the flat car and the switch. On the other hand, there was evidence that the end of the box car where Menary was at work was jacked up to a height of four feet, and was high enough so that the men who were putting in the coal cars ought to have seen it. Although the wire mill track was not a repair track, light repairs were occasionally made upon cars standing on it, so that there was a possibility of men being at work on it. The evidence on the part of the plaintiff would have been sufficient to require submission to the jury of the question whether, under all the circumstances, the manner in which the cars were put upon the track and pushed against the flat car was negligent, if there had also been evidence fairly tending to prove that Menary was in the exercise of reasonable care and caution for his own safety.

On the question whether Menary was in the exercise of the care and caution required of him there was no contradictory evidence. The only one who gave any testimony relating to that subject was Louis Johnson, who was working with Menary, and who testified as a witness on behalf of the plaintiff. He testified that Emerson took them to the place, and gave them directions what to do, and went away, and that before they went to work the witness said to Menary, "Tom, don't you suppose we ought to have

a flag?" and Menary answered, "No," and said they could look out for themselves. The account of the same conversation which the witness said he gave to another person, and which as not materially different, was that he said, "Tom, don't you suppose we ought to put out some kind of a sign?" and that Menary said he did not think it was necessary; that they had only that one car, and they could look out for themselves. They were taken to the car by Emerson about 8 o'clock, and the accident occurred about 10 o'clock. Nothing whatever was done by Menary, either to give notice that he and the other men were working at the car or to keep any watch or lookout for cars or engines. The flag was lying on the pile of ties about 250 feet distant from the box car, and the witness said he did not know it was there until after the accident. Menary's statements that they could look out for themselves showed that he knew the necessity of adopting some sort of precaution, while, as a matter of fact, he did nothing.

There seems to have been much strife at the trial, and it is continued in the argument, as to whether Menary should be called a foreman or not. That question is not of the slightest importance in this case, since there is no question relating to the authority of a foreman or superior servant, or any liability of defendant arising out of the exercise of such authority or any act of Menary in that capacity. It was proved, and not denied, that he had the book and controlled the movements of the three men who were with him, and the question whether the defendant would have been liable for some act or omission by him on account of his position is not involved. There is no claim that Menary relied, or had any right to rely, upon Emerson, as general foreman of the yards, either to put up a flag or signal or do anything else to protect him, and if Menary was not a foreman his duty to use reasonable care and caution for his own safety would not be affected in any degree by that fact. Due care and caution on his part was indispensable to the right of plaintiff to recover against defendant for the injury, even if other servants of defendant were guilty of negligence. There was no dispute whatever in the evidence of the fact that Menary took no precaution whatever for his own safety, but went to work at the car without giving any attention whatever to the surroundings or the dangers of his situation. There was an utter lack of evidence tending to prove the averment that he was in the exercise of due care and caution; but the evidence affirmatively proved the want of any care, and the court erred in refusing to give the instruction.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(230 Ill. 208)

PEOPLE ex rel. HEALY, State's Atty., v. MACAULEY.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 4, 1907.)

1. ATTORNEY AND CLIENT — DISBARMENT — GROUNDS.

An attorney, organizing a conspiracy to harass a corporation with prosecutions in various states, and to embarrass its business by organizing corporations with the name in which its business is transacted, for the sole purpose of injuring the business of the corporation and extorting money from it as a price of relief from further loss, is guilty of misconduct requiring his disbarment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, §§ 51, 63.]

2. SAME—ADMISSION TO PRACTICE—STANDARD OF CHARACTER.

The statute and rules of court requiring good moral character as a condition precedent to a license as an attorney include common honesty, which is not satisfied by such conduct as merely enables one to escape the penalties of the criminal law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 5.]

3. SAME—DISBARMENT—GROUNDS—EXCUSE.

Youth or inexperience of an attorney does not extenuate the offense of a fraudulent conspiracy to extort money, and does not afford a ground for not disbarring him.

Information by the people, on the relation of John J. Healy, state's attorney of Cook county, to disbar Charles P. R. Macauley. Rule of disbarment made absolute.

The state's attorney of Cook county filed an information in this court for the disbarment of the respondent, Charles P. R. Macauley, who was enrolled as an attorney on June 7, 1900. The cause was referred to a commissioner to take the evidence and report his conclusions of law and fact, and this has been done. For several years prior to the year 1900 the Colliery Engineer Company, a Pennsylvania corporation, had been conducting a school under the name of "The International Correspondence Schools of Scranton, Pennsylvania." Instruction was by correspondence through the mails, and the students were furnished text-books by the corporation. The school had agents in all parts of the country soliciting students, and had built up a large business. An active competitor of this school was the American School of Correspondence of Boston, of which Romanta F. Miller, Jr., was president. Soon after respondent's admission to the bar he was employed as a solicitor by the American School of Correspondence, and sought to induce students of its competitor to abandon their contracts and make new ones with him. He succeeded in inducing one Charles Peacock to abandon his contract with the Scranton corporation upon promise that the respondent would defend him without charge in case a suit was commenced for the violation of the contract. Suit was brought, and respondent appeared for the defendant, for which he received \$25 from Miller. The defense was that the

Pennsylvania corporation was illegally doing business in this state. After the trial the respondent induced the state authorities to begin an action against the Pennsylvania corporation to recover the penalty provided by statute in case a foreign corporation illegally does business within this state. In August, 1901, he went to Scranton, Pennsylvania, and induced certain citizens to apply for a charter under the laws of that state for a corporation to be known as "The International Correspondence Schools," with its principal office at Scranton. He represented that he would make a good sum of money for himself and those who joined him, as the Colliery Engineer Company would pay him well to give up the charter which he was applying for. Upon learning the object of the respondent some of the signers requested to have their names erased from the application. Other names were substituted, and notice of the application published. While the application was pending, the officers of the Colliery Engineer Company made application for a charter for the International Correspondence Schools and for a change of the name of the Colliery Engineer Company to the International Text-Book Company. Respondent opposed these applications, and the Colliery Engineer Company opposed respondent's application for a charter. While these contests were pending respondent obtained a charter from the state of Illinois for a corporation to be known as "The International Correspondence Schools of Scranton, Pennsylvania," and made application to the Pennsylvania authorities for a license for it to do business in that state as a foreign corporation, which application was opposed by the officers of the Colliery Engineer Company. Respondent then formed what was known under the laws of Pennsylvania as a limited partnership, using the name "The International Correspondence Schools, Limited." He also formed another limited partnership under the name of "The Colliery Engineer Company, Limited." His applications for a charter and for a license for his Illinois corporation to do business in Pennsylvania were refused, and the application of the officers of the Colliery Engineer Company for a charter and a change of name was allowed. Respondent then applied for a charter under the Pennsylvania law for a corporation to be known as "The Colliery Engineer Company," and thereupon a bill was filed by the International Text-Book Company, successor to the Colliery Engineer Company, claiming to be the owner of all of the capital stock of the International Correspondence Schools, to restrain the respondent and his associates from conducting schools or doing any other business under the names "International Correspondence Schools" and "Colliery Engineer Company"—the names of the two limited partnerships formed by him—and also to prevent the

Illinois corporation known as the "Illinois Correspondence Schools of Scranton, Pennsylvania," from using any of said names.

While the bill was pending respondent was arrested on a charge of conspiracy and held to bail. He finally agreed with the manager of the International Text-Book Company to abandon all proceedings inimical to the Colliery Engineer Company or its successors, not to further annoy or harass said International Text-Book Company, to surrender all his rights and papers connected with said proceedings, and to permit the injunction prayed for in said bill to be made perpetual. He also signed a written statement setting forth his object and purpose in the business in which he had been engaged. The commissioner found that the respondent originated and devised the scheme aforesaid to annoy and injury the Colliery Engineer Company in its business by instigating prosecutions against said company on the charge of violating the statutes of the several states concerning foreign corporations, advised the American School of Correspondence of such scheme, sought the conduct thereof as its attorney, and was employed for such purpose by Romanta T. Miller, Jr., its president. It was while employed as such attorney that respondent made the efforts above mentioned to secure the various charters of incorporation. Miller contributed over \$600 to the scheme, but about August 24, 1901, advised respondent that the American School of Correspondence was unwilling to have its name used in that connection, and that the remittances already made and thereafter to be made in aid of said scheme should be treated as Miller's personal investment in said business. He also suggested that respondent should sever all official relations with the American School of Correspondence, but that this would make no difference in the personal relation of Miller to the business. All the acts of the respondent in these transactions were done with the approval and concurrence of Romanta S. Miller, Jr., and their motive was to harass and annoy the Colliery Engineer Company, and, by causing it large expense and injuring its business, to induce it to pay the respondent and his associates a large amount of money to desist from further annoyance and injury. The respondent and his associates at no time intended to conduct the business of a correspondence school, but they conspired to take the name of the Colliery Engineer Company in order to cause it to pay a large sum of money to be relieved from their attacks upon and injury to its already established business; the sole purpose being to compel that company to buy its peace from respondent's attacks by the payment of his demands.

John L. Fogle, for relator. Cantwell & Roth and Charles H. Soelke, for respondent.

DUNN, J. (after stating the facts as above). The substance of the charge against the respondent is that, having discovered what he regarded as a defect in the charter of the Colliery Engineer Company, he organized a conspiracy to harass that company and to embarrass its business by organizing corporations having its name or the name in which its business was transacted, apparently for the purpose of conducting a similar business, but really for the sole purpose of injuring the business of the Colliery Engineer Company, and extorting money from it. The commissioner has found that the charge is proved, and, no exception having been taken to bring the evidence or any of his rulings before us, it is to be taken as true. The statement of the charge made and proved sufficiently characterizes the moral quality of respondent's acts. His counsel seek to justify them for the reason that what he did was done openly, under a claim of right, and that his action was praiseworthy, because he gave the Colliery Engineer Company an opportunity to test the question at the start. This argument would carry weight, if the respondent had been in good faith attempting to organize a corporation for a lawful purpose; but, while pretending to do so, his sole object was the dishonest and unlawful purpose of extorting money by interfering with the established business of a corporation already organized. He did not intend to engage in the business for the purpose for which he pretended to organize his corporation, but he intended to demand money for not doing so.

The standard of personal and professional integrity which should be applied to persons admitted to practice law in the courts is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law. The statute and the rules of this court require a good moral character as a condition precedent to a license as an attorney. This includes at least common honesty, and is not consistent with an effort to obtain a part of the wealth of another by any means not denounced by the criminal statutes. The predatory instinct which led to respondent's raid upon the Colliery Engineer Company is accompanied with an obtuse moral discernment, which seems not to realize that the respondent's use of the forms of law in that matter was not proper. Youth or inexperience does not extenuate the offense of a fraudulent conspiracy to extort money that is inconsistent with the common honesty which should be an attribute of every attorney having the license of this court.

No reason is apparent why the lapse of time in this case makes it unjust or unfair to require the respondent to answer this charge. The rule will be made absolute, and respondent's name stricken from the roll of attorneys of this court.

Rule made absolute.

(230 Ill. 225)

CROCKER et al. v. VAN VLISSINGEN.

(Supreme Court of Illinois, Oct. 23, 1907.

Rehearing Denied Dec. 6, 1907.)

WILLS — CONSTRUCTION — ESTATE DEVISED — BASE FEE.

Testatrix devised certain land to her three sons, and provided that, in case of the death of either without child or children him surviving, the land should go to her other sons, their heirs and assigns, each an equal undivided part thereof, share and share alike. By another clause she gave to one of the sons, O., her Masonic ring. O. died, after testatrix's death, without leaving a child or children him surviving. *Held*, that the bequest of the Masonic ring to O. absolutely indicated that testatrix did not intend that his death, referred to in the devise of the land, should be limited to his death before her death, but referred to his death at any time without child or children surviving, and hence O. took a base fee in the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1351-1359, 1514-1518.]

Appeal from Circuit Court, Cook County; Lockwood Honoré, Judge.

Suit for partition by Cora Crocker against Frank E. Crocker and others. Before answer, Arend Van Vlissingen by leave of court filed a supplemental bill, alleging a transfer of interest from Cora Crocker, and was substituted as complainant. From a decree in favor of complainant, certain defendants appeal. Reversed and remanded.

Francis A. Harper, for appellants. Benjamin Levering, for appellee.

CARTWRIGHT, J. On September 30, 1898, Laura V. Crocker died, leaving a last will and testament, by the third clause of which she devised to her three sons, Orsamus W. Crocker, Marlowe H. Crocker, and Frank E. Crocker, a certain lot 6 in the city of Chicago, with this provision: "And in case of the death of either of my sons without child or children him surviving, I give and devise all of said lot six (6) to my other sons, their heirs and assigns, each an equal undivided part thereof, share and share alike." By the fourth clause she gave to her said son Orsamus W. Crocker her Masonic ring having 13 emblems. On December 16, 1902, Orsamus W. Crocker and Cora Crocker, his wife, conveyed their share in lot 6 to William A. Shryer, who on December 20, 1902, reconveyed to Cora Crocker. On August 6, 1905, Orsamus W. Crocker died without leaving a child or children surviving him. On October 2, 1905, Cora Crocker filed her bill in this case in the circuit court of Cook county, setting up the foregoing facts, and claiming to own one-third of said lot in fee, and praying for a partition. Appellants, Frank E. Crocker and Marlowe H. Crocker, were made defendants, together with the owner of a mortgage on the interest of Marlowe H. Crocker. Before any of the defendants appeared, the appellee, Arend Van Vlissingen, by leave of court filed a supplemental bill, alleging that since the filing of the origi-

nal bill he had purchased the interest of Cora Crocker in the premises and had become entitled to a partition. On June 15, 1906, appellants answered the supplemental bill, admitting the facts therein alleged, and contending that the effect of the will was to give to Orsamus W. Crocker a determinable fee in lot 6, which came to an end at his death. The cause was heard on the pleadings, and a decree was entered finding that the appellants, Frank E. Crocker and Marlowe H. Crocker, and the appellee, Arend Van Vlissingen, were each the owners of an undivided one-third of the lot, and that the interest of the mortgagee was a lien for \$200 on the share of Marlowe H. Crocker, and partition was ordered. An appeal to this court followed.

The question involved is whether the testatrix intended that Orsamus W. Crocker should take a fee-simple estate if he survived her, or whether the devise over took effect on his death without issue after the death of the testatrix. The proper construction of like provisions in wills has been considered by this court in many cases, the most recent of which is *Fifer v. Allen*, 81 N. E. 1105, and, under the rules of construction adopted, Orsamus W. Crocker took a base or determinable fee, which came to an end at his death without a child or children surviving him, and the devise over to his brothers took effect. Aside from the rule of construction, there is a provision in this will which shows that the testatrix contemplated the death of Orsamus W. Crocker as well after her death as before, and that provision is the gift of the Masonic ring, without providing for any other disposition of the ring in the event of the death of Orsamus. The testatrix intended that he should have the ring absolutely, and the argument that she was providing against the contingency of his death in her lifetime for the purpose of preventing a lapse is not only contrary to the natural import of the words used, but the supposition that she had in mind the death of Orsamus in her lifetime is negatived by the bequest of the ring, which he was to have at her death.

The decree is reversed, and the cause is remanded, with directions to dismiss the bill.

Reversed and remanded, with directions.

(230 Ill. 80)

NORTHWESTERN UNIVERSITY et al. v. VILLAGE OF WILMETTE.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 5, 1907.)

1. MUNICIPAL CORPORATIONS — SEWER IMPROVEMENT — ASSESSMENTS — ESTIMATE — SUFFICIENCY.

An estimate of the cost of a sewer improvement was not insufficient as failing to provide for the cost of repairing the streets used and of removing the surplus earth taken from the ditches, where it provided a lump sum for lawful expenses attending the improvement, in ad-

dition to items, for sewer pipe, etc., and the ordinance provided the work should be done in a good and workmanlike manner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 793.]

2. SAME—APPROVAL OF WORK—VALIDITY OF ORDINANCE.

An ordinance for a sewer improvement is not void for allowing the board of local improvements to determine whether the work is done in a workmanlike manner; the board's approval being only tentative, as before the improvement can be accepted and paid for the court in which the assessment is confirmed must determine that the improvement is constructed substantially according to the improvement ordinance.

3. SAME—DESIGNATION OF DISTRICT—SUFFICIENCY.

A sewer improvement ordinance, defining the district as all the territory of the village lying west of a line terminating on the south at the village limits, includes a strip of land lying within the village west and south of such terminating point; there being a jog in the south line of the village.

4. SAME—ORDINANCE—RULE OF CONSTRUCTION.

Where an ordinance is uncertain and open to two constructions, a court will adopt the one which will uphold the ordinance's validity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 275.]

5. SAME—"LOCAL IMPROVEMENT" DEFINED.

A "local improvement" is a public improvement which through its being confined to a locality enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality, and though a system of sewers to relieve the congested condition of existing sewers by furnishing additional means, whereby the surface water caused by excessive rain may be carried away, may benefit all the property in a village, if the improvement will specially enhance the adjacent property, it is local and may be paid for by special assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1021.]

6. STATUTES — CLASSIFICATION OF CITIES — CONSTITUTIONALITY.

Local Improvement Act, § 94 (Hurd's Rev. St. 1905, c. 24, § 600), authorizing cities, etc., having less than 100,000 inhabitants in special improvement proceedings to provide that a sum not exceeding 6 per cent. of the amount of the assessment shall be applied toward the cost of making and collecting the assessment, is not unconstitutional on the ground the classification of the cities, etc., is arbitrary and not founded upon a rational basis.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 101.]

7. STATUTES—VALIDITY — CLASSIFICATION OF CITIES.

A classification of cities, etc., by population, as a basis for legislation, may be made if it is based upon a rational difference of situation or condition found in the municipalities placed in the different classes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 101, 102.]

8. CONSTITUTIONAL LAW — STATUTES — PRESUMPTION OF VALIDITY.

In determining the constitutionality of a statute, every presumption obtains in favor of its validity, and so, where it is not clear that a classification of cities is unreasonable, the provision therefor should be sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

9. APPEAL—REVIEW—FINDINGS OF FACT—CONCLUSIVENESS—NECESSITY FOR IMPROVEMENT.

A court's finding upon the necessity for and reasonableness of a sewer improvement will not be disturbed on appeal, where the evidence is conflicting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3983-3989.]

10. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—NECESSITY—DETERMINATION BY CITY COUNCIL—CONCLUSIVENESS.

A city council may determine whether a local improvement is needed and decide upon its location, etc., and courts may not interfere upon the ground the improvement is unnecessary or its construction an unreasonable burden, unless the discretion has been so abused as to make the ordinance for the improvement so unreasonable that it may be declared void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 800.]

11. SAME—RIGHTS OF VILLAGE AUTHORITIES.

That a village is connected with the Sanitary District of Chicago by Act July 1, 1903 (Hurd's Rev. St. 1903, p. 363, c. 24, § 369e), does not deprive it of jurisdiction to construct sewers, nothing having been done in the village by the district, except to locate the route of its main channel, and no right of way having been acquired.

12. SAME.

It is no objection to village assessments for a system of relief sewers that the system will contaminate the water supply of a near-by city taken from the lake in which the sewers are to discharge; the city not objecting, and it appearing that only a small portion of the village's sewage will be discharged at the new outlet, and that for \$100 expense the system can be made to fully comply with contracts existing between the city and village whereby the village is permitted to discharge surface water at a point nearer the city's water supply intake than the main sewer outlet.

13. SAME—PROCEEDINGS TO CONFIRM ASSESSMENT—ISSUES.

Where, on an application to confirm a village assessment for a sewer improvement, the only issues were whether objectors' property was assessed more than it was benefited or more than its proportionate share of the cost, the court having held the improvement a proper one, the question whether the improvement should be made was properly excluded from the jury.

Appeal from Cook County Court; W. L. Pond, Judge.

Application by the village of Wilmette for confirmation of a special assessment. From a judgment of confirmation, the Northwestern University and others appeal. Affirmed.

Augustus N. Gage, Eln, Grover & Graves, H. H. C. Miller, Western Starr, Alden, Latham & Young, George A. Mason, King, Lanh & Gage, Charles J. Michelet, H. S. Gemmill, Lee F. English, Otto Gresham, W. H. Johnson, and Robert W. Miller (Frank R. Grover, Carl R. Latham, and Asahel W. Gage, of counsel), for appellants. Robert Redfield and A. C. Wenban (Tolman, Redfield & Sexton, of counsel), for appellee.

HAND, C. J. This is an application for judgment of confirmation by the village of Wilmette, in the county court of Cook county, of a special assessment levied by said village to pay the cost of constructing a system of

sewers in a portion of the streets of said village to relieve the congested condition of the sewers already in the streets of said village, by furnishing additional means whereby the surface water which accumulates in said village at times of excessive rainfall or freshets may be carried into Lake Michigan, which lies to the east of said village of Wilmette. The appellants appeared and filed objections to confirmation as to their property, and there was a hearing before the court upon the legal questions involved, and afterwards a trial before the court and a jury upon the questions of benefits and whether the property of the appellants was assessed more than its proportionate share of the cost of the improvement, and, the findings upon both branches of the case having been against the appellants, a judgment of confirmation was entered against appellants' property, and they have prosecuted an appeal to this court.

First. It is objected that the estimate of the cost of the improvement is not sufficient, in this: That it makes no provision for the cost of the repaving of streets in which the sewers are to be constructed or for the removal of the surplus earth taken from the ditches in which the sewers are to be laid. The estimate of the cost of the improvement is in the following form:

Estimate Cost of Improvement.	
550 lineal feet of oak plank sewer, at \$3 per lineal foot.....	\$ 1,650 00
1,000 lineal feet of concrete sewer of 6 feet internal diameter, at \$3.70 per lineal foot	12,120 00
1,710 lineal feet of concrete sewer of 5½ feet internal diameter, at \$3.30 per lineal foot	36,423 00
1,630 lineal feet of concrete sewer of 4½ inches internal diameter, at \$3.70 per lineal foot.....	10,321 00
1,375 lineal feet of concrete sewer of 4½ inches internal diameter, at \$3.30 per lineal foot	8,325 00
3,350 lineal feet of concrete sewer of 4½ inches internal diameter, at \$3.70 per lineal foot	12,525 00
1,350 lineal feet of concrete sewer of 3½ inches diameter, at \$4.70 per lineal foot	5,325 00
5,500 lineal feet of concrete sewer of 3½ inches internal diameter, at \$4.30 per lineal foot	23,650 00
4,625 lineal feet of vitrified tile pipe sewer of 34 inches internal diameter, at \$3.30 per lineal foot.....	14,363 00
1,900 lineal feet of vitrified tile pipe sewer of 18 inches internal diameter, at \$2.70 per lineal foot.....	5,130 00
1 concrete bulkhead	300 00
25 ordinary manholes, complete, at \$30 each	750 00
23 spillway manholes of 4 feet internal diameter, complete, with conduit, at \$40 each	1,320 00
1 spillway manhole of 6 feet internal diameter, complete, with conduit.....	80 00
21 catch-basins and connections, complete, at \$35 each.....	1,260 00
For lawful expenses attending the proceedings for making said improvement and the cost of making and collecting the assessment therefor.....	2,400 00
Total	\$149,933 00

And the ordinance provides: "All the necessary labor and work shall be performed in a good and workmanlike manner." We think it clear that the cost of repaving streets torn up in excavating for the sewers and removing surplus earth placed upon the streets of

the village during the construction of the sewers is included in the estimate of the cost of the improvement, as, obviously, the improvement would not be put in in a good and workmanlike manner if the portions of the streets where sewers were laid were left unpaved, and the earth excavated and not used for refilling remained in the streets as an obstruction to travel. It has repeatedly been held by this court that an itemized statement of the cost of a local improvement is sufficient which contains a statement of the cost of the substantial component elements of the improvement. *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097; *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358; *Connecticut Mutual Life Ins. Co. v. City of Chicago*, 217 Ill. 352, 75 N. E. 365.

It is said, however, that the ordinance provides that the improvement shall be constructed under the direction and supervision and to the satisfaction of the board of local improvements of the village of Wilmette, and that to allow said board to determine whether the work of construction had been performed in a good and workmanlike manner would be to vest a discretion in said board which would render the ordinance void. We do not agree with this contention. The approval of the work by the board of local improvements is only tentative, as before the improvement can be accepted and paid for by the village the court in which the assessment is confirmed must determine that the improvement is constructed substantially according to the improvement ordinance (*Case v. City of Sullivan*, 222 Ill. 56, 78 N. E. 37); and should the board of local improvements determine that the sewers had been put in in a good and workmanlike manner when paved streets remained torn up and obstructed by earth, the approval would be annulled by the court, and the improvement would be directed to be completed by replacing the pavement which had been disturbed and removing the earth from the surface of the streets before the construction of the work would be approved and the contract price directed to be paid to the contractor, so that there is nothing to be feared from the abuse of the power conferred upon the board of local improvements to supervise the construction of the work upon the improvement. The work of constructing sewers in a city or village must necessarily proceed under the supervision of some person or body which represents the city or village, and there is no objection to conferring such power upon the board of local improvements, subject, as it is, to the approval of the court that confirmed the assessment.

Second. It is objected that the drainage district established by the improvement ordinance is indefinite and uncertain, in this: That the southern boundary of the district is not properly defined. The ordinance provides that the drainage district shall be composed of "all of the territory lying within the corporate limits of said village west of

the following described line," which line commences at Lake Michigan at a point in said village and then runs upon a crooked line to a certain point in the village, from which point it runs south "to the south limits of said village." It appears that the point in the village where the east line of the district terminates upon the south, by reason of a jog in the south line of the village, is 200 feet north of the south line of the village, a short distance west of where said east line terminates upon the south, and the contention is that a strip upon the south side of the village, which is about 200 feet in width, is not included in the drainage district created by the ordinance. Said strip is west of the line which runs "to the south limits of the village." While it may not be due west, it is west of said line, and said strip, we think, is fairly included within the limits of the drainage district. It also appears that the ordinance provides for the construction of sewers in said strip, which clearly shows that said strip is included in the drainage district. In order to determine the meaning of an ordinance, the ordinance as a whole must be considered. *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191; *Gage v. City of Chicago*, 196 Ill. 512, 63 N. E. 1031. At most, all that can be said of the location of the southern boundary of said district is that it is left uncertain by the ordinance, and the rule is, where an ordinance is uncertain and open to two constructions, the court will adopt the construction which will uphold the validity of the ordinance. *Berry v. City of Chicago*, 192 Ill. 154, 61 N. E. 498.

Third. It is objected that the improvement proposed to be constructed is not a local improvement and cannot therefore be constructed by special assessment, but must be paid for, if constructed, by general taxation. The drainage district created by the improvement ordinance is not co-extensive with the limits of the village of Wilmette, which shows conclusively that in the judgment of the village board all the property in the village will not be benefited by the construction of the improvement, and generally this court has held that water mains and sewers placed in the streets of a village or city are local improvements and can be paid for by special assessment of the property benefited. A local improvement is defined to be "a public improvement which, by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality." *City of Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412. While it may be true that a system of relief sewers like the system in question will be a benefit to all the property in the village, this is not the test. If the improvement will enhance, specially, the property adjacent to which it is made, the improvement is local within the meaning of the law, and may be paid for by special assessment upon the property benefited. We

think a system of sewers in a city or village which conveys the surface water from the cellars and basements of property located therein, as the evidence shows the sewers will do which are to be located in said village under this improvement ordinance, is a local improvement, which may be paid for by special assessment. In *Ewart v. Village of Western Springs*, 180 Ill. 318, 54 N. E. 478, on page 323 of 180 Ill., page 480 of 54 N. E., it was said: "The test whether an improvement is local or not depends upon the question whether or not it specially benefits the property assessed." To the same effect is *Fisher v. City of Chicago*, 213 Ill. 268, 72 N. E. 680.

Fourth. It is objected that the proviso to section 94 of the local improvement act (Hurd's Rev. St. 1905, c. 24, § 600), which provides that cities, towns, and villages of this state having a population of less than 100,000 by the last preceding census, may, in and by the ordinance for the assessment prescribed, provide that a sum not to exceed 6 per cent. of the amount of the assessment shall be applied toward the payment of the cost of making and collecting said assessment, and under which provision \$3,400 of the present assessment is levied, is unconstitutional and void, as the classification of the cities, towns, and villages, of the state made in said proviso is arbitrary and is not founded upon any rational basis. The general rule is that a classification of the cities, towns, and villages of the state by population, as a basis for legislation, may be made if such classification is based upon a rational difference of situation or condition found in the municipalities placed in the different classes. *Douglas v. People*, 225 Ill. 536, 80 N. E. 341, 8 L. R. A. (N. S.) 1116. In determining the constitutionality of a statute, every presumption obtains in favor of the validity of the statute. While this provision has not heretofore expressly been held to be constitutional by this court, special assessments, including the cost of making and collecting the assessment levied under this proviso, have been sustained. *Gault v. Village of Glen Ellyn*, 226 Ill. 520, 80 N. E. 1046. In *Chicago Terminal Transfer Railroad Co. v. Greer*, 223 Ill. 104, 79 N. E. 46, on page 106 of 223 Ill., page 47 of 79 N. E., it was said: "When the classification on the basis of population has reasonable relation to the purposes and objects of the legislation, the act is not within the constitutional prohibition against local or special laws."

By section 6 of the local improvement act (Hurd's Rev. St. 1905, c. 24, § 512), in cities having a population of 100,000 or more a board of local improvements is created, with a president, vice president, secretary, and assistant secretary; while in cities, towns, and villages having a population of less than 100,000 certain designated city, town, or village officers are, by virtue of their respective offices, members of the board of local improvements in such cities, towns, and villages.

The boards in cities of 100,000 or more are paid a salary, and their official duties require their constant attention, and their salaries and expenses, like those of other officers of such cities, are paid from the city treasury; while in cities, towns, and villages having a population of less than 100,000 the officers composing the board of local improvements are paid their salaries or per diem as officers of said cities, towns, or villages, and are not paid as members of the board of local improvements. The Legislature has, it will therefore be seen, classified the cities, towns, and villages of the state, in section 6, upon the basis of population of 100,000, as well as in the proviso to said section 94 of the local improvement act. We are unable to see, if such a classification is valid in section 6, which we think it is, why it is not in the power of the Legislature to pass the proviso to section 94. At least we are unable to point out any valid constitutional objection to the classification found in either of said sections of the statute, and cannot therefore say said classification is unreasonable and does not rest upon a substantial basis. As we are not entirely clear that the classification is unreasonable, it is our duty to hold the proviso to said section constitutional.

Fifth. It is said that the village of Wilmette has a system of sewers in its streets which amply provides all the property in said village with drainage and sewerage facilities, and that the ordinance providing for said improvement is therefore unreasonable, oppressive, and void. The judge who tried the case below visited the property assessed, and the evidence upon the question of the ability of the present system of sewers in said village to accommodate the property in said village was exceedingly conflicting. The witnesses for appellants testified that the property in said village was amply provided with facilities for the removal of the sewage of the village therefrom, while the witnesses for the appellee testified such was not the fact, but that the streets, the cellars, and the basements of the houses and business blocks in said village, in times of heavy rains and freshets, were flooded to a depth of several inches and in places to a depth of several feet; that during such times the water and sewage ran from, instead of into, the catch-basins located upon the streets of said village; that the present system of sewers in said village was wholly inadequate; and that it was necessary, in order to protect the property and health of the people residing in said village, that the new system provided for by the improvement ordinance in this case should be constructed. In view of this evidence we cannot disturb the finding of the court below upon the question of the necessity and reasonableness of this improvement. *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358.

It is also said the proposed sewers are to be constructed in paved streets, instead of the alleys of said village, and that they are

to be laid along an unnecessarily circuitous route, which makes the ordinance unreasonable and void. In *Walker v. City of Chicago*, 202 Ill. 531, 67 N. E. 369, on page 538 of 202 Ill., page 371 of 67 N. E., this court said: "The city council is clothed with the power to determine whether or not a local improvement is required, also to decide upon its location, nature, and character, and when it shall be made and the manner in which it shall be constructed, and the courts have no power to interfere to prevent the construction of a local improvement upon the ground that it is not necessary and that its construction is an unreasonable burden upon the property sought to be assessed, unless the discretion vested in the city council has been abused to such an extent as to render the ordinance providing for the improvement so unreasonable that it may be declared void." And in *Field v. Village of Western Springs*, 181 Ill. 186, 54 N. E. 920, on page 191 of 181 Ill., page 931 of 54 N. E., it was said: "The question of the necessity of a local improvement is by the law committed to the city council, and courts have no right to interfere to prevent such improvement except in cases where it clearly appears that such discretion has been abused. The ground on which courts interfere is that the ordinance is so unreasonable as to render it void."

Sixth. It is objected that the territory of which Wilmette forms a part was by act of the Legislature which went into effect July 1, 1903 (*Hurd's Rev. St.* 1905, p. 368, c. 24, § 369e), connected with the Sanitary District of Chicago, and that the village of Wilmette is, by reason of that fact, without jurisdiction to construct sewers within its corporate limits. Nothing has been done in the village of Wilmette by the Sanitary District of Chicago except to locate the route of its main channel. No right of way has been acquired, and no work done, and under the decisions of this court in *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255, and *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127, the contention of appellants that the village of Wilmette has lost jurisdiction over territory located within its corporate limits to construct sewers therein is without force.

Seventh. It is objected that the proposed system of sewers, if completed, will contaminate the water supply of the village of Wilmette and that of the city of Evanston, which city is located upon Lake Michigan immediately south of the village of Wilmette, and that thereby a nuisance will be created which would be subject to abatement by injunction. There is no pretense that the amount of sewage which will flow into Lake Michigan from the village of Wilmette will be increased by the proposed improvement. The village of Wilmette, like all the north shore towns, has heretofore poured its sewage into Lake Michigan, and will be forced to continue so to do until relieved by the extension and completion of the improvement

now being made by the Sanitary District of Chicago. The proposed system is so constructed that it can readily and with little expense to the village be connected with the drains of the Sanitary District of Chicago when they are extended to Wilmette. The most that can be said in support of the appellants' contention is that the outlet into Lake Michigan from the new system of sewers is about 2,400 feet nearer the intake of the water supply of the city of Evanston than the outlet of the present system of sewers. In 1892, and again in 1902, the village of Wilmette made a contract with the city of Evanston to furnish it its water supply. In a modification of those contracts, which was obtained about the time the improvement ordinance involved was passed, the city of Evanston consented that the proposed sewerage system of Wilmette might enter the lake 2,400 feet nearer the intake of its water supply, if the sewers of its new system were so arranged that only surface water would flow into the lake at that point until after a certain quantity of water was flowing through the said sewers, and that the sewage of the village proper should be poured into the lake at the outlet of the old system of sewers, and the contention is made that the new system of sewers is to be so constructed that the probability is a portion of the sewage of the village will enter the lake at the new outlet, which would cause the contamination of the water supply of the city of Evanston and the village of Wilmette and amount to a breach of said contracts. The city of Evanston is not here complaining, and the evidence clearly shows that under no circumstances, after the new system is completed, will more than an infinitesimal portion of the sewage of the village of Wilmette be discharged into the lake at the new outlet, and that the spillways to be constructed are so arranged that for an additional expense of about \$100 they can be made to fully comply with the contracts existing between the village of Wilmette and the city of Evanston, and it will be time enough to adjust the contract relations between said city and village when those questions arise, and we are of the opinion they cannot properly be determined in this proceeding. In *Walker v. City of Aurora*, 140 Ill. 402, 29 N. E. 741, which was a special assessment case, it was objected that the waters of Fox river, below Aurora, into which the sewer sought to be constructed would empty, would contaminate the waters of said river. The court said (page 409 of 140 Ill., page 743 of 29 N. E.): "It is suggested that the sewerage will be a nuisance to the cities and towns on Fox river below Aurora. If this should turn out to be so, and if the discharge of the sewerage into the river should prove to be 'to the injury or prejudice of others,' and if appellee should fail to provide suitable appliances for the purification of the sewerage matter, then there will be ample opportunity to afford relief, upon

complaint being made, either on behalf of the public or of those injured or prejudiced."

Eighth. A number of questions have been raised upon this record as to the conduct of the trial before the jury, and the rulings of the trial court upon the admission of evidence and the instructions given by that court to the jury have been criticised. But two issues were before the jury, namely: Was the appellants' property assessed more than it was benefited by the improvement or more than its proportionate share of the cost of the improvement? The court had held that the improvement was a proper one to be made, and all questions other than those suggested were entirely foreign to the questions being tried before the jury, and all evidence or instructions which sought to bring before the jury, and have them pass upon, the question whether the improvement should be made were properly excluded or refused. We think the court did not commit reversible error in its rulings upon the evidence or in giving or refusing instructions.

A number of other questions have been raised. We think, however, they are without merit. We have examined this record with care, and, although it is a long one, we have found it unusually free from error.

The judgment of the county court will be affirmed.

Judgment affirmed.

(230 Ill. 128)

DONASON v. BARBERO et al.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 5, 1907.)

1. VENDOR AND PURCHASER—REDEMPTION FROM MORTGAGE FORECLOSURE—DISTINGUISHED FROM PURCHASE.

Intestate died seized of 957 acres of land, subject to a mortgage for \$15,000. The land was purchased by the mortgagee on foreclosure for \$18,005.39, after which he agreed to assign the purchase certificate to the widow on payment of such amount, with interest, which agreement was extended until September 1, 1889, when a redemption was effected by a payment of the amount due, made up of two partial payments previously made by the widow, \$6,326.67, the price of 100 acres of land sold by J., one of the heirs, for their benefit to another, \$9,000 raised by a deed of trust on the remaining 857 acres, and \$153.53, furnished by J. A quitclaim deed to the land was made by the purchaser under the mortgage sale to J. in his own right. At this time the land was worth \$38,000. Held, that such transaction operated as a redemption of the land for the benefit of the widow and heirs of intestate, and not a purchase by J. for his sole use.

2. DEEDS—EXECUTION—BLANKS.

Where a deed at the time of its execution had a blank left for the insertion of the name of the grantee, the insertion of a grantee's name by the grantor's agent without authority left the deed ineffective to convey title as between the grantor and the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 96.]

3. PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION.

Where, after execution of a deed with a blank for the name of the grantee, the grantor's agent inserted the name of a grantee without

authority, such act was ratified by the grantor's appearance in a subsequent suit for partition of the land and disclaiming any interest therein; the complainant having alleged a conveyance of the land to the grantee by such deed.

4. TENANCY IN COMMON—OUSTER.

Where, on redemption of certain land from foreclosure for the benefit of the heirs and distributees of the former owner, the deed was made to J., one of such heirs, in his own right, and he thereafter held exclusive possession of the land, paid taxes thereon, collected rents, mortgaged the land, and openly claimed it as his own, such acts were insufficient to constitute an ouster of the interest of his co-tenants, who had knowledge that the interest held by J. had been acquired under a contract made for the benefit of all.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 30-32.]

5. SAME.

Possession by a co-tenant and payment of taxes, however long continued, and the appropriation of rents, with the making of slight repairs and improvements on the land, is not alone sufficient to constitute an ouster of the rights of his co-tenants, unless they are given notice that an adverse possession and an actual disseisin are intended to be asserted against them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 30-32.]

6. SAME—NOTICE.

Where land held in common had been conveyed to one of the co-tenants by a deed purporting to convey to him the entire title, and in a suit by one of the co-tenants for partition he answered, claiming to be the absolute owner, but it was not shown that two other tenants in common who were made codefendants knew of such answer, or what defense such tenants in common intended to make, the answer was not notice to them that he claimed the entire title, the suit having been discontinued without trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 30-32.]

7. VENDOR AND PURCHASER—BONA FIDE PURCHASER.

J., a tenant in common, having taken a redemption deed in his own name, but actually for the benefit of his co-tenants, sold part of the land and executed a deed of trust of the balance for a loan to raise part of the redemption fund. Thereafter the deed of trust was taken up and certain other indebtedness paid by defendant H., to whom J. executed a warranty deed, which was, in fact, a mortgage, H. advancing only \$10 in cash to J. J. continued to operate the land until he subsequently executed to H. a quitclaim deed barring his equity of redemption. Prior to this H. had notice of a suit by a co-tenant for partition, which was settled by his advancing to her \$500 for a quitclaim deed, and also had knowledge that two other co-tenants had the same right as was possessed by the complainant in such suit, and had been informed at his own request by the attorney who had previously represented such co-tenants concerning J.'s title. Held, that H. was not an innocent purchaser of the land.

8. PARTITION—ACCOUNTING—GRANTEE OF CO-TENANT—VOLUNTEER.

Where a co-tenant owning under a deed purporting to convey an absolute title, but which, in fact, was for the benefit of all the co-tenants, conveyed the land to H., who was not an innocent purchaser, a grantee of certain of such co-tenants was not a mere volunteer, but was entitled to partition and to compel H. to account for rents, except such as matured prior to the taking of complainant's deed.

9. SAME—LACHES.

Where there had never been any sufficient disseisin of co-tenants by one of them who held

possession and conveyed the land to H. under a deed purporting to convey an absolute title, the grantee of such co-tenants was not barred to assert his right to partition and to an accounting against H. because of the alleged laches of his grantors.

Appeal from Circuit Court, Knox County; Robert J. Grier, Judge.

Bill by Nathan Donason against John J. Barbero and others. From a decree dismissing the bill, complainant appeals. Reversed and remanded, with directions.

This is an appeal from a decree of the circuit court of Knox county dismissing for want of equity, upon a hearing, a bill filed by appellant against John J. Barbero and Andrew C. Housh and others, for partition, accounting, and other relief.

It appears from the record that on October 20, 1882, Nathan Barbero, Calista W. Barbero, his wife, and John J. Barbero, their son, executed a mortgage on 957 acres of land owned by said Nathan Barbero in Knox county, Ill., to the Provident Life & Trust Company of Philadelphia, to secure a loan from it of \$15,000. John J. owned no interest in the land, but seems to have joined in the mortgage for the reason that he was then engaged in managing the business of his father. On January 1, 1885, Nathan Barbero died intestate, seised of all of said lands, leaving surviving him his widow, Calista W. Barbero, and Sarah L. McGirr, John J. Barbero, Nathan H. Barbero, and Ann M. Donason, his children and only heirs at law. Upon the death of said Barbero, the widow took out letters of administration, and by agreement of all the heirs remained in possession of the premises and collected the rents and profits therefrom, and applied the same to the payment of taxes, repairs, improvements, interest on the mortgage indebtedness and her living expenses. At the February term, 1888, of the said circuit court, the mortgage was foreclosed, and on April 9, 1888, the premises were sold, under the decree of sale, to the mortgagee for \$16,005.39, the amount of the debt, interest, and costs. After the sale, and during the time allowed for redemption, Calista W. Barbero, on behalf of herself and the heirs of Nathan Barbero, endeavored to raise the money necessary to redeem the said property. This, however, she was unable to do. In her efforts to secure the money, she employed one George W. Lyon to assist her, and on May 31, 1888, Lyon entered into a contract in writing with the said mortgagee, whereby it agreed to assign and transfer the certificate of purchase of said property upon the payment to it of \$16,005.39, with interest thereon at the rate of 6 per cent. per annum from April 9, 1888, in the following manner: \$917.15 on July 20, 1888, \$450 on October 20, 1888, \$450 on April 20, 1889, and the balance of said amount and interest on August 1, 1889. This contract was made for the benefit of the widow and all the heirs of the deceased. On the application of the

Provident Company the master in chancery, upon the expiration of the statutory period of redemption, executed and delivered to it a deed for the said premises. The first three payments as provided for in the contract were made by Calista W. Barbero, but whether as they fell due does not certainly appear. The fourth and principal payment was not made. She seems to have been hampered in her efforts by the fact that Sarah L. McGirr would not join in a mortgage for the purpose of raising the funds necessary, and Lyon, who was endeavoring to negotiate a loan, seems to have been unable to find any one willing to advance the money. After receiving the deed from the master, the Provident Company made a tentative or qualified extension of the time within which the final payment could be made under the Lyon contract until September 1, 1889, as shown by letters hereinafter set out. It having become apparent that Calista W. Barbero would fail in her efforts to raise the money in the required time, it appears that John J. Barbero in the month of July, 1889, employed one C. D. Hendryx, an attorney practicing at Galesburg, Ill., to secure the funds necessary to complete the transaction contemplated by the Lyon contract. Hendryx called on many persons, soliciting the loan, and finally arranged for the same with Messrs. Bourland & Bailey, of Peoria, Ill., and on August 10, 1889, wrote a letter to C. H. & C. B. Wood, attorneys, of Chicago, Ill., who were acting with N. W. Harris & Co., of that city, for the Provident Company, as follows:

"I learn by Mr. Lyon, at Peoria, that you agreed to extend the time in which the Barberos can redeem. I wish to know if this is true, and if we will remit you the interest for ninety days from August 1, if we can have that? I have the loan placed so there will be no mistake or failure, but as it is eastern money will take a little time to get it around. I think it will be done in thirty days, and as soon as it comes you will get the money, whether ninety days is up or not. If you will kindly write me so I can get your answer by Tuesday morning you will do me a great favor. I don't wish to close the deal for the money unless it will go for redemption. Very truly yours, C. D. Hendryx, Attorney for the Barberos."

This letter was turned over to Harris & Co., and on August 12, 1889, they wrote Hendryx in reply, as follows:

"Your favor 10th, to Messrs. Woods, has been placed in our hands for reply. The trust company sent us a deed covering the Barbero land, which we tendered Mr. Lyon in our office a few days since. We asked trust company in case Lyon should not be ready to pay for the property for a few days after money was due, if we should accept payment, and they wrote us that we could do so. We did not make a definite extension of time to Mr. Lyon, as we told him we had no authority to do so. We promised not to sell the land

or entertain propositions from other parties without notifying him. We also gave him to understand that if matter was settled up within thirty days from August 1st we had no doubt it would be all right, and that we would deliver deed and accept payment, provided we did not in the meantime receive instructions to the contrary from trust company. We just wrote Mr. Lyon this morning, before receiving your letter, asking him what the prospect was, and saying to him that he must not expect any further extensions if not closed up this month. Mr. L. claimed he had a party in Peoria who would furnish the money but that there had been some delay in examining the land. We trust this matter will be closed up promptly. Yours truly, N. W. Harris & Co.

"P. S. We suppose you understand that a contract of sale was made with Mr. Lyon some months ago, he representing Mrs. Barbero. We cannot promise anything after this month. N. W. H. & Co."

On July 29, 1889, the Provident Company, anticipating that the money would be forthcoming to satisfy their claim, executed a quitclaim deed to the property in question and sent the same to its agents, Harris & Co., in Chicago, who afterwards sent it to the German Bank at Peoria. At the time of its execution, the grantee was not named nor the consideration mentioned in the deed, but the same was afterwards written in the deed, before its delivery, by Thomas F. Dow, a clerk in the Harris office. Hendryx, John J. Barbero, and his wife, David Hartsook, to whom Barbero had contracted to sell 100 acres of the said land, and one William Swigert, met at the German Bank in Peoria, on August 31, 1889, and the deed was delivered to John J. Barbero upon the payment to the bank of the amount due the said company. The deed had either been sent to the bank by Harris & Co. or was brought to Peoria for delivery by a clerk from their office. When delivered, the deed contained the name of John J. Barbero as grantee and recited the consideration to be \$16,005.39. Dow did not have authority from the Provident Company to fill the blank for the name of the grantee with the name of John J. Barbero or with any other name. In taking up this deed, John J. Barbero was given credit for the payments which had been made by his mother on the Lyon contract. The amount which he actually paid was \$15,480.20. Prior to this he had agreed to sell 100 acres of the land to Hartsook, and that transaction was closed and the purchase price paid on this day. The money paid by John J. Barbero to the Provident Company was made up of the purchase price of this 100 acres (\$6,326.67), \$9,000 furnished by Benjamin L. T. Bourland, and \$153.53 furnished by John J. Barbero himself. At the same time Barbero and his wife executed and delivered to Hartsook a warranty deed for the 100 acres sold to him and a deed of trust to the re-

maining 857 acres of the land to Bourland to secure the loan of \$9,000.

On March 21, 1900, Barbero and his wife, for the expressed consideration of \$21,424, conveyed to Andrew C. Housh, by warranty deed, all of the land included in the trust deed to Bourland. This deed was, in fact, a mortgage made to secure the sum of \$21,425. The items secured by that conveyance are shown by the following statement made and agreed to by the parties to the deed at the time of the conveyance:

1890.

March 31, to C. W. & J. J. Barbero note and interest	\$ 4,842 08
" " J. J. Barbero note and interest	4,381 17
" " H. J. Swabacher note, amounting to	9,000 00
" " Int. 7 mo. 7 pr ct.....	367 75
" " Mrs. C. Goesche's note..	800 00
" " Int. 6 mo. 6 pr ct.....	24 00
" " Cash	10 00
	<u>\$21,425 00</u>

1890.

March 31, by 857 acres of land, at \$25 an acre.....	\$21,425 00
	<u>\$21,425 00</u>

The \$9,000 item is the note secured by the Bourland trust deed, and the principal of that note remains unpaid to the present time. From the death of Nathan Barbero the lands of his estate had been in the possession of the widow. John J. Barbero, under her direction, had the actual management thereof, and they were operated for the benefit of the widow and all the heirs, but the net proceeds were all applied to the satisfaction of the indebtedness of the deceased. After the transactions of August 31, 1889, and March 31, 1900, John J. Barbero, as before, continued in the actual management of the lands so conveyed to Housh. Out of the proceeds taxes were paid, repairs were made, the profits in some manner divided with Housh, and out of the portion thereof which did not go to the latter Callista W. Barbero and the family of John J. Barbero were supported. The widow died in 1894. On October 14, 1897, John J. Barbero, despairing, as he says, of being able to pay the amount secured by the deed to Housh and being unable to sell the land to any one else for a greater price than the \$25 per acre which the mortgage indebtedness amounted to, for the purpose of releasing his equity of redemption, executed a quitclaim deed to Housh for all the lands upon an expressed consideration of one dollar. The heirs of Nathan Barbero other than John J. never at any time, either before or after the transactions at Peoria on August 31, 1889, had any part in the management of the lands, and never handled any of the rents and profits. Knowledge of the deed of August 31, 1889, to John J. Barbero came to his brother and sisters within a few weeks after it was made.

On January 25, 1889, before the lands in controversy had been conveyed to John J. and before the period of redemption had expired, Sarah L. McGirr filed a bill in the circuit court of Knox county against the widow and remaining heirs of Nathan Barbero for partition of the lands of which he died seised, and on March 15, 1890, after the conveyance to John J. and before the conveyance to Housh, filed a supplemental bill in said cause (which was later amended), pleading the conveyance from the Provident Company, and alleging that it was executed pursuant to an agreement made by the said heirs with Callista W. Barbero and John J. Barbero that they would redeem for all of the heirs; that the transaction was, in fact, for all of the heirs; that Callista W. and John J. sometimes stated that the deed to the latter was for the benefit of all the heirs, and at other times pretended that the deed was taken by John J. in his own right, and praying, among other things, that said John J. Barbero be decreed to hold the title he had acquired by his deed from said company as trustee for all of said heirs.

To the original bill the widow and heirs, other than Mrs. McGirr, on March 11, 1899, filed an answer, in which it was alleged that "said premises have, by consent of all the heirs, remained wholly with the widow, who has expended the entire income in making improvements, paying interest, taxes," etc., and that "respondents are desirous of redeeming therefrom [referring to the foreclosure sale], and have assurance of the necessary funds from responsible parties if complainant, Sarah L. McGirr, sees cause to join with them in giving proper security upon the lands in suit therefor. Respondents have not sought, nor do they now seek, any undue or improper advantage of complainant, but would gladly join her in proper steps for redemption of all of said real estate before too late. As yet the Provident Life & Trust Company hold such property subject to the statutory rights of redemption of said widow and heirs of Nathan Barbero, and the land is well worth probably \$30,000, if judiciously managed; admits that complainant, Sarah L. McGirr, is personally unable alone to redeem said lands from said mortgage sale, but avers the truth to be that, if she will cordially join them in taking proper steps to borrow the needed redemption money for a term of years by means of a mortgage on said estate lands, it is readily practicable to do so at a moderate rate of interest, thus precluding danger of loss of such lands."

To the amended supplemental bill the widow and John J. filed an answer on February 15, 1890, alleging that Sarah L. McGirr refused to join in a mortgage to raise money to redeem, and that the redemption of said land was prevented by the failure and refusal of said Sarah L. McGirr to so join; that after the expiration of the period of re-

demption John J. Barbero, in his own right and with his own means, purchased the said premises, and that he was the absolute owner of the same. To the amended supplemental bill Nathan H. Barbero filed a separate answer, which admits all the allegations of the supplemental bill; states that equity and good conscience require that a trust be fastened upon the lands for the benefit of the estate of the deceased; and admits that complainant is entitled to relief sought. The Provident Company was made a defendant, and on February 15, 1890, filed a disclaimer. Mrs. Donason does not seem to have answered the supplemental bill. On February 7, 1893, the claim of the complainant in that suit was compromised. John J. Barbero paid Sarah L. McGirr \$500, and she thereupon executed a deed to him of all her interest in the said lands. On December 19, 1893, the bill was dismissed at the cost of John J. Barbero, the order reciting "cause of action discharged." The \$500 paid Mrs. McGirr was furnished by Housh. On January 26, 1898, Nathan H. Barbero, Eliza Barbero, his wife, and Ann M. Donason, for the consideration of \$1, executed to Nathan Donason, a son of Ann M. Donason, a quitclaim deed of all their interest in the premises conveyed by John J. Barbero to Housh, and on December 26, 1903, during the pendency of the present suit, Sarah L. McGirr conveyed to said Nathan Donason, by quitclaim deed, for the consideration of \$1, all her interest in the said premises.

Nathan Barbero, prior to December 27, 1879, had made no advancement to his son John J., but had advanced to Sarah L. \$500, to Ann M. \$1,500, and to Nathan H. \$3,560. Nathan Barbero and his children all lived near Maquon, in Knox county. Housh was in the banking business at that place, and has been banker for all the members of the family. He was surety on the bond of Mrs. Barbero as administratrix of her husband's estate. He assisted her with the management of the estate, and was entirely familiar with the affairs of that estate. Prior to the loan being negotiated in Peoria, Mr. Hendryx, as he testifies, spoke to Housh about the matter, and inquired where he would be likely to borrow the money. Afterwards Housh asked Hendryx what his opinion was about John J. Barbero's title, and at that time Hendryx explained to him exactly what had been done to vest the title in John J. Barbero. Nathan Barbero at the time of his death owned certain other realty, but it was all sold under a decree of the county court of Knox county entered in a proceeding instituted by his administratrix for leave to sell real estate to pay debts. All the assets of his estate which came to the hands of the administratrix were not quite sufficient to meet the indebtedness of the estate, aside from the mortgage indebtedness to the Provident Company. Callista W. Barbero and John J. Bar-

bero seem to have been practically without property, other than their interests in the estate of the deceased.

On January 27, 1898, the bill herein was filed by Nathan Donason, and thereafter, on December 30, 1903, he filed an amended bill, which later was again amended or altered by certain interlineations written upon the face thereof, and which, while perhaps not formal amendments, were so treated in the litigation, and upon the bill as so finally interlined and amended, and which will hereafter be referred to as the "bill," the cause was heard. The bill charges that the deed from the Provident Company to John J. Barbero was void, because the name of the grantee was inserted therein without authority from the grantor, that the transaction between John J. and the Provident Company was, in fact, a redemption, and that thereafter the children of the deceased were each the owner of an undivided one-fourth of the lands, that Housh was not a bona fide purchaser, and knew at the time he took the conveyances of the lands that they were held and owned by the heirs at law of Nathan Barbero, deceased, as tenants in common, that the value of said lands at the time of the foreclosure sale was at least \$30,000; sets up the conveyances from the heirs other than John J. to complainant; shows that the latter is the owner of three-fourths of the lands and Housh the owner of one-fourth; prays an accounting of rents which had accrued to complainant's grantors, and asks that Housh account for \$4,000, the proceeds of one tract of the land sold and conveyed by him; offers to pay proper proportion of the indebtedness existing against the lands that was created for the purpose of redeeming the same from the foreclosure sale, and proper proportion of all taxes, insurance, and repairs that had been justly and legally expended upon the premises.

To the bill the heirs of Nathan Barbero, deceased, Housh, and certain other persons only nominally interested, were made defendants. Housh answered, claiming ownership of the lands in fee; alleged laches on the part of the grantors of the complainant; charges that the complainant is a volunteer, that the conveyances to him were made upon a nominal consideration; and avers that for this reason he has no standing in a court of equity. It is unnecessary to set out the other answers.

Replications were filed, and the cause was referred to J. B. Boggs, master in chancery. While the cause was pending before him, he departed this life, and the matter came to the hands of Phillip S. Post, his successor, who reported the evidence and with it his findings and recommendations. The master found that the premises conveyed to John J. Barbero were of the value of \$40 per acre in August, 1889. His other findings, so far as material to the questions now presented

to this court, were, in substance, as follows (although not stated in the same language or given the same numbers by the master) to wit: (1) That John J. Barbero, upon receiving the deed from the Provident Company, immediately entered into possession of the premises and thereafter claimed to be the sole owner thereof; (2) that the purchase of the premises by John J. Barbero in his own name and for his own benefit was wrongful; (3) that the acts of John J. Barbero in entering into exclusive possession of said real estate and openly claiming the same as his own property under said deed, in paying taxes thereon and collecting the rents thereof, in mortgaging the same by deed to Housh, were sufficient outward acts of ownership to give notice to the other heirs of the deceased that possession adverse to them was intended; (4) that the rights of the heirs of Barbero other than John J., and the rights of complainant claiming under them, are barred by the laches of such other heirs. Defendant Housh objected to the second finding above set out, and appellant objected to the other of said findings. The objections were all overruled and were refiled as exceptions in the circuit court. Upon a hearing the court sustained the exception to the second finding, overruled the remaining exceptions, and in accordance with the recommendations of the master dismissed the bill for want of equity. Complainant appealed to this court, and here makes the same contentions as in the circuit court, except that he does not now claim that he takes anything by virtue of the deed from Sarah L. McGirr, as her deed to John J. conveyed all interest which she had and left nothing upon which her deed to appellant could operate. He now contends that he is the owner of the undivided one-half of the real estate and entitled to an accounting as prayed by the bill.

A. M. Craig, C. S. Harris, and C. C. Craig, for appellant. Williams, Lawrence, Welsh & Green (Brown & Soule, of counsel), for appellees.

SCOTT, J. (after stating the facts as above). We are satisfied that the transaction by virtue of which John J. Barbero received the deed for the property now in controversy was a redemption. The widow of Nathan Barbero, in negotiating the contract with the holder of the certificate of purchase, acted for herself and all the heirs of the deceased. Had that contract been consummated by her, it would have been, in fact, a redemption. Although the certificate of redemption passed into a deed, yet the grantee in that deed virtually extended the period of redemption to September 1, 1889, and within that period it carried out that contract, except that John J. Barbero, as grantee, was substituted for the grantee mentioned in the contract. John J. Barbero, in closing the negotiations, was given credit for the payments that had been

made on the Lyon contract by his mother, and those payments had been made for and on behalf of the widow and all the heirs. The balance of the money arose from the sale and incumbrance of land descended from Nathan Barbero, with the exception of \$153.53 advanced by John J. The letter written by Mr. Hendryx, set out in the foregoing statement of facts, shows that he understood that he was acting for the Barbero widow and heirs; that he understood that the Lyon contract was a contract for redemption; and that the money which he proposed to raise if that contract had been or could be extended was money with which to effect a redemption. Moreover, he states that at the time the deed was delivered at Peoria he was acting as attorney for the estate of Nathan Barbero, and that he never knew until after he reached Peoria that the deed was to be made to John J.

According to the master's report, this property in August, 1889, was worth over \$38,000. It is urged by appellees that the value was, in fact, less. But, if the testimony be given the most favorable construction possible to appellees, and if we take into consideration the fact that witnesses, with their knowledge of the great advance in the price of farm lands in Illinois in the last few years, are prone to estimate the value of lands at an earlier period at a greater price, perhaps, than they would have done had their testimony been taken during that period, we yet conclude that the lowest possible value as of August, 1889, which could be placed upon this land, upon consideration of the evidence contained in this record, would be many thousand dollars above the amount actually paid at the time the deed was delivered. If this realty was only worth the \$6,326.67 paid by Hartsook for the 100 acres purchased by him and the \$21,425 for which John J. pledged the remainder of the land in March, 1890, the total value was \$27,751.67, or more than \$12,000 in excess of the amount paid the Provident Company in August, 1889. It is not equitable to say that John J. Barbero became the owner of that excess in his own right when he acquired the deed by virtue of a contract made for the benefit of his mother and all the heirs of his father. The making of the deed to John J. Barbero under a contract extending the time for redemption, payment being made with the property of the widow and heirs of the deceased, excepting the small portion thereof advanced by John J., was, in effect, a redemption, and thereafter, in equity, the heirs of Barbero, as between themselves, were tenants in common of the real estate, precisely as though redemption had been made within the statutory period. If it is true that Mrs. McGirr refused to join in the redemption, a different question would be presented as to her. The interest which she claimed, however, passed by virtue of a deed made by her to John J.,

who conveyed the same to Andrew C. Housh, and appellant does not contend that she was not entitled to the benefit of the redemption. Whether she was so entitled is therefore immaterial.

As between the Provident Company and John J. Barbero the deed delivered August 31, 1889, conveyed no interest in the land at the time of its delivery, for the reason that the name of the grantee was, without authority from the grantor, inserted in a blank left in the deed at the time of its execution. *People v. Organ*, 27 Ill. 27, 79 Am. Dec. 391; *Whitaker v. Miller*, 83 Ill. 381. After that deed had been delivered, however, the Provident Company, in the partition suit brought by Sarah L. McGirr (the bill wherein averred the conveyance of the lands to John J. Barbero by the Provident Company), answered, disclaiming any interest in the premises. This, we think, ratified the act of Dow in writing the name of John J. Barbero in the blank left in the deed for the name of the grantee, so far, at least, as the appellant and those through whom he claims are concerned. *Devin v. Himer*, 29 Iowa, 301.

Prior to August, 1889, John J., as the employé or agent of his mother, had the actual, visible control of these lands; that is, as her agent he was engaged in supervising the agricultural operations carried forward thereon. Appellees vigorously contend that after the receipt of the deed by him his conduct of business upon this farm and in relation to this farm was such as to give notice to his brother and sisters that he claimed to be the exclusive owner thereof. The master found that after August, 1889, he was in the exclusive possession of said real estate, paid taxes thereon, collected rents therefrom, and mortgaged the same by deed to the defendant Housh, and, further, that he openly claimed the same as his own property. That claim amounts to nothing unless it was brought to the attention of those who were, in equity, his co-tenants. There is in this record no evidence of any acts of an exclusive ownership of such nature as to give notice to the co-tenants that John J. was claiming the exclusive ownership of this land. The other heirs of the deceased knew that the interest of John J. had been acquired under a contract made for the benefit of all, and this knowledge on their part must be taken into consideration in determining the conclusion which they would draw from the acts of ownership exercised by him. *McMahill v. Torrence*, 163 Ill. 277, 45 N. E. 269, is authority for the statement that possession by him and payment of taxes, however long continued, the appropriation of rents, the making of slight repairs and improvements on the lands, is not alone sufficient, "for all this may be consistent with the continued recognition of the rights of his co-tenants." In some way his co-tenants must be given notice "that an adverse possession and an actual disseisin are

intended to be asserted against them." *Busch v. Huston*, 75 Ill. 343; *Ball v. Palmer*, 81 Ill. 370; *McMahill v. Torrence*, supra.

This case, upon the proof as to this question of notice, is not materially different from *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. 674, 16 L. R. A. 326, where the party setting up laches held a deed purporting to convey to him the title of those who were originally his co-tenants, as did John J. Barbero here. It was there held that if one of two tenants in common takes the actual possession of the land and continues to occupy same, appropriating to himself the exclusive rents and profits, and pays the taxes for more than seven years, and does nothing to apprise his co-tenant that he claims to be the owner of the entire premises, such possession will not be adverse but will be the possession of both.

Reliance is placed by appellees upon the fact that John J. Barbero, in his answer filed on February 15, 1890, to the amended supplemental bill of Sarah L. McGirr, stated that he was the absolute owner of the real estate in question. Nathan H. Barbero and Ann M. Donason in that suit were codefendants with John J. No trial of that cause was ever had. It does not appear that either Nathan H. or Mrs. Donason knew that John J. had filed any answer, of any character, to the said amended supplemental bill, or knew what defense he proposed to make thereto. Under these circumstances the answer filed by him cannot be regarded as actual notice to them that he was claiming the entire title. Mrs. Donason testified, on behalf of Housh, that John J. claimed to own all the land, but that he never set up that claim until after the mother's death, which was in 1894 and within the statutory period. The bill herein alleged "that the said John J. Barbero, after obtaining said deed, denied that the other heirs of Nathan Barbero, deceased, had any interest in the said lands, but set up and claimed to be the absolute owner thereof." That allegation, however, cannot be regarded as an admission that John J. Barbero's co-tenants had notice, at any particular time prior to the filing of the bill, that his possession was adverse as to them.

Was Housh an innocent purchaser? It appears that he was fully advised of the existence of the Lyon contract and the negotiations that preceded the delivery of the deed to John J. On March 31, 1889, at the time the deed was made to him, which, in law, was a mortgage, the suit of Sarah L. McGirr for partition of these premises was pending in the circuit court of Knox county. When he received that deed he advanced to John J. but \$10 in cash. The other indebtedness secured by that deed had been in existence some time, and Housh, in taking that conveyance, was evidently merely getting the only security obtainable to assure the payment of pre-existing debts. Thereafter Mrs. McGirr filed an amended supplemental bill, claiming that the transactions by which John J. Barbero ob-

tained the deed from the Provident Company were, in fact, a redemption, and for the purpose of ridding himself of her claim John J. Barbero paid her \$500, which was furnished by Housh, and took from her a quitclaim deed. Housh knew that Nathan H. and Ann M. had each the same right that was possessed by Sarah L. We think that the knowledge that Housh had of the steps by which John J. acquired the deed from the Provident Company, and the information which he possessed in reference to the affairs of the estate of the deceased were sufficient to put him upon notice of the rights of Ann M. Donason and Nathan H. Barbero. The case of *Dugan v. Follett*, 100 Ill. 581, upon which the appellees rely, is distinguished from the case at bar by the fact that in that case the parties who had enjoyed the possession throughout the statutory period did so without knowledge that the parties who asserted an adverse interest had any claim to the premises. As we have above pointed out, it is here otherwise as to John J. Barbero and Housh.

Appellees also urge that appellant is a mere volunteer and speculator; that he acquired his deed without giving any valuable consideration therefor, and for this reason has no standing in a court of equity in this cause. We are unable to perceive that Housh is in any other or different position than if the deed from Nathan H. Barbero and Ann M. Donason had not been made and the suit had been brought by them, except as to rents falling due before the making of the deed to the appellant, and as to those rents Housh's position in this suit is improved, as appellant cannot require him to account for them. The rights of appellant, though the deed was made without consideration, are neither greater nor less than the rights of his grantors, so far as Housh is concerned, with the exception noted. If Mrs. Donason and Nathan H. had an equitable interest in this real estate, they could give it to whomsoever they saw fit, and the person so acquiring it could assert the interest received against their co-tenant with the same effect that they could have done.

The decree of the circuit court will be reversed, and the cause will be remanded, with directions to the court to overrule the exceptions to the master's report taken by the appellees and to sustain the exceptions taken by the appellant to the master's finding to the effect that appellant is barred to assert his rights by virtue of the laches of his grantors, and to enter a decree finding appellant and appellees to be each the owner of the undivided one-half of the premises in question, other than the tract sold by Housh. Appellant is not entitled to an accounting for rents or other money or property, in the nature of profits, derived from the lands prior to the date of his deed from Ann M. Donason and Nathan H. Barbero. The cause, however, should be again referred to the master for the purpose of taking and stating the account between the parties, in which

event evidence already taken may be considered without the same being retaken, and either party will be at liberty to offer such other and further evidence as he or they desire. Housh should account, according to the ordinary rules in such cases, for rents and profits falling due after the date of the appellant's deed. Housh should also be charged with the sum of \$500 on account of the advancement made by Nathan Barbero, in his lifetime, to Sarah L. McGirr. The appellant should be charged \$3,560 on account of the advancement made to Nathan H. Barbero and \$1,500 on account of the advancement made to Ann M. Donason. The evidence only shows advancements made prior to December 27, 1879. If advancements were made by the deceased after that time, they should be charged to Housh or appellant, accordingly as they were made to the grantors of either. No interest should be allowed upon any advancement. Housh should account for the money received by him from the tract of real estate which he sold, with interest thereon at 5 per centum per annum from the date when he received the proceeds. Housh should have credit for the \$153.53 paid by John J. Barbero out of his own funds to the Provident Company, with interest thereon at 5 per centum per annum from the date of the deed to appellant from Mrs. Donason and Nathan H. If the commissioners divide the land, the various charges and the sums due upon the accounting may be secured by a decree in favor of the party to whom the balance is due, which can be made a lien upon the lands set off to the other party. If the lands should be sold, the balance due upon the accounting can be adjusted out of the proceeds. A decree appointing commissioners may be entered after the accounting is concluded. The costs of this court will be adjudged against Housh.

Reversed and remanded, with directions.

(230 Ill. 164)

COAL BELT ELECTRIC RY. CO. et al. v. PEABODY COAL CO.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 5, 1907.)

1. CORPORATIONS—TRANSFER OF STOCK—EFFECT—ESTOPPEL.

A New Jersey company, owning the stock of a railway company and of a mining company, sold the railway stock to complainant. For some time the railway company through sufferance had taken water from a pond owned by the mining company. *Held*, that complainant acquired no interest in the railway company's property, he becoming merely a stockholder, and hence his purchase does not create an equitable estoppel against the mining company to deny that the railway company has an easement to take a water supply from the pond; the railway company, after the transfer of its stock, sustaining the same relation to its property as before, not losing or gaining any rights by the transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 686, 687.]

2. ESTOPPEL—EVIDENCE—SUFFICIENCY.

Where a corporation, owning stock of a railroad company and of a mining company,

sold the railroad stock to complainant, on a claim that the sale was that of the property of the railroad company and not of the stock, that representations at the time of the sale were made that the railroad company had an interest in the waters of a certain pond, so as to be entitled to draw water from the same, *held* not sustained by the evidence.

3. CORPORATIONS—STOCK—SALE—CONSTRUCTION OF CONTRACT—WARRANTY AS TO PROPERTY OWNED.

On a sale of electric railway stock, a warranty that the company owned a power house with machinery therein, a pump house and machinery connected therewith, a battery house and other appurtenances, all of which property was to be mentioned in an inventory then being made by the parties, did not include an easement for drawing water from a pond, not mentioned in the warranty or the inventory, and not in fact belonging to the company.

Appeal from Circuit Court, Williamson County; W. W. Duncan, Judge.

Bill by the Coal Belt Electric Railway Company and others against the Peabody Coal Company. From a decree dismissing the bill, complainants appeal. Affirmed.

Forman & Whitnel and William H. Warder, for appellants. Denison & Spiller and Arthur W. Underwood, for appellee.

DUNN, J. In 1889 and later the Egyptian Prospecting Company purchased the coal underlying certain lands in Williamson county and began the sinking of a mine and the construction of a coal washer, near which was constructed a pond for the purpose of collecting water necessary for use in said mine and washer. On March 21, 1901, all the rights of the Egyptian Prospecting Company were conveyed to the Southern Illinois Coal Mining & Washing Company, which continued to own and operate the mine and washer until January 7, 1905, when it conveyed all its interests to the Peabody Coal Company of Illinois. In 1901 the Coal Belt Electric Railway Company built an electric railroad passing near the said mine, and constructed its power house near said pond. The water supply for this power house was first obtained from the pond above mentioned under a verbal arrangement between the presidents of the two companies; the railway company paying nothing for the privilege and having no right beyond the oral consent of the president of the Southern Illinois Coal Mining & Washing Company. The water was used in this way for some time, but with much controversy between the superintendents of the two companies; the superintendent of the mining company demanding, when the water was low in the pond, that the railway company should cease using it. Finally the railway company laid a pipe to the shaft of another mine, and for a few weeks used the water from that mine, until a deep well was driven near the power house. The water obtained from the well was not good for use in the boilers, and while it could be used, and was used to some extent, the railway company continued to use the water from the pond whenever it was

permitted to do so, and at times without the knowledge of the mining company. The stock of the railway company at first was owned equally by Francis S. Peabody, Arthur W. Underwood, and Frank P. Reed; the latter being president of the company. Later Mr. Reed sold his stock to the other two, and in 1902 or 1903 they sold all the stock to the Peabody Coal Company of New Jersey. The stock of the Southern Illinois Coal Mining & Washing Company originally belonged to Mr. Peabody, Mr. Reed, Mr. Armstrong, and Mr. Morris. The Peabody Coal Company of New Jersey owned all the capital stock of the Peabody Coal Company of Illinois, which was a distinct corporation, and Francis S. Peabody was president of both companies. The Peabody Coal Company of Illinois owned all the capital stock of the Southern Illinois Coal Mining & Washing Company in 1904. On December 12, 1904, the Peabody Coal Company of New Jersey sold to George J. Gould all the shares of the capital stock of the railway company for a consideration amounting to \$710,000, and the parties executed a written contract of sale, whereby the Peabody Coal Company guaranteed the existence of certain facts in regard to the indebtedness, property, franchises, and other conditions of the railway company, and made certain agreements, not necessary to be specifically stated, in regard to the traffic of said railway company and the mines controlled by the Peabody Coal Company. After the transfer of the stock to Mr. Gould the railway company continued using water from the pond. The superintendent of the mining company notified the superintendent of the railway company that the water was not sufficient for both and that the railway company must make some other arrangement for water. Finally, on September 22, 1906, the Peabody Coal Company notified the railway company to remove its intake pipe from the pond within two days, or on failure to do so the coal company would remove it. Thereupon the railway company, George J. Gould, and the other appellants filed their bill in the circuit court of Williamson county, alleging that the individual appellants were the owners of all the stock of the railway company, and that in the sale of said stock to Gould the Peabody Coal Company and F. S. Peabody showed him the property of said railway company, and as a part thereof said pond, and stated that the railway company had a proprietary interest in said pond and in the water therein, and that said pond was a part of the plant of the railway company. The bill prayed that the Peabody Coal Company be enjoined from removing the railroad company's intake pipe from said pond, and from interfering in any way with the taking by the railway company of water from said pond for its power house. A temporary injunction was issued, an answer was filed, and on a hearing the temporary injunction was dissolved and the bill was dismissed for want

of equity. The complainants thereupon prosecute this appeal.

The Coal Belt Electric Railway Company had no easement in the pond and could not itself maintain this bill. It is claimed that the circumstances of the purchase of the stock of the railway company by Mr. Gould create in his favor an equitable estoppel against the Peabody Coal Company's denying that the railway company has an easement to take its supply of water from the pond. Appellants claim that Mr. Gould, by his purchase of the stock of the railway company, acquired all the property of the railway, and, in addition, the right to a supply of water for the power house from the pond. The Peabody Coal Company of New Jersey had no direct ownership of the property of the railway company, but was the owner of its stock, and it was the latter which was the subject-matter of the contract with Mr. Gould. By its purchase Mr. Gould did not acquire the ownership of the property of the railway company. The ownership of that property remained in the Coal Belt Electric Railway Company as before, unaffected by the sale. Mr. Gould merely became a stockholder of the railway company, but not the owner of its property in a legal sense, though he could control its action by the selection of its officers. *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246, 40 L. R. A. 589; 2 Cook on Stock & Stockholders, § 709. After the transfer of the stock the Coal Belt Electric Railway Company sustained the same relation to its property as before. It neither acquired nor lost any right, by estoppel or otherwise, for it was no party to the transaction. It drew water from the pond by sufferance before the change in the ownership of its stock, and it had no greater right afterward.

But, if the sale had been of the property of the railway company, the evidence is insufficient to support the bill. The allegation is that the defendants showed the pond as a part of the property owned by the Coal Belt Electric Railway Company, and stated that said company had a proprietary interest in said pond and the water therein, and that said pond was a part of the plant of said company. Mr. Middleton was Mr. Gould's representative to inspect the physical property of the company before the purchase of the stock, and he testified that Mr. Peabody told him the supply of water was from the pond, that it was a part of the power plant, and that the supply was sufficient to operate the plant. Mr. Burns testified that Mr. Peabody said the supply of water came from the pond, and that "we" have a proprietary interest in the pond. Mr. Peabody testified that he said the supply of water came from the pond, but that he did not say that the railway company had a proprietary interest in the pond, or that it was a part of the rail-

way company's property. This is all the evidence on this point. It was true that the supply of water came from the pond. The coal companies which Mr. Peabody represented had a proprietary interest in the pond, and, if he made the statement Mr. Burns testified to, "we" could as well refer to the coal companies as to the railway company. As to the statement that the pond was a part of the plant of the railway company, one witness asserts and the other denies that it was made. This testimony falls short of that clear, precise, and unequivocal evidence requisite to establish an estoppel. In the written contract which was prepared after Mr. Middleton had inspected and reported upon the property nothing is said about the water supply, though all other items of property are mentioned in detail. If the parties understood that the pond was a part of the plant of the railway company, it is strange that so important an item should have been omitted from the guaranty which was required of the defendant in the contract for the sale of the stock.

Since neither the Coal Belt Railway Company nor the Coal Belt Electric Railway Company had any easement in the pond, a conveyance of all the property would have carried no right to draw water from the pond as appurtenant to the property. The warranty of the Peabody Coal Company that the Coal Belt Electric Railway Company owned a power house with machinery therein, a theater, also a pump house and machinery connected therewith, also a battery house, and other appurtenances, all of which property was to be mentioned in an inventory then being made up by the representatives of the parties, could not apply to an easement for drawing water, which was not mentioned in the warranty or the inventory, and did not, in fact, belong to the railway company.

The evidence did not entitle the appellants to the relief prayed for, and the bill was properly dismissed.

Decree affirmed.

(230 Ill. 228)

CLOSE et al. v. BROWNE

(Supreme Court of Illinois. Oct. 23, 1907.)

1. SALES—DEFINITION.

"Sale" ordinarily means a transfer of property for money.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1-5.]

2. CONTRACTS—CONSTRUCTION.

In construing a written contract, a court will endeavor to place itself in the position of the parties and read the instrument in the light of the circumstances surrounding them when it was made and of the objects they then evidently had in view, so as to understand the language used in the sense intended by the parties using it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 730.]

3. BROKERS—REAL ESTATE—RIGHT TO COMPENSATION.

Where, to acquire means of irrigating for lands so as to make them salable, they were transferred to a land and irrigation company, the owners taking stock and bonds therefor, the transaction was a consolidation of interests, and not a sale of the lands within a contract entitling plaintiff to commissions for services in effecting sales of the lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 73.]

4. WORK AND LABOR—RECOVERY FOR SERVICES—SERVICES NOT ACCORDING TO CONTRACT.

Though plaintiff could not recover under a contract entitling him to commissions for effecting "sales" of lands, where they were conveyed to a corporation, the owners taking stock and bonds therefor, he could recover the reasonable value of his services in bringing about the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 27.]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Action by Thomas Hinsley against William B. Close and others to recover for services in selling land; D. H. Browne, administrator, being substituted on plaintiff's death. From a judgment of the Branch Appellate Court for the First District for plaintiff, defendants appeal. Reversed and remanded.

This was an action of assumpsit brought in the superior court of Cook county by Thomas Hinsley, now deceased, against the appellants, copartners doing business under the name of Close Bros. & Co., of Chicago, to recover for services claimed to have been rendered by Hinsley, under a contract, in effecting the sale of 96,099 acres of land in the western part of the state of Kansas. Appellants were the agents of the owners of these lands, who lived in England. Under date of April 2, 1887, a contract was entered into between Hinsley and appellants, whereby Hinsley was employed by appellants to act as their agent at Hartland, Kan., for showing and selling lands along the line of the Atchison, Topeka & Santa Fé Railway in southwestern Kansas, to reside on or near said lands, to negotiate sales, and to forward to appellants applications of prospective purchasers, but without authority to execute contracts or to make conveyances. On December 10, 1888, another agreement, which superseded that of April 2, 1887, was made between appellants and Hinsley. It provided that Hinsley should act for Close Bros. & Co. as their agent for showing and selling the Kansas lands; that he should negotiate sales, forward applications, and receive binding money, but should not execute contracts or conveyances and should not show or sell lands, nor forward applications for the same, so as to cut or subdivide the sections disadvantageously. Hinsley agreed to use all reasonable diligence in finding purchasers and in making sales, and to act for the best interests

of Close Bros. & Co. in all matters confided to him during his agency. As compensation for such services Close Bros. & Co. agreed to pay Hinsley commissions, as follows: First, on sales made to purchasers found by him and effected by, through, or under his personal efforts, without assistance from other parties or from Close Bros. & Co., 25 cents an acre; second, on sales of lands sold by Close Bros. & Co. or by their other agents, through the assistance of Hinsley, 10 cents an acre; third, on all sales made by Close Bros. & Co. or their agents resident along the line of the railway in southwestern Kansas, without the assistance of the second party, but under his advice, 5 cents an acre. The agreement went into effect January 1, 1889, and could be terminated by either party on giving one month's notice in writing. Hinsley was not to be entitled to any commissions on sales consummated after the expiration of one month from the giving of such notice.

The evidence shows that the lands were arid, and that Hinsley soon discovered that they could not well be sold unless some means of irrigation was provided. The Amity Land & Irrigation Company, a Colorado corporation, owned certain lands and certain water rights in Colorado, including a ditch some 76 miles long, which extended from a point on the Arkansas river, in Colorado, to within about 6 miles of the Kansas state line. Hinsley learning of this ditch, and having been directed by appellants to be on the watch for any irrigation ditches that could be extended to the Kansas lands, during the spring of 1894 went to Lamar, Colo., and there met William J. Halleck, president of the Amity Land & Irrigation Company. Halleck testifies that at this meeting he and Hinsley had some talk about the Kansas lands; that he (Halleck) endeavored to show Hinsley that the canal would be valuable to the Kansas lands if it was extended to them, and Hinsley was mildly interested in the matter and said he would write to appellants about it; that he (Halleck) was not then acquainted with appellants and had not had any previous communication with them. Halleck soon afterwards returned to New York, and, after some correspondence with Hinsley, brought the matter to the attention of the president of the Western National Bank of New York; that bank being the beneficial owner of the canal. In June, 1894, Halleck went to Chicago and met Samuel H. Graves, one of the appellants, and opened negotiations with him, which Halleck says brought about a consolidation of the interests of the irrigation company and appellants; such consolidation being the transaction evidenced by the contract between that company, the owners of the Kansas lands, and the appellants, of date February 18, 1895, hereinafter referred to. According to Hinsley's testimony, he went to Lamar and met Halleck, showed him a map of the Kansas lands, described their lo-

cation and asked him if the canal could be extended to those lands. Halleck wanted to sell the ditch, but Hinsley told him it was his (Hinsley's) business to sell the lands. Hinsley asked Halleck whether he knew appellants, and Halleck replied that he did not. He then gave Halleck a map of the Kansas lands, with appellants' address, and Halleck said he would call and see appellants on his way to New York. Hinsley reported this meeting with Halleck to appellants by mail. Thereafter Hinsley, at the request of appellants, made frequent examinations of the irrigating ditch throughout its course, and obtained information concerning the capacity of the ditch, details concerning its construction, the supply of water furnished at its source, the probable benefit to the Kansas lands if extended to them, and various other facts tending to show the advantages which would be derived from the extension of this ditch to the Kansas lands, all of which he reported to appellants in numerous letters sent by him at various times during the summer and autumn of 1894.

The negotiations between the Amity Land & Irrigation Company and appellants culminated in the execution of a contract on February 18, 1895, the substance of which is as follows: After reciting that the Amity Land & Irrigation Company is the owner of certain lands, water rights, and irrigation ditch in the state of Colorado, that William Austin, Edward Ford North, and Robert Edward Bateman are owners of certain unincumbered lands in Hamilton, Gray, Kearny, and Finney counties, Kan., aggregating 96,419 acres, for which Close Bros. & Co. are agents and managers, and that it is the mutual desire of the parties that the Amity Company should extend its irrigation ditch into the state of Kansas and supply said lands with water for irrigating purposes, the contract provides: (1) That Austin, North, and Bateman shall deed, subject to trust deed securing the three series of bonds, aggregating \$1,160,000, hereinafter provided for, to the Amity Land & Irrigation Company (referred to as the Amity Company), or its successors or assigns, the Kansas lands, and in payment therefor shall receive from the Amity Company \$600,000 in bonds and 49 per cent. of the stock of the Amity Company, its successors or assigns. (2) The Amity Company agrees to enlarge its ditch in Colorado and extend it to the Kansas lands. (3) The Amity Company shall issue bonds amounting to \$1,160,000; \$200,000 to be used for the enlargement and extension of the Amity canal and to constitute a first lien, \$360,000 of the bonds to be used to take up outstanding bonds against the Colorado property of the Amity Company and to constitute a second lien, and \$600,000 of the bonds, to be known as purchase money bonds, to be delivered to Austin, North, and Bateman in payment for their Kansas lands and to be a third

lien—all of said bonds to be secured by trust deed upon all the property, lands, water rights, and franchises of said Amity Company, its successors and assigns, including the said Kansas lands. (4) Provision for the application of the income to the maintenance of the canal and payment of interest and bonded indebtedness. (5) Close Bros. & Co. to take charge of the lands and endeavor to sell them.

The parties to this contract were: First, the Amity Land & Irrigation Company; second, Austin, North, and Bateman, the owners of the Kansas lands; and, third, Close Bros. & Co., the agents for the sale of the Kansas lands. For the purpose of carrying out the provisions of this contract, the parties thereto organized the Amity Land Company, a corporation, under the laws of Kansas. Austin, North, and Bateman, by deeds dated May 3, 1895, conveyed the Kansas lands to the Amity Land Company, and the Colorado corporation conveyed the Colorado lands to the Kansas corporation. Forty-nine per cent. of the capital stock of the new corporation was issued to Leonard H. Hole as trustee for Austin, North, and Bateman, and 51 per cent. to Hole as trustee for William N. Coler, Jr., representing the owners of the stock of said Amity Land & Irrigation Company. The bonds were issued and delivered as provided by the contract. Thereafter, on May 22, 1895, a new contract was made between appellants and Hinsley, whereby Hinsley from that time received a salary, instead of commissions. During the month of July, 1895, acting under directions from appellants, he removed to Holly, Colo., and thereafter resided there in charge of appellants' branch office, and acted as field agent for the Colorado lands owned by the Amity Land Company, until October 10, 1896, when he quit their service. According to his testimony, he did not know that the Kansas lands had been deeded to the Amity Land Company until December, 1896, and did not, prior to that time, know the terms of the contract of February 18, 1895. On January 13, 1897, he for the first time demanded commissions under his contract of December 10, 1888, and payment being refused, brought this suit.

The declaration under which the case was tried consisted of counts declaring upon the contract and the common counts, including a quantum meruit count. On the first trial the jury returned a verdict for \$31,632.58 in favor of Hinsley. The superior court required Hinsley to remit \$18,967.54 of this amount and rendered judgment against the appellants for \$12,665.04. Upon appeal to the Appellate Court for the First District, the judgment of the superior court was reversed, and the cause remanded, for the reason, as stated in the opinion of the Appellate Court, that the verdict of the jury was a finding that appellants were liable under the first clause of the contract of December 10, 1888, but was not a finding that they were liable under

either the second or third clause; that the verdict was against the overwhelming preponderance of the evidence, so far as the right to recover under the first clause of the contract was concerned; and that the superior court should have set aside the verdict and granted a new trial, instead of requiring a remittitur and rendering a judgment not based on the verdict of the jury, but based solely on the finding of the court that appellants were liable under the second clause of their contract. *Close v. Hinsley*, 104 Ill. App. 65. After the remanding order of the Appellate Court had been filed in the superior court, Hinsley died, and, his death being suggested to the court, D. H. Browne, as administrator of his estate, was substituted as plaintiff. The cause was re-docketed in the superior court and was again tried before a jury. Upon the second trial appellee expressly waived all claim to the commission of 25 cents per acre under the first clause of the contract, which related to sales made by Hinsley without assistance from the appellants or their other agents, and the case was tried under the counts of the declaration based on the second and third clauses of the contract and the common counts. The trial resulted in a verdict against appellants for \$14,454.90. Appellants filed a motion for a new trial, which was overruled. A motion in arrest of judgment was likewise overruled, and the superior court rendered judgment upon the verdict for \$14,454.90 against the appellants. This judgment was affirmed by the Branch Appellate Court for the First District, and appellants bring the cause to this court. The grounds urged for reversal are that the superior court erred in refusing appellants' motion, made at the close of all the evidence, to instruct the jury to return a verdict in their favor, and that the court erred in giving, refusing, and modifying instructions.

F. C. Elliott, for appellants. Milton Brown, H. W. Gleason, and Orpheus A. Harding, for appellee.

SCOTT, J. (after stating the facts as above). The superior court held, in passing upon the instructions offered by the respective parties, that the transaction between the owners of the Kansas lands, the Amity Land & Irrigation Company, and the appellants, set forth by the contract of February 18, 1895, constituted a sale of those lands, and so advised the jury by instructions, and submitted to the jury the question whether such sale was made through the assistance of Hinsley or under his advice. The action of the court in holding that transaction to be a sale is the principal ground upon which a reversal is sought.

The contract between the appellants and Hinsley, upon which the appellee bases his right to recover, provided that Hinsley should act as the appellants' agent for showing and selling the Kansas lands, that he should be

authorized to negotiate sales and receive binding money, and that as compensation for his services he should receive commissions upon "sales" of the lands; the rate of commission to depend upon the kind of services rendered by Hinsley in the particular sale. The word "sale" is ordinarily understood to mean a transfer of property for money. 2 Blackstone's Com. 446; *Schermerhorn v. Talman*, 14 N. Y. 117; *Williamson v. Berry*, 8 How. (U. S.) 495, 12 L. Ed. 1170; *Five Per Cent. Cases*, 110 U. S. 471, 4 Sup. Ct. 210, 28 L. Ed. 198. In the case last cited the Supreme Court of the United States construed the language hereinafter quoted from an act of Congress of March 3, 1845, supplemental to the act by which the state of Iowa was admitted into the Union, the language so construed being as follows, to wit: "Fifth, that five per cent. of the net proceeds of sales of all public lands lying within the said state which have been or shall be sold by Congress from and after the admission of said state, after deducting all the expenses incident to the same, shall be appropriated for making public roads and canals within the said state." The question was whether the state was entitled to a percentage of the value of lands not sold for cash, but disposed of by the United States in satisfaction of military land warrants. The court said: "A 'sale,' in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent." If the purchase price is paid by the transfer of other property, the transaction is more properly denominated an exchange or trade. "It is a familiar rule, of constant application, that courts give effect to all written instruments according to the ordinary, popular meaning of the terms employed, when nothing appears to show they were used in a different sense, and no unreasonable or absurd consequences will result from doing so." *Stettauer v. Hamlin*, 97 Ill. 312. If this rule of construction is applied to the contract of December 10, 1888, it is apparent that Hinsley would not be entitled to commissions upon the transfer of the lands to the Amity Land Company; that transfer not having been made for a money consideration. There is, however, another well-known rule of construction applied to written instruments, viz., that in construing a written contract the court will endeavor to place itself in the position of the contracting parties, and read the instrument in the light of the circumstances surrounding them at the time it was made and of the objects which they then evidently had in view, so that the court may understand the language used in the sense intended by the parties using it. *Torrence v. Shedd*, 156 Ill. 194, 41 N. E. 95, 42 N. E. 171; *Street v. Chicago Wharfing Co.*, 157 Ill. 605, 41 N. E. 1108; *Matthews v. Kerfoot*, 167 Ill. 313, 47 N. E. 859; *Whalen v. Stephens*, 193 Ill. 121, 61 N. E. 921. Applying the latter test to the contract of December 10, 1888, is there anything appearing, from the circumstances surrounding the parties at

the time the contract was made, which shows an intention on their part to give to the word "sale" any other than its usual and ordinary meaning? An answer to this question involves a consideration of those circumstances as disclosed by the evidence.

It appears from the stipulation and undisputed evidence in the case that during the years 1887 and 1888, and prior thereto, appellants were engaged in the business of colonizing large tracts of western lands; that they had numerous agents in their employ, some of whom were known as field agents and others as traveling agents; that the traveling agents were employed to interest persons in Illinois and eastern states in the western lands controlled by appellants and to induce prospective purchasers to visit the lands; that the field agents resided on or in the immediate vicinity of the lands offered for sale, and to them the traveling agents brought or sent the prospective purchasers; that the field agents were required to be familiar with each quarter section of land within their respective territories and the boundaries thereof, and it was their duty to show the lands to the prospective purchasers and to aid the traveling agents in making the sales. Hinsley had acted as field agent for appellants in Iowa prior to April 2, 1887. On the latter date he removed from Iowa to Hartland, Kan., and entered the service of appellants as field agent for their lands in that vicinity under a contract, by the terms of which he was to receive a salary of \$40 per month and 5 cents per acre on all lands sold by the appellants by or through his assistance. Hinsley worked under the latter contract until December 10, 1888, when the contract of that date was entered into. Bearing in mind these facts, the reason for fixing three different rates of commission becomes apparent, and the sense in which the parties intended to use the word "sale" may be clearly understood. According to the previous experience of appellants and Hinsley, in carrying on the business of appellants there might, and probably would, arise three classes of cases in which Hinsley would be required to render some service in effecting sales of the lands: First, cases in which Hinsley should find the purchaser and make the sale; second, cases in which prospective purchasers should be brought or sent by appellants or their traveling agents to Hinsley, and the latter should show the lands to the prospective purchasers, and thereby, or by other means, assist appellants or their traveling agents in inducing the purchasers to buy; third, cases in which other field agents in that locality should send to appellants the applications of prospective purchasers, and appellants, not knowing whether it would be to their interest to make the sales on the terms proposed, should seek the advice of Hinsley with reference thereto. Hence the parties provided by the contract of December 10, 1888, that on all sales falling within the first class Hinsley should receive 25

cents per acre, on all sales falling within the second class 10 cents per acre, and on all sales falling within the third class 5 cents per acre. Considering this contract in the light of the circumstances surrounding the parties at the time the contract was made and of the objects which they then evidently had in view, it does not appear that they intended to use the word "sale" other than according to its ordinary acceptation.

When the contract of February 18, 1895, is considered in connection with the facts leading up to its execution, it becomes apparent that the parties thereto adopted the means set forth by that contract to effect a consolidation of their respective interests. It appears from the evidence that the Amity Canal & Reservoir Company was originally the owner of the canal and of other Colorado property subsequently owned by the Amity Land & Irrigation Company. The former company issued bonds secured by mortgage upon its property, and these bonds were taken by the Western National Bank of New York. The mortgage was foreclosed, and the property of the company purchased by the bank at the foreclosure sale. The bank, early in 1894, through its officers and agents, organized the Amity Land & Irrigation Company and transferred the property to that company. The bank, however, remained the beneficial owner of the property. The appellants desired to sell the Kansas lands. Those lands could not well be sold without some means of irrigation. The canal of the Amity Land & Irrigation Company could be extended to the Kansas lands, but appellants did not desire to buy that canal, and the bank did not wish to purchase the Kansas lands. Appellants, their principals, the owners of the Kansas lands, and the Amity Land & Irrigation Company, really acting for and under the direction of the bank, on February 18, 1895, entered into the contract of that date. No money was to pass. The bank had theretofore conveyed its canal and other Colorado property to the Amity Land & Irrigation Company. The value of that property was not as great as the value of the Kansas lands. The bank desired to retain the controlling interest in the corporation to which it had transferred the canal. It was therefore agreed that the owners of the Kansas lands should convey those lands to the Amity Land & Irrigation Company and should receive therefor 49 per cent. of the stock of that company or of its successor or assignee, and in order to equalize the interests of the respective parties in the assets of the corporation it was also provided that the owners of the Kansas lands should receive, in addition to their stock, bonds of the corporation of the face value of \$600,000, secured by mortgage on the property of the company.

While it is true that the owners of the Kansas lands parted with the title to those lands, yet they did so for the purpose of placing those lands in such condition that they might be sold for money. Hinsley was urg-

ing appellants to either purchase the canal or secure the controlling interest therein. The services for which he now seeks to recover were performed with that end in view. Obviously, if the appellants, for their principals, had followed the advice of Hinsley and purchased the canal, Hinsley would not have been entitled to any commission under his contract. By the plan adopted in the contract of February 18, 1895, the owners of the Kansas lands obtained the same benefit as they would had they purchased the canal; the only substantial difference being that, instead of receiving their money directly from purchasers of the lands, they would receive it, when the lands were sold, in the form of payments upon the bonds and dividends upon the stock issued to them by the Amity Land & Irrigation Company. We think that neither Hinsley nor the appellants had in contemplation any such transfer of property as that set forth in the last-mentioned contract when they agreed that Hinsley should receive commissions upon all sales made by him alone, or made with his assistance, or made under his advice.

Appellee seeks to sustain the judgment in this case upon the authority of *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162, and other like cases, which hold that a real estate broker is entitled to his commissions if the principal sells to a purchaser produced by him, even though the sale be made upon terms different from those stated in the brokerage contract. Such is the law applicable to cases where there is merely a departure from the terms of the contract, leaving the transaction substantially that provided for by the agreement, such as a reduction in the price asked or an extension of the time of payment of all or part of the consideration; but where the transaction is wholly different from the one contemplated by the parties when the contract was made there can be no recovery upon the contract. In this class of contracts it may be fairly presumed that the parties contemplate some slight modification in the terms of sale, provided the principal assent to such modification; but it cannot be presumed that the parties intend that the contract shall apply to a transaction wholly different from the one which they have in view when they enter into the contract. In the latter instance, however, the broker or agent is not without remedy. If the principal receives the benefit of the agent's services, rendered at the instance of the principal, he is liable upon a quantum meruit.

From what we have said it follows that the superior court erred in instructing the jury that the transaction evidenced by the contract of February 18, 1895, constituted a sale within the meaning of the contract of December 10, 1888, and in refusing instructions offered by the appellants which would have advised the jury that such transaction was not a sale within the meaning of the last-mentioned contract. Inasmuch as there was no sale within the meaning of the contract be-

tween appellants and Hinsley, appellee was not entitled to recover under any of the clauses of that contract. The verdict, however, plainly shows, and appellee states, that the jury awarded commissions under the second clause of the contract at the rate of 10 cents per acre on the land transferred to the Amity Land Company, together with interest thereon at the rate of 5 per centum per annum from February 18, 1895, to the date of the verdict; the court having instructed the jury that they might allow such interest in case they found that appellee was entitled to recover under the contract of December 10, 1888. It is therefore apparent that the error committed by the court in advising the jury that the transaction set forth in the contract of February 18, 1895, was a sale, affected the verdict in the case and was prejudicial to appellants. The motion for a peremptory instruction at the close of all the evidence was, however, properly denied. The undisputed evidence shows that Hinsley rendered valuable services at appellants' request which led to the consolidation, and that appellants received the benefit of those services. The services so rendered by Hinsley which led to the consolidation are not covered by the contract of December 10, 1888, and were not performed under any express contract. Appellee is entitled to recover the reasonable value of those services. The declaration contained a quantum meruit count, and the evidence would have supported a verdict under that count. Under such circumstances it would have been error for the court to have directed a verdict for appellants.

It is unnecessary to consider any of the other alleged errors discussed by appellants in their brief. They are such as will not probably arise upon another trial of this case.

Because of the error of the court in instructing the jury that the transaction set forth by the contract of February 18, 1895, constituted a sale, and in refusing the instructions offered by appellants which would have advised the jury that such transaction was not a sale, the judgment of the superior court and the judgment of the Appellate Court will be reversed, and the cause remanded to the superior court for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded.

(230 Ill. 310)

LITZ et al. v. VILLAGE OF WEST HAMMOND et al.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 6, 1907.)

1. MUNICIPAL CORPORATIONS—EXPENDITURES—NECESSITY FOR APPROPRIATION.

Under the express terms of Hurd's Rev. St. 1905, c. 24, § 91, the corporate expenditures for appropriations of a village in any one year may not lawfully exceed the amount provided for in the annual appropriation bill of that year, and no contract may be made or expense incurred, unless the object of the contract or expenditure

shall have been included in the general appropriation bill and an appropriation therefor made, except in an emergency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1834, 1842.]

2. SAME—MISAPPROPRIATION OF FUNDS—REMEDY.

Municipal taxpayers being in equity the owners of a municipal fund, and the authorities merely trustees, who may only hold and apply the fund to the legitimate purposes of the trust, a bill by a taxpayer will lie to enjoin such authorities from misappropriating it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 2157-2164.]

3. SAME—EFFECT OF ISSUANCE—ILLEGAL WARRANT.

An unauthorized expenditure of municipal funds may be restrained, though warrants have issued.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 2162-2164.]

4. SAME—LOCAL IMPROVEMENT—ACQUIRING LAND—METHOD.

Where private property must be acquired by a village for a local improvement, to be paid for, in whole or in part, by special assessment. Hurd's Rev. St. 1905, c. 24, § 519, expressly requires that title thereto shall be obtained by condemnation proceedings, and the provision may not be defeated by an attempt to purchase the property and pay for it out of funds derived from general taxation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 625.]

5. APPEAL—WAIVER OF ERROR.

Appellants not having attempted to show by their brief and argument that a demurrer to part of the bill was improperly sustained, error assigned on that ruling is deemed waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

6. SAME—QUESTIONS NOT CONSIDERED BELOW.

Where a bill was dismissed for want of equity, appellee may not sustain the decree because the bill is multifarious; that ground not having been raised below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1226-1240.]

Appeal from Superior Court, Cook County; W. M. McEwen, Judge.

Bill by Bernhard Litz and others against the village of West Hammond and others. From a decree dismissing the bill for want of equity, complainants appeal. Reversed and remanded.

Appellants, who are residents and property owners in the village of West Hammond, appeal from the decree of the superior court of Cook county dismissing for want of equity their bill filed therein against appellees for injunction and for other relief. The bill alleges, among other things, that the village of West Hammond is a municipal corporation organized and incorporated under the act of the General Assembly of the state of Illinois entitled "An act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 6, 1872, together with the amendments thereto; that in the month of November, 1905, the president and board of trustees of said village passed a resolution resolving that said village of West Hammond should purchase from one Fred R. Mott certain premises situated within the said village,

known as lots 18 to 25, inclusive, in Freitag's subdivision of that part of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 8, etc., lying south of the Michigan Central Railroad; that they agreed with said Mott to purchase said lots for the sum of \$3,500, which amount was greatly in excess of their value; that subsequent to the passage of said resolution, and on November 10, 1905, said Mott and his wife executed and delivered to the village of West Hammond a warranty deed for said premises; and that in pursuance of said agreement, and in return for such conveyance, and as consideration therefor, the said president and board of trustees delivered to said Mott certain warrants of the said village of West Hammond, signed by it through its officers, drawn on the treasurer of said village, authorizing him to pay to said Mott the sum of \$3,500 out of any funds of said village in his hands not otherwise appropriated. The bill further alleges that no provision was made in the appropriation ordinance passed at the beginning of the fiscal year of 1905 for the payment of the said sum of \$3,500, or any part thereof, as and for the purchase price of said lots, and that no proposition for the making of any such appropriation was ever sanctioned in any manner by a majority of the legal voters of said village, and that the purchase of said lots was not made necessary through any casualty or accident happening after the making of the annual appropriation in the said fiscal year 1905; alleges that on or about May 30, 1906, the president and board of trustees of said village passed an ordinance providing for the construction of a sewage pumping station and the building of a system of sewers within a portion of the said village, which portion was established and limited by said ordinance as a drainage district, which portion included only about one-third of the property located within the said village, and that under the terms of said ordinance only the property within said drainage district was to have the benefit and use of said pumping station and said system of sewers, and that complainants are the owners of real estate in the village of West Hammond not within the limits of said drainage district, and therefore not entitled to the benefits or the use of said pumping station or system of sewers; alleges that the purchase by the village board of said lots 18 and 19 was for the sole object and purpose of locating and erecting the said pumping station thereon, and that the purchase of the remainder of said lots was for the purpose of using them in connection with said sewer system and pumping station, or for some other purpose foreign to any of the lawful purposes for which a municipal corporation may purchase or hold real estate, and that said Mott, at the time of such purchase from him, knew for what purpose the said lots were to be used; alleges that said ordinance passed on or about May 30, 1906, provided that the said pumping station should be constructed

on said lots 18 and 19, and that no provision of any kind was made for the acquisition of said lots, or for the payment for the same, or any portion thereof, by special assessment on the property to be benefited thereby, and that no portion of the property located within said drainage district was specially assessed to pay for the cost of said lots, nor was any provision made by said ordinance for the reimbursement of said village of West Hammond for the use of said lots for said pumping station; alleges that an assessment has been levied against the property within said drainage district for the costs of the construction of said pumping station and sewers, and that the board of local improvements has advertised for bids for the letting of the contract for construction, and intends to award to one James Healy the said contract, and that said Healy, immediately upon the letting of the contract to him, proposes to proceed with the construction of said pumping station upon said lots 18 and 19, that the erection of a pumping station on said lots will render the same unsuitable and useless for any other purpose, and that if said lots are so used no property other than that within said district will derive any benefit from the use of said lots, that the said warrants have not yet been paid and are still owned by said Fred R. Mott, that the purchase of said lots and the issuance of said warrants therefor were wholly beyond the powers of the said president and board of trustees, and that the proposed use of said lots 18 and 19 by said village and said president and board of trustees is unlawful and beyond the power of said president, board and village, and that the said president and board of trustees are, in law, commissioners of said drainage district. The bill prays that the sale of said lots may be rescinded and declared void and that said village be required to reconvey said premises to Mott; that Mott be required to deliver up and cancel said warrants issued to him and that the village treasurer be restrained from paying said warrants; that the village of West Hammond and James Healy be restrained and enjoined from constructing or beginning to construct the pumping station, building, and foundations on said lots. The village of West Hammond, the members of the village board, Mott, Healy, and the village treasurer were made defendants. They appeared and filed a general demurrer, which was sustained. The complainants elected to abide their bill, which was thereupon dismissed for want of equity, and the cause comes to this court by appeal. It is urged by appellants that the court erred in sustaining the demurrer and in dismissing the bill.

Lackner, Butz & Miller, for appellants.
Samuel K. Markham (Albert Martin, of counsel), for appellees.

SCOTT, J. (after stating the facts as above).
Under the provisions of section 91, c. 24,

Hurd's Rev. St. 1905, the corporate expenditures for appropriations of the village in any one year cannot lawfully exceed the amount provided for in the annual appropriation bill of that year, and no contract can be legally made or expense incurred by the village, unless, the object of the contract or expenditure shall have been included in the general appropriation bill and an appropriation therefor made (*City of Chicago v. Nichols*, 177 Ill. 97, 52 N. E. 359), except in an emergency, the existence of which is denied by the bill now under consideration. The village of West Hammond purchased the real estate in question and issued warrants to pay for the same without any provision for so doing having been included in the annual appropriation bill passed during the first quarter of the fiscal year in which the warrants were issued. Those warrants are still in the hands of Mott, from whom the real estate was purchased. The taxpayers are in equity the owners of the fund upon which the warrants are drawn. Municipal authorities are merely trustees, and can only hold and apply the fund to the legitimate purposes of the trust. "The law is established, beyond doubt or controversy, that a bill to enjoin public officers so situated from misappropriating the fund in their charge is a proper remedy for a taxpayer. Courts of chancery will interfere to restrain such authorities from a misuse of the fund intrusted to them or its appropriation to a purpose not warranted by law." *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222, and cases there cited.

The fact that the warrants had issued we regard as without significance. So long as they had not been paid, the funds of the municipality were not, in fact, applied to the purchase of this real estate, and so long as those funds remained in the hands of the village treasurer their unauthorized expenditure might be restrained at the suit of the taxpayer. Upon this branch of the controversy appellees rely upon *City of East St. Louis v. East St. Louis Gaslight & Coke Co.*, 98 Ill. 415, 38 Am. Rep. 97, *Town of Kankakee v. McGrew*, 178 Ill. 74, 52 N. E. 893, *County of Coles v. Goehring*, 209 Ill. 142, 70 N. E. 610, and other cases, where the municipality itself, after the contract was executed by the other party thereto, has sought to avoid the performance of the contract on its part, where it could not put the other party in statu quo, or where it did not offer so to do. It seems scarcely necessary to say that such cases are entirely without application here, where the suit is brought by taxpayers who were not parties to the contract.

It is also urged by appellants that the municipality was without right to acquire that portion of this real estate which it designed to use as a site for a pumping station for a system of sewers that was to be constructed by special assessment, except by condemna-

tion. To this appellees reply that "in 1905, when the premises in question were acquired, the only method open to the village of West Hammond to acquire the property in question and pay for the same out of the general fund was first to seek to agree with the owner on the amount of compensation, and, failing in this, to take steps to acquire the property under the statute relating to the exercise of eminent domain." We think the proposition just quoted inaccurate, in view of the fact that it appears from the bill that lots 18 and 19 of the property purchased were acquired for the sole purpose of erecting thereon the pumping station which was to be used in connection with the sewer system, and that said lots, if so used, could be used for no other purpose. Where private property must be acquired for the making of any local improvement, to be paid for, in whole or in part, by special assessment, the statute requires that the title thereto shall be obtained by condemnation proceedings. *Hurd's Rev. St. 1905, c. 24, § 519; Village of Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846. "Where the method by which property shall be obtained by a village has been prescribed by the Legislature that method is exclusive, and where the law provides for acquiring property by condemnation," and does not in express terms authorize the use of any other method, "a village cannot acquire it by private purchase, which would lead to favoritism, corruption, private bargain, and the exercise of improper influence." *Snyder v. Village of West Hammond*, 225 Ill. 154, 80 N. E. 93. Where the only purpose for which the real estate is acquired is that it may be used in making local improvements, the provisions of the statute requiring condemnation may not be defeated by an attempt to purchase the property and pay for it out of funds resulting from general taxation.

The question of the title of the village to the lots 18 and 19 was considered in *Snyder v. Village of West Hammond*, *supra*, where it was said that "the deed to the appellee [the village] divested the grantor of his estate and vested it in appellee, and no one has questioned the legality of the purchase by any proceeding against appellee," and it was therefore held that it was not a good objection to an application for the confirmation of the special assessment to pay for the pumping station and system of sewers that the title to this real estate had been acquired by purchase. So far as appeared from the record then before us, the title vested in the village might never be disturbed, and the objection to the confirmation of the assessment could not be sustained merely because there was a possibility that the conveyance to the village might thereafter be found to be invalid. It did not appear from that record that a suit had been or would be brought to test the validity of that transfer to the village. The rights of the objectors in the

special assessment proceeding would, perhaps, have been better conserved, had the question of the validity of the title of the village to the real estate been litigated at their instance prior to the hearing of their objections to the confirmation of the assessment. While we do not regard it as here material, yet, for the purpose of explaining what might seem to be an inadvertence, we point out the fact that it appeared from the record in the Snyder Case that the real estate had been paid for by the village.

This suit was instituted by appellants as property owners paying taxes upon property within the village, but not within the district to be benefited by the sewer system, the pumping station for which was to be located upon the real estate purchased of Mott. From one portion of the bill it appears that the board of local improvements is about to award to Healy the contract for the erection of the pumping station, and that Healy will immediately proceed to construct the same upon said real estate, and the bill asks an injunction to restrain Healy from performing the contract. The station is to be constructed solely with funds raised by the assessment of property lying within the district. Appellants contribute nothing to that fund, and they have not attempted to show by their brief and argument that the demurrer was improperly sustained as to this part of the bill. The errors assigned, in so far as they question the action of the court below in sustaining the demurrer to the part of the bill by which an injunction was sought to prevent the construction of the pumping station, must therefore be regarded as waived.

Appellees urge, however, that the inclusion of the portion of the bill just referred to makes the bill multifarious, and that the demurrer was properly sustained for that reason. We deem it unnecessary to consider this question. It appears from the record that the court dismissed the bill for want of equity. It does not appear that the demurrer was sustained on the ground that the bill was multifarious. There may be equity in a bill, even though it be multifarious, and for that reason obnoxious to a demurrer. Where the record shows that the bill was dismissed for want of equity, and it does not appear that the question of multifariousness was considered by the court below, appellee will not be permitted to sustain the decree in this court on the ground that the bill is multifarious. Had the demurrer been sustained for that reason, appellants would have had an opportunity to ask leave to amend, and, had the leave been granted, this objection could readily have been obviated by the amendment.

The decree of the superior court will be reversed, and the case will be remanded to that court for further proceedings consistent with the views herein expressed.

Reversed and remanded.

(230 Ill. 273.)

MINNESOTA MUTUAL LIFE INS. CO. v. LINK et al. SAME v. MILLER. SAME v. WELSH.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 6, 1907.)

1. APPEAL—REVIEW—DECISIONS OF INTERMEDIATE COURTS.

Where the court decided that certain statements in an application for a policy were representations, and not warranties, and an issue of fact as to these statements as representations was decided by the jury and their finding approved by the Appellate Court, the Supreme Court will not consider the issue of fact further than to determine whether the court properly ruled that the alleged statements were mere representations, and not warranties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4322, 4324.]

2. INSURANCE—AVOIDANCE OF POLICY—WARRANTIES.

Where it is contended that warranties have been inserted in an insurance contract, the effect of which will inevitably be to defeat it in the end, such intention must be so clearly and unequivocally expressed as to leave the court with no other alternative but to so construe the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 560-562.]

3. SAME—APPLICATION—STATEMENTS—REPRESENTATIONS.

An applicant for life insurance was asked in the application if at any time he had suffered from any of some 60 listed diseases, among which were chronic cough and bronchitis, to which he answered "No." At the end of this list was the statement: "Having carefully read the foregoing questions, I declare that I have never had any of the diseases or any other serious ailment, except pneumonia." The applicant then signed a statement that he warranted the above statements to be true, and, if they were not true, the policy should be void. Held, that the questions and answers were representations, and not warranties, and the company could not defend, in an action on the policy, that they were untrue and rendered the policy void without averring and proving their materiality, and that they were known to be false when made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 558-561.]

4. APPEAL—FRIVOLOUS APPEAL—DAMAGES.

The 10 per cent. damages awarded in case an appeal is taken merely for delay will not be awarded, unless it is clear that it was not in good faith and merely for delay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 983.]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Jesse Holdom, Judge.

Consolidated actions by Lizzie Miller Link and others against the Minnesota Mutual Life Insurance Company to recover on a life insurance policy. From a judgment of the Appellate Division affirming a judgment of the superior court for plaintiffs, defendant appeals. Affirmed.

Tenney, Coffeen, Harding & Wilkerson, for appellant. Albert M. Kales, for appellee.

VICKERS, J. These three cases have been consolidated in this court, and will be considered as one case. They are all actions on

a life insurance policy issued by appellant on the life of John P. Miller for \$3,000, \$1,000 of which was payable to each of the appellees, as beneficiaries. By certain pleas filed, to which the trial court sustained demurrers, and by certain instructions offered, appellant sought to defeat the action on the ground that certain statements in the application upon which the policy in suit was issued were untrue, and that such statements were by the terms of the contract made warranties. The trial court held that the alleged false statements were mere representations and not warranties, and that appellant could not rest a defense upon such statements without averring and proving their materiality and that they were known to be false by the assured at the time they were made. By its additional pleas appellant tendered an issue of fact as to the statements as representations. Upon these pleas, which were made necessary by the ruling of the court as to the sufficiency of the original pleas, the issue of fact thus presented was decided against appellant by the jury, and that finding has been approved by the Appellate Court for the First District. We therefore have no concern with the issue of fact further than to determine whether the court properly ruled that the alleged statements were mere representations and not warranties.

The particular questions in the application the answers to which are relied on by appellant as a defense relate to the previous personal health of the assured. Among the questions and answers found in the application are the following: "Except as herein stated, are you now and usually in good health and do you believe yourself to be physically sound? Yes." The application also contains the following statement: "The medical examiner will request applicant to carefully read the following question: 'Have you at any time suffered from chronic cough?' etc. Then follows an enumeration of more than 60 diseases, among which are bronchitis and gall stones. At the end of the list of particular diseases the following statement is made: "Having carefully read and fully understanding the foregoing questions, I declare that I have never had any of the diseases or any other serious ailment, except pneumonia when nine years old, which lasted several weeks," naming Dr. Lindsey as the attending physician. The following certificate then appears above the signature of the assured: "I, the undersigned, do hereby certify that I am the applicant for life insurance mentioned and described in the foregoing statements, representations, questions and answers; that I have read and fully understand each and every of said statements, representations, questions and answers; that said answers, statements, and representations, and each and all of them, as above written, are the answers, statements, and representations given and made by me, and

were written by me under my direction and in my presence. And I do further declare and agree that each and every of said answers, statements, and representations made by me, as aforesaid, is and are material to this application and any action taken thereon by said the Minnesota Mutual Life Insurance Company, and I warrant and declare each and every of said answers, statements and representations to be full, complete, and true, and that if either or any of said answers, statements and representations be not full and complete, or if either or any of them be untrue in any respect, then and in such case any policy issued hereon shall be null and void from the beginning, except as shall be otherwise expressly provided in the policy. I do further agree that any policy issued upon this application and accepted by me, whether of the form or kind hereby applied for or otherwise, shall bear the same date as this application but shall not take effect until actually delivered to me and the first premium actually paid the company, and that in determining the due date of any premium the reckoning shall be from the date of the policy. And I further hereby agree that this application, and everything therein contained, shall be and constitute a part of any policy issued thereupon. Dated this 20th day of January, 1902. John P. Miller, Applicant." The contention of appellant is that by answering "No" to the questions as to whether the assured had ever had any of the enumerated diseases, and by the certificate above set out, the assured thereby warranted the literal truth of each of said answers, and that, if they are false in any particular, such falsity will avoid the policy, whether such answers were material to the risk or not, and notwithstanding they may have been made unintentionally and innocently, through mere mistake or inadvertence.

There is a material and substantial difference between the legal effect of a warranty and a representation. A representation must relate to a material matter, and it is only required to be substantially true, while a warranty must be literally true, and its materiality cannot be called in question. It is said that warranties enter into and are made a part of the contract, while representations are merely inducements to it. *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; *Metropolitan Life Ins. Co. v. Moravec*, 214 Ill. 186, 73 N. E. 415. Whether the alleged false answers are warranties or mere representations is a question to be determined from a construction of the contract, which should be in accordance with the expressed intention of the parties. It is not reasonable to suppose that Miller took this policy with the distinct understanding that it would be void and that all premiums paid by him on it were a mere gratuity conferred upon the company, and yet, if the absolute truth of

all of the answers to the more than three-score questions was warranted, there is scarcely a probability that any liability could ever accrue on such policy. It is well known, as is observed by the Supreme Court of the United States in *Moulor v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447, that a person may have diseases of the presence of which in his system he has and can have no knowledge and which even skillful physicians are unable to discover after a most searching examination. It is therefore unreasonable that persons who organize corporations for the purpose of selling life insurance would exact a warranty of an applicant for insurance of the truth of a matter which, from the very nature of the inquiry, might be wholly unknown to the applicant, and still more unreasonable that any sane person would knowingly warrant that he had never had, in any form or any degree, any disease embraced within the long catalogue embodied in this application.

While the law will permit parties competent to contract to insert any provisions that they see proper which are not contrary to law or good morals, still, where it is contended that warranties have been inserted in an insurance contract the effect of which will inevitably be to defeat it in the end, such intention must be so clearly and unequivocally expressed as to leave the court with no other alternative but to so construe the contract. If the language employed is ambiguous and doubtful, or if there is another reasonable construction that may be placed upon it and thus avoid the consequences of a warranty, courts are inclined to adopt the latter construction. In this connection the language of Justice Harlan in the case last above cited is pertinent: "In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void and all premiums paid thereon forfeited, if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some one of the diseases mentioned in the question to which he was required to make categorical answer. If those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid contract, a guaranty against the existence of diseases of the presence of which in his system he has and can have no knowledge, and which skillful physicians are often unable, after a most careful examination to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion." Again, in the same opinion, the learned justice uses the following language: "The applicant was required to answer 'yes' or 'no' as to whether he had been afflicted with certain diseases. In respect to some of those diseases, particularly

consumption and diseases of the lungs, heart, and other internal organs, common experience informs us that an individual may have them, in active form, without at the time being conscious of the fact and beyond the power of any one, however learned or skillful, to discover. Did the company expect, when requiring categorical answers to the existence of diseases of that character, that the applicant should answer with absolute certainty about matters of which certainty could not possibly be predicated? Did it intend to put upon him the responsibility of knowing that which perhaps no one, however thoroughly trained in the study of human diseases, could possibly ascertain?" The foregoing language applies with great force to the case in hand. The facts in this case are even stronger in support of appellees' contention that a warranty was not intended than in the *Moulor* Case, from which we have quoted.

We are of the opinion that there is sufficient reason for holding the alleged statements in this case to be representations and not warranties, aside from those already suggested. Following the categorical answers to the list of questions, the application contains this language: "Having carefully read and fully understanding the foregoing questions, I declare that I have never had any of the diseases mentioned or any other serious ailment." The words "other serious ailment" may fairly be said to modify all of the negative answers to the preceding list of questions. Any person reading the entire application would conclude that it was only information in respect to serious ailments that was sought by the company. A physician who testifies in this case for appellant says that a cold accompanied with a cough is one form of bronchitis, but he says it is not a serious ailment, and, further, that the attacks of bronchitis for which he had treated the assured could not be said to be serious ailments. Manifestly the company did not expect that the applicant would be able to remember every cold he ever had which was accompanied with a cough, during his entire life, together with the duration of his illness and the name and address of the attending physician, if any. Neither would the applicant so understand, but, on the contrary, he would naturally understand that the question related to something more serious and material. If the question had been formulated in this way: "Have you ever had bronchitis or other serious ailment?" would not the words "other serious ailment" clearly exclude in the mind of any reasonable person an ordinary cold accompanied with a cough? In our opinion the trial court properly construed the questions and answers in this case as mere representations and not warranties, and that the rulings of the court as to the pleas and instructions, in accordance with this interpretation, were proper.

There is some objection made to the ad-

missibility of certain evidence, but the appellant's contention in this regard is without merit.

We have been asked by appellees in this case to award 10 per cent. damages because the appeal has been taken merely for delay. We cannot say that there is a want of good faith or that the appeal was prosecuted merely for delay on the part of appellant from the Appellate Court, and accordingly appellees' motion for the statutory 10 per cent. damages will be denied.

Finding no error in these judgments, the judgments of the Appellate Court for the First District will be affirmed.

Judgment affirmed.

(230 Ill. 558)

CONNOR et al. v. GARDNER.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 6, 1907.)

1. WILLS—CONSTRUCTION.

A will should be so construed, if possible, as to prevent intestacy as to any portion of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 964, 965.]

2. SAME—GIFTS.

A gift is made without any express words of gift, if an intention to give clearly appears from the will as a whole.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 988.]

3. SAME—DEVISE BY IMPLICATION.

While a devise by implication cannot rest on conjecture, it is not required that the inference should be absolutely irresistible; it being sufficient if the circumstances taken together afford such an inference as leaves no doubt of the testator's intention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 999.]

4. SAME—RULE IN SHELLEY'S CASE.

The word "children" in a will does not ordinarily mean "heirs" or "heirs of his body," so as to bring a devise under the operation of the rule in Shelley's Case, unless the context of the will leaves no doubt of such intention.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1372-1378.]

5. SAME—HEIRS.

The word "heirs" is a word of limitation, and not of purchase, and, when used in a will, its legal intentment is to designate a class of persons who are to take in succession from generation to generation, the law effectuating this purpose by declaring a fee to pass to the first taker.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1090-1102, 1114-1128.]

6. SAME.

Testator gave a life estate expressly to his wife, reciting that he desired to make a "disposition" of his estate. He gave a certain farm to his son in fee, providing that, if the farm was not equal to the shares remaining to be divided among his other children, the other shares should contribute to make the shares equal. The will also provided that the shares of testator's three daughters were to be equal and free from the control of their husbands, and gave the executors power in trust to control, rent, sell, and convey the property of the daughters. The will provided that the shares of the daughters "shall be theirs and their child's or children's exclusively," and that, besides her "equal share"

in all testator's estate, one of his daughters should have her own riding horse and saddle. It further provided that, if any of testator's children should die childless, their shares, except as the law otherwise directed, should revert to the other children equally. There was no direct or express devise of real estate to any of the children except the son, to whom the farm was devised. *Held*, that the testator's intention was to devise the fee-simple title in the lands of his estate to each of the three children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1319-1350.]

Appeal from Circuit Court, Sangamon County; James A. Creighton, Judge.

BILL by James Gardner against John F. Connor and others. Decree for complainant, and defendants appeal. Affirmed.

James Gardner, appellee herein, claiming to be the owner in fee and in possession of the E. ½ of the N. E. ¼ of section 20, township 16 N., range 7 W., in Sangamon county, Ill., filed a bill in chancery to remove as a cloud upon his title certain alleged claims of appellants based on the last will and testament of Joseph Berry, deceased. Appellants answered the bill, denied that the appellee was the owner in fee, and set up the claim that appellants were the owners in fee under the will of their grandfather, Joseph Berry. The answer set out the will in *hæc verba*. Appellee filed exceptions to the answer, and the circuit court held that under the will appellants had no interest in the premises, sustained the exceptions, and ordered all portions of the answer relating to said will, and the copy thereof, expunged from the answer. The cause was referred to the master, who took the evidence upon the allegations of the appellee's bill and recommended a decree in accordance with the prayer thereof. Accordingly the prayer of the bill was granted, and appellee was adjudged to be the owner in fee, and that the appellants had no interest, right, or title in said premises by virtue of the will set out in the answer. Appellants excepted and have appealed to this court, assigning as error the ruling of the court holding that appellants had no interest or title under the will and in expunging it from the answer and in decreeing the relief prayed for in the bill.

The will of Joseph Berry, under which appellants set up title, is as follows: "Know all men whom it may concern, that I, Joseph Berry, of Bath county, state of Kentucky, being of sound and deposing mind and desiring to make a disposition of my estate at my leisure, do now make it as follows, *viz.*: I will and direct that all my just debts be honestly paid, and if my personal property be not sufficient for that purpose, then such of my real estate as shall seem most advisable to my executors shall be sold for that purpose. I will and direct that my wife, Jane C. Berry, have one-third part of my estate during her life, as the law directs. I further will and direct that my son Joseph A. Berry after my death shall

own and possess forever my farm I now live on, lying on Flat creek and containing about three hundred acres of land, be it more or less (reserving my wife's right of dower to her if then living), on condition that he lives with me during my life, supports myself and family and attends to my business and the cultivation of my farm, all the proceeds being mine except what we may agree on as his; and if the above named farm shall not be an equal share or portion of all my estate, including in the estimate the Paris and Bourbon property not disposed of which my wife inherited of her father, so as to make his share equal to the share of the rest of my children, viz., James J. Berry, Elizabeth, Mary Jane and Ann Amelia, respectively, or of such of them as shall then be living, or their child or children being their legal representatives, then said Joseph A. Berry shall receive of the rest of my estate, and of the landed property my wife inherited from her father, as together shall make his share equal to that of the rest of my children, respectively. But if the share of said Joseph A. Berry (I mean the farm) should exceed the share of the residue of my children, respectively, there shall be no deduction made from said farm, but he shall own and possess all said farm as his share and in consideration of his expenses and trouble in attending to my business and supporting myself and family, and giving and returning to me a bond I formerly executed to him for two hundred and eighty-two and ten hundredths acres of land lying in Rush county and state of Indiana. I further will and direct the shares or portions of my estate falling to my daughters, respectively, shall be theirs and their child's or children's exclusively, shall be under the control of my executors to rent, lease, sell and convey said property of said daughters, to give each, as their necessity may demand, a part of the money, vest part in bank stock or withdraw said stock when advisable, and may vest part of said money in other landed property for the sole benefit of said daughters and children, at the discretion of my executors, said daughters' share or portion to be free from the control, debts or liabilities of their husbands; and if any of my daughters or sons should die childless, then her or their share or shares shall, except as the law otherwise directs, revert to the residue of my children, equally. I further direct that the sum of \$1,500 be deducted from the share of my son James J. Berry on account of the expense of his education, and also the sum of \$712 which I gave him after his education was completed, so that his share shall be less than that of the rest of my children, respectively, by those sums last named. And I further desire, empower and direct my executors to manage and use the share of my estate falling to my son James J. Berry, which will consist mostly of Illinois and Indiana land, for his sole benefit and his

children, if any, to rent, lease, sell and convey part or all of said James J. Berry's share and dispose of and vest the proceeds as in their judgment may seem best for his benefit, or if and when the said executors shall judge it advisable, to convey his share, or part thereof, in my estate to himself, said James J. Berry, they shall so convey. And further I will and desire my son Joseph A. Berry, my brother, John Berry, and Thomas Gordon, Esq., be executors of this my last will and testament, with power to choose others in their stead, if necessary. I also direct that my two grown slaves, Tarlton and Phebe, be sold to reasonably good masters; and further, that my two female slaves Rachel and Ellen, when arrived at the age of twenty-one years, be free and sent to Liberia or colony in Africa as soon as the hire of each shall defray expenses of transportation. And further, that my young slave Jemima, in consideration of her earlier development of mind and in view of the probable advanced stage of colonization by that period, and that she may accompany her sister, Ellen, be free when seventeen years of age, and also sent to colony in Africa as soon as her hire will suffice to defray the expenses of her transportation, and that my executors attend to the hiring and transportation of said slaves to an African colony. And further, I direct that if any heir or heirs of mine shall institute against or go to law with another heir or heirs of mine respecting my estate or part thereof, said heir or heirs thus going to law shall forfeit and lose one-half of my estate they were otherwise entitled to, to be divided among the other of my heirs, equally. This clause is not intended to prohibit the legalizing some necessary and formal proceedings nor to prevent any heir or heirs from defending their just rights by law, if invaded by another heir or heirs, but in case of any difficulty or dispute should arise among any heirs of mine about my estate, it is my wish and intention that arbitrators chosen by my executors shall settle and determine finally such difficulties. I further direct that my daughter Ann Amelia, besides her equal share in all my estate, have and own her riding horse and saddle, and a new * * * that is in my house. That all my other household and kitchen furniture and bedding shall belong to, as well as my dwelling house, to my wife during her lifetime, and said house be a home free of charge to my daughter Ann Amelia while she remains unmarried and at the death of my wife shall belong to my son Joseph A. Berry, and that all my books be equally divided among my children, giving only to my sons, not to my daughters, my books in dead languages, and to my son Joseph A. Berry my medical books. Witness my hand and seal which I have subscribed in the presence of the subscribing witnesses who have subscribed their names in the presence of myself and of each other,

this seventh day of May, in the year of our Lord eighteen hundred and fifty. Joseph Berry. [L. S.]”

It is averred in the answer that appellants were the surviving children and heirs at law of Mary Jane Connor, who was the daughter of Joseph Berry and one of the devisees under his will. It is also averred that the mother of appellants, Mary Jane Connor, and her brothers and sisters, devisees under the will of Joseph Berry, after the death of Joseph Berry, and in the year 1852, entered into a partition agreement in writing, by which it was agreed that certain persons therein named should make a partition and division of the real estate in Sangamon county, Ill., among the several devisees under Berry's will, and that the said agreement was duly recorded, and that the commissioners therein named proceeded to make a partition and division among the parties, and that the land in controversy was assigned and set off to Mary Jane Connor, with other lands, as her share under the will aforesaid, and it is averred in the answer that the partition among the devisees of Joseph Berry was approved by all of the parties to said agreement and acquiesced in by them and the report was duly recorded. The answer charges that appellee and his grantors had actual notice of the rights of the appellants before they acquired any title to said premises. Appellants' answer further avers that under the provisions of said will, and by virtue of said partition, their mother, Mary Jane Connor, only acquired a life estate in said premises, and that upon her death the same became the absolute property of appellants, who were her only children. It is averred that Mary Jane Connor died in May, 1905, intestate, leaving appellants as her only children surviving.

The evidence shows that the appellee derived title by warranty deed from David W. Clarke and wife, executed February 14, 1895, and that Clarke derived title by two deeds—one executed by Joseph A. Berry and wife May 1, 1875, and another warranty deed from R. M. Connor and Mary Jane Connor, his wife, dated March 22, 1875. Joseph A. Berry was a son of the testator, Joseph Berry, and sole acting executor under his will. The evidence shows that Joseph A. Berry purchased the land in controversy at a master's sale, and that on November 21, 1872, a master's deed issued to him for the land in controversy. The evidence further shows that Clarke went into the actual possession of the premises, claiming to be the owner, by virtue of the deeds from Mary J. Connor and husband and Joseph A. Berry and wife in 1875, and that he continued in the actual, exclusive possession of the premises, claiming to be the owner, and that he paid all taxes and assessments on said lands as the same became due, until he sold and conveyed the lands to appellee, in 1895, and that appellee has continued such possession and payment of taxes

under claim of ownership to the present time. There is a period of actual adverse possession under claim and color of title and payment of taxes for approximately 30 years.

Albert Salzenstein, for appellants. Patton & Patton, for appellee.

VICKERS, J. (after stating the facts as above). The question over which the most serious contention exists is: What interest, if any, did Mary Jane Connor take under the will of Joseph Berry? The appellants insist that their mother took a life estate only, with remainder in fee to her children, and that by the partition and her subsequent conveyance to Clarke, and Clarke's conveyance to appellee, only a life estate was conveyed, and that appellee and his grantors, being the owners of the life estate, could acquire no rights, by possession and payment of taxes, against the remaindermen so long as the life estate existed, while, on the other hand, appellee contends, first, that Mary Jane Connor took no interest whatever under her father's will, and that whatever interest she had in the premises she acquired by descent; second, that, if any interest passed to Mary Jane Connor under the will, it was an interest in fee, and not a mere life estate. It is therefore apparent that the determination of the rights of the parties to this controversy depends largely upon the construction to be given to the will of Joseph Berry. The testator resided at the time the will was executed, in 1850, on a farm on Flat creek, Bath county, Ky. He had a wife, Jane C. Berry, and five children—two sons, Joseph A. and James J. Berry, and three daughters, Elizabeth, Mary Jane, and Ann Amelia Berry. At the time of his death he owned the farm on which he resided on Flat creek, containing about 300 acres of land, and other real estate, and a large amount of personal property in Kentucky. He also owned about 2,500 acres of land in Sangamon county, Ill., and considerable real estate in the state of Indiana.

It will be seen by a careful reading of the will set out in the statement that the fundamental difficulty arises out of the failure of the testator to make any direct or explicit disposition of four-fifths of his estate. It will be noted that after providing for the payment of his just debts and a one-third interest in his estate for his wife, the testator gives absolutely to his son Joseph A. Berry, in fee, the farm on which the testator then resided, lying on Flat creek, containing about 300 acres, reserving the right of dower to his wife therein if she survived him. Nowhere in the will is there any other express, specific devise of any of the real estate, either in Indiana or Illinois. A careful reading of the will, however, will disclose that the testator intended that his son Joseph A. Berry should have the Flat creek farm, and, in case that farm was not equal to the shares remaining

to be divided among his other children, the other shares should contribute to bring the value of Joseph A.'s share up to the value of the shares received by his other children; that, if the Flat creek farm should exceed one-fifth in value, it was not to be reduced; that from the share of James J. Berry, \$2,212 was to be deducted on account of advancements made to him; that the shares of his three daughters were to be equal, and that such shares should be free from the control, debts, or liabilities of their husbands, and that the executors of the will took a power in trust to control, rent, lease, sell, and convey the property of said daughters. In construing the will such a construction should be adopted, if possible, as to prevent intestacy as to any portion of the estate. It is always presumed that the testator did not intend to die intestate as to any part of his estate. *King v. King*, 168 Ill. 273, 48 N. E. 582; *Minkley v. Simons*, 172 Ill. 323, 50 N. E. 176; *Craw v. Craw*, 210 Ill. 246, 71 N. E. 450; *Greenwood v. Greenwood*, 178 Ill. 387, 53 N. E. 101. The legal presumption in this case is strengthened by the clear expression by the testator of his intention to dispose of his entire estate, found in the first sentence of the will, as follows: "Know all men whom it may concern, that I, Joseph Berry, of Bath county, state of Kentucky, being of sound and disposing mind and desiring to make a disposition of my estate at my leisure, do now make it as follows." The words "disposition of my estate" indicate a purpose to dispose of all his estate, and not a part of it. Again, referring to the Flat creek farm, the testator says: "If the above named farm shall not be an equal share or portion of all my estate, including in the estimate the Paris and Bourbon property," etc.—thus showing that the testator had in mind his entire estate, and contemplated an equal division of it among his children by his will. The intention of the testator to make a full and complete disposition of his entire estate is further shown by the clause directing that, "if any heir or heirs of mine shall institute against or go to law with another heir or heirs of mine respecting my estate or part thereof," such heir should forfeit one-half of the estate that he would otherwise be entitled to; and also the provision that, if "any difficulty or dispute should arise among any heirs of mine about my estate," the same should be determined by arbitrators chosen by the executors. If the testator failed to dispose of his entire estate by his will, such failure is not due to any expressed intention to die intestate as to any part thereof.

Having determined what the intention of the testator was, the next matter requiring consideration is whether such intention is so expressed or implied in the words of the will as to carry into effect such intention consistently with the rules of law. As already pointed out, there is no direct or express de-

vise of real estate to any of his children except Joseph A. Berry, but in our opinion the intention to devise the residue of his estate in equal parts to his four other children, less deductions from James' share, is so manifest from the general testamentary scheme as gathered from the words of the will, that a devise by implication must be held to have been made. A gift is made, without any express words of gift, if an intention to give clearly appears from the will as a whole. *Rood on Wills*, § 495. A devise by implication cannot rest upon conjecture, but it is not required that the inference should be absolutely irresistible. It is enough if the whole circumstances, taken together, afford such an inference as leaves no doubt in the mind of the judge who has to decide as to the intention of the testator. *Hartley v. Hurlie*, 5 Ves. 546; *Bootle v. Blundell*, 19 Ves. 517. To uphold a legacy by implication, the inference from the will of the testator's intention must be such as to leave no hesitation in the mind of the court and permit of no other reasonable inference. *Bradhurst v. Field*, 135 N. Y. 564, 32 N. E. 115; *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225. Referring to the shares of the daughters, the will provides: "I further will and direct the shares or portions of my estate falling to my daughters, respectively, shall be theirs and their child's or children's exclusively," etc. Again, referring to his daughter Ann Amella, the testator uses this language: "I further direct that my daughter Ann Amella, besides her equal share in all my estate, have and own her riding horse and saddle and a new * * * that is now in my house." Of the 15 or more times where the testator uses the words "share" or "portion" the above is the only place where the share is qualified by the word "equal." In other parts of the will Ann Amella's share or portion is referred to simply as "her share" or "her portion"; but in the expression last above quoted the testator gives Ann Amella her riding horse and saddle "besides her equal share in all my estate." Can there be any reasonable doubt that the testator intended that Joseph A. should have the Flat creek farm, and, if necessary, enough to make it equal to a one-fifth share of his entire estate, and that he intended that his son James J. should have one-fifth, less the advancements made to him, and that the three daughters should each have one-fifth, and that Ann Amella should, in addition thereto, have her riding horse and saddle? It seems to us that the inference is so clear that the case is controlled by the rules relating to devises by implication.

Appellants insist that the daughters of the testator took merely a life estate with remainder in fee to their children. This contention is based on the clause of the will which directs that "the shares or portions of my estate falling to the daughters, respectively, shall be theirs or their child's or children's exclusively"; the argument being that

a devise to one and his "child" or "children" passes only a life estate to the first taker with remainder in fee to his children. Where a devise is made to a person and his children, it may mean any one of three dispositions: (1) That the devisee named should have the whole estate; (2) that the devisee should have a life estate and a remainder in fee to his children; (3) that the devisee named, and his children should take jointly or as tenants in common. Rood on Wills, § 552. The word "children," in a will, does not ordinarily mean "heirs" or "heirs of his body," so as to bring the devise under the operation of the rule in *Shelley's Case*, unless the context of the will leaves no doubt of such intention. The word "heirs" is a word of limitation, and not of purchase; and, when used in a will, its legal intentment is to designate a class of persons who are to take in succession, from generation to generation, and the law effectuates this purpose by declaring a fee to pass to the first taker, or, as it is sometimes expressed, by giving a life estate to the first taker and a limitation in fee to himself. Kales on Future Interests, § 129; *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136; *Strawbridge v. Strawbridge*, 220 Ill. 61, 77 N. E. 78, 4 L. R. A. (N. S.) 948, 110 Am. St. Rep. 226. The words "sons," "daughters," "child," and "children" are not technical, legal terms, to which a fixed and determined meaning must be given regardless of the sense in which they are employed; but they are flexible and subject to construction, to give effect to the intention of the testator. In *Schaefer v. Schaefer*, supra, this court gave the word "children," where the same occurred twice in the same clause, directly opposite meanings, holding that in one case it meant heirs and was a word of limitation, and in the other that it was a word of purchase. The rule in *Shelley's Case* often defeats the clearly expressed intention of the testator. In a devise to one for and during his natural life with remainder to his heirs in fee, the inexorable rule of the common law, from which courts cannot escape without legislative aid, requires them to set at naught the clearly expressed intention and decide that the testator gave a fee simple title to the first taker, although he expressly limited it to a life estate by apt words. When, however, the testator has used other words, such as "child" or "children," the rule in *Shelley's Case* has no application, and the court is left free to adopt a construction which will carry into effect the intention of the testator. It is true the intention, when discovered, may lead to the same result as is reached under the rule in *Shelley's Case* where the word "heirs" is used, but, if this be so, it is because the intention is carried out by adopting such construction. It will never be so construed to defeat the intention, as may follow from the rigor of the rule in *Shelley's Case*.

When the will in hand is considered in all

its parts, and each part compared with the other, we cannot escape the conclusion that the intention of the testator was to devise a fee-simple title to each of his children. We reach this conclusion by considering that the testator gave a life estate expressly to his wife. This shows he appreciated the difference between a fee-simple title and a life estate, and was apprised of the proper method of creating the latter. He did not, by express words, create a life estate for his daughters as he did for his wife, from which an inference, of more or less strength, may be deduced that he intended something different for the daughters. Again, we find running through the whole will unmistakable evidence that the testator desired to deal equitably with his children. There can be no doubt that the devise to Joseph A. was a fee in the Flat creek farm. The other "shares" or "portions" were to be equal shares in his estate. The equality contemplated was not merely equality of quantity, but equality in value and character of the estate devised. It cannot be supposed that the testator intended to give Joseph A. a fee in the Flat creek farm, which was, it is fair to assume, improved and productive, and give his daughters only a life estate in a lot of cheap, nonproductive prairie lands, such as much of Sangamon county was in 1850. These lands were only appraised at from \$6 to \$12 per acre in 1852. In fact, we do not see how it would be possible to procure the equality which was, as we conceive, the chief concern of the testator, unless we assume that it was the intention to pass the same quality of title to the daughters that was given to Joseph A. There is here clear manifestation of an intention to give an estate in fee. The rule adopted in *Wilde's Case*, 6 Coke, 17, would, if followed, probably lead to a different result; but that rule does not control in this State, since under our statute words of inheritance are not necessary to pass a fee. *Davis v. Ripley*, 194 Ill. 399, 62 N. E. 852; *Strawbridge v. Strawbridge*, supra; *Boehm v. Baldwin*, 221 Ill. 59, 77 N. E. 454.

It is suggested that the provision that, if any of his children should die childless, her share or their shares should revert to the other children equally, distinguishes this case from *Davis v. Ripley*, supra, *Strawbridge v. Strawbridge*, supra, and *Boehm v. Baldwin*, supra. We do not see how this clause can have any effect, since the shares only revert in case the law does not otherwise dispose of the estate. The clause is modified by "except the law otherwise directs." Of course, if the devisee should die childless and the law did not provide any other person to take the estate, it would pass by descent to the surviving brothers and sisters, but, if they should leave a surviving husband or parent, the law of descent would direct otherwise, and the estate would not be distributed among the brothers and sisters equally. This clause

tends to strengthen, rather than weaken, our conclusion that the testator intended to vest an estate of inheritance, for otherwise there would be nothing upon which the clause "except the law otherwise directs" could operate.

Our conclusion is that the testator devised an equal portion of his real estate to each of his children in fee, and that Mary J. Connor, the mother of appellants, obtained a title in fee by the partition made among the children of Joseph Berry to the land in controversy, and when she conveyed the premises, in 1875, by general warranty deed, the title passed to her grantee. Appellants therefore have no interest in these premises, and the court properly decreed that their alleged claim was a cloud upon appellee's title.

The decree of the circuit court is affirmed.
Decree affirmed.

(230 Ill. 469)

ADAMS et al. v. PEABODY COAL CO.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 6, 1907.)

1. VENDOR AND PURCHASER—OPTIONS TO PURCHASE—CONSIDERATION.

An agreement providing that in consideration of \$1 and other valuable consideration the owner of land granted to another the right to demand and receive on payment of the further sum of \$15 per acre a conveyance of the land, was based on sufficient consideration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 23.]

2. SAME—NATURE OF OPTION—WITHDRAWAL.

An "option" is a continuing offer which the offerer may not withdraw until the expiration of the time limited.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 23.

For other definitions, see Words and Phrases, vol. 8, pp. 5000-5002, 7739.]

3. CONTRACTS—SEAL—CONSIDERATION.

Where a contract is under seal, consideration is imported.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 406.]

4. SAME—IMPEACHING—INADEQUACY OF CONSIDERATION.

Inadequacy of consideration is of itself no ground for impeaching a contract in a court of equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 1171.]

5. VENDOR AND PURCHASER—OPTION—BINDING EFFECT.

Where an agreement provided that in consideration of \$1, etc., the owner of land granted to another, his legal representatives and assigns, the right, at his or their option, to demand and receive on payment of a certain further sum a conveyance of the property to such party, his nominee, assigns, or successors in interest, the contract was binding on the owners, devisees, and legatees.

6. CONVERSION—REALTY INTO PERSONALTY—OPTION TO PURCHASE—EFFECT.

Testator in his lifetime gave a written option for the purchase of land. By his will he gave his wife a life estate in all his real estate and also all the residue of his personal property. *Held*, that on conveyance of the property under the option by testator's executors the pro-

ceeds passed as real estate, and not as personal estate under the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Conversion, §§ 21, 23.]

Appeal from Circuit Court, Christian County; Albert M. Rose, Judge.

Bill by the Peabody Coal Company against William B. Adams and others. From the decree defendant Adams appeals. Reversed.

This was a bill brought by the Peabody Coal Company against William B. Adams, Marcella Adams, executrix of Gavin R. Adams, and others, in the circuit court of Christian county, for the specific performance of a written option, under seal, entered into between Francis S. Peabody and Gavin R. Adams December 29, 1904; the option providing, among other things, that in consideration of \$1 and other valuable consideration in hand paid, said Adams gives and grants to said Peabody, his legal representatives and assigns, "the right, at his or their option, to demand and receive, upon payment of the further sum of \$15 per acre, in cash, at any time within nine months from the date hereof, a conveyance to said Francis S. Peabody, his nominee, assigns or successors in interest, by warranty deed, of good title in fee simple to all the coal and other minerals underlying the following described premises," describing the 233¼ acres in question, and also provided that "all rights and obligations created by this agreement shall extend to and be binding upon the successors, heirs, executors, administrators and assigns of the parties, respectively." This agreement was assigned by Francis S. Peabody to the Peabody Coal Company January 5, 1905.

Gavin R. Adams died August 18, 1905. By his will, executed October 15, 1904, after directing that all his just debts be paid, he bequeathed to a stepdaughter, Mrs. Maude Smith, a legacy of \$1,000, making such legacy a charge upon the real estate that he should own at the time of his decease. The will further provides:

"Third—If my wife, Marcella Adams, shall survive my decease, I give and devise to her, subject to the said charge or lien of \$1,000, all the real estate that I shall own at my decease, to have and to hold for and during her natural life only, and not in fee; and I give and bequeath to her, absolutely, all the residue of the personal property that I shall own at my decease. * * *

"Fourth—Subject to the life estate above given to my wife if she survives my decease, I give and devise to my daughter, Elsie Mabel Adams, all the real estate that I shall own at my decease, subject to said charge of \$1,000, to have and to hold for and during her natural life only, and not in fee. The estate in remainder I give and devise to the heirs of her body to be born who shall survive her decease. Failing such heir or heirs of her body surviving her decease, then and

in that event I give and devise said estate in remainder to such of my own brothers and sisters, and my step-children, Walter B. Tyler and Maude Smith, who shall survive the decease of my daughter, Elsie Mabel Adams, share and share alike."

The will appoints the wife executrix, without bond.

September 28, 1905, the Peabody Coal Company gave notice, directed to said G. R. Adams, of its election to acquire title to the coal and minerals underlying the premises in question, and requesting that an abstract be furnished for examination, and stating its readiness, upon good title being shown, to carry out the provisions of the contract. Marcella Adams, executrix, accepted service of the notice and furnished the abstract of title. After some corrections were made in the title the Peabody Coal Company filed this bill setting up the foregoing state of facts and petitioning the court for specific performance of the contract, alleging that said Marcella Adams, as executrix, could not, without an order of court, convey said property. The bill made Marcella Adams a party in her own right and as executrix, and also named as parties Elsie Mabel Adams, William B. Adams, and all the other living devisees and legatees under the will. After the defendants were duly brought into court, Marcella Adams filed her separate answer, admitting substantially the allegations of the bill. Joint and several answers were filed by appellant and the other brothers and sisters of the testator, admitting the making of the contract, but denying that the Peabody Coal Company had a legal right to exercise its option after the death of said Adams, and averring that upon his death said optional contract became null and void; further averring that, if the Peabody Coal Company had a right to accept the option after the death of Adams, then, as the conversion of real estate into personal property would take place after the testator's death, the court, by its decree, should consider the proceeds as real estate and direct that it be disposed of the same as the real estate of the testator.

The decree of the circuit court sustained the bill, directing that upon payment by appellee to Marcella Adams of \$3,500 she should, as executrix and commissioner for that purpose appointed, execute and deliver a deed in accordance with the contract, and that "upon the election to purchase, under said option and contract, by said Francis S. Peabody or his assigns, such purchaser became, from the date of said option contract, the equitable owner of said coal and other mineral, together with the rights and privileges specified in said contract, and entitled to a legal conveyance of the same upon making the payment therefor specified in said contract, and the said executrix, as such, became the equitable owner of said purchase money; that said purchase money is personal

estate and passes as such under the said will." An appeal was thereupon prayed to this court by William B. Adams.

Frank P. Drennan, for appellant. Provine & Provine and Arthur W. Underwood, for appellee coal company. Hogan & Wallace, for appellee Marcella Adams.

CARTER, J. (after stating the facts as above). The writing in this case was more than an offer, and the consideration was sufficient to support it as a valid and binding contract. It is important to distinguish clearly between an offer to sell something, which offer may or may not become a completed contract by acceptance in the future, and a contract to leave that offer open for a time, which, if accepted, becomes at once an executed contract. Only the last is an option. An option is a continuing offer, which the offerer may not withdraw until the expiration of the time limited. 21 Am. & Eng. Ency. of Law (2d Ed.) pp. 925, 926. The parties agreeing "to sell an option to buy for the sum of \$1, there is no reason why such an express consideration is not an adequate one." Guyer v. Warren, 175 Ill. 328, 51 N. E. 590. Where the contract is under seal, consideration is imported. Hayes v. O'Brien, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555; Forthman v. Deters, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. Inadequacy of consideration is, of itself, no ground for impeaching a contract in a court of equity. 1 Chitty on Contracts (14th Am. Ed.) p. 30; Lawrence v. McCalmont, 2 How. (U. S.) 426, 11 L. Ed. 326; Waterman v. Waterman (C. C.) 27 Fed. 827. While it was formerly held, with some degree of strictness, that the want of mutuality would render a contract for the sale of land incapable of specific enforcement, the doctrine of the earlier cases upon this subject has been considerably modified. "Where the party holding an option signifies his acceptance within the time limited and upon the terms stated, the obligation of the contract becomes mutual and capable of enforcement at the instance of either party." Guyer v. Warren, supra. See, also, Seyferth v. Groves & Sand Ridge Railroad Co., 217 Ill. 483, 75 N. E. 522; Carter v. Love, 206 Ill. 310, 69 N. E. 85; Estes v. Furlong, 59 Ill. 298. The Peabody Coal Company, being the assignee of Francis S. Peabody, had the same rights as Peabody. Perkins v. Hadsell, 50 Ill. 216. Under these authorities, it is clear that this option could have been specifically enforced against Gavin R. Adams during his lifetime, and as the option specifically states that "all rights and obligations created by this agreement shall extend to and be binding upon the successors, heirs, executors, administrators and assigns of the parties," it seems equally clear that it is binding upon the heirs, devisees, and legatees. 21 Am. & Eng. Ency. of Law (2d Ed.) p. 925; Duncan v. Wickliffe, 4 Scam. (Ill.) 452; Estate of Rapp v. Phoenix Ins. Co., 113 Ill.

390, 55 Am. Rep. 427; Fuller v. Bradley, 100 Ill. 51, 43 N. E. 732; Fry on Specific Performance (3d Ed.) § 57.

Counsel for appellant does not seem seriously to question the right of the court to enforce this contract against the heirs and devisees of said Gavin R. Adams, but he does insist that the chancellor incorrectly held that upon the execution of the contract and the conveyance of the fee-simple title to the coal land in question by testator's representative, the purchase money, when the same was paid over, was personal property. Appellant insists that this purchase money when paid over should be considered as real estate, and be held to pass, under the third and fourth clauses of the will, as real estate. While numerous authorities touching this question from other jurisdictions have been cited, all counsel state in their briefs that this court has never decided the particular question involved in this case. In the recent case of Covey v. Dinamoore, 226 Ill. 438, 80 N. E. 998, the principles of law here involved were fully considered, and the case is decisive of the question now under discussion. It would serve no useful purpose to repeat at length the reasoning of that decision. The doctrine of equitable conversion, depending upon the principle that a court of equity looks upon that as done which the parties to an agreement have contracted to be done, should not apply in cases of this kind, as it would result in defeating the intention of the testator, which is the paramount rule of construction as to wills. Bradshy v. Wallace, 202 Ill. 239, 66 N. E. 1088. Manifestly, the testator in this will considered these mineral and coal rights covered by the optional contract as real estate. We recognize, as we did in Covey v. Dinamoore, supra, that there are authorities which hold that, in contracts of sale upon the purchaser's option, the moment such option is exercised a conversion, as between the parties claiming title under the vendor, relates back to the time of the execution of the contract. But these authorities are not in harmony with the decisions of this court. We are fully satisfied with the rule stated in Covey v. Dinamoore, supra, and adhere to it in this case. The holding of the chancellor that the executrix was the equitable owner of the purchase money, "and that said purchase money is personal estate and passes as such under the said will," cannot be upheld.

That portion of the decree directing the execution and delivery of the deed by the executrix in accordance with the contract, on the payment of the purchase money, will be sustained, and that portion of the decree which found that such purchase money was personal estate and passed as such under the will must be reversed, with directions for further proceedings in harmony with the views herein expressed.

Reversed and remanded, with directions.

(230 Ill. 552.)

ACME HARVESTER CO. v. CHITTICK.

(Supreme Court of Illinois. Oct. 23, 1907.

Rehearing Denied Dec. 6, 1907.)

1. APPEAL—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

Where there is evidence fairly tending to support the cause of action, the court on appeal must hold as a matter of law that plaintiff has sustained his cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

2. MASTER AND SERVANT—INJURIES TO EMPLOYÉ—EVIDENCE—SUFFICIENCY.

Evidence, in an action for injuries to an employé, in that owing to the worn and slippery condition of the floor his feet slipped and his hand was caught in the knives of the machine at which he was working, held not to warrant the withdrawal of the case from the jury at the instance of defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1010.]

3. EVIDENCE—OPINION EVIDENCE—SUBJECTS OF EXPERT TESTIMONY—CAUSE AND EFFECT.

In an action for injuries sustained by an employé, in that owing to the worn and slippery condition of the floor, which was made of hard maple, his feet slipped and his hand was caught in the knives of the machine at which he was working, witnesses familiar with the effect of wear on maple floors could testify that such floors would become smooth and slippery from constant use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2275.]

4. APPEAL—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTIONS CONSIDERED.

The correctness of an instruction to which no objection was urged in the Appellate Court cannot be raised for the first time in the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4281.]

Appeal from Appellate Court, Second District, on Writ of Error to Circuit Court, Peoria County; N. E. Worthington, Judge.

Action by Guy Chittick against the Acme Harvester Company. From a judgment of the Appellate Court, Second District, affirming a judgment of the Circuit Court for plaintiff, defendant appeals. Affirmed.

Lackner, Butz & Miller and Pinckney & McRoberts, for appellant. Dailey & Miller, for appellee.

HAND, C. J. This was an action on the case commenced in the circuit court of Peoria county to recover damages for a personal injury alleged to have been sustained by appellee while in the employ of appellant. The jury returned a verdict in favor of the appellee for the sum of \$6,500, which has been affirmed by the Appellate Court for the Second District, and a further appeal has been prosecuted to this court.

The appellant first contends that the trial court erred in declining to take the case from the jury at the close of all the evidence. The declaration alleged that the appellant failed to provide a reasonably safe place for the appellee in which to work, in this: That the appellee was placed at work on a certain

joinder woodworking machine, the dangerous character of which was unknown to him; that the floor in front of said machine had become worn, smooth, and slippery from walking over the same and by oil dripping thereon from the machine; that the appellee had never worked on said machine prior to the day of the accident; that while he was working upon said machine, in the exercise of due care for his safety, his feet slipped on the smooth floor, and he fell forward upon the machine, and a portion of his left hand was caught in the knives of the machine and severely injured. It appears from the evidence that the appellant was engaged in operating a manufacturing establishment near Peoria, in which it manufactured all kinds of farm machinery; that the appellee had been in its employ for about one month prior to the time he was injured; that during that time he was doing general work in and about the factory; that on the day of the accident he was directed by his foreman to do work on a certain joinder woodworking machine; that while he was working on said machine his feet slipped and his left hand was caught in the knives of the machine, and so injured as to necessitate the amputation of the fingers of that hand. The room of the appellant in which the appellee was at work was about 300 feet long and 100 feet in width. Through the center of said room, the long way, there ran an aisle, along the outer edges of which were placed 15 or 20 woodworking machines, among which was the machine upon which appellee was injured. The floor of the room, including the aisle, was made of hard maple, which the evidence tends to show will become very smooth and slippery with wear, and that the space in front of the machine at which appellee was at work was smooth and slippery; that after appellee had been at work 20 or 30 minutes upon said machine his feet slipped and he fell, and his left hand went into the knives of the machine.

The evidence bearing upon the condition of the floor generally, and particularly in front of the machine, was conflicting. There is, however, found in this record ample evidence, if true, which tends to establish that the floor immediately in front of the machine upon which appellee was at work was worn and was smooth and slippery; that it was covered with dust, shavings, etc., so that appellee did not know of its smooth and slippery condition; that appellee was inexperienced in the use of said machine, and that the foreman who set him to work at the machine knew he was inexperienced, and that the floor had been in use for a number of years and was worn smooth and was slippery; and that he did not notify appellee of the dangerous condition of said floor at the time he set him to work upon said machine. Where there is evidence in the record which fairly tends to support a cause of action, this court cannot weigh the evidence, but must hold, as a matter of law, that the plaintiff

has sustained his cause of action. We are therefore of the opinion the circuit court did not err in declining to take the case from the jury.

It is next contended that the court erred in permitting the appellee to prove by witnesses who are familiar with the effect of wear upon maple floors that such floors would become smooth and slippery from constant use. Such evidence was admitted in *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714, and its admission was approved by this court. We do not think that the court erred in admitting that class of evidence.

It is finally contended the court erred in giving to the jury appellee's sixth given instruction. A copy of appellant's Appellate Court brief has been filed in this court by permission of court, from which it appears that no objection was urged in the Appellate Court against the giving of said instruction. That being true, the question of the correctness of that instruction cannot be raised in this court for the first time.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(230 Ill. 319)

STREIT v. FAY.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 6, 1907.)

1. LANDLORD AND TENANT—COVENANT OF RE-NEWAL—VALIDITY.

Covenants for renewal of leases, not fixing the amount of rent to be paid for the extension terms, but merely providing that lessee might have the "privilege of five years longer, he paying additional rent on revaluation now fixed at \$500," and making no provision as to when or how the revaluation should be determined, are too indefinite to constitute valid covenants of renewal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 263, 264.]

2. PERPETUITIES—SUSPENSION OF ABSOLUTE POWER OF ALIENATION—LIFE ESTATE.

Testator devised certain premises in equal parts to his two sons on the trust that the part devised to each should be held for his benefit, without power of sale, for life, unless the court should hold that his interest was liable to his debts or to be sold by him, or either of the sons should institute proceedings to set aside the will, in either of which events the interest of the son was to terminate, and he appointed his two sons trustees of the property devised for their own use. *Held*, no trustee having been appointed to hold the legal title during the time testator's sons should have the beneficial interest, the effect of the devise was to vest in testator's sons a life estate, and the attempt to deprive them of the power of alienation was repugnant to that estate and void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Perpetuities, §§ 46, 47, 52, 53.]

3. LANDLORD AND TENANT—UNLAWFUL DETAINER—EVIDENCE—SUFFICIENCY.

Though by a lease lessee was bound to pay the taxes, and it was provided that, on failure to do so, the same might be paid by lessor and collected in the same manner as rent, the fact that a tax deed of the premises was issued to a third party would not warrant an inference that lessee had not paid the rent.

4. ERROR, WRIT OF—REVIEW—PRESUMPTIONS.

In the absence of proof, in an action of forcible detainer, that there was any rent in arrear, it cannot be assumed in a court of review that lessee held over after the expiration of his lease without payment of rent.

5. LANDLORD AND TENANT—TENANCY FROM YEAR TO YEAR—CREATION.

Where lessee remained in possession of a lot more than two years after the expiration of a five-year lease thereof, and of another lot more than one year after the expiration of a like lease, during which times the rent was collected from him therefor, he became a tenant from year to year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, *Landlord and Tenant*, §§ 373-381.]

6. SAME—TERMINATION.

A tenancy from year to year cannot be terminated by a demand for immediate possession, but such tenant must be notified to quit in accordance with Hurd's Rev. St. 1905, c. 80, § 5, providing that 60 days' notice, in writing shall be sufficient to terminate such a tenancy at the end of the year, and that the notice may be given at any time within 4 months preceding the last 60 days of the year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, *Landlord and Tenant*, §§ 382-388.]

Error to Appellate Court, First District, on Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Action of forcible detainer in a justice's court by Catherine S. Fay against Nicholas Streit. The justice gave judgment for plaintiff, but, on appeal to the superior court, judgment was rendered for defendant, and from a judgment of the Appellate Court, First District, reversing the judgment of the superior court, defendant brings error. Judgment of the Appellate Court reversed and of the Superior Court affirmed.

This is an action of forcible detainer brought by defendant in error, Catherine S. Fay, against plaintiff in error, Nicholas Streit, April 23, 1898, before a justice of the peace of Cook county, to recover possession of certain property, consisting of two lots in block 3, Frazier's addition to Chicago. George E. Cooke, of Louisville, Ky., was the owner of the premises, and on the 18th day of October, 1890, by ground lease, rented to plaintiff in error one of the lots, to "hold from November 1, 1890, until November 1, 1895, with privilege of five years longer; he paying additional rent on revaluation now fixed at \$500." The consideration named was \$30 a year, payable \$15 semiannually on the 1st of May and November of each year during the continuance of the lease, at the office of the lessor at Louisville, Ky. The lessee also agreed to pay "all water rates, and state and county taxes, that may be laid, charged, or assessed on said demised premises pending the existence of this lease." The lease to the second lot, which joined the first one immediately on the south, was for the same consideration, and in all its terms and conditions the same as the one above described, with the exception that it was executed February 1, 1892, and was to run to February 1, 1897. Plaintiff in error went into pos-

session of the premises, and retained the same to the time of the bringing of this suit. In 1893 George E. Cooke died leaving a will, which was duly probated at Louisville, Ky. The only part of said will that pertains to the property in controversy is clause 7 and the codicil hereafter referred to. On April 9, 1898, J. Esten Cooke and wife by quit-claim deed conveyed all interest in said block 3 to defendant in error, the deed being recorded April 14, 1898, and on April 16, 1898, H. Brent Cooke and wife, by similar deed, conveyed all interest in and to the same property to said defendant in error; said deed being recorded April 18, 1898. On April 23, 1898, Thomas Fay, husband of defendant in error, representing her, called on plaintiff in error and asked him for rent. On this subject Fay's testimony, as abstracted, is: "I went to Mr. Streit in the morning and asked him for some rent, and he says, 'I will pay the rent.' He says, 'I will pay the rent when I know the right one to pay it to.' 'Well,' I says, 'Mr. Streit, don't you think from what I have told you we are the right one—Mrs. Fay is the right one?' He says, 'I don't know.'" The plaintiff in error did not pay the rent at this time, and the same day the defendant in error caused a demand for immediate possession of the premises to be served on him and instituted this suit. On May 5, 1898, the justice gave judgment for possession. The case was appealed to the superior court of Cook county, where a trial was had before the court without a jury and judgment rendered in favor of plaintiff in error, holding that defendant in error was not entitled to the possession of the premises. Defendant in error prosecuted an appeal from that judgment to the Appellate Court, where the judgment of the superior court was reversed and a judgment rendered in the Appellate Court finding the plaintiff in error guilty of unlawfully withholding possession of the premises, and adjudging that defendant in error have restitution of said premises. No finding of facts is incorporated in the judgment. A certificate of importance was granted by the Appellate Court, and the case is brought here for review upon a writ of error sued out of this court.

Adler & Lederer, for plaintiff in error.
Enoch J. Price, for defendant in error.

FARMER, J. (after stating the facts as above). Three grounds are urged by plaintiff in error as reasons for a reversal of the judgment of the Appellate Court: (1) He was entitled to retain possession by virtue of covenants of renewals in the leases; (2) that defendant in error had no right to the possession unless she acquired title thereto by the conveyances from the Cookes, and it is insisted that their interest in the premises was not alienable, and therefore defendant in error acquired neither title nor right of possession by virtue of said conveyances; (3) that if said covenants were void as cove-

nants for renewal, permitting him to remain in possession for so long a time after the terms mentioned in the lease had expired made him a tenant from year to year, and as such he was entitled to the notice provided for the termination of such tenancies by section 5 of the landlord and tenant act. Hurd's Rev. St. 1905, c. 80.

First. It will be observed that the covenants for renewal did not fix the amount of rent to be paid for the extension term, but merely provided that plaintiff in error might have the "privilege of five years longer, he paying additional rent on revaluation now fixed at \$500." No provision was made as to when or how the revaluation should be determined. The provisions, therefore, for the renewal of the leases were too vague and indefinite to constitute valid covenants for renewal. 1 Taylor on Landlord and Tenant (8th Ed.) § 333; 18 Am. & Eng. Ency. of Law (2d Ed.) 686.

Second. Clause 7 of the will is of such extreme length that we shall not set it out in full. The following extract from it sufficiently shows the nature of the estate devised to the sons of the testator, defendant in error's grantors. By said clause testator devises "In equal parts to my two sons, H. Brent Cooke and J. Esten Cooke, upon the following trusts and with the following limitations, to-wit: The part devised to each of them shall be held by him for his own benefit for the period about to be mentioned, but without any power in him to sell or encumber the same or to anticipate its income or in any way subject same to his debts for and during his natural life, or until a court of competent jurisdiction shall by a judgment hold that his interest in said property, or its use or income, is liable to be subjected to his debts or liable to be sold or encumbered by him or to have its rents and profits anticipated by him, with remainder after such death or judgment to my grandchildren now born or to be hereafter born, per capita and not per stirpes; but in case of the death of any such grandchild, leaving descendants, before the termination of the particular estate, the interest he or she would have taken shall go to his or her descendants. And though such judgment should be appealed from, still it is my will that said beneficial interest of that son against whom such judgment shall be entered shall cease and determine at the date of the judgment appealed from." The codicil provided that, if either of the sons should attempt to set aside the will or institute proceedings at law to change it in any way, the interest of such son should cease and go to other persons therein provided. The clause of the will quoted in part appointed the two sons trustees of the property devised for their own use and benefit during their natural lives. The language used indicates that the testator intended them to have the possession and occupancy of the lands during their lives, without the

right to sell or encumber the same unless a court of competent jurisdiction should hold the property subject to the debts of the life tenant or liable to be sold or encumbered by them, or in case proceedings at law should be instituted by the sons "to change in any way" the will, in either of which events the interests of the sons were to terminate. No trustee having been provided to hold the legal title during the time the testator's sons should have the beneficial interest in the premises, the effect of the devise was to vest in the sons of the testator a life estate, and the attempt to deprive the life tenants of the power of alienation is repugnant to the estate devised, and therefore void. *Henderson v. Harness*, 176 Ill. 302, 310, 52 N. E. 68, 70. In that case it was said: "By placing this estate devised to Milton Harness in the hands of trustees, as in *Steib v. Whitehead*, 111 Ill. 247, and applying the rents therefrom which should be paid to the appellee, the testator could have accomplished the ends which it is insisted by appellee it was the intention to accomplish. The intervention of trustees was not sought by the testator nor used, and no principle of public policy or of stare decisis establishes a rule in this state that the testator may, without the intervention of a trustee, vest an estate in fee or for life in the first taker with a restriction thereon repugnant to an estate, and which would prevent alienation of the same or seizure under process of law."

Third. Upon the third proposition above stated, we are of opinion the contention of plaintiff in error is correct. Although the covenants for renewal in the leases were not enforceable because of their uncertainty, plaintiff in error was permitted to remain in possession of one of the lots two years and a half, and of the other one year and a half, after the original term in the leases had expired. There is no proof that any rent was due or unpaid at the time the demand for possession was made and the suit instituted. The leases bound plaintiff in error to pay the taxes on the premises, and, in event of his failure to do so, the same might be paid by the lessor and charged to the lessee and collected in the same manner as rent. In making his defense in the trial court plaintiff in error introduced in evidence a tax deed for said premises issued to a third party, and from this defendant in error argues that the proof shows plaintiff in error had not paid the rent. Such an inference is not warranted. When the agent of defendant in error called upon plaintiff in error, he did not claim there was any rent in arrear, nor is the demand for possession based upon the claim that plaintiff in error had failed to pay rent due, or that he had violated any of the terms of the leases under which he was holding over. In the absence of proof to that effect, we cannot assume that plaintiff in error had held over without the payment of any rent. The theory of defendant in error in demand-

ing possession and in instituting suit appears to have been, and it is so argued in counsel's brief, that after the expiration of the original term of the leases, plaintiff in error was subject to be dispossessed at the will of the landlord. If, as we must presume in the absence of proof to the contrary, plaintiff in error was suffered to remain in possession of one of the lots more than two years and the other more than one year after the expiration of the term mentioned in the leases, during which period the rent was collected from him therefor, he would become a tenant from year to year. In *Hunt v. Morton*, 18 Ill. 75, the premises were leased to the tenant in the fall of the year under an agreement that he might remain in possession until the following spring. He remained in possession the year following the fall of his entering upon the premises, and raised a crop on the land. The following winter he left the premises in possession of his son, who continued in possession and raised a crop thereon the next year. The court treats the possession of the son "the same as if the father had continued and was still in possession," and say, by Caton, J.: "Without any new agreement, and without objection from the landlord or his agent, the tenant continued his possession for two years and over and cultivated the land in crops for both seasons. This certainly created a tenancy from year to year, if it is possible for such a tenancy to be created without an express agreement to that effect, which I presume will not be controverted." See, also, *Eppstein v. Kuhn*, 225 Ill. 115, 80 N. E. 80; *Abeel v. Radcliff*, 13 Johns. (N. Y.) 297, 7 Am. Dec. 377; 1 *Taylor on Landlord and Tenant* (8th Ed.) §§ 55, 56, 57; 4 *Kent*, 112, 114.

The authorities cited by defendant in error are not in conflict with this rule. In *Cairo & St. Louis Railroad Co. v. Wiggins Ferry Co.*, 82 Ill. 230, the leasing was for a definite term and after it expired the defendant held over, without, however, the consent of the plaintiff. In *Brown v. Keller*, 32 Ill. 151, 83 Am. Dec. 258, the leasing was for six months. The party holding over disclaimed holding under the lessor as landlord, but claimed adversely to and independent of him. Section 22 of 1 *Taylor on Landlord and Tenant* lays down the rule that a tenant "who holds over after the expiration of his term without paying rent or otherwise acknowledging a continuance of the tenancy becomes either a trespasser or a tenant, at the option of the landlord." Here there is no evidence that during the long period of time plaintiff in error held over he ever failed or refused to pay rent or that he ever claimed adversely to the owner. What he said when Fay asked him to pay rent was not that he would not pay, but that he would do so when he knew the right party to pay it to. Under the state of defendant in error's title this cannot be said to be an unwarranted precaution on his part or a denial of her right as landlord. It

does not appear that plaintiff in error ever claimed from any other source than the original leases. A tenancy from year to year cannot be terminated by a demand for immediate possession, but such tenant must be notified to quit in accordance with the requirements of section 5, c. 80, *Hurd's Rev. St.* 1905. These requirements not having been complied with by defendant in error, she was not entitled to possession, and the judgment of the Appellate Court to the contrary was erroneous.

The judgment of the Appellate Court is therefore reversed, and the judgment of the superior court affirmed.

Judgment reversed.

(230 Ill. 441)

BRIXEL v. BRIXEL.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 6, 1907.)

1. JUDGMENT—CONFORMITY TO FINDINGS—PARTITION.

Where, in partition, the master's finding was limited to a certain lot designated by number, and he made no finding as to a strip of 2½ feet on the east side of the adjoining lot, which was included in the bill, a decree based entirely on the master's report, that complainant was entitled to partition not only of the numbered lot, but of the 2½-foot strip, was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 446-454.]

2. HUSBAND AND WIFE—TRANSACTIONS INTER SE—VACATION.

Complainant, shortly after her marriage to defendant, left him without cause, and was induced to return only when defendant executed to her a judgment note for \$1,000 as a gift, and sent his daughter to live with others. Thereafter, defendant desiring to sell certain real estate, complainant refused to sign the deed, unless defendant agreed to invest the proceeds in other real estate in their joint names, which he agreed to do. She signed the deed and the money was deposited with their agents, and ultimately used with other money furnished by defendant to purchase the real estate in question, in their joint names, complainant agreeing that, if this was done, she would surrender the \$1,000 note, continue to live with defendant and perform her duties as his wife, without further friction. After the deed was taken, she failed to comply with this promise, but left him, brought suit for divorce and for partition of the property, and to have a judgment recovered on the note satisfied out of defendant's share thereof. Held that, the part of the suit praying for a divorce having been dismissed as unsustainable, complainant was not entitled to partition, but that defendant was entitled to have the judgment set aside and the entire title to the real estate vested in him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 251.]

Appeal from Circuit Court, Cook County; Lockwood Honore, Judge.

Suit by Minna Brixel against Leopold Brixel for partition, in which defendant filed a cross-bill to set aside a confession of judgment obtained against him by complainant, and to set aside a deed to the property in controversy made to complainant and defendant, and to vest title to the property solely in defendant. From a decree in favor of com-

plainant, defendant appeals. Reversed and remanded, with directions.

In its original form this was a bill for divorce and for partition of lot 12 and the east $2\frac{1}{2}$ feet of lot 13, in block 2, in Demarest & Kamerling's Columbian subdivision of the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 1, in township 39 N., range 13 E., of the third principal meridian. The grounds alleged upon which Minna Brixel predicated her right to a divorce was extreme and repeated cruelty. Leopold Brixel filed his answer, in which he denied all of the material allegations of the original bill, both as respects the charges upon which the divorce was sought, as well as those relating to the right of partition of the premises described. Subsequently the appellee filed an amended bill, eliminating the divorce feature entirely, and seeking only a partition of the premises above described. An amended answer was filed, denying all of the substantial averments of the amended bill. Leopold Brixel, appellant herein, then filed a cross-bill, in which it is charged that appellant and appellee are husband and wife and that they were married on the 16th of October, 1902; that in March, 1903, appellee deserted appellant without any reasonable cause, and lived separate and apart from him until about the 25th of April, 1903, at which time an agreement was entered into between the parties that if appellee would return and make her home with appellant and live peaceably and harmoniously with him, and discharge the duties of a wife and remain with him as his wife, appellant would give her a writing showing that, in case of appellant's death, appellee should receive \$1,000 over and above the amount she would receive by law as his widow; that, in pursuance of this agreement, appellant executed a judgment note bearing date April 25, 1903, for \$1,000, payable six months after date, and delivered the same to appellee, and that in compliance with the above agreement appellee returned to appellant's home and remained as his wife and performed her duties as such. It is averred in the cross-bill that appellee was not possessed of any property whatever, real or personal, at the time of the marriage, except her ordinary wearing apparel. The cross-bill charges that appellant was the owner in fee simple of certain real estate in the city of Chicago which he desired to sell; that appellee refused to join in a deed of conveyance of said real estate unless appellant would agree to invest the proceeds thereof in other real estate; that it was then agreed that appellant would reinvest the proceeds of the sale in other real estate, and, as an evidence of good faith on his part, he agreed to leave the purchase money (being \$3,000) with Zuttermeister & Co., which was to be paid by this firm on the purchase of other real estate when appellant and appellee should find something that suited them, and it was agreed that, in case appellant died before such reinvestment of the \$3,000, appellee

should have said \$3,000; that appellee then joined with appellant in conveying the real estate which appellant owned at the time of his marriage with appellee. It is charged that appellee repeatedly complained that she was not properly provided for in respect to appellant's property, and that she threatened to desert him and sue him for a divorce, unless appellant would agree to purchase real estate and take a conveyance in the names of appellant and appellee; that appellee agreed that, if this was done, she would be satisfied and contented, and would not again desert appellant, but would remain with him as his wife and would not annoy him with divorce proceedings, and would discharge her duties and live in peace and harmony with appellant; that appellant had confidence in appellee's sincerity and believed in her promises, and, being desirous of rendering his home life peaceable, he then purchased the premises in question in this suit, paying therefor out of his own money \$5,500—\$2,500 in addition to the \$3,000 which appellant had received for the real estate sold by him—and that by his direction and in consideration of appellee's promises he directed the deed to be made to appellant and appellee as grantees. It is also averred in the cross-bill that appellee agreed that, when the deed was made to her, she would then surrender the \$1,000 note which the appellant had previously given her. It is charged in the cross-bill that appellee, with the design of defrauding appellant out of his property, refused to surrender up the \$1,000 note, but, on the contrary, while she was still living with appellant as his wife, she caused to be entered on said note a judgment by confession in the circuit court of Cook county for \$1,129.12, which is the same judgment appellee seeks to have satisfied out of appellant's interest in said real estate. It is averred that two days after the entry of this judgment by confession, appellee, without any reasonable or just cause, deserted the appellant and has lived separate and apart from appellant, and has refused, and still does refuse, to return and make her home with appellant. It is charged that the conduct of appellee is in fraud of her agreement and contrary to equity and right in the premises. It is averred that appellee, three days after the entry of the judgment aforesaid, filed a bill for divorce against appellant, praying for temporary alimony and solicitor's fees; that said bill for divorce has never been brought to a hearing or otherwise disposed of; and that on January 24, 1906, appellee filed an amended bill praying for partition of the premises described therein, which are the same premises appellant had caused to be conveyed to himself and wife in pursuance of the agreement above set out. Appellant avers that appellee and himself, and appellant's daughter, Fannie Brixel, were living on said premises prior to the date of appellee's desertion last mentioned, and that appellant

and his daughter, Fannie, are still living on the premises, and that it is appellant's homestead. The cross-bill prays that the confession of judgment may be set aside and declared of no force and effect, and that the deed made to appellant and appellee may be declared void as to appellee and the title vested solely in appellant. Appellee answered the cross-bill, admitting the marriage, but denying substantially all of the other material allegations of the cross-bill. She claims that the \$1,000 note was given her by her husband as a present. She denies the agreement set out in the cross-bill, and that the note should be surrendered when the deed was executed. She claims that the deed was executed to her as a voluntary settlement for her benefit, and not in pursuance of any agreement, as set out in the cross-bill.

The cause was referred to a master in chancery to take the evidence and report his conclusions. Upon the hearing before the master, a large amount of evidence was heard and a finding made in favor of appellee and against appellant. The master recommended a decree for partition of lot 12, above described, but omitted to include the $2\frac{1}{2}$ feet off the east side of lot 13, which was included in the bill. The description in the decree follows the bill, and includes the $2\frac{1}{2}$ feet of lot 13. The deed is not in the record, and there is no evidence preserved upon which the court's decree for partition of the $2\frac{1}{2}$ feet on the east side of lot 13 can rest. The cause was tried on exceptions to the finding of the master, which were overruled and the decree entered in accordance with the master's finding.

M. E. Ames (Park Phipps, of counsel), for appellant. Arnold Tripp, for appellee.

VICKERS, J. (after stating the facts as above). It is apparent that this decree will have to be reversed if for no other reason than that there is no evidence in the record supporting the decree as to the $2\frac{1}{2}$ feet off the east side of lot 13. The master finds, from the evidence, that appellee is entitled to a partition of lot 12, and recommends a decree as to that lot. It appears from the abstract and record that appellee's counsel offered in evidence a "deed from Hans G. Thorenson and wife to Leopold Brixel and Minna Brixel, dated September 29, 1903, which being objected to, objection was overruled and deed admitted in evidence and marked 'Complainant's Exhibit 1.'" Upon referring to the record there is no Exhibit 1 to be found, nor is there anywhere any copy of the deed or other evidence identifying the property described in the bill and decree as the premises conveyed by the supposed deed. There is some reference in the parol evidence of Leopold and Minna Brixel to this deed, and it might be that, if the master had found that appellee was entitled to partition of a) of the premises described in the bill, the decree could be supported, so far as this

point is concerned, by the parol evidence respecting this deed, but we have been unable to find any evidence upon which a decree for partition as to the $2\frac{1}{2}$ feet can be supported. As already pointed out, the master limited his finding and recommendation to lot 12, and made no finding as to the $2\frac{1}{2}$ feet. While the decree of the court, based entirely on the evidence in the master's report, found that appellee was entitled to a partition of lot 12 and $2\frac{1}{2}$ feet off the east side of lot 13, the court clearly erred in decreeing a partition as to the $2\frac{1}{2}$ feet.

In addition to the errors above pointed out, we are not satisfied with this decree on the merits. The principal evidence is given by the parties to the suit and Fannie Brixel, a daughter of appellant. The case was heard upon depositions taken before the master. In such a case there is no presumption, on appeal, in favor of the decree in chancery. The findings of the master are merely advisory, and cannot aid the decree nor supply the insufficiencies of the record to sustain it. *Baker v. Rockabrand*, 118 Ill. 365, 8 N. E. 456; *McGinnis v. Jacobs*, 147 Ill. 24, 35 N. E. 214; *Kellogg v. Peddicord*, 181 Ill. 22, 54 N. E. 623. The evidence shows that Minna Brixel came to the United States from Baden, Germany, in 1883; that she was married in Germany and left her husband there, who afterwards obtained a divorce from her for her fault. She became acquainted with appellant in 1902, and was married to him October 16th of that year. Appellant had also been married before, and by his marriage he had two daughters, one of whom was married and resided in South Dakota. The other, a young lady of 22 years of age, resided with her father. It is shown that in January, 1903, appellee was sick and suffered a miscarriage, and had to be operated upon. The parties lived together until in March, 1903, when appellee left appellant and went to reside with a Mrs. Wilda. Appellee claims that she was justified in abandoning appellant on this occasion. The excuse given by the appellee for leaving him is thus given by her when testifying before the master: "Before I married him I was living with Mrs. Wilda at 94 Clybourn avenue. I then went to live with Mr. Brixel on Seventeenth street. I lived with him six months, until April 9, 1903, when I left him and went back to Mrs. Wilda. My husband and his daughter treated me like strangers from the beginning. He ruled the house with his daughter and himself, and gave me no money to run the house. Groceries and everything they bought themselves. He called me 'German people' and 'the Dutch one.'" She also says that he refused to give her money and to pay her lodge dues and to buy clothes, and that she then went out of the house. It is admitted that the next day appellant went to see appellee at Mrs. Wilda's and insisted on her returning to his home; that appellant made a number of calls urging appellee to return;

that appellee refused to return until it was agreed that the daughter, Fannie, should leave home and go to her sister's, in South Dakota. The appellee said: "If I come back, then Fannie will come back to the house again in two or three weeks, and then I will have to go out again." It was during appellant's efforts to get appellee to return to his home that he agreed to give her, and did give her, the \$1,000 note. After the agreement to send the daughter (Fannie) away, appellee refused to return until the daughter left. Appellee contends that appellant refused to properly support her, and mistreated her and suffered his daughter to mistreat her, while, on the other hand, appellant and his daughter expressly deny any mistreatment, and claim that appellee was furnished with sufficient clothing, and that she had money furnished her with which to supply the house with provisions, and that appellee ate at the same table with appellant and his daughter and fared as well as they did. We think that the evidence of appellant and his daughter is more reasonable and more credible than that of appellee. Appellee's statements that appellant was seeking to drive appellee out of his house by mistreatment is inconsistent with appellant's beseeching and sacrificing efforts to induce her to return. Appellant complied with every condition, however unreasonable or burdensome, imposed by appellee, to induce her to return to his house and live peaceably with him as his wife.

Aside from the corroboration of the appellant and his daughter which is afforded by the acts and conduct of the parties, appellee's testimony is very much weakened by the reckless and unexplained contradictions found in her testimony. A few excerpts will show why we think that her evidence should be scrutinized with great care. In one part of her testimony she uses the language which we have quoted above, to the effect that her husband would give her no money to run the house and no money to buy clothes, and again she says at another time in her testimony: "When I wanted money, he would fight me every time, and say I am not worth it." Now, contrast the foregoing statements with the following, taken from appellee's evidence: "One time he gave me \$5, but that was not enough. One time while I lived with Mr. Brixel I bought myself a brooch. The price was \$28. I had necessary clothes at that time. The \$28 I paid for the brooch I saved out of the household expenses. Yes; I got the rent from the tenants—\$34 per month. It was for household and other expenses. During the time I was away my husband paid me \$6 per week. I also took \$90 cash money that I found there in the house belonging to Mr. Brixel. This was when we were on Cornelia street. While living on Fourteenth street, I also took money of his a couple of times to buy goods with. The

\$90 was interest money, and I took it because I needed it. I told him I took it. Yes; on another occasion, while living on Cornelia street, I took over \$100 from him. I did not ask him before I took it, but told him afterwards. Besides the things I have mentioned, I also bought myself a belt, a pocketbook, combs, underwear, hosiery, and gloves. I considered these things necessities which I needed for my household, and I got them from household money. I did not use any money for myself. I bought things I needed in the household, and clothing, shoes, and life insurance, and everything. Yes; I was in need of clothing during the time I lived with him. Shortly after our marriage I did buy a long black coat. The coat was broadcloth and lined with satin, and was my bridal present. This was a couple of weeks after our marriage. There was a winter hat purchased at the same time. I also bought a silk jacket for street wear. I bought that after I left him the first time. I did not buy a spring hat about that time. I bought that afterwards, with money which he provided me. Afterwards, when I came back to live with him, I bought a black winter suit, a coat, and a skirt of heavy serge cloth. This was in the fall of 1903. I also bought a brown suit—skirt and waist—in the spring of 1904. I bought a rainstorm skirt of heavy gray cloth in the fall of 1903. Yes; I also bought a blue fancy skirt, brilliantine, light weight. That was in the summer of 1904. I also bought a black dress and a fancy dropskirt. This was ordered from a dressmaker, and is the one I have on here. I bought it in the fall of 1904. I also bought a long black silk coat in 1905. It was spring coat. I also bought a white crocheted cape—a cheap thing—to put around my shoulders. Yes; I also bought a heavy shawl. I got that summer dress while living with Mr. Brixel. His money was used in paying for the things I bought. I also bought material for two shirt waists and two skirts—cheap gingham—and made them myself. I bought a white waist for summer and several white lawn waists—only one white lawn waist—and I bought another winter hat and two pairs of shoes. These articles I have mentioned were all purchased out of money obtained by me from Mr. Brixel; also the breast pin for my Christmas present, which cost \$28." It is apparent from the foregoing admissions of appellee that her statement that her husband refused to provide her with clothing is utterly untrue, and since it appears that appellee was furnished with money for household expenses out of which she was able to save a considerable sum, which she expended for necessities and ornaments for herself, we are bound to conclude that, if she was not supplied with ample food, it was because she preferred to cut down household expenses in order that she gratify her taste for dress. The daughter, Fannie, went away in the spring of 1903,

and remained away until November, 1904. Appellant and appellee lived together from the time the daughter left, until in June, 1905. The daughter was away for more than a year and a half, supporting herself during this time by her own efforts. The daughter could not have been the cause of any trouble between the parties while she was away.

Prior to September, 1903, appellant wanted to sell a piece of property on Seventeenth street. Appellee refused to sign the deed until the appellant agreed that the money should be reinvested in other real estate. To this appellant consented under the following agreement:

"This agreement, made July 10, 1903, between Leo Brixel and Minna Brixel, both of Chicago, witnesses: That said Leo Brixel has deposited with H. C. Zuttermeister & Co., of Chicago, \$3000, to be held by H. C. Zuttermeister & Co. for the said Leo Brixel until such time as said Leo Brixel shall desire to invest said money in real estate in Chicago, when H. C. Zuttermeister & Co. shall pay the same to the seller of such real estate for Leo Brixel on account of the purchase price thereof. Should, however, the said Leo Brixel die before investing said money in real estate, as aforesaid, then said money shall be paid to said Minna Brixel as her money, free of any charge of creditors of said Leo Brixel. The consideration of this agreement is the signing of a deed of certain property to-day sold by said Leo Brixel, by said Minna Brixel, and said money is deposited, as aforesaid, to secure said Minna Brixel in her rights in said property.

"Minna Brixel. [Seal.]

"Leopold Brixel. [Seal.]"

"Chicago, Ill., Sept. 30, 1903.

"Received of H. C. Zuttermeister & Co. the sum of three thousand and 00/000 dollars, being in full satisfaction of all demands to date and for full compliance to the above agreement.

Leo Brixel.

"Minna Brixel,

"Per Milt H. Allen, Her Attorney."

After the execution of the foregoing agreement, appellant and appellee selected the property in controversy in this suit, on Cornelia street, which was purchased for \$5,500, which was paid for by appellant, he furnishing \$2,500 in addition to the \$3,000 arising from the proceeds of the sale of the property on Seventeenth street. It is said that the deed was taken in the names of both appellant and appellee as grantees; but, as already pointed out, this is not proven by the deed itself. After the property involved in this suit was purchased, appellant and appellee moved into one of the flats of said property; the other three being rented for \$34 per month. Appellant contends and testifies, and he is corroborated to some extent by his daughter, that the appellee agreed that, if appellant would have the deed made

to the parties jointly, she would surrender the \$1,000 note that had been executed to induce her to return to appellant, while appellee testifies that there was no agreement whatever, but that the deed was made to her and her husband jointly to secure her in her rights in his property. In November, 1904, the daughter, Fannie, returned to her father's house, and again became a member of his family. It is not shown that appellee made any objections to the daughter's return, and there is no proof whatever of any misconduct on the part of the daughter or mistreatment of appellee, except appellee's own statements. It is apparent from the whole of the evidence of appellee that she has a very bitter feeling against Fannie. Some time before his daughter's return, appellee had refused to occupy appellant's bed, and each of them occupied separate rooms in the flat. There were only two bedrooms in the flat. When the daughter returned appellant surrendered his room to her, and thereafter he was compelled to sleep on a couch in the kitchen while appellee had the best front room alone. Appellee frankly admits that she would not allow appellant to come into her room or to keep any of his clothing therein. His clothing was kept by his daughter in a closet in her bedroom. There was no other place where it could be kept. Based on the fact that appellant was seen by appellee in the daughter's bedroom on one or two occasions, where he had gone to get clothing from her closet in his nightdress or only partially dressed, appellee charges that appellant was criminally intimate with his daughter. It is needless to say that this charge seems to be entirely baseless, and the fact that appellee makes it is another evidence of the wanton recklessness that characterizes her evidence. On Sunday, June 4, 1905, appellee dressed herself, and said she was going to a birthday party. She went away and never returned. On the next day she filed a bill for divorce against her husband. On June 13th appellee returned to her home with the ostensible object of getting some of her things. She brought with her Emma Phillips and Anna Saunders, manifestly for the purpose of making witnesses of them as to anything that might occur between the appellant and appellee. There was something of an altercation, and appellee and her two witnesses testify that appellant would not allow her to come into the house and pushed her back, placing his hand on her throat. Whatever were the occurrences at the house at this time, they do not, in our opinion, affect the merits of this case. The bill for divorce had already been filed and the property rights could not be affected by this transaction.

Taking this whole record into consideration, we are strongly impressed that the decree of the court in this case does appellant a great injustice. In executing this note to his wife, and in causing the deed to be made to her jointly with himself, there is no doubt

that appellant was moved by his desire to satisfy the unreasonable and burdensome demands made by his wife, for the purpose of trying to induce her to live with him as his wife. Appellant was evidently very much attached to appellee, as is shown by the sacrifices that he was willing to make in order to induce her to live with him peaceably. After appellee had gotten as strong a grasp as she could get upon appellant's property she abandoned him, apparently without any justifiable cause, and is now seeking to get the proceeds of the note and the real estate into cash. If she succeeds she will have something like \$4,000 of appellant's money, and appellant will have no wife, notwithstanding all of the appellee's alleged rights in his property were given her on the faith of her promises to carry out her marital duties. This decree ought not to stand, since its effect is to enable appellee to consummate a fraud upon appellant. If appellee had continued to live with appellant and discharged her duties as his wife, or if it had been judicially determined that she was compelled to live separate and apart from him without her fault, she might then have some standing in a court of equity to assert her rights to the judgment and the interest in the real estate. From the evidence in this record, if it were a bill for separate maintenance or divorce, the finding must have been against appellee. These views herein expressed are supported by *Hursen v. Hursen*, 212 Ill. 377, 72 N. E. 391, 103 Am. St. Rep. 230, and cases there cited.

The decree of the circuit court is reversed, and the cause remanded to that court, with directions to dismiss the original bill and to enter a decree in accordance with the prayer of the cross-bill.

Reversed and remanded, with directions.

(230 Ill. 423)

GAGE et al. v. VILLAGE OF WILMETTE.

(Supreme Court of Illinois. Oct. 23, 1907.
On Rehearing, Dec. 5, 1907.)

1. MUNICIPAL CORPORATIONS—SEWER IMPROVEMENT—ESTIMATE—SUFFICIENCY.

An estimate for the cost of a sewer improvement, "including labor, materials, and all other expenses attending the same," and containing items for sewer pipe, etc., and one for lawful expenses, is not insufficient for not separately itemizing labor, material, and other expenses not itemized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 793.]

2. SAME—PROPRIETY OF CHARGE.

An estimate of \$149,083 for the cost of a village sewer improvement properly includes an item for \$8,400 for "lawful expenses" attending the improvement and for the cost of making and collecting the assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 793.]

3. SAME—DESCRIPTION OF DISTRICT.

Where a sewer district is defined by ordinance to include all territory in a village west of a line terminating at the south limits of the village, it includes a strip of land lying within the village limits south and west of the ter-

minating point; there being a jog in the south line, and other portions of the ordinance showing that the strip was intended to be included.

4. SAME—CONSTRUCTION OF ORDINANCE.

Where an ordinance is susceptible of two constructions, one of which will support it, and the other defeat it, the one that will uphold it must be adopted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 275.]

5. SAME—CERTAINTY OF ORDINANCE.

In a sewer improvement proceeding, it was provided that the manhole covers should be the same as the catch-basin covers, except that the catch-basin covers should have perforated lids, while the others were to have tight lids. Plan F shows the perforated lid and top of the catch-basin, and plan G shows only a tight lid. *Held*, that the ordinance for the improvement, providing that the manholes should be fitted with covers with tight lids as shown by plans F and G, was not uncertain as to whether the manholes were to have tight or perforated lids.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 813.]

6. SAME—RIGHT TO CONSTRUCT SEWER.

That a village is connected with the sanitary district of Chicago by Act July 1, 1903 (*Hurd's Rev. St. 1905*, p. 368, c. 24, § 369e), does not deprive it of jurisdiction to construct a system of relief sewers; nothing having been done in connection with the district, as to the village, except to locate the proposed route of the main channel, no right of way having been acquired, and it appearing it may be years before the channel will be available to the village.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 725.]

7. SAME.

An ordinance of the village of Wilmette, providing for a system of relief sewers to carry surface water into Lake Michigan, is not invalid as contrary to the spirit of the sanitary district act of July 1, 1903 (*Hurd's Rev. St. 1905*, p. 368, c. 24, § 369e), providing for a system of drainage to prevent sewage and drainage from being carried into the lake; the sewer being so constructed that it can be connected with the sanitary district channel when the channel is completed.

8. SAME—ORDINANCES—VALIDITY PRESUMED.

An ordinance is presumed to be reasonable and valid and will only be declared unreasonable and void when the evidence shows a clear, strong case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 284.]

On Rehearing.

9. SAME—LOCAL IMPROVEMENTS—ESTIMATE.

An estimate for a village sewer improvement, including an item for lawful expenses attending the improvement and the cost of making and collecting the assessment therefor, does not authorize payment of the expenses of maintaining the board of local improvements out of the assessment, since under the express terms of Local Improvement Act, § 6 (*Hurd's Rev. St. 1905*, p. 405, c. 24, § 512), such board in villages is made up of members of the council, and clearly they are not to be paid any additional compensation as members of such board.

Appeal from Cook County Court; *W. L. Pond, Judge*.

Application by village of Wilmette for confirmation of a sewer assessment. From a judgment of confirmation, *Henry H. Gage* and others appeal. *Affirmed*.

F. W. Becker, for appellants. *Robert Redfield* and *A. C. Wenban* (*Tolman, Redfield & Sexton*, of counsel), for appellee.

CARTER, J. This is an appeal from a judgment of confirmation of an assessment in the county court of Cook county, levied to defray the expense of constructing a relief sewer in the village of Wilmette, at an estimated cost of \$149,083. The main sewer, with its branches and adjuncts, is planned to intersect the present sewer system of the village for the purpose of carrying off the surface water and relieving the present sewers in times of unusual pressure. Appellee village is located on the west shore of Lake Michigan, immediately adjoining and north of the city of Evanston. The improvement is proposed to be constructed of concrete, except the 550 lineal feet forming the outlet into Lake Michigan, which is to be built of heavy plank.

It is first objected that the estimate of the engineer is not sufficiently and correctly itemized. The heading of the estimate states that it is submitted as "an estimate of the cost of the construction of said improvement, including labor, materials, and all other expenses attending the same, and the cost of making and collecting the assessment therefor, as provided by law, namely." Then follow some 16 different items; the last item reading as follows: "For lawful expenses attending the proceedings for making said improvement, and the cost of making and collecting the assessment therefor, \$8,400." It is insisted that there should be a separate item for labor, material, and other expenses that are not itemized. Substantially this contention has been considered and overruled by this court in *Lanphere v. City of Chicago*, 212 Ill. 440, 72 N. E. 426; *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097; *Gage v. City of Chicago*, 223 Ill. 602, 79 N. E. 294, and the cases therein cited. In this same connection it is contended that under the authority of *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752, the last item quoted above for the lawful expenses attending the proceedings for making said improvement and the cost of making and collecting the assessment therefor is contrary to the statute. On an ordinance practically the same in wording on this point as the one here involved, this court, having under consideration the question discussed in the briefs, in *Gault v. Village of Glen Ellyn*, 228 Ill. 520, 80 N. E. 1046, distinguished the wording of the ordinance there under discussion from the point decided in the *Betts* Case, *supra*. Our conclusion in the *Gault* Case must control here. We are of opinion that substantially all the component elements of the improvement are set forth in the estimate, and that under the authorities heretofore cited it was not necessary to estimate the labor and materials in a separate item. Nothing that was said in *Lyman v. Town of Cicero*, 222 Ill. 379, 78 N. E. 830, in any way conflicts with this holding. It is not necessary to have all the minute details as to materials that go into the improvement estimated in different items.

Doran v. City of Murphysboro, 225 Ill. 514, 80 N. E. 323; *MacChesney v. City of Chicago*, 227 Ill. 215, 81 N. E. 410.

It is further contended that the ordinance is uncertain as to the limits of the drainage district. The ordinance provides that the drainage district shall be composed of "all that territory lying within the corporate limits of said village west of the following described line," then giving a line commencing at the west shore of Lake Michigan, thence running through various crooks and turns, and finally south "to the south limits of said village." It appears that the south limits of the village at that point, on account of a jog, are some 200 feet north of the south limits further west. From this part of the ordinance alone there might be some doubt as to the southern limits of the drainage district, although we would be inclined to hold that, notwithstanding the jog of 200 feet, the ordinance quite plainly intended, from this wording alone, that all of the territory west of this line (and the line extended 200 feet southward) within the limits of the village was to be within the drainage district. This, however, is plainly shown to be the meaning by other sections of the ordinance, which provide for branch sewers to be built in portions of the streets in the village which are in this 200-foot strip in question. This court has frequently held that in order to obtain the true meaning of an ordinance it must be looked at as a whole, and that one section may be considered to explain the meaning of another. *Gage v. City of Chicago*, 198 Ill. 512, 63 N. E. 1081; *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191. If we were to judge the limits of the drainage district only from that part of the ordinance quoted above, we think the most that could be contended for by appellant is that the ordinance in this respect was susceptible of two constructions. In such case, if one construction will support and the other defeat the ordinance, that one which will uphold the ordinance must be the one adopted. *City of Chicago v. Wilson*, 195 Ill. 19, 62 N. E. 843, 57 L. R. A. 127; *Berry v. City of Chicago*, 192 Ill. 154, 61 N. E. 498. Considering the ordinance as a whole, we do not think there is any uncertainty as to the boundaries of the proposed drainage district.

Appellants also contend that the ordinance is uncertain in that part which refers to the covers for the manholes and spillway manholes. It appears from the record that the covers for the manholes are to be the same as the covers for the catch-basins as to size and weight, except that the manhole covers are to have a plain or tight lid, while the catch-basin covers are to have a perforated lid, with holes for the purpose of letting in the water. In describing these covers, plans F and G are referred to. Plan F is a drawing for a perforated lid, and plan G for a tight lid. Plan G only shows the lid itself, while plan F shows, not only the lid, but the top of the catch-basin. The ordinance states:

"Each of said ordinary manholes and the spill-way manholes shall be provided and fitted with a cast-iron cover with tight lid, which cover, with the lid, shall weigh 470 pounds, and shall be of design as shown in the detail plans or drawings hereto attached and made a part hereof, and marked 'Plans F' and 'G.'" It is admitted that the ordinance itself shows that the manhole covers are to be with tight lids, but it is contended that by referring to both plans F and G the ordinance is made uncertain as to whether the manholes are to be covered with perforated or tight lids. From what we have already said, it is quite clear that no one would be misled as to the covers intended for the manholes, from the ordinance and specifications alone. Two witnesses who were admitted by appellants to be qualified to testify on this question, stated positively that any one familiar with the work would have no difficulty in understanding the character of the covers to be placed on the manholes from this description quoted in the ordinance and taken in connection with the plans and specifications; that it was plainly intended by the ordinance that the tight lid should be used for the manholes. From the record before us there is no foundation for the claim that there is any uncertainty in the ordinance on this point.

It is further contended that the village of Wilmette has been added to the sanitary district of Chicago, and that thereby the district has acquired power over this territory and under the law should provide drainage for the same. The territory of the village of Wilmette was added to the sanitary district by a law which went into force July 1, 1903. Hurd's Rev. St. 1905, p. 368, c. 24, § 369e. This record shows that since then the only thing that has been done as to the Wilmette territory is the passing of an ordinance by the sanitary district trustees locating a proposed route of the main drainage channel from the North Branch of the Chicago River to Lake Michigan; the point where it touches Lake Michigan being practically the same point where the outlet of the sewer here in question is to enter the lake. Not a foot of land for right of way for this channel, as appears from the record, has been obtained, and there is nothing to show that the proposed route may not be changed before the channel is finally dug. Even if that channel is dug on the proposed route, no matter how expeditiously the work is carried on, past experience with this work shows clearly that it may be years before the North Shore Channel can be completed so that the village of Wilmette can drain its sewage into it. In adding this territory to the sanitary district, the Legislature certainly never contemplated that pending the completion of the channel all power should be taken from the village authorities to construct sewers to care for the sewage in that village. Until the main channel of the sanitary district is extended to within the limits

of the village of Wilmette, no serious contention can be made that the sanitary district trustees have control over the sewers and drains of the municipality. We express no opinion as to the law on this question when such main channel has been so extended. This conclusion is in harmony with what this court said in *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 253, and *Gage v. City of Chicago*, 225 Ill. 218, 80 N. E. 127.

It is further urged that the ordinance is unreasonable because the outlet of the proposed sewer is into Lake Michigan, and that this is contrary to the spirit of the sanitary district act, heretofore referred to, which had for its object the construction of a system of drainage to prevent the sewage and drainage of the city and its surroundings from being carried in Lake Michigan, thereby contaminating the waters of the lake. *People v. Nelson*, 133 Ill. 565, 27 N. E. 217. The only outlet for the sewage of Wilmette since the village was founded has been Lake Michigan. Practically all the villages along the lake shore drain their sewage into the lake. The present relief sewer is not proposed to be constructed for the purpose of carrying sewage, but chiefly to carry off surface water. This sewer system is so planned that when the main drainage channel to the north shore is finally completed the two can readily be connected, and the sewage thereafter all turned away from Lake Michigan. If the contention of appellants be upheld on this point, then the village of Wilmette, and all the other municipalities in the state along the lake shore, could be restrained from sewerage into the lake. The result of such action might be an epidemic of disease in all of these towns. Before the court would be justified in taking this course, it would have to be shown, beyond all doubt, that the public health clearly demanded such action. All the presumptions are in favor of the reasonableness and validity of the ordinance, and the courts will only declare an ordinance unreasonable and void when the evidence shows a clear, strong case. No showing of any kind has been made here beyond the bare fact that the surface water, and incidentally some sewage, is to be carried by this sewage system into Lake Michigan. There is nothing in this record to authorize the court in holding this ordinance unreasonable. *City of Belleville v. Pfingsten*, 225 Ill. 293, 80 N. E. 266, and cases there cited.

Finding no reversible error in the record, the judgment of the county court will be affirmed.

Judgment affirmed.

On Rehearing.

PER CURIAM. The appellants insist in the petition for rehearing, as they did in their original brief, that by the wording of the estimate the expenses of maintaining the board of local improvements can be paid out

of this assessment. Under section 6 of the local improvement act (Hurd's Rev. St. 1905, p. 405, c. 24, § 512) it is plain that in cities having a population of 100,000 or more regular salaries are to be paid from the general funds of the city to the members of the local board of improvements, and that in all other cities, villages, and incorporated towns this board is made up of regular employes of the city or members of the city or village councils. Clearly they are not to be paid, as members of the local board of improvements, any additional compensation. Under section 94 of the local improvement act (Hurd's Rev. St. 1905, p. 427, c. 24, § 599) in cities, towns, and villages having a population of less than 100,000 it may be provided by ordinance that a certain sum, not exceeding 6 per cent. of the amount of the assessment, may be applied to the payment of the costs and expenses of the improvement. It would be impracticable, however, to take from the funds of a particular assessment the money to pay, proportionately, the regular salary of any employe of the local board of improvements. The law does not fix any fees for services for the proceedings before the board in making an assessment, and if it were attempted to pay, proportionately, the salary of any city employe from any assessment, such a division would necessarily be arbitrary, and would be impossible to carry out without actually charging to one assessment a portion of the costs of other local improvements. This cannot be done. *Betts v. City of Naperville*, 214 Ill. 380, 73 N. E. 752. If, however, a person who is not a regular employe of the city or village should be hired to do special work on a particular improvement, doubtless, under this law, he could be paid for his work from that assessment. For example, if a village does not have a regular engineer employed at a stated salary, such a man might be hired and paid for his special work on the improvement out of the funds raised by that assessment. This is in harmony with the views expressed on this subject in *Gault v. Village of Glen Ellyn*, 226 Ill. 520, 80 N. E. 1046. The estimate in this proceeding does not cover any part of the salaries of the board of local improvements or the regular expenses of maintaining said board.

Rehearing denied.

(170 Ind. 106)

DALY et al. v. GUBBINS et al. (No. 20,972.)¹
(Supreme Court of Indiana. Nov. 22, 1907.)

1. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—SPECIAL ASSESSMENTS—FORECLOSURE—PETITION—SPECIFICNESS.

A petition to foreclose a special assessment for a street improvement was not subject to a motion to make it more specific as to whether the total length of the improvement was more than one whole square, as the length of the improvement could not affect the jurisdiction of the board of trustees to levy the assessment under *Burns' Ann. St. 1901, § 4288*, providing that, whenever a petition of two-thirds of the abutters

was received praying for a street improvement of one whole square or more in length, it should be the duty of the board to cause the same to be made, and authorizing the board, in its discretion, to provide for such improvement for any reasonable distance less than one square in length.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1276.]

2. SAME.

In a suit to foreclose an assessment for street improvement, the facts disclosed in the engineer's estimate, the price of the work, the nature and kind of the improvement, the bid, the amount of the assessment per running foot being necessarily merged in the final assessment, and not reviewable in the action to foreclose, the petition was not subject to a motion to make it more specific with reference to such matters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1276, 1277.]

3. SAME—PRELIMINARY MATTERS—INVESTIGATION BEFORE HEARING.

Where all statutory steps were taken prior to the levy of an assessment for street improvement and notice given, objections based on facts shown in the engineer's estimate, the price of work, the nature and kind of improvements, the bid and the amount of assessment per foot, etc., were matters which the owners of property to be assessed were bound to investigate at the hearing before the special committee appointed to consider and report on the engineer's final estimate, and were not available after confirmation of assessment by the board of trustees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1151.]

4. SAME—ASSESSMENT—COLLATERAL ATTACK.

An assessment for street improvement, confirmed by the board of trustees, is conclusive against collateral attack for illegality or inaccuracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1180.]

5. SAME—ACTION—COMPLAINT—DEMAND.

A complaint to foreclose a special assessment for street improvement, averring that a demand for payment was made more than 60 days before the action was begun, was sufficient as against demurrer, though the language of the statute is not followed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1276.]

6. PLEADING—CURING ERROR—DEFECTS IN COMPLAINT—FINDINGS.

Informality in a complaint may be cured and rendered harmless by a special finding of facts and by the conclusions of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1451-1476.]

7. MUNICIPAL CORPORATIONS—STREET ASSESSMENT—FORECLOSURE—COMPLAINT.

A complaint to foreclose a special assessment for street improvement alleging the location of the street improved, the width, character, and terminal points of the improvement, and containing allegations with respect to notice and other requisite jurisdictional steps, including a copy of so much of the assessment as related to defendants' property, was sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1276.]

8. SAME—EXTENT OF IMPROVEMENTS.

Neither *Burns' Ann. St. 1901, § 4400*, providing that street improvements should not be made for a distance less than a block at a time, nor section 4288, conferring on town boards discretion to authorize such improvements for a reasonable distance less than a block in length, restricted the authority of such boards to the improvement of a single block at a time,

¹ Rehearing denied.

nor prevented them from making extended improvements when desired.

9. SAME—DEFENSES.

In an action to foreclose a street assessment, the answer alleged that the board of trustees did not adopt a general plan of improvement previous to causing the work to be done; that no plans and specifications were in existence; that the plans and specifications had not been published as a by-law nor an emergency declared; that no general plan of street improvements had been published, and that no emergency for dispensing therewith had existed; that no such office or officer as town engineer had ever existed in the town; that the office could be created only by ordinance or resolution, which must be published in the absence of emergency, and denied any emergency or publication; that no act fixing the grade of the street had been published nor had a dispensing emergency existed; that the grade of the street was changed after awarding the contract to the advantage of the contractor and injury of the public; that the salary of the town engineer was included in the cost of the improvement, and, that in letting the contract, the board reserved the control and disposal of surplus earth with certain limitations, with the right to change the grade, causing uncertainty and enhancing the cost of the work. *Held*, that such objections were mere irregularities in procedure leading to the final assessment, and were unavailable as defenses, when advanced collaterally as in this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1180.]

10. TOWNS—OFFICERS—TRUSTEES—STATEMENT OF ELECTION—FILING—STATUTES.

Burns' Ann. St. 1901, § 4331, requiring the filing of a statement of the election of town trustees in the office of the clerk of the circuit court of the county, is applicable only to the first election held on the incorporation of the town.

11. MUNICIPAL CORPORATIONS — STREET ASSESSMENTS—DEFENSES—COLLATERAL ATTACK.

In a suit to foreclose a street assessment, an objection that no statement of the election of any member of the board of trustees of the town having charge of the improvement was ever filed in the office of the clerk of the circuit court of the county, as required in certain cases by Burns' Ann. St. 1901, § 4331, constituted a collateral attack on the assessment, and was not available as a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1180.]

12. SAME—ANSWER—INDEFINITENESS.

An answer in a suit to foreclose a street assessment, alleging that no statement of the election of any member of the board of trustees of the town had been filed in the office of the clerk of the circuit court of the county, as required in certain instances by Burns' Ann. St. 1901, § 4331, was defective for failure to allege when the town was incorporated, and when the trustees whose acts were questioned were elected.

13. SAME—CURATIVE ACT.

Under Acts 1899, p. 90, c. 68, validating the incorporation of a town, the election of its trustees and other officers, their official acts and all ordinances and proceedings thereof, failure to file a statement of the election of the town board of trustees, as required by Burns' Ann. St. 1901, § 4331, was cured, and could not therefore be made a defense to a street assessment levied by such board.

14. SAME—QUALIFICATION OF TRUSTEES—INTEREST.

There being no statute in terms disqualifying a member of a board of town trustees from acting on the levy and assessment for street improvement because of interest, his act was voidable only, and any objection on that ground was waived by defendants' failure to raise it

until sued for the foreclosure of the lien of the assessment against their property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1151.]

15. CONSTITUTIONAL LAW—STATUTES—CONSTITUTIONAL OBJECTION—RIGHT TO RAISE.

Where defendants were estopped to object that town trustees levying a street assessment were disqualified by interest, defendants were also estopped to object that the statute under which the levy was made was unconstitutional because it made no provision for supplying the places of disqualified trustees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 41.]

Appeal from Circuit Court, Delaware County; Jos. G. Leffler, Judge.

Suit by John Gubbins and others against George Daly and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

Frank Ellis, for appellants. Templer & Ogle, for appellees.

MONTGOMERY, J. Appellees brought this suit to foreclose a special assessment lien for street improvements made by them in the town of Normal City. Appellants, having unsuccessfully moved to require the complaint to be made more specific, and demurred to the same, answered in 16 paragraphs. Demurrers were sustained to all paragraphs of answer, except the first and eleventh; the first being a general denial. A reply in denial was filed to the eleventh paragraph of answer, the cause tried by the court, a special finding made, with conclusions of law in favor of appellees, and judgment was entered accordingly. Appellants' motion for a new trial was overruled. Appellants have assigned and urged as errors the overruling of their motion to make the complaint more specific, the overruling of their demurrer to the complaint, and sustaining demurrers to the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth paragraphs of answer. It was asked that the complaint be made more specific with respect to the facts shown in the engineer's estimate, the price of work, the nature and kind of improvement made, the bid, the amount of assessment per running foot, and whether the total length of the improvement was more than one whole square. The improvement was made upon petition of two-thirds of the abutters. Whenever such a petition is presented praying for a street improvement of one whole square or more in length, it is the duty of the board to cause the same to be made, and the board may, in its discretion, authorize such improvement for any reasonable distance less than one square in length. Section 4283, Burns' Ann. St. 1901. It is manifest that the length of the improvement could not affect the jurisdiction of the board over the subject, and otherwise the special facts sought were of no consequence in this proceeding. The other specifications of the motion related to mat-

ters which preceded and were necessarily merged in the final assessment made against appellants' property, and such facts cannot be reviewed in this action. If all statutory steps were taken and notices given, as alleged in the complaint, appellants were bound to investigate all such matters at the hearing before the special committee appointed to consider and report upon the engineer's final estimate, and, when the work of this committee was completed and confirmed by the board of trustees, the assessment became conclusive against collateral attack upon a charge of irregularity or inaccuracy. The motion to make the complaint more specific was rightly overruled.

The only objection urged against the sufficiency of the complaint is with regard to the allegation of a demand for payment. It is averred that payment of the assessment was demanded more than 60 days before the action was begun, and, while the language of the statute has not been followed, the allegation is sufficient as against a demurrer. This holding is justified, further, from the circumstance that a special finding of facts was made, and in such cases any informality in the complaint may be cured and rendered harmless by the finding and conclusions of law. *Ross v. Van Natta*, 164 Ind. 557, 558, 74 N. E. 10; *Goodwine v. Cadwallader*, 158 Ind. 202, 61 N. E. 939; *Runner v. Scott*, 150 Ind. 441, 50 N. E. 479; *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437. The complaint avers the location of the street improved, the width, character, and terminal points of the improvement, and contains allegations with respect to notices and other requisite jurisdictional steps, including a copy of so much of the assessment as relates to appellants' property. The complaint was sufficient. *Deane v. Indiana Macadam, etc., Co.*, 161 Ind. 371, 374, 68 N. E. 686; *Leeds v. Defrees*, 157 Ind. 392, 394, 61 N. E. 930; *Van Sickle v. Belknap*, 129 Ind. 558, 561, 28 N. E. 306; *Lewis v. Albertson*, 23 Ind. App. 150, 159, 53 N. E. 1071; *Dugger v. Hicks*, 11 Ind. App. 377, 38 N. E. 1085.

The second paragraph of appellants' answer proceeded upon the theory that the board of trustees was without power to improve more than one block at a time, and averred that the improvement in question was eight blocks in length, and therefore void. The act of 1857 (Acts 1857, p. 73, c. 84; section 4400, Burns' Ann. St. 1901) did not authorize street improvements to be made for a distance less than one block at a time, but the Barrett law (Acts 1889, p. 237, c. 118; section 4288, Burns' Ann. St. 1901) confers upon town boards discretion to authorize such improvements for a reasonable distance less than one block in length, while it does not purport to limit or restrict their authority to make improvements to a single block at a time, as argued by appellants' counsel. These statutes contemplate extended improvements when desired, and were de-

signed to discourage and avoid piecework of less than one square's length, except in special cases approved by the governing body. The construction contended for by appellants would enhance the cost of such improvements, and be prejudicial to the interests of the abutters, as well as of the public, and frequently mar the uniformity of the work and destroy its appearance and value. This answer was clearly bad.

The third paragraph of answer alleged that the board of trustees of the town had not adopted a general plan of improvement previous to causing the work under consideration to be done, and the assessment was in consequence illegal; the fourth charged that at the time of ordering this work no plans and specifications thereof were in existence; the fifth alleged that such plans and specifications in the absence of a declared emergency should be published as a by-law, and denied such emergency and publications; the sixth denied any publication of a general plan for street improvements, and averred that no emergency for dispensing with such publication existed; the seventh alleged that no such office or officer as town engineer had ever existed in the town of Normal City; the eighth declared that the office of town engineer could be created only by ordinance or resolution, which must be published in the absence of emergency and denied any emergency and publication; the tenth alleged that the establishment of the grade of the street to be improved was a condition precedent to the making of any valid improvement, and denied the publication of any act fixing such grade, and denied any dispensing emergency; the twelfth charged that the grade of the street was changed after awarding the contract to the advantage of the contractor and to the injury of the public; the thirteenth alleged that appellees unlawfully changed the grade of the street; the fifteenth alleged that the salary of the town engineer was erroneously included in the cost of the improvement; and the sixteenth paragraph of answer alleged that in letting the contract the board reserved the control and disposal of all surplus earth within certain limitations, and reserved the right to change the street grade, and thereby caused uncertainty and enhanced the cost of the work.

We shall not discuss these paragraphs of answer severally, as some of them are manifestly insufficient in form and substance, and all of them, at best, set forth irregularities in the procedure not available as a defense, in whole or in part, when advanced collaterally against a complaint to enforce collection of the final assessment. *Lux, etc., Stone Co. v. Donaldson*, 162 Ind. 481, 488, 489, 68 N. E. 1014; *Brown v. Central Bermudez Co.*, 16 Ind. 452, 458, 69 N. E. 150; *Deane v. Indiana Macadam, etc., Co.*, 161 Ind. 371, 377, 68 N. E. 686; *Shank v. Smith*, 157 Ind. 401, 61 N. E. 932, 55 L. R. A. 564; *Redden v. Town of Covington*, 29 Ind. 118; *Willard v. Albertson*

23 Ind. App. 164, 53 N. E. 1077, 54 N. E. 403; Larned v. Maloney, 19 Ind. App. 199, 49 N. E. 278.

The ninth paragraph of answer alleged that no statement of the election of any member of the board of trustees of the town of Normal City having charge of the improvement in question was ever filed in the office of the clerk of the circuit court of the county. In the case of *Low v. Dallas*, 165 Ind. 392, 75 N. E. 822, we held that the provisions of section 4331, Burns' Ann. St. 1901, upon which this answer was founded, apply only to the first election held upon the incorporation of a town; and that such a defense constitutes a collateral attack and is not available. See, also, *Deane v. Indiana Macadam, etc., Co.*, 161 Ind. 371, 68 N. E. 686; *McEneny v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540; *Mullikin v. Town of Bloomington*, 72 Ind. 161; *Redden v. Town of Covington*, 29 Ind. 118. The answer is also too indefinite and uncertain to show that the proceedings assailed were invalid under the provisions of the above statute, since it is not made to appear when the town of Normal City was incorporated, nor when the trustees, whose acts are questioned, were elected. This pretended defense is further wholly without merit, inasmuch as before the proceedings under consideration were undertaken the incorporation of Normal City, the election of its trustees and other officers, their official acts, and all ordinances and proceedings, were validated by an act of the General Assembly. Acts 1899, p. 90, c. 68.

The fourteenth answer averred that each member of the board of trustees having the work in charge was during all the time the owner of a lot abutting upon the improvement and assessed for the construction of the same. It is contended that the statute under which such improvements are constructed makes no provision for supplying the places of disqualified trustees, and does not afford a right of appeal from the final action of the board, and in consequence is unconstitutional and void. In the absence of prohibitory legislation upon the subject, the question of interest or bias on the part of an officer charged with the performance of a particular duty is regarded as a private matter and of concern only to the parties to the proceeding; but, when constitutional or statutory provisions forbid such an officer from acting officially in matters affecting his own interests, his action in such cases is regarded as transgressing the public policy of the state. There is no statute in this state in terms disqualifying or prohibiting a member of the board of trustees of an incorporated town from acting in matters of this character on account of interest, and therefore his action in such instances is at most, voidable only, and objections on account of interest must be made at the earliest opportunity, or they will be deemed waived. *Carr et al. v. Duhme et al.*, 167 Ind. 76, 78 N. E. 323. No

objection, because of interest, appears from the record to have been raised until the filing of this paragraph of answer. So far as we are advised, appellants appear to have stood by with full knowledge of the disqualification of which they now complain, and suffered the work to go on and costs to accumulate until they had reaped the full benefit of the improvement. The action of the board was not void, and upon the facts disclosed appellants are now estopped to avail themselves of any disqualification on the part of any member of the board of trustees. *Bradley v. City of Frankfort*, 99 Ind. 417; *Carr v. Duhme*, supra, and cases cited.

It follows, also, that appellants are in no position to challenge the constitutionality of the statute, and we are not required to pass upon that question, inasmuch as they must be held to have waived any objection to the alleged disqualification of members of the board.

The special finding of facts and conclusions of law are not set forth in any manner in the briefs, or urged upon our attention, and no further questions have been presented for consideration.

No error having been made to appear, the judgment is affirmed.

(77 Ohio St. 19)

STATE v. HANLON.

(Supreme Court of Ohio. Oct. 22, 1907.)

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—TAXATION—UNIFORMITY.

Section 6968-2, Rev. St. as amended April 26, 1898 (93 Ohio Laws, p. 304), in so far as it enacts that every person, firm, or corporation desiring to engage in fishing in the waters of Lake Erie and the estuaries and bays thereof within this state shall make application to the commissioners of fish and game and obtain a license or authority so to do, and for such license or authority shall pay the fee therein specified, is a valid enactment, and is neither in violation of the fourteenth amendment to the Constitution of the United States, nor repugnant to section 26, art. 2, of the Constitution of the state of Ohio.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 687.]

(Syllabus by the Court.)

Error to Circuit Court, Ottawa County.

Action by Louisa Hanlon against the state. Judgment for plaintiff was affirmed by the circuit court, and the state brings error. Reversed, and judgment entered for plaintiff in error.

Under favor of the provisions of an act of the General Assembly of the state of Ohio passed May 10, 1902 (93 Ohio Laws, pp. 498-500), entitled, "An act to authorize claimants for damages and rebate of license fees under an act passed April 26, 1898 (93 Ohio Laws, pp. 303-307) entitled: 'An act for the further and better protection of fish and game,' to sue the state of Ohio," the defendant in error, Louisa Hanlon, brought suit in the court of common pleas of Ottawa county to recover from plaintiff in error the sum of \$70 there-

tofore paid by her, as license fees, to the president of the commissioners of fish and game of the state of Ohio, in accordance with the provisions and requirements of section 6968-2, Rev. St., as amended April 26, 1898. To the petition filed by said Louisa Hanlon in the court of common pleas, the defendant, the state of Ohio, demurred, alleging as ground of demurrer that "said petition does not state facts sufficient to warrant the relief prayed for." Upon consideration, this demurrer was overruled by the court of common pleas, and, defendant not desiring to plead further in said cause, judgment was thereupon rendered by said court in favor of the plaintiff, Louisa Hanlon, and against the state of Ohio, for the sum of \$70 and the costs of suit, taxed at \$15.48. This judgment was affirmed by the circuit court. From this judgment of affirmance the state of Ohio prosecutes error, and prays "that said judgment of the circuit court, and that of the court of common pleas, may be reversed, set aside, and held for naught, and that it may be restored to all things it has lost by reason thereof."

Wade H. Ellis, Atty. Gen., and J. M. Sheets, for the State. George A. True, for defendant in error.

CREW, J. (after stating the facts as above). Whether the facts stated in the petition of Louisa Hanlon show her entitled to the relief therein prayed for and furnished sufficient warrant for the judgments rendered by the courts below depends, in the present case, solely upon the constitutionality of certain provisions of section 6968-2, Rev. St., as amended April 26, 1898 (93 Ohio Laws, p. 304). These provisions, so far as they are pertinent to, or involved in, the present inquiry, are as follows: "No person, firm or corporation shall engage in the catching of fish for profit with nets in the waters of Lake Erie and the estuaries and bays thereof within this state, without complying with the provisions of this section. Every person, firm or corporation desiring to engage in fishing as above mentioned, shall make application to the commissioners of fish and game and obtain a license or authority so to do; and for such license or authority shall pay the following fee: For each tugboat or boat propelled by steam engaged in fishing with gill-net, the sum of forty dollars; for each sail boat engaged in fishing with gill-nets, the sum of five dollars; for each pound-net, fyke-net, or trap-net used in fishing, the sum of three dollars; for all other nets, or seines used in fishing, except gill-nets fished from boats which have been licensed as hereinabove provided, the sum of two dollars." If the foregoing provisions of section 6968-2, requiring the payment of license fees as therein stipulated by persons who for profit engage in the catching of fish with nets in the waters of Lake Erie, or the estuaries and bays thereof within this state, are constitutional and

valid, then admittedly the petition of Louisa Hanlon in this case was and is wholly insufficient, states no cause of action in her favor, and the demurrer thereto by the state of Ohio should have been sustained by the court of common pleas, and her petition should have been dismissed. The constitutionality of said statute is here challenged, and its validity denied by counsel for defendant in error, upon the grounds: (1) That it denies to defendant in error the equal protection of the laws; (2) that it violates the uniformity clause of section 20 of article 2 of the Constitution of the state of Ohio; (3) that it unjustly and unlawfully discriminates between persons engaged in the same occupation, and tends to create a monopoly. Is the statute in question, for either of the foregoing reasons, unconstitutional? The right of the state, in the exercise of its police power, to regulate and control the taking of fish in all the public waters within its jurisdiction, is a right so universally recognized and so uniformly affirmed, by both text-writers and courts, that it may not now be questioned. The ownership of fish and game, so far as they are capable of ownership, until reduced to actual possession, is in the state, and their protection and preservation by the state has always been regarded and treated as within the proper domain of its police power, and the validity of laws limiting the season within which game may be killed, and prescribing the terms and conditions upon which, and the time and manner in which, fish may be taken or caught in public waters within the territorial limits of the state, have been repeatedly and almost uniformly upheld by the courts. In *Magner v. People*, 97 Ill. 333, it is said: "The ownership being in the people of the state—the repository of the sovereign authority—and no individual having any property rights to be affected, it necessarily results that the Legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinion of its members, will best subserve the public welfare. Stated in other language, to hunt and kill game is a boon or privilege granted, either expressly or impliedly, by the sovereign authority, not a right inhering in each individual, and consequently nothing is taken away from the individual when he is denied the privilege at stated seasons of hunting and killing game. It is perhaps accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence, by implication, it is the duty of the Legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use, in the future, to the people of the state. But in any view the question of individual enjoyment is one of public policy, and not of private right." Tiedeman, in his valuable work on State and Federal Control of Persons and Property (volume 2, § 151), says: "Where the prohibition was lim-

ited to the killing of game and the catching of fish in the public lands and streams of the state, no possible question could arise as to the constitutionality of the regulation, for the reason that no one's rights of property could be violated in such case. The right to hunt or fish in such case is at best only a privilege, which the state may grant or withhold at its pleasure."

Within the principles above announced, it is obvious that, in the enactment of police regulations for the protection and preservation of fish and game, there is reposed in the Legislature a very large discretion, and courts will not assume to interfere with the exercise of such discretion unless, in the particular case, it be made to clearly appear that the act assailed does not reasonably tend to accomplish the object for which it was passed. In the present case the section under review is one of the sections of an act entitled: "An act for the further and better protection of fish and game." If the true purpose and object of this act is expressed in its title, as would seem apparent from a consideration of the other provisions of said section, one of which is, "All fees required to be paid hereunder shall be paid to the president of the commissioners of fish and game, and by him paid into the state treasury to the credit of a fund, which is hereby appropriated, for the purpose of propagating, protecting and preserving the fish in the waters of Lake Erie"—then certainly the imposition, for such purpose, of a license fee upon all persons who engage in the business of fishing with nets in the waters of Lake Erie, is a proper exercise of legislative power. And, it being matter of public and common knowledge that reasons may and do exist for imposing terms, conditions, and restrictions upon persons engaged in fishing with nets in the waters of Lake Erie that do not apply to or exist, as to other waters of the state, such enactment would be a valid law, and not in conflict with section 26 of article 2 of the State Constitution. While it may be true, in a sense, that the right to fish is a common or general right, yet it is equally true that laws regulating the exercise of this right must of very necessity be local rather than general in their character, and hence they may, and should be, adapted to the various needs of different localities and waters. *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Bittenhaus v. Johnston et al.*, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380; *Rea et al. v. Hampton et al.*, 101 N. C. 51, 7 S. E. 649, 9 Am. St. Rep. 21; *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; *Morgan v. Commonwealth*, 98 Va. 812, 35 S. E. 448; *Osborn v. Charlevoix Circuit Judge*, 114 Mich. 655, 72 N. W. 982; *Ex parte Fritz*, 86 Miss. 210, 38 South. 722, 109 Am. St. Rep. 700; *Hughes v. State*, 87 Md. 298, 39 Atl. 747; *Organ v. State*, 56 Ark. 267, 19 S. W. 840; *State v. Mrozinski*, 59 Minn. 465, 61 N. W. 560, 27 L. R. A. 76.

The contention of defendant in error, that

this statute is unconstitutional because it denies to her the equal protection of the laws, and unjustly and unlawfully discriminates between persons engaged in the same occupation, would seem, in part at least, to be answered by the statute itself, the language of which is: "No person, firm or corporation shall engage in the catching of fish for profit with nets in the waters of Lake Erie * * * without complying with the provisions of this section. Every such person, firm or corporation desiring to engage in fishing as above mentioned shall make application to the commissioners of fish and game and obtain a license or authority so to do." It will be observed that the foregoing provisions are general in character, and alike applicable to all persons who would engage in fishing in the waters of Lake Erie and the estuaries and bays thereof, in the mode or manner prescribed in said section. The prohibition of the act is not confined to any particular class, but all persons are denied the right to fish with nets for profit, except such as have previously obtained a license or authority so to do. By the provisions of said act the following license fees are required to be paid: "For each tug boat or boats propelled by steam engaged in fishing with gill-net, the sum of forty dollars; for each sail boat engaged in fishing with gill-nets, the sum of five dollars; for each pound-net, fyke-net, or trap-net used in fishing, the sum of three dollars; for all other nets or seines used in fishing, except gill-nets fished from boats which have been licensed as hereinabove provided, the sum of two dollars each." It is the contention of counsel for defendant in error that the license fees as thus levied are unequal, unjust, and oppressive, and as instancing their inequality counsel in argument quotes from the opinion of Hull, J., in *Yensen v. State*, 7 Ohio N. P. 18; where it is said: "Under this act, if 400 or 500 gill-nets were used from a single steamboat, a license fee of \$40 would be imposed, and if 20 gill-nets were used by a man of limited means in fishing from rowboats, the same license fee would be imposed; and for 100 gill-nets fished from rowboats the man who had not the means to purchase a steamboat would be compelled to pay \$200, while the man or company who had the means to purchase a steamboat for fishing the same number of nets would pay the fee of \$40. These are unequal burdens, imposed upon men engaged in the same lawful occupation, upon the same waters and in the same locality, and the act is therefore unconstitutional." The fallacy of this argument is that it ignores or denies that the license fee exacted is, and may rightfully be, measured and determined by the character of boat from which gill-net fishing is to be done, and assumes that the constitutionality of the act should be determined solely from a consideration of whether or not all fishermen are able to avail themselves of all provisions. In other words, the argument

would seem to be that, although under the provisions of said act, all within the same class, and employing the same agencies, are taxed alike, and no privilege is accorded one citizen that is denied another who may be within the same class or condition, yet, because all fishermen cannot purchase or procure tugboats propelled by steam, from which to fish with gill-nets, that the latter are therefore unlawfully discriminated against. Such conclusion, we think, by no means follows. As said by Spear, J., in *Marmet v. State*, 45 Ohio St. 69, 12 N. E. 467: "Absolute equality as to burdens, whether applied to taxes or other subjects of legislation, is not to be expected in our laws. The wisdom of man has not yet devised a system of equalizing burdens so perfect in its application and so thorough in its enforcement as to leave no room for adverse comment or criticism." While we may not certainly know just what considerations induced the Legislature to adopt the classification it did in fixing these license fees, it is enough that for the purpose of protecting and preserving the fish in the waters of Lake Erie, its estuaries, and bays sufficient reason for such classification may, and in the judgment of the Legislature did, exist. In *Hayes v. Missouri*, 120 U. S. 71, 7 Sup. Ct. 352, 30 L. Ed. 578, Mr. Justice Field says: "The fourteenth amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier v. Connolly*, speaking of the fourteenth amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' 113 U. S. 27, 32, 5 Sup. Ct. 360, 28 L. Ed. 923."

The judgment of the circuit court will be reversed, and judgment entered for the plaintiff in error.

SHAUCK, C. J., and PRICE, SUMMERS, and DAVIS, JJ., concur.

(186 Mass. 497)

LONG et al. v. INHABITANTS OF ATHOL.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 26, 1907.)

1. MUNICIPAL CORPORATIONS — CONTRACTS — RESCISSION — GROUNDS OF.

Contractors are entitled to rescind a contract with a municipality for the construction of a sewer extension, if it was fraudulently obtained from the contractors by giving to them, as a basis for the proposed contract, erroneous estimates of the work to be done which largely

understated the amount thereof, and keeping from the files of the town clerk and concealing from the contractors the maps, drawings, profiles, and specifications in accordance with which the contract was made, or if the contract was made under a mutual mistake, in that the estimates on which the contractors made their bid, which estimates were made by an engineer employed by the municipality and were given to the contractors by it as correct, were erroneous and materially underestimated the amount of work to be done, and to recover the money incidentally necessary to afford full relief.

2. SAME — ACTIONS FOR RESCISSION — LACHES.

Where the contractors' right to rescind a contract with a municipality for the construction of a sewer extension on the ground of mutual mistake depended on the refusal of the municipality to correct the mistake, and the bill to rescind was brought promptly after discovery of the mistake and the municipality's refusal to correct it, the contractors were not barred by laches.

3. SAME — MUTUAL MISTAKE.

Contractors are entitled to rescind a contract with a municipality for the construction of a sewer extension, where the contract was made under a mutual mistake, in that the estimates on which the contractors made their bid, which estimates were made by an engineer employed by the municipality and were given to the contractors by it as correct, materially underestimated the amount of work to be done, notwithstanding the estimates were given in good faith, their inaccuracy unknown until after the contractors had begun to work, and notwithstanding the contractors expressly covenanted to do the work "in strict accordance with the maps, drawings, profiles, and specifications prepared therefor" * * * all of which were to be considered as part of the contract and to be construed therewith, and "that the amounts and quantities of materials and work as stated in the notice to bidders, governing the making of proposals, were approximate only."

4. SAME.

The contract for the sewer extension was not within the rule that the mistake was not to be treated as one of fact, and that a contract is not to be set aside where before the making thereof there may have been an honest expression of opinion or statement of fact, not purporting to be as of knowledge, that the thing contracted for will turn out other than it does.

5. SAME — DEFENSES — NEGLIGENCE.

Where such contractors had access to correct profiles, maps, and drawings and to printed specifications, and it would have been possible for a skilled engineer, by correctly scaling these plans, to ascertain and correct the mistakes made in the estimates, furnished, but such mistake could have been discovered only by one skilled in such matters, *held*, that there was no such negligence by the contractors in accepting the erroneous estimates, without employing all other means of knowledge furnished by the municipality, as to bar their relief by rescission of the contract as a matter of law.

6. SAME — CONDITIONS PRECEDENT — RESTORATION OF FORMER STATUS.

Rescission by such contractors will not be denied on the ground that the municipality cannot be put in statu quo, since the municipality may be placed in statu quo by requiring of it that it pay but the fair value of the material and labor furnished, and no more.

7. SAME.

Rescission by such contractors will not be denied on the ground that the municipality cannot be placed in statu quo, in that the result of the work done by the contractors has shown that the necessary excavation was more difficult and expensive than anticipated, and that a new contract for the same work could not be let on so favorable terms.

8. SAME—ACTIONS FOR RESCISSION—FINDINGS OF MASTER—CONSTRUCTION.

On a bill by such contractors to rescind the contract, the master, after stating the municipality's contention as to why the contractors complained about the extra depths of excavations and abandoned the contract, stated: "I find that the defendants did not sustain the burden of that contention, but I find that the real reason for the complaint and action of the plaintiffs was the result of the errors made by" the engineer "in scaling said profile plans and preparing said engineer's estimate." Held not a ruling that the burden of proving why the contractors complained about the extra depths of excavations and abandoned the contract rested on the municipality.

9. SAME—EVIDENCE—ADMISSIBILITY.

Evidence to show that the contractors acted on the mistake caused by the erroneous estimates and relied on the same as correct was competent.

10. SAME.

Evidence by a witness of what was in the mind of himself and the contractors was competent, where it appeared that he referred and was understood to refer to what was in his own mind as representing them.

11. SAME.

Evidence that other bidders also relied on the estimates was competent.

12. APPEAL—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The rule that material error in rulings on evidence, such as has been prejudicial to the excepting party, must be shown, is peculiarly applicable to evidence taken before a master on a bill to rescind a contract for fraud and mutual mistake.

Case Reserved from Supreme Judicial Court, Worcester County.

Bill by Joseph Long and others against the inhabitants of Athol to rescind a contract for a sewer extension entered into between plaintiffs and defendants. From an interlocutory order overruling a demurrer to the bill, defendants appeal and also except to the master's report. Decree directed overruling all exceptions, ordering the contract rescinded, and that defendants pay plaintiffs the sum found by the master.

Whipple, Sears & Ogden and Alexander Lincoln, for plaintiffs. Herbert Parker and Frederick H. Nash, for defendants.

SHELDON, J. The defendants appealed from the interlocutory order overruling their demurrer to the bill, and their counsel have discussed some of the questions naturally arising thereon. As however all these questions are raised, and perhaps more advantageously for the defendants, upon the master's report and the exceptions thereto, and as the appeal has not been specifically argued, it need not be considered at any great length. We think it plain that the bill as amended sets forth a good cause of action. It is drawn with a double aspect, seeking to obtain a rescission of the contract of the plaintiffs with the defendants, first upon the ground that it was fraudulently obtained from the plaintiffs by giving to them as a basis for the proposed contract erroneous estimates of the work to be done, which largely understated the amount thereof, and keep-

ing from the files of the town clerk of Athol and concealing from the plaintiffs the maps, drawings, profiles and specifications in accordance with which the contract was to be and in fact was made; and secondly upon the ground that the contract was made under a mutual mistake of both parties arising from the fact that the estimates upon which the plaintiffs made their bid and upon the faith of which they entered into the contract, which estimates were made by an engineer employed by the defendants for that purpose, and were given to the plaintiffs by the defendants as correct, were erroneous and materially underestimated the amount of the work to be done. If the proof came up to the averments of the bill on either of these grounds it would entitle the plaintiffs to relief. It would be enough if either of the grounds claimed were made out. *Redgrave v. Hurd*, 20 Ch. D. 1; *Davies London & Provincial Ins. Co.*, 8 Ch. D. 469; *Newbiggin v. Adam*, 34 Ch. D. 582; *Trail v. Baring*, 4 De G., J. & S. 316, affirming s. c. 4 Giff. 485; *Rawlins v. Wickham*, 3 De G. & J. 304; *Daniel v. Mitchell*, 1 Story (U. S.) 172, Fed. Cas. No. 3,562; *Goodwin v. Massachusetts Loan & Trust Co.*, 152 Mass. 189, 25 N. E. 100; *Motherway v. Wall*, 168 Mass. 333, 47 N. E. 135; *Keene v. Demelman*, 172 Mass. 17, 51 N. E. 188; *Boles v. Merrill*, 173 Mass. 491, 53 N. E. 894, 73 Am. St. Rep. 308; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371; *Winnipisseeogee Lake Co. v. Perley*, 46 N. H. 83. The bill could be maintained both for a rescission of the contract and for the recovery of whatever money might be incidentally necessary to afford full relief. *Rackemann v. Riverbank Improvement Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427; *Davis v. Peabody*, 170 Mass. 397, 49 N. E. 750; *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Franklin v. Greene*, 2 Allen, 519. Nor does the bill show upon its face that the plaintiffs had such means of ascertaining the real facts or were guilty of such gross negligence in relation thereto as to deprive them of the right to relief for this reason. *Conner v. Welch*, 51 Wis. 431, 8 N. W. 260. The statement of *Jessel, M. R.*, upon this subject in *Redgrave v. Hurd*, 20 Ch. D. 1, was quoted and followed in *Smith v. Land & House Property Co.*, 28 Ch. D. 7, 17, and in *Karberg's Case*, [1892] 3 Ch. 1, 13. Nor does the bill show that the plaintiffs were guilty of such laches as to lose their right to relief. Their right to rescission depended upon the refusal of the defendant to correct the mistake, so far as the bill rested upon that ground (*Keene v. Demelman*, 172 Mass. 17, 23, 51 N. E. 188); and the bill seems to have been brought promptly after the discovery of the mistake and the defendant's refusal to rectify it (*Rawlins v. Wickham*, 3 De G. & J. 304). It does not appear by the bill that the defendants cannot as to all essential matters be put substantially into their original position under the rule of *Thayer v. Turner*, 8 Metc. 550, and *Snow*

v. Alley, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119. See Drohan v. Lake Shore & Michigan Southern Railroad, 162 Mass. 435, 38 N. E. 1116; Rackemann v. Riverbank Improvement Co., 167 Mass. 1, 4, 5, 44 N. E. 990, 57 Am. St. Rep. 427. We cannot doubt that the demurrer was rightly overruled. The cases which hold that without a rescission of the contract the plaintiffs would be held to performance in conformity to its terms and could not set up the antecedent error are beside the point, and need not be considered.

It sufficiently appears by the master's report that, although no fraud was practiced upon the plaintiffs, their claim that the contract was entered into under a mutual mistake caused by the error of the engineer employed by the defendants to make the estimate that was furnished by the defendants to the plaintiffs and other contractors for them to base bids upon, was proved. The plaintiffs had access also to correct profile maps and drawings and to printed specifications; and it would have been possible for a skilled engineer, by correctly scaling these plans, to ascertain and correct the mistakes made in the estimate furnished by the defendant to the plaintiffs and other bidders. It is manifest however and, as we understand, is not disputed, that the mistakes could have been discovered only by one skilled in such matters, and only by careful and accurate scaling and processes of computation. The master has found that the defendants acted in good faith in furnishing this estimate, and believed that the information given therein was at least approximately correct, and were ignorant that any material errors had been made in compiling it; that the mistakes made were unintentional and that all parties were ignorant of any serious discrepancies in the estimate, but that the plaintiffs were not grossly negligent in not examining the plans more minutely, and had the right to assume that the engineer's estimate was at least approximately correct, and to rely thereon in making up and submitting their bids. He has also found that the statements of this estimate were not even approximately correct; that the amount of excavation required of the plaintiffs was so much in excess of that shown by the erroneous estimate that the plaintiffs were justified in fact in refusing to proceed further with their contract.

Upon these findings taken by themselves, under the circumstances which appear here, it is manifest, upon the cases already referred to, that the plaintiffs are entitled to the relief which they seek, unless this should be refused to them by reason of some of the specific objections of the defendants, or unless it should appear, upon some of their exceptions, that there has been material error on the part of the master; and we proceed to consider these questions.

The defendants contend that there was no right of rescission by reason of the issuing

of the paper containing the inaccurate estimates, because this was put forth in good faith; its inaccuracy was unknown and unsuspected by the defendants until after plaintiffs had begun their work; and because the plaintiffs in their contract expressly covenanted to do the work "in strict accordance with the maps, drawings, profiles and specifications prepared therefor and on file in the office of the town clerk, * * * all of which are to be considered as part and parcel of these presents, and to be construed therewith," and further in the same contract in express terms admitted and agreed "that the amounts and quantities of materials * * * and work * * * as stated in the notice to bidders, governing the making of proposals for said work, are approximate only," and that they were satisfied therewith in determining the prices for doing the work required by the contract, and that they had judged for themselves as to all conditions affecting the cost of performance of the work. And the defendants contend that the plaintiffs, after having made these express stipulations, cannot now upon discovery of the mistake which was common to them and the defendants, claim that the contract was represented to them to be an agreement to do the work according merely to the erroneous estimate. Sullivan v. Sing Sing, 122 N. Y. 389, 25 N. E. 566; Williams v. Dalker, 33 Misc. Rep. 70, 68 N. Y. Supp. 348. Certainly, the plaintiffs cannot make such a claim. As long as the contract remains in force they are bound by its provisions. Stuart v. Cambridge, 125 Mass. 102; Lentilhon v. New York, 102 App. Div. 548, 92 N. Y. Supp. 897. But the equitable right to rescind an agreement which has been entered into upon a mutual mistake as to material facts, knowledge of which would have prevented the parties from making it, is not to be defeated by reason merely of the stringency of the covenants which it contains. We have found nothing in the New York decisions already referred to inconsistent with this position. If, as the defendants contend on the authority of Weeks v. Trinity Church, 56 App. Div. 195, 67 N. Y. Supp. 670, and Gearty v. Mayor of New York, 171 N. Y. 61, 63 N. E. 804, they could be construed as denying such a right of rescission, we should not be willing to follow them.

It is claimed also that the agreement should not be rescinded by reason of this mistake, because it is not to be treated as a mistake of fact. The paper it is claimed was given to the plaintiffs merely as an estimate. The defendants, though believing it to be accurate, did not attempt to pass off their belief as knowledge. Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727. They did nothing to prevent a full investigation. Parker v. Moulton, 114 Mass. 99, 19 Am. Rep. 315. They claim, substantially in the language of this court in Schramm v. Boston Sugar Refining Co., 146 Mass. 211,

216, 15 N. E. 571, that a contract is not to be set aside merely because before the making thereof there may have been an honest expression of opinion, or an honest statement of a fact not purporting to be as of knowledge, that the thing contracted for will turn out better than it proves to be; and they cite also *Comins v. Coe*, 117 Mass. 45, *Powers v. Mayo*, 97 Mass. 180, *Gordon v. Parmelee*, 2 Allen, 212, *Mooney v. Miller*, 102 Mass. 217, *Roberts v. French*, 153 Mass. 60, 26 N. E. 416, 10 L. R. A. 656, 25 Am. St. Rep. 611, *Brownlee v. Campbell*, 5 App. Cas. 925, 936, 937, and *Smith v. Chadwick*, 9 App. Cas. 187. But this argument overlooks the fact that in the case at bar the erroneous estimate was the basis of the plaintiffs' bid and the ground of their making the contract; it was a material element in the minds of both parties; it was given by the town both to the plaintiffs and to all other contractors who asked for information on the subject; both parties regarded it as approximately correct, and the plaintiffs relied upon it; and the errors were unknown to all parties until after the execution of the contract. The plaintiffs' admission in their contract as to the character of the quantities stated in the estimate went no further than that these were approximate only, and the defendants seem to have been content with this; but the master has found that they were not even approximately correct. There was here a material mistake as to the very basis upon which the contract was made. *Spurr v. Benedict*, 99 Mass. 463. And for that mistake the defendants are in the first instance responsible. *Keene v. Demelman*, 172 Mass. 17, 21, 51 N. E. 188; *Rackemann v. Riverbank Improvement Co.*, 167 Mass. 1, 44 N. E. 990, 57 Am. St. Rep. 427. The case is not within the contention of the defendants as to this point.

Nor was there such negligence of the plaintiffs in accepting the erroneous estimate without employing the other means of knowledge furnished by the defendants as to bar their relief as matter of law. The master has found that the maps and plans were in the selectmen's rooms, which were used also by the town clerk, that the plaintiffs saw them there and had full opportunity to inspect them and to scale them for the purpose of comparing them with the estimate, but that the plaintiffs were not grossly negligent in not examining the plans more minutely, and had a right to assume that the engineer's estimate was at least approximately correct. The defendants rely here upon the many cases in which it has been held that one to whom fraudulent representations are made has no right to rely upon them if the facts are within his observation or if he has equal means of knowing the truth. *Savage v. Stevens*, 126 Mass. 207; *Brown v. Leach*, 107 Mass. 364; *Salem India Rubber Co. v. Adams*, 23 Pick. 256; *Poland v. Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Brady v. Finn*, 162 Mass. 260, 38 N. E. 506. This to be sure

presents usually a question to be passed upon by the jury at law or by the master here. *Arnold v. Teel*, 182 Mass. 1, 64 N. E. 413; *Whiting v. Price*, 172 Mass. 240, 51 N. E. 1084, 70 Am. St. Rep. 362, and cases cited. And the defendants admit that negligence as a defense in cases of fraud has been in danger of being pushed too far. *Arnold v. Teel*, 182 Mass. 1, 64 N. E. 413; *Holst v. Stewart*, 161 Mass. 516, 522, 37 N. E. 755, 42 Am. St. Rep. 442; *Way v. Ryther*, 165 Mass. 226, 229, 42 N. E. 1128. But they contend that one who has merely put forth in good faith an inaccurate estimate should be allowed to avail himself fully of the negligence of one who claims to have been misled by this innocent mistake. *Slaughter v. Gerson*, 13 Wall. (U. S.) 379, 20 L. Ed. 627; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; *Long v. Warren*, 68 N. Y. 426; *Conner v. Welch*, 51 Wis. 431, 8 N. W. 260. But it must be remembered that the only finding of the master upon this point is that a skilled engineer, by correct scaling of the maps and drawings might have ascertained the errors in the engineer's estimate. It is not found that examination by others would have disclosed them. The engineer's estimate was erroneously supposed by both parties to be a correct rendering into ordinary language of the hidden sense of the maps, plans and drawings, and the defendants furnished it to the plaintiffs as such, merely requiring the plaintiffs to stipulate that its figures were approximate only. The master may have found on the evidence that the case stood as if the correct plans had been expressed in some foreign language or in hieroglyphics which only some peculiarly skilled persons could translate, and that the defendants had innocently furnished the plaintiffs with a materially incorrect version of them. Nor do we know what the evidence was upon which the master made his findings. We cannot say that the plaintiffs did not have under the circumstances the right which the master has found that they did have, or that the finding that they were not grossly negligent in this matter is not enough to protect them. This was substantially the rule adopted in equity in *Redgrave v. Hurd*, 20 Ch. D. 1; *Smith v. Land & House Property Co.*, 28 Ch. D. 717; *Karberg's Case*, [1892] 3 Ch. 1, 13; *Aaron's Reefs v. Twiss*, [1896] A. C. 273, 279. And see *Goodwin v. Massachusetts Loan & Trust Co.*, 152 Mass. 189, 201, 25 N. E. 100; *Keene v. Demelman*, 172 Mass. 17, 21, 51 N. E. 188.

And for the reasons already stated, the defendants' contention that there having been on their part no fraud or concealment or inducement to omit investigation, the plaintiffs cannot go behind the conditions of the contract and their bid to assert that they intended to bid upon the estimate and not upon the maps, plans and specifications cannot be supported. This contention is correct so long

as the contract remains in force; it is not correct when rescission is sought on the ground of a material mistake of both parties in the basis of the contract. Upon the findings of the master, there is nothing in *Blaiberg v. Keeves*, [1906] 2 Ch. 175, or in *Brownlee v. Canon*, 5 App. Cas. 925, to help the defendants here.

But it is argued that rescission of the contract cannot now be granted, because the defendants cannot be put in statu quo. The master's finding as to this is that the plaintiffs "could not by rescinding their contract place the defendants in the same condition that they were in before the beginning of the work, or in other words, could not undo the work of construction, so far as it had been done, and reclaim the materials furnished and labor performed." This is far from being an unqualified finding that the defendants cannot be put in statu quo. If the contract is rescinded and the defendants are held to pay the plaintiff for the fair value of the materials and labor furnished by the latter, and no more, we do not see why the defendants are not in a legal sense put in statu quo. This was the rule adopted at law in *Bailey v. Marden*, 193 Mass. 277, 79 N. E. 257; *Brown v. Woodbury*, 183 Mass. 279, 67 N. E. 327; *Posner v. Seder*, 184 Mass. 331, 333, 68 N. E. 335; *Simmons v. Lawrence Duck Co.*, 133 Mass. 298; and *Fitzgerald v. Allen*, 128 Mass. 232. The same rule has been adopted in equity. *Franklin v. Greene*, 2 Allen, 519; *Davis v. Peabody*, 170 Mass. 397, 49 N. E. 750; *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Old Dominion Copper Co. v. Bigelow*, 188 Mass. 315, 329, 74 N. E. 653, 108 Am. St. Rep. 479. The case comes really within the rule laid down in *Snow v. Alley*, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119.

But the defendants contend that the rescission of this contract and the consequent necessity of paying upon a quantum meruit for what has been done by the plaintiffs, prevents them in another way from being put in statu quo. The result of the work done by the plaintiffs was to show that the necessary excavation was more difficult and expensive than was anticipated; and the total expense of the work has been increased accordingly. The result of this is that a new contract for the same work could not have been let on so favorable terms for the defendants as if this fact had not been brought to light; and so the defendants say that they neither have been nor could be put into as favorable a condition as that which they at first occupied. But it seems to us that this amounts only to saying that the real facts which have become known have operated to deprive them of an inequitable advantage which they formerly enjoyed over prospective contractors for this work by reason of the general ignorance of the character of the soil and the difficulty of excavation in it. It was perhaps unavoidable, while these matters remained unknown, that one of the parties should derive a cer-

tain degree of advantage or of detriment from that fact; the loss of that advantage to the one and the removal of that detriment to the other is not a change of which either party has the right to complain. It does not in our judgment prevent the defendants from being put in statu quo.

It is contended that the master erred in ruling that the burden of proving why the plaintiffs complained about the extra depths of excavation and abandoned the contract rested upon the defendants. But it does not sufficiently appear that he did so rule. In his report, after stating the defendants' contention upon this subject, he says: "I find that the defendants did not sustain the burden of that contention, * * * but I find that the real reason for the complaint and action of the plaintiffs was the result of the errors made by" the engineer "in scaling said profile plans and preparing said engineer's estimate." The latter part of this finding, which involved the real issue, seems to have been made independently of any question of the burden of proof. The master's language in the opening of the sentence, though it may perhaps have contained an intimation that he wrongly threw the burden upon the defendants, does not seem to us to be decisive of this. If the defendants were apprehensive that he did so rule, they might have settled the question by a request for a ruling, and if that were refused might then have saved an exception. *O'Brien v. Keefe*, 175 Mass. 274, 56 N. E. 588. They have not done so, and we cannot say that the master made the ruling of which they complain.

The exceptions to the testimony of the witness McKenzie ought not to be sustained. It was competent to show that the plaintiffs acted on the mistake caused by the errors in the estimate, and relied on the latter as correct. And when he spoke of what was in the mind of himself and the plaintiffs it sufficiently appears that he referred, and was understood to refer, to what was in his own mind as representing them. The admission of testimony that the other bidders also relied on the estimate came under the rule of *Cass v. Boston & Lowell Railroad*, 14 Allen, 448, and *Lane v. Boston & Albany Railroad*, 112 Mass. 455.

We do not find that any of the other exceptions to the rulings of the master in admitting or rejecting evidence should be sustained. The language of *Bigelow, C. J.*, in *Fisher v. Plimpton*, 97 Mass. 441, 443, and of the present Chief Justice in *Koplan v. Boston Gaslight Co.*, 177 Mass. 15, 23, 58 N. E. 183, as to the necessity of showing a really material error in this respect, such as has been prejudicial to the excepting party, is peculiarly applicable to evidence taken before a master in a case like this.

It is not necessary to consider the other exceptions to the master's report in detail. Most of them are disposed of by what has been already said; and none of the others

can be sustained. The master rightly refused to pass upon the additional questions of fact requested by the defendants. The contract having been rescinded, the plaintiffs could recover upon a quantum meruit for all that they had done; and we do not find that any objection was made to the master's settling this upon the basis of actual cost to the plaintiffs. Neither the cost nor the value of the so-called extra work was material. The case was not like the cases in which a plaintiff who has substantially but not exactly complied with the terms of a contract to put a structure upon another's land is allowed, within the limits of the contract price, to recover for the benefit thus conferred upon the latter; for there the contract is not abrogated. *Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; *Blood v. Wilson*, 141 Mass. 25, 6 N. E. 302; *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268. A decree should be entered overruling all the exceptions to the master's report, ordering the contract between the plaintiffs and the defendants and the bond accompanying the same to be delivered up and canceled, and that the defendants pay to the plaintiffs the sum found by the master with interest from the filing of the bill, and for costs.

So ordered.

(196 Mass. 468)

WHITING v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 28, 1907.)

1. EMINENT DOMAIN — PROPERTY SUBJECT OF COMPENSATION — ESTABLISHED BUSINESS ON LAND TAKEN.

The treasurer and general manager of a cotton mill corporation, in which all the stock is held by him and his relatives, does not own an established business on land in the place where the mill is located, for the taking of which he can recover damages under the metropolitan water acts, though he has been in the corporation's service for a long time and has well-grounded expectations of continuing therein.

2. CONSTITUTIONAL LAW — EMINENT DOMAIN ACT — DAMAGES — DISCRIMINATION.

St. 1896, p. 444, c. 450, § 4, provides that no stockholder of a corporation whose plant is taken as a reservoir for the metropolitan water supply shall receive compensation for loss of employment under the corporation. The same act allows a recovery by employees for such a loss. *Held*, that the section is not unconstitutional, though arbitrarily discriminating against a stockholder who is also an employee, since loss of business is ordinarily not an element of damage in eminent domain, and a law may provide that one class of persons may not recover for loss of business, though others differently situated may.

Case Reserved from Supreme Judicial Court, Worcester County.

Petition by Alfred N. Whiting against the commonwealth for assessment of damages to property taken under the metropolitan water acts. Judgment for the commonwealth.

Winfred H. Whiting, for petitioner. Dana Malone, Atty. Gen., and W. P. Ball, Asst. Atty. Gen., for the Commonwealth.

MORTON, J. The petitioner was the treasurer and general manager of the L. M. Harris Manufacturing Company, a corporation owning and operating two cotton mills at West Boylston, and engaged in the manufacture of various kinds of cotton goods and of cotton yarn. He was also clerk of the corporation, and a director and stockholder. As treasurer and general manager he made all purchases and sales, superintended the manufacture of all goods and attended to the financial affairs of the company. His whole time was thus occupied. For his services as treasurer, general manager and clerk, he received a salary equal to \$2,500 a year. He had been treasurer, general manager and clerk, by successive annual re-elections, since the corporation was formed in 1890, and was acting as such at the time of the taking by the commonwealth in February 1898 of the real estate and machinery of the corporation for the purposes of the metropolitan water act. He had been superintendent and general manager for many years before the corporation was formed. The commissioners found that he had reasonable grounds to expect that he would be continued in his position as treasurer, general manager and clerk so long as he was able to perform the work required of him; the stock being all held by himself and his family and relatives, and his management having been successful and satisfactory.

The question is whether the petitioner owned an established business on land in West Boylston on April 1, 1895. We do not see how it can be said that he did. He had no business except that which he did for the corporation as clerk and treasurer and general manager thereof. That could be spoken of, no doubt, as in a sense his business, meaning thereby his occupation or employment. But, though the circumstances were such as apparently to insure to him a certain degree of permanency in his tenure of the offices to which he had been elected it can not be said in any fair sense of the words, that by reason thereof he owned an established business on land in West Boylston. The business which he did was the corporation's business and it was carried on by the corporation through its officers, agents and servants on premises belonging to it. If the petitioner's contention were sound, it would follow that every clerk, servant, or agent of a person, firm, or corporation having an established business on land in West Boylston who had been in the service of his employer for a considerable length of time, and who had well-grounded and reasonable expectations of continuing therein, owned an established business on land in West Boylston and was entitled to recover damages for any injury thereto caused by the carrying out of the act under which this petition is brought. We find no warrant for such a construction either in the act itself, or in subsequent legislation.

The petitioner contends that unless the

construction for which he argues is given to the statute, section 4, c. 450, p. 444, St. 1896, providing that no stockholder in any corporation whose plant is taken on account of a reservoir for the metropolitan water supply shall be entitled to compensation under that act is unconstitutional, on the ground, as we understand him, that it would constitute an arbitrary and unjust discrimination against a stockholder who might also be an employé. But an employé as such is not entitled to damages for the loss of employment. And the Legislature might well provide that one who is a stockholder and as such entitled to receive compensation for the taking of the property of the corporation shall not be entitled to recover damages for loss of employment. Loss of business is not, generally speaking, an element of damage in a taking of right of eminent domain (*Bailey v. Boston & Prov. R. R.*, 182 Mass. 537, 66 N. E. 203), and there is, therefore, nothing unconstitutional in an act which provides that one whose property is taken shall not recover damages for loss of business even though parties differently situated are allowed to recover therefor.

Judgment for the commonwealth.

(196 Mass. 466)

HARRIMAN v. WHITNEY.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 26, 1907.)

1. TRESPASS—TO REALTY—JUSTIFICATION.

In trespass for making an excavation, proof that the excavation was made within the limits of a street, by defendant as superintendent of streets, in the repair of the street, is a justification.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespas, § 52.]

2. BOUNDARIES—DESCRIPTION—STREETS.

Where premises are by deeds conveying them bounded on the west by the line of a street, the exterior easterly line of the street is the westerly boundary of the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, §§ 123-135.]

3. TRESPASS—TO REAL ESTATE—EVIDENCE—QUESTIONS FOR JURY.

Whether an excavation made by one as superintendent of streets in the repair of a street was within the limits thereof, or on premises of an abutting owner suing in trespass therefor, held, under the facts, for the jury, authorizing a recovery on their finding that the excavation was on the premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespas, § 150.]

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge. Action by James W. Harriman against Ernest C. Whitney. There was a judgment for defendant, and plaintiff brings exceptions. Sustained.

James A. Stiles and Joseph P. Carney, for plaintiff. Herbert Parker, Henry H. Fuller, and John F. Dervin, for defendant.

MORTON, J. The question in this case is whether there was any evidence warranting

a jury in finding that the trespass was committed as alleged. We think that there was. The defendant admits that he made the excavation complained of and justifies it on the ground that it was within the limits of a public way, namely, a street called Nichols street, and was done by him as superintendent of streets, in the repair of the way. If the excavation was within the limits of the street as laid out then the justification was made out. But if there was any evidence warranting a finding that it was not but was upon premises in the possession of the plaintiff then the case should have been submitted to the jury. To show that it was upon premises belonging to him the plaintiff put in evidence deeds under which he claimed title. These bounded the premises on the west by the line of Nichols street. The exterior easterly line of Nichols street was, therefore, the westerly boundary of the plaintiff's lot. *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51, 6 N. E. 531. Nichols street, or that part of it on which the plaintiff's premises abut, was laid out by the town in 1879. The defendant in effect concedes that, as the case was left at the close of the evidence on both sides, it would have been difficult if not impossible to determine the exact location of the easterly line of the street from the record of the lay-out. The question of the location of the east line of the street was a question of fact. Evidence of the existence of certain bounds, walls, fences and other structures and of certain statements made by a former owner was introduced by the plaintiff and taken in connection with other evidence in the case tended to show we think, if believed, that the line was where the plaintiff claimed that it was, and that the excavation was on his premises. Contradictory evidence was introduced by the defendant but the weight to be given to and the inferences to be drawn from the evidence were plainly for the jury. We do not see how it could be ruled as matter of law that there was no evidence warranting them in finding that the line was where the plaintiff claimed that it was, or that the defendant had not trespassed upon the premises described in the amended declaration. The case should have been submitted to the jury under suitable instructions.

Exceptions sustained.

(196 Mass. 458)

NATIONAL FERTILIZER CO. v. FALL RIVER FIVE CENTS SAVINGS BANK et al.

(Supreme Judicial Court of Massachusetts.
Hampshire. Nov. 26, 1907.)

CORPORATIONS — FOREIGN CORPORATIONS — NONCOMPLIANCE WITH STATUTES — "MAIN-TAIN."

Under St. 1903, p. 444, c. 437, § 60, providing that "no action shall be maintained" by a foreign corporation so long as it fails to comply with the law, when considered in connection

with other provisions of the act imposing penalties on officers and corporations for failing to comply with the law, and providing that a failure to comply shall not affect the validity of contracts made by such corporations, an action by a foreign corporation must be stayed during the period of its noncompliance with the law, on noncompliance being properly pleaded in abatement; the word "maintain" carrying a different meaning from "institute" or "begin," and implying that an action has been begun before it can be maintained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2542, 2544.

For other definitions, see Words and Phrases, vol. 5, pp. 4277-4281; vol. 8, p. 7712.]

Exceptions from Superior Court, Hampshire County; Frederick Lawton, Judge.

Suit by the National Fertilizer Company against the Fall River Five Cents Savings Bank and another. There was a judgment sustaining a plea in abatement, based on the ground that plaintiff, a foreign corporation, had not complied with the statute regulating foreign corporations, and plaintiff brings exceptions, alleging that the court erred in refusing to rule as a matter of law that plaintiff was entitled to maintain the action, because since the commencement thereof it had complied with the law. Sustained.

John B. O'Donnell and John C. Hammond, for plaintiff. Jackson, Slade & Burden and Irwin & Hardy, for defendants.

RUGG, J. The plaintiff is a foreign corporation. Prior to the filing of the bill of complaint in this case, which was July 30, 1906, it had several places of business in this commonwealth. The defendant pleaded in abatement that the plaintiff was a foreign corporation within the meaning of St. 1903, p. 443, c. 437, § 56; that it had a usual place of business in this state, and had not complied with sections 58 and 60 (pages 443, 444) of said chapter. On the 12th day of October, 1906, the plaintiff corporation did all acts required by the laws of this commonwealth of foreign corporations as prerequisites to the transaction of business, but had prior to that day taken no steps to comply with our laws in these respects. The single question presented is whether on this plea judgment must be entered for defendant. The laws regulating the doing of business by foreign commercial corporations in this state have contained the provision that failure to comply with their terms should not affect the validity of contracts made by or with such corporations. St. 1884, p. 359, c. 330, § 3; St. 1896, p. 166, c. 157; St. 1900, p. 209, c. 280; Rev. Laws c. 126, § 6; St. 1903, p. 444, c. 437, § 60. Under these statutes it has been held that contracts made before compliance with them by the corporation were valid, and actions upon such contracts could be maintained in our courts, the statutes being treated as merely directory. *Rogers Co. v. Simmons*, 155 Mass. 259, 29 N. E. 580; *Kelley v. Rice-Blake Lumber Co.*, 167 Mass. 28, 44 N. E. 1090; *Enter-*

prise Brewing Co. v. Grime, 173 Mass. 252, 53 N. E. 855. See, also, *Chase's Patent Elevator Co. v. Boston Towboat Co.*, 152 Mass. 428, 28 N. E. 300, 9 L. R. A. 339. In section 60 of the statute last cited (St. 1903, p. 444, c. 437) for the first time appear the words, "No action shall be maintained or recovery had in any of the courts of this commonwealth by any such foreign corporation so long as it fails to comply with the requirements of said sections," that is, those respecting the appointment of an agent and the filing of certain papers with the commissioner of corporations. It is to be noted that this language of prohibition does not attempt to indicate all the steps in a litigation, nor does it undertake to describe by a general phrase the course of an action in the courts from beginning to end. It does refer to two steps only, namely, the maintenance and the recovery. It must be assumed that both these words were intended to be given effect, and they must be construed, if reasonably possible, with reference to the shade of meaning, which each expresses. While it would be possible under certain circumstances to construe the phrase "maintenance of an action" as including all steps from the making of the writ to the recovery of final judgment, and while there are many authorities giving the word this meaning in certain connections, nevertheless in this statute the legislature used "maintenance" in contradistinction to "recovery." This being so, it would not be carrying into effect the legislative intent to give it a broader meaning and include within its scope the institution of an action. Using the words in their ordinary significance "maintain" carries a different meaning from "institute" or "begin," and implies that an action must be begun before it can be maintained. To give the words this construction harmonizes with the general intent of the statute, which is not to prohibit the doing of business by foreign corporations or avoid their contracts made before complying with the laws, but merely to suspend the privileges of our courts during the period of non-compliance. It is a temporary disability, to remove which lies within the power of the corporation at any time. It follows from its preservation of the validity of contracts of foreign corporations, notwithstanding their noncompliance with the law, that the purpose of the statute is not to hamper the doing of business within the range of their corporate powers, nor to put into the hands of those, with whom they may contract in reliance upon the contractual protection given by the statute, a weapon of substantial defense, which might in conceivable cases amount to immunity from liability; but its aim is rather to bring foreign corporations under the supervision and regulation of state officials, and to give to the public the same information respecting their financial standing, their character and management, which is required of domestic cor-

porations and also to render them amenable to ordinary legal process. *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 207, 13 L. R. A. 733; *Steel v. Webster*, 188 Mass. 478, 74 N. E. 686; *Heard v. Pictorial Press*, 182 Mass. 530, 65 N. E. 901. The ample penalties against the officers and the corporation for failure to comply with our laws (St. 1903, pp. 444, 447, 448, c. 437, §§ 60, 68, 70) and the power in equity to absolutely restrain such delinquent corporation from exercising any of its franchises or doing any business (St. 1906, p. 346, c. 372), when read in connection with the provision that the contracts it makes shall not be invalid, evince a legislative intent to directly punish offenses for violation of the statute, and not to impose upon the court any duty of wresting words from their ordinary sense in order to impose indirectly an additional penalty. The sovereignty is thus authorized to enforce the statute by appropriate proceedings, the corporation and its officers may each be punished, and the benefit of the courts is suspended. The statute does not say that an action shall not be begun, nor that the courts shall not receive or entertain it nor prohibit its maintenance forever but only until the corporation has complied with the law. The statute constitutes an inhibition upon remedies, which may be avoided at any time. Proper allowance of terms upon a plea in abatement will protect the real rights of the parties without adding the harsh penalty of entering final judgment upon a matter which does not go to the merits of the case.

It was intimated in *Friedenwald Co. v. Warren*, 194 Mass. —, 81 N. E. 207, that noncompliance with the statute could only be taken advantage of by a plea in abatement. This is almost tantamount to saying that such noncompliance is a mere temporary incapacity, capable of removal at any stage of the proceedings.

While the question now before us was expressly left undecided in *Friedenwald Co. v. Warren*, 194 Mass. —, 81 N. E. 207, it was there said that the words we are now construing imply "a temporary disability merely, like that of alien enemy at common law or any other personal disability." But the result of that case is conclusive against the claim of the defendant. If the effect of the statute is to wholly deprive the courts of power over any stage of an action, until its terms have been complied with, then the jurisdiction of the court over the subject-matter is affected. In such case, general appearance and pleading to the merits, or even express consent of parties, cannot confer jurisdiction. It becomes the duty of the court to consider the question of its own motion, even though parties have not raised nor counsel argued it. *Baldwin v. Willbraham*, 140 Mass. 459, 4 N. E. 829. *Santom v. Ballard*, 133 Mass. 464. When, therefore, the attention of the court was directed in *Friedenwald Co. v. Warren* to the plaintiff's non-

compliance with the statute, it became its duty to at once dismiss the action, if the language employed in the statute was an absolute prohibition of resort to the courts. That this court there reached the conclusion that failure to comply with the statute must be pleaded seasonably in order to avail a defendant must have been premised upon the determination that the statute was not prohibitive, but merely suspensory. The effect of the statute is, therefore, when noncompliance with its terms is seasonably and properly pleaded, to stay proceedings until the temporary disability is removed, which can be done at any time after, as well as before, resort to the courts. The great weight of authority in other jurisdictions supports the conclusion here reached. *Buffalo Zinc & Copper Co. v. Crump*, 70 Ark. 525, 534, 69 S. W. 572, 91 Am. St. Rep. 87; *Woolfort v. Dixie Cotton Oil Co.*, 77 Ark. 208, 91 S. W. 306, 113 Am. St. Rep. 139; *Sutherland Co. v. Chaney*, 72 Ark. 327, 80 S. W. 152; *Carson-Rand Co. v. Stern*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; *State v. Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N. S.) 1041; *Deere v. Wyland*, 69 Kan. 255, 261, 76 Pac. 863; *Hamilton v. Reeves*, 69 Kan. 844, 76 Pac. 418; *Ryan Livestock & Feeding Co. v. Kelly*, 71 Kan. 874, 81 Pac. 470; *Savings & Loan Society v. Harris*, 111 Cal. 133, 43 Pac. 525. There is nothing in conflict with this view in *W. A. Wood Co. v. Caldwell*, 54 Ind. 270, 23 Am. Rep. 641, or in *Security Savings, etc., Ass'n v. Elbert*, 153 Ind. 198, 54 N. E. 753. *Neuchatel Asphalte Co. v. Mayor*, 155 N. Y. 373, 49 N. E. 1043, and *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, 32 Pac. 1073, were proceedings to enforce liens, where the statement was filed before, but the petition brought after, compliance with the statute, and it was held that the proceedings might be maintained. See *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 897, 58 C. C. A. 79; *Wetzel & Tyler Ry. v. Tennis Bros. Co.*, 145 Fed. 458, 75 C. C. A. 266; *Crefeld Mills v. Goddard (C. C.)* 69 Fed. 141; *Swift v. Little*, 28 R. I. 108, 65 Atl. 615; *Hastings Industrial Co. v. Moran*, 143 Mich. 679, 107 N. W. 706. There are contrary authorities. *Thompson Co. v. Whitehead*, 185 Ill. 455, 56 N. E. 1106, 76 Am. St. Rep. 51; *United Lead Co. v. Elevator Mfg. Co.*, 222 Ill. 199, 78 N. E. 567; *Heileman Brewing Co. v. Pie-meisl*, 85 Minn. 121, 88 N. W. 441. These cases, however, construe statutes of different phraseology, and proceed upon reasoning respecting the effect of statutes as to foreign corporations, which is not in harmony with the trend of decisions in this commonwealth, as indicated in the cases cited. *Allen v. Milwaukee*, 128 Wis. 678, 106 N. W. 1099, 5 L. R. A. (N. S.) 680; *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; and *Halsey v. Jewett Dramatic Co.*, 114 App. Div. 420, 99 N. Y. Supp. 1122, deal with statutes so different from ours that, al-

though apparently contrary to this decision, they throw no light upon the question here pending. The plaintiff's fourth request for ruling should have been given.

Exceptions sustained.

(196 Mass. 554)

KELSALL v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 26, 1907.)

1. RAILROADS—CROSSING ACCIDENT—NEGLIGENCE—OMISSION OF SIGNALS.

Where there was evidence that defendant's servants neglected to give the signals required by Rev. Laws, c. 111, § 188, as the train approached the crossing at which plaintiff was injured, the jury was authorized to infer that such failure contributed to the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 978, 1142.]

2. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Rev. Laws, c. 111, § 268, provides that if a person is injured by collision at a railroad crossing, and the corporation has neglected to give signals required by section 188, which contributed to the injury, the corporation shall be liable, unless the person injured has been grossly or willfully negligent, which also contributed to the injury. *Held* that, where plaintiff was injured at a crossing by defendant's failure to give statutory signals, the burden of proof of plaintiff's negligence was on defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1117-1123.]

3. SAME—QUESTION FOR JURY.

In an action for injuries at a railroad crossing through the railroad company's failure to give signals required by Rev. Laws, c. 111, § 188, evidence *held* to require submission to the jury of the question whether plaintiff was chargeable with such gross or willful negligence contributing to the injury as would preclude a recovery, as provided by section 268, under the rule that, where the facts alleged to constitute negligence are proved by evidence, important parts of which may be believed or disbelieved, or where they depend in part on inferences of fact to be drawn from other facts, the entire question is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1168-1189.]

Exceptions from Superior Court, Bristol County; Lloyd E. White, Judge.

Action by Walter Kelsall against the New York, New Haven & Hartford Railroad Company. Plaintiff recovered a verdict for \$1,500, and defendant brings exceptions. Overruled.

John W. Cummings and Jas. T. Cummings, for plaintiff. Frederick S. Hall and Charles C. Hagerty, for defendant.

KNOWLTON, C. J. The exception in this case was to the refusal of the judge to direct a verdict for the defendant. The action is to recover for personal injuries received from a collision of the plaintiff's wagon with an engine drawing a passenger train on the defendant's road, at a crossing of a highway in Fall River.

There was testimony from which the jury might find that the defendant's servants neg-

lected to give the signals required by the statute to be given at railroad crossings. Rev. Laws, c. 111, § 188. If there was neglect in this particular, the jury might infer that it contributed to the injury. *Doyle v. Boston & Albany Railroad Co.*, 145 Mass. 386, 14 N. E. 461.

According to the defendant's contention, it should have been ruled upon the evidence as matter of law, that even if there was a failure to give the required statutory signals, the plaintiff was guilty of gross negligence in attempting to cross the tracks as he did. Under Rev. Laws, c. 111, § 268, which is the section on which the plaintiff relied in presenting his case to the jury, the burden is upon the defendant to prove this proposition, if he would defeat a claim founded upon a failure to ring the bell or blow the whistle at a crossing of a highway.

In the present case there was evidence which well would have warranted the jury in finding the plaintiff guilty of gross negligence, and if the burden had been upon the plaintiff to prove that he was not grossly negligent, perhaps the court might have held that there was not sufficient evidence to justify a finding in his favor. However, we need not consider the question thus raised, for when a party has the burden of establishing a proposition by oral testimony, a court can seldom rule as a matter of law that the proposition is proved. What facts have been established by evidence is ordinarily a question for a jury. Whether certain facts in one's conduct, without inferences from them, constitute negligence, is sometimes a question of law for the court. But where such facts are being proved by evidence, important parts of which may be believed or disbelieved, or where they depend in part upon inferences of fact to be drawn from other facts, they are all for the jury. The difference between cases brought under this section of the statute and those where the question is whether a party who has the burden of proving a proposition has introduced any evidence to warrant an affirmative finding in his favor, was considered in *Brusseau v. New York, New Haven & Hartford R. R. Co.*, 187 Mass. 84, 72 N. E. 348, and *Kenny v. Boston & Maine Railroad*, 188 Mass. 127, 74 N. E. 309. In some cases under this statute, in which it was held that the question was rightly submitted to a jury, the distinction was not referred to in the opinion. *Sullivan v. New York, New Haven & Hartford R. R. Co.*, 154 Mass. 524, 28 N. E. 911; *Doyle v. Boston & Albany R. R. Co.*, 145 Mass. 386, 14 N. E. 461. The case of *Debbins v. Old Colony R. R. Co.*, 154 Mass. 502, 28 N. E. 274, was decided by a divided court, and in the opinion it was left undetermined whether the statute now before us (Pub. St. 1882, c. 112, § 213) applied to the case. It was held that, if it did, the plaintiff was guilty of gross or willful negligence, and this decision was put upon the ground

that there were conceded facts which constituted, in substance, the plaintiff's whole case, and which enabled the court to come to its conclusion as matter of law. In *Manley v. Boston & Maine R. R.*, 159 Mass. 493-497, 34 N. E. 951, this case is referred to as one that was decided upon "undisputed facts." In like manner in *Emery v. Boston & Maine R. R.*, 173 Mass. 136, 53 N. E. 278, the decision is put almost altogether upon established facts, and it appears by the papers on which the case was submitted that nearly all the material facts bearing upon the question of the plaintiff's care are introduced in the bill of exceptions by the words, "by uncontradicted evidence, or by agreement, it appeared that."

In the present case, while a few facts as to the location and other incidental matters are agreed, the conduct of the plaintiff and of the defendant's servants and all the occurrences at and immediately before the time of the accident appear only in the testimony of witnesses, some of whom are contradicted, and most of whom testify in such a way as to leave questions in regard to their credibility for the jury. The testimony also opens a door for inferences of fact in determining some of the material questions. It is far from presenting to the court the naked question of law, whether certain agreed or undisputed facts in the case establish gross or willful negligence on the part of the plaintiff.

Exceptions overruled.

(196 Mass. 471)

DUMPHY v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 26, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff, an experienced brakeman, with knowledge that a freight train had come gradually to a stop on a slightly rising grade, and had not yet run back to take up the slack, without notice to the conductor or engineer, went between two cars to uncouple them, and, while taking care that his body should not be caught between the deadwoods, reached his hands between them to lift the pin, and while there the slack came back and his arm was crushed. *Held*, that plaintiff had no right to expect that the engineer would hold the train, so as to obviate danger from the slack until plaintiff should signal him to the contrary, and that plaintiff was negligent as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 751-756.]

2. SAME—SAFETY APPLIANCE ACT.

Where a brakeman, with knowledge that an automatic coupler on a foreign car was so defective that it could not be operated without going between the cars, negligently placed his arm between the deadwoods before the slack of the train had run out, and his arm was caught and crushed, his negligence in continuing to work after he knew of the defective coupler and in failing to guard against a known danger was the proximate cause of his injury, so that he could not recover under Rev. Laws, c. 111, §§ 203, 209 (St. 1906, pp. 558, 559, c. 463, pt. 2, §§ 161, 167), prohibiting railroad companies from hauling cars not equipped with automatic

couplers which could be operated without going between the cars, and declaring that an employé injured by a car used contrary to such provision should not be considered to have assumed the risk, though he continued to work with knowledge of the unlawful use of such cars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 795-800.]

3. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE.

The admission of a railroad rule in an action for injuries to a brakeman was not prejudicial to him, where the final ruling must have been against him if the rule had not been admitted in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4035, 4036, 4133-4160.]

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Action by William Dumphy against the New York, New Haven & Hartford Railroad Company. The court ordered a verdict in favor of defendant, and plaintiff brings exceptions. Overruled.

Marvin M. Taylor, for plaintiff. John L. Hall, for defendant.

SHELDON, J. If we assume that there was evidence on which the jury might have found that the defendant was itself negligent, or that there was negligence on the part of its servants for which the defendant might itself have been held liable either at common law or under our statutes, we are yet of opinion that the judge at the trial acted rightly in ordering a verdict for the defendant. The plaintiff was an experienced man. He knew that the train had come gradually to a stop upon a slightly rising grade; he knew that the drawbars which connected the cars were equipped with recoil springs, and that upon every stop there must be more or less movement of each car forward or back, amounting to some eight or ten inches, this movement being known as slack. Knowing also that this slack had not yet run back, that it naturally would tend to run back, and that under the circumstances of the gradual stop which had been made the effect of the slack running back would be to bring the deadwoods of the cars forcibly together, he went between the cars for the purpose of separating them by pulling out the block or pin in the drawbar; the slack came back, and his arm, which was between the deadwoods, was caught and crushed, causing the injury complained of. He gave no notice either to the conductor or the engineer of the train before going between the cars; and although he seems to have appreciated the danger of getting caught between the deadwoods upon the slack's running out, he took no other precaution than to see that his body did not get between the deadwoods, but did allow his arm to get into that position. He knew and appreciated the danger, and did not guard against it; and the very injury against which he failed to guard happened to his arm. Nor can his contention that he had a right to ex-

pect the engineer to hold the train so as to obviate any danger from the slack until the plaintiff should himself give a signal to the contrary, be sustained on the evidence. Under these circumstances, it is impossible to say that he was in the exercise of due care, even if he did not assume the risk of the accident which happened. *Ellsbury v. New York, New Haven & Hartford R. R.*, 172 Mass. 130, 51 N. E. 415, 70 Am. St. Rep. 248.

But the plaintiff's counsel claims that these circumstances are not conclusive against his right to recover, because it is provided in our statute that "a railroad corporation in moving traffic between points in this Commonwealth shall not haul or permit to be hauled or used on its lines any car which is not equipped with couplers coupling automatically by impact, and which can be uncoupled in some other way than by men going between the ends of the cars," and that "an employé of a railroad corporation who is injured by any locomotive, car or train which is used contrary to the provisions" of the foregoing and other sections "shall not be considered to have assumed the risk of such injury, although he continues in the employment of such corporation after the unlawful use of such locomotive, car or train has been brought to his knowledge." Rev. Laws, c. 111, §§ 203, 209, now contained in St. 1906, pp. 558, 559, c. 463, pt. 2, §§ 161, 167. But if we assume that these cars, which were being switched to different places in and about the defendant's yard for the purpose of delivery to their different consignees, were being used in moving traffic between points in this Commonwealth within the meaning of the statute (see *Taylor v. Boston & Maine R. R.*, 188 Mass. 390, 74 N. E. 591), yet this car appears to have been equipped as required by the statute, but either the lever by means of which the coupler was intended to be lifted without a necessity of going between the cars or the bracket upon which this lever moved was found to be broken or so unfastened or loosened as not to work properly. The car was either a "Central New Jersey" or a "New York & Lake Erie" car, and had brought Coal through from another state. When or how the lever or bracket had been broken or injured did not at all appear. The defendant was not shown to have been at fault in receiving the car, or in starting to deliver it to its consignee. It is at least difficult to say that the case came within the statutes cited. If it did so come, yet the plaintiff's injury appears to have been due to his own lack of care after he had seen the exact situation; and we need not consider how far the jury might have gone in finding such negligence of the defendant's servants as would have made it responsible. The plaintiff's negligence was not merely in continuing work upon this car after he had learned of the broken and defective condition of its uncoupling apparatus; it was in his failure to guard against the known danger while he was so

at work. *Hissong v. Richmond & Danville R. R.*, 91 Ala. 514, 8 South. 776; *Louisville & Nashville R. R. v. Orr*, 91 Ala. 548, 8 South. 360.

We need not consider the plaintiff's exception to the admission of rule No. 1029, one of the rules for passenger brakemen. The final ruling of the court must have been the same if this rule had not been put in evidence; and accordingly the plaintiff was not aggrieved by its admission. *Gleason v. Worcester Consolidated St. Ry.*, 184 Mass. 290, 293, 68 N. E. 225.

Exceptions overruled.

(196 Mass. 463)

KUPIEC v. WARREN, B. & S. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.

Worcester. Nov. 27, 1907.)

1. STREET RAILROADS—INJURIES TO PERSONS NEAR TRACK—RATE OF SPEED.

A speed of eight or ten miles an hour by an electric car in the country between two villages late at night is not excessive, where the track is on the side of the road and it does not appear that there was any travel at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 200.]

2. SAME—SUFFICIENCY OF EVIDENCE.

Evidence in an action for injuries sustained in being run against by an electric car *held* not to show that the motorman's failure to detect plaintiff's prostrate form was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 244.]

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Peter Kupiec against the Warren, Brookfield & Spencer Street Railway Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Richard J. Talbot and Fred P. Squier, for plaintiff. Charles H. Sibley, for defendant.

RUGG, J. This is an action of tort, in which the plaintiff seeks damages for an injury received by him by being run into by a car of the defendant. The plaintiff testified, in substance, that he "started from the village of West Warren at 10 o'clock in the evening to walk to his boarding house, which was about 15 minutes' walk; that after having walked about 5 minutes he was pushed and struck by two men, and afterward became unconscious; that the next thing he remembered was thinking to get up and hearing the noise of the car, and when he opened his eyes he saw the car coming. It was then about 100 feet away from him, and not more than 15 seconds elapsed before he was struck. He did not get out of the way because he could not help himself, and the car was running too fast; that he was trying to get up, started with his right hand to get up, and just as soon as he tried to get up his finger was caught and his foot was caught by the car; that it was 300 feet from where he was lying to a curve in the track. When

he recovered consciousness, and before the car struck him, he was lying between the fence and the rail nearest the fence, about 8 feet from the rail; that when he was trying to get up he held his finger on the rail, and his right leg was over it." There was other evidence tending to show that there was a street light on the other side of the road distant from the street railway track 36 feet and 6 inches to the inner rail, and 67 feet and 8 inches from the place where the plaintiff was injured; that the car was going 8 or 10 miles an hour; that there was a light fog, which made the rail damp and slippery; that the brakes were working, and the car was stopped about 50 feet from where it struck.

This is a close question upon the negligence of the defendant's motorman. The speed was not excessive for a car in the country between two villages late at night, where the track was upon the side of the road, and where there was no travel at the time. On the plaintiff's own story, until he heard the car he was lying 3 feet outside the rail, not upon the road-side, but next to the fence. If we assume that the car was going 10 miles an hour, it would cover the distance of 300 feet between the curve and the point where the plaintiff was lying in a trifle less than 21 seconds' time. If the plaintiff's estimate be correct of the distance of the car away from him at the time he first began to move and observe the car, namely, 100 feet, it would cover that distance in a trifle less than 7 seconds. Under the conditions of darkness and lateness at night, the attention of the motorman would much more naturally be directed toward the track a longer distance in front of him, and toward the road where travel might have been expected, rather than toward the fence side on the ground where nobody would be ordinarily. Under all these circumstances we are of opinion that the failure of the defendant's motorman to detect the prostrate form of the plaintiff cannot be said to have been negligent.

Exceptions overruled.

Report from Superior Court, Bristol County; Wm. F. Dana, Judge.

Action by Patrick O'Brien against the Hargraves Mills. A verdict was directed for defendant in the superior court, and the case was reported to the Supreme Judicial Court. Judgment on verdict.

Hugo A. Dubuque, for plaintiff. Richard P. Borden and Philip E. Tripp, for defendant.

SHELDON, J. The plaintiff testified in substance that he was told by Moran, the second hand, to get a ladder and a piece of string and tie a belt which had come off the pulleys and was lying on the shafting; that Moran placed the ladder against the driving shaft and went away while the plaintiff was getting the string; that the plaintiff on his return went up the ladder, the shaft being still in motion, until he was within two or three steps from the top, picked up the bottom of the belt, reaching over the shaft to do so, and got hold of the top to tie it, when the bottom of the belt at once lapped or doubled around the revolving shaft, and his arm was drawn in between the belt and the shaft and torn off at the elbow. He said that he had had no experience about tying belts, never had seen them tied, and knew nothing of the danger involved in attempting to tie them; that when he had been appointed third hand about a week before the accident, he told the defendant's overseer that he knew nothing about that work, but that the overseer told him to take it, saying, "We will push you through," meaning that the overseer and Moran would teach him how to fix speeders and put on belts. He testified also that Moran had called his attention to the method of repairing speeders and to the danger in putting on belts, but never had spoken to him about the danger of tying belts or the way to tie them; that Moran gave him no instructions or warning on this occasion, and that he asked for none because he relied on Moran and supposed there was no danger. He claims that the risk of the accident which happened to him was not an obvious one, that in fact he knew nothing of it, and that he should have been told of the proper method of tying the belt and warned of the danger which would exist if any other than the proper method was adopted. But on cross-examination it appeared that he was well aware of the danger of going near a moving shaft, that anything near it would be caught and drawn in and wound around it by the belt, and that this was one of the things to which Moran had referred when he warned the plaintiff of the danger in putting on belts; and he finally admitted, though apparently with reluctance, that the overseer had told him, at the time of appointing him to be third hand, if there was anything wrong and he did not know anything about it to go and tell the second hand, who would fix it for him or show him; and that when he

(196 Mass. 559)

O'BRIEN v. HARGRAVES MILLS.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 26, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT —CONTRIBUTORY NEGLIGENCE.

Where plaintiff, on being appointed third hand in defendant's mill, was directed to ask his superior concerning anything he did not know about, and with knowledge of the general danger of getting his arm caught in attempting to tie a belt while the shaft was in motion, but ignorant of the proper method to be adopted, attempted to perform the work in an improper method without asking the advice of his superior, and was injured, he did not exercise ordinary care, and could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 723-742.]

undertook to tie this belt he did not know where to tie it, but did know that the overseer had told him to ask Moran if there was anything he did not know about, and that he did not ask Moran on this occasion because he thought that if there was any danger Moran would tell him. It also appeared on the cross-examination of an expert called by the plaintiff that there would have been no danger in tying the belt by first attaching the top of the belt to the ceiling or by stopping before getting to the top of the ladder, reaching under the shaft, and taking hold of both parts of the belt and pulling them out so as to tie the string around them.

On this state of facts it is impossible to say that the plaintiff was in the exercise of proper care in doing as he did. He understood and appreciated the danger of getting caught between the belt and the shaft; although he did not perhaps fully appreciate the peculiar risks of getting so caught in attempting to tie the belt while the shaft was in motion, he yet understood fully the general danger, and he was ignorant and was aware that he was ignorant of the right method to be adopted. He had been expressly instructed under such circumstances to go to the second hand for information. Instead of following this instruction he chose to take it for granted that he needed no advice but could safely go about the work in his own way, on the ground that though his instructions were to apply for information, Moran would have volunteered it if it had been needed. Apparently he availed himself of Moran's temporary absence to act upon his own initiative, in direct violation of the instructions which he had received. Under such circumstances he cannot hold his employer for the injury which has resulted; and it is unnecessary to consider whether there were any such peculiar dangers attending the job of tying this belt as, if these instructions had not been given to the plaintiff, would have made it the duty of the defendant to see that special instructions and warnings should be given to him. *Lennon v. Goodrich*, 192 Mass. 293, 294, 78 N. E. 421; *Daniels v. New England Cotton Yarn Co.*, 188 Mass. 260, 74 N. E. 332; *Brundige v. Dodge Mfg. Co.*, 183 Mass. 100, 66 N. E. 604; *Gaudet v. Stansfield*, 182 Mass. 451, 65 N. E. 850; *Silvia v. Sagamore Mfg. Co.*, 177 Mass. 476, 59 N. E. 73; *Stuart v. West End St. Ry.*, 163 Mass. 391, 393, 40 N. E. 180; *Roonney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 160, 36 N. E. 789.

Judgment for the defendant.

(196 Mass. 539)

ROBERTSON v. COUGHLIN, Mayor, et al.
(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 26, 1907.)

1. OFFICERS—REMOVAL—CIVIL SERVICE STATUTES.

St. 1904, p. 266, c. 314, which protects persons holding office in the classified service of the

commonwealth or in any municipality thereof from arbitrary removal during their term, does not apply to an officer whose term of office has expired.

2. MUNICIPAL CORPORATIONS—DELEGATION OF POWER TO APPOINT OFFICERS—AUTHORITY TO DETERMINE TENURE.

The delegation of power to appoint a subordinate officer whose term is not fixed confers on the appointing power authority to determine its tenure.

3. SAME—ORDINANCES CREATING OFFICES—TERM OF OFFICE.

A municipal ordinance, providing that officers of the water board shall be a clerk, chosen by the board, who shall hold office during its pleasure, adopted in 1874, and retained without material change in successive revisions of the ordinances, empowers the board to fix the term of office of the clerk for the year, during which time, under the statute, there would be no change in the membership of the board, and as to a clerk who has held office for 28 years under annual appointments the ordinance must be construed as expressly authorizing the appointment for fixed terms, not exceeding a year, as the board might prescribe.

Report from Supreme Judicial Court, Bristol County.

Petition for mandamus by William W. Robertson against John T. Coughlin, mayor of the city of Fall River, and others, to compel the reinstatement of petitioner as clerk of the water board of the city. Dismissed.

James M. Swift, George Grime, and John A. Kerns, for petitioner. Hugo A. Dubuque, for respondents.

KNOWLTON, C. J. For 28 years the petitioner has served as clerk of the Watuppa water board of Fall River, to which office he was annually elected by the members of the board during all this period. At the last annual organization of the board he was not elected, but the respondent Kirby was chosen in his place. He brings this petition for a writ of mandamus to compel the board to recognize him as its clerk, instead of Kirby, on the ground that he held an office for a term extending indefinitely into the future, from which he could not be removed, except for cause, upon a hearing. He relies upon St. 1904, p. 266, c. 314, which protects persons holding office or employment in the classified public service of the commonwealth, or in any city, county or town thereof, from arbitrary removal during their term.

But this statute applies only to a removal during the term of the office or appointment, and does not apply to an officer whose term of office has expired. *Smith v. Mayor of Haverhill*, 187 Mass. 323, 72 N. E. 988; *Lahar v. Eldridge*, 190 Mass. 504, 77 N. E. 635. The respondents contend that the petitioner's term of office expired on the election and qualification of his successor, and that therefore he was not removed from his office. This contention rests upon a construction of the ordinance of the city relative to the water board, taken in connection with the action of the board and of the petitioner under it.

This ordinance was ordained in 1874 under St. 1871, p. 511, c. 133, § 7, and it has been reordained without material change in successive revisions of the city ordinances. In the latest revision sections 4 and 5 of chapter 46 are as follows:

"Sec. 4. The officers of the board shall be president and a clerk who shall be chosen by the members thereof by ballot. The clerk shall not be a member of the board.

"Sec. 5. A superintendent may be appointed by the board, who with the clerk thereof and all such subordinate officers, agents and assistants as may be found necessary, and whom said board is hereby authorized to appoint, shall hold their respective offices or situations during its pleasure, shall perform such duties, respectively, as the board shall assign, and receive such compensation as the board, in absence of any order of the city council in relation thereto, shall determine."

Under chapter 1, § 2, of the Revised Ordinances of 1904, these sections are to be treated as a continuation of the original ordinance.

The petitioner contends that under this ordinance the board could not manifest their pleasure effectively as to the length of his term of office by determining that it should be for one year, and he insists that all the time since his first election, he has been holding an office for life, from which, under the present statute, he could not be removed except for cause and after a hearing.

This ordinance must be construed in reference to the time when it was ordained. This was in 1874, 10 years before the enactment of the earliest statute in Massachusetts for the improvement of the civil service. The ordinance leaves to the water board the determination in part of what subordinate officers, agents and assistants shall be appointed, and provides specially for a superintendent and clerk. By section 6 the clerk is made the water registrar. Inasmuch as there was at that time no law to control the manifestation of the pleasure of the board under this ordinance, if the contention of the petitioner is correct that it was not in the power of the board to prescribe the term for any one of these officers, agents or assistants, and if each one must be appointed for an entirely indefinite time, it would follow that no one of them could be appointed or employed with any certainty of retaining his place for a single week. Upon the petitioner's construction of the ordinance, it was impossible for the board to declare its pleasure in advance by making an appointment or contract with any one of these persons which should limit the arbitrary exercise of their volition for a single day in the future, if at any time they chose to remove him. It is hardly possible that the city council, in framing the ordinance, should have had such a purpose. It would greatly limit the efficiency of the board in their efforts to pro-

cure competent and trustworthy subordinates, if the board was forbidden to give them an assurance of any degree of permanence in the places to which they were appointed. A far more reasonable construction of the ordinance is that the board might indicate their pleasure and exercise their power in any reasonable way, and might determine in advance, if they chose, that the term of office or employment for a particular service, should be a year, or some shorter stated time, if the duties of the office were properly performed. In such a case, under the ordinance, they could exercise their power to terminate the relation for a good cause. *Freeman v. Bourne*, 170 Mass. 289, 49 N. E. 435, 39 L. R. A. 510; *Knowles v. Boston*, 12 Gray, 339. It has been held that the delegation of power to appoint a subordinate officer, if the length of his term is not fixed, confers upon the appointing power authority to determine its duration. 23 Am. & Eng. Enc. of Law (2d Ed.) 405; *State v. Williford*, 104 Tenn. 695, 58 S. W. 295; *State v. Manlove*, 33 Tex. 798; *Williams v. Newport*, 12 Bush (Ky.) 438; and *Ex parte Hennen*, 13 Pet. 230, 10 L. Ed. 138. See *Lahar v. Eldridge*, 190 Mass. 504-506, 77 N. E. 635. Of course the board would be obliged to act reasonably in fixing a term of office or employment. Probably, in endeavoring to procure proper incumbents for these places, they could prescribe terms extending for a reasonable time into the future. Certainly they could make a term extend through a year, during which time, under the statute, there would be no change in the membership of the board.

This construction of the ordinance is the only one, under the statutes then existing, that would give a subordinate officer or employé tenure for a single day after the board should choose to declare their pleasure to dismiss him immediately. It accomplishes a part of the purpose of the Legislature manifested in the enactment of St. 1904, p. 266, c. 314, upon which the petitioner founds his claim. If this last statute had been in effect when the ordinance was first ordained, there would be more ground for the petitioner's argument.

In accordance with this construction of the ordinance the petitioner was elected for 28 years in succession, only for terms of 1 year each, and he annually took the oath of office as for a new term. In the performance of his official duty he made a record of each of these successive elections. He now takes an extreme position inconsistent with his former conduct, when he contends that he has been holding office all the time under his first election, and that the subsequent elections and qualifications by oath were contrary to the statute and ordinance. This long continued action of the board with his acquiescence indicates a fixing of the term of office of the clerk at 1 year in the beginning and for the purposes of this case the

ordinance must be construed as if it expressly authorized the election and appointment of subordinate officers and agents for such reasonable fixed terms not exceeding a year, as the board should prescribe.

The petitioner's term of office expired with the election of his successor, and the statute upon which he relies is inapplicable.

Petition dismissed.

(196 Mass. 478)

KEITH v. WORCESTER & B. V. ST. RY. CO.

SAME v. INHABITANTS OF MILLBURY.
(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 27, 1907.)

1. MUNICIPAL CORPORATIONS—STREETS—OBSTRUCTIONS—INJURIES—DUE CARE.

Where a woman hurried from a store in the daytime with her husband to take an electric car, when she tripped and fell over street railroad rails left in the street, such obstructions being temporary and such as were not ordinarily encountered on a street, she was not chargeable with negligence as a matter of law in failing to discover them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1754-1756.]

2. SAME—CROSSING STREET—SIDEWALKS.

A pedestrian is entitled to cross a street on any part thereof, and is not confined to the use of crosswalks.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1679.]

3. NEGLIGENCE—STANDARD OF CARE—DEFECTIVE VISION.

The standard of care required of a person of defective vision is the same as that required of a person in full possession of his faculties, though the afflicted person is required to put forth greater effort to attain that standard of care which the law requires of the ordinarily prudent and cautious person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 117.]

Exceptions from Superior Court, Worcester County; William Cushing Walt, Judge.

Two actions by E. B. Keith, revived after her death in the name of Collins A. Keith, her administrator, against the Worcester & Blackstone Valley Street Railway Company and against the inhabitants of Millbury. A verdict was rendered in favor of plaintiff, and defendants bring exceptions. Overruled.

The actions were for injuries to the original plaintiff in her lifetime, sustained by her in falling over certain rails left in the street by the railroad company, as plaintiff was hurrying from the store to take a street car.

John Alden Thayer and Charles B. Perry, for plaintiff. E. H. Vaughan, Thomas H. Sullivan, and Jay Clark, Jr., for defendants.

RUGG, J. The evidence of due care on the part of the plaintiff's intestate is inconsiderable, but not so slight as to warrant the court in pronouncing it insufficient as matter of law. Although the accident occurred in daylight and the obstruction could have been seen, if the traveler had looked, such

circumstances are not necessarily decisive. *Fuller v. Hyde Park*, 162 Mass. 51, 37 N. E. 782. Her husband had run out of a store in the effort to stop an electric car, which both, together with a companion, desired to board, and were hastening to reach. These occurrences may have diverted her attention from the surface of the street. The obstructions were temporary in character and not a part of the permanent constructions within the street, as in *Raymond v. Lowell*, 6 Cush. 524, 53 Am. Dec. 57, and they were not such as one ordinarily encounters in traveling upon a public way. *Woods v. Boston*, 121 Mass. 337; *Flynn v. Watertown*, 173 Mass. 108, 53 N. E. 147; *Slee v. Lawrence*, 162 Mass. 405, 38 N. E. 708; *Lamb v. Worcester*, 177 Mass. 82, 58 N. E. 474. If she was going from the sidewalk to the crosswalk, there was reason for her to expect an unobstructed pathway, while if she was about to step upon that part of the street wrought and used particularly for carriages, this fact does not preclude recovery, as she had a right to travel anywhere upon the street. Pedestrians are not confined in their rights to specially prepared crosswalks. While sometimes failure to see and avoid a danger in the street may occur under such circumstances as inevitably to indicate a failure to exercise reasonable prudence to protect one's self from peril (*Gillman v. Deerfield*, 15 Gray, 577; *Wilson v. Charlestown*, 8 Allen, 137, 85 Am. Dec. 693; *Raymond v. Lowell*, 6 Cush. 524, 53 Am. Dec. 57) ordinarily there are present such diverting incidents as to make it a question of fact.

The defendant asked the court to rule that if the person injured "had defective eyesight, she should take greater care in walking the street than one of good sight, and if she failed to use this greater degree of care the verdict must be for the defendant." This request was properly refused, for the reason that it directed a verdict upon a single phase of the testimony, which was not necessarily decisive. In this respect the prayer differs vitally from the one which *Winn v. Lowell*, 1 Allen, 177, held should have been given. We see no reason for modifying the decision in *Winn v. Lowell*, nor is it inconsistent with subsequent cases. The standard of care established by the law is what the ordinarily prudent and cautious person in the full possession and exercise of his faculties would do to protect himself under given conditions. There is no higher or different standard for one who is aged, feeble, blind, halt, deaf or otherwise impaired in capacity, than for one young and in perfect mental and physical condition. The standard is the same for all. It has frequently, in recent as well as earlier, cases been said, in referring to one under some impediment, that greater caution or increased circumspection may be required in view of these adverse conditions. See, for example, *Winn v. Lowell*, 1 Allen, 177; *Hilborn*

v. Boston & Northern St. Ry., 191 Mass. 14, 77 N. E. 646; Vecchioni v. N. Y. Central & Hudson River R. R. Co., 191 Mass. 9, 77 N. E. 306; Hawes v. Boston Elevated Ry., 192 Mass. 324, 78 N. E. 480; Hamilton v. Boston & Northern St. Ry. Co., 193 Mass. 324, 79 N. E. 734. These expressions mean nothing more than that a person so afflicted must put forth a greater degree of effort than one not acting under any disabilities in order to attain that standard of care, which the law has established for everybody. When looked at from one standpoint, it is incorrect to say that a blind person must exercise a higher degree of care than one whose sight is perfect, but in another aspect, a blind person may be obliged to take precautions, practice vigilance and sharpen other senses, unnecessary for one of clear vision, in order to attain that degree of care which the law requires. It may depend in some slight degree how the description of duty begins, where the emphasis may fall at a given moment, but when the whole proposition is stated, the rights of the parties are as fully protected in the one way as in the other. It is perhaps more logical to say that the plaintiff is bound to use ordinary care, and that in passing upon what ordinary care demands, due consideration should be given to blindness or other infirmities. This was the course pursued by the Superior Court. *Neff v. Wellesley*, 148 Mass. 489, 20 N. E. 111, 2 L. R. A. 500; *Smith v. Wildes*, 143 Mass. 556, 10 N. E. 446. But it is also correct to say that in the exercise of common prudence one of defective eyesight must usually as matter of general knowledge take more care and employ keener watchfulness in walking upon the streets and avoiding obstructions than the same person with good eyesight, in order to reach the standard of excellence established by the law for all persons alike, whether they be weak or strong, sound or deficient.

Exceptions overruled in each case.

(196 Mass. 454)

BENJAMIN v. AMERICAN TELEPHONE & TELEGRAPH CO.

(Supreme Judicial Court of Massachusetts.
Berkshire. Nov. 26, 1907.)

1. VENDOR AND PURCHASER—RIGHTS OF PURCHASER—TRESPASS.

One purchasing real estate after a trespass was committed thereon cannot maintain an action therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 456; vol. 48, Trespass, § 28.]

2. SAME.

Since the action of trespass lies for any direct and wrongful invasion of the possession of another, one purchasing real estate after a telephone company had built a line thereon may, after a demand for the removal of the pole and wires, maintain trespass therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, § 456; vol. 48, Trespass, § 28.]

3. TENANCY IN COMMON — CONVEYANCES BY TENANT.

A conveyance by metes and bounds by a tenant in common of a portion of the estate, if not void, is at least voidable as against the co-tenant; and this rule applies to a conveyance by a tenant of an easement, for an easement may operate to the prejudice of the co-tenant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 27, 38, 39.]

4. SAME.

A deed of a tenant in common, which gives to a telephone company the right to construct and operate its lines over the premises, is void as against his co-tenant unless ratified by him; nor will it operate either by way of grant or estoppel as to him or his grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Tenancy in Common, §§ 27, 121.]

5. SAME.

A tenant in common conveyed to a telephone company the right to construct and operate its lines over the premises. The deed was recorded. The co-tenant executed an instrument purporting to convey like privileges, which instrument was not recorded. Thereafter the tenant and co-tenant conveyed the premises to a purchaser, who had no notice of the unrecorded instrument. *Held*, that as against the purchaser the unrecorded instrument did not operate as a conveyance of an interest in the premises.

6. SAME—RATIFICATION.

The co-tenant did not ratify the conveyance of the tenant, and the instrument was, if anything, a conveyance by the co-tenant, and was void as against the tenant.

Exceptions from Superior Court, Berkshire County; John O. Crosby, Judge.

Action by S. Ella Wilcox Benjamin against the American Telephone & Telegraph Company. There was a judgment for plaintiff, and defendant brings exceptions. Overruled.

Collins & Giddings, for plaintiff. Pingree, Dawes & Burke, for defendant.

MORTON, J. The pole and the anchor to which the guy was attached had been set in the ground and the wires had been strung before the plaintiff became the owner of the premises, and she cannot therefore maintain an action for the trespass, if any, thereby committed. But the action of trespass *quare clausum* lies for any direct and wrongful invasion of the possession of another, and the maintenance of the pole and anchor and the operation of the wires by the defendant company under the contract between it and the American Telephone & Telegraph Co. of Massachusetts after the plaintiff became the owner of the locus and after a demand had been made by her for their removal constituted or could be found to constitute, in the absence of a legal justification therefor, a direct and wrongful invasion of the plaintiff's possession, and as such to entitle her to maintain an action of trespass *quare clausum* therefor. "The gist of the action is the disturbance or violation of the plaintiff's possession." *Holmes v. Wilson et al.*, 10 A. & E. 503; *Bowyer v. Cook*, 4 M., G. & S. 236; *Russell v. Brown*, 63 Me. 203; *Ferrin v. Symonds*, 11 N. H. 365. The premises in question were conveyed to the plaintiff by Fannie M. and

H. B. Callender who formerly owned them as tenants in common. The defendant relies upon a deed from Fannie M. Callender to the American Telephone & Telegraph Company of Massachusetts of "the right to construct, operate and maintain its lines over and along the property which I own or in which I have any interest in the town of Sheffield * * * [being the premises in question], including the necessary poles and fixtures along the roads, streets, or highways adjoining the property owned by me in said town, * * * with the right to set the necessary guy and brace poles." This deed was duly executed and recorded before the conveyance to the plaintiff. There was also an instrument purporting to convey like privileges from the other tenant in common H. B. Callender. This, though under seal, was not acknowledged or recorded and the plaintiff had no notice of it as, upon evidence warranting him in so doing, the presiding justice must have found.

It is well settled that a conveyance by metes and bounds by a tenant in common of a portion of the estate, if not void, is at least voidable as against his co-tenant. *Frost v. Curtis*, 172 Mass. 401, 52 N. E. 515; *Barnes v. Boardman*, 157 Mass. 479, 32 N. E. 670. The defendant concedes and rightly that no distinction can be made between such a conveyance and the conveyance of an easement for the reason that the latter would or might operate equally to the prejudice of a co-tenant. *Palmer v. Palmer*, 150 N. Y. 139, 149, 44 N. E. 966, 55 Am. St. Rep. 653; *Crippen v. Morss*, 49 N. Y. 63; 17 Am. & Eng. Ency. of Law (2d Ed.) 684, note 9. The deed from Fannie M. Callender to the Telephone & Telegraph Company of Massachusetts was therefore void as against her co-tenant, H. B. Callender, unless affirmed or ratified by him. It could not operate either by way of grant or estoppel as against him. Though it might operate by way of estoppel as against her in favor of those claiming under her, it could not so operate as against him and those claiming under him. Conceding, as was said in effect in *Crippen v. Morss*, supra, that the plaintiff as the grantee of Fannie, might be estopped by the latter's deed to the Telephone & Telegraph Company, that deed was void as against the plaintiff as the grantee of the other co-tenant, and as against her passed no interest.

The defendant contends that the conveyance from Fannie B. Callender was ratified and affirmed by her co-tenant by the instrument which he executed to the Telephone & Telegraph Company. But there are two objections to this contention. First, the instrument was not recorded and the plaintiff had no notice of it. As against her, therefore, it did not and could not operate as a conveyance of an interest in the real estate. Secondly, the instrument from H. B. Callender did not purport to be and was not an affirmation or ratification of the conveyance by

Fannie M. Callender. It was, if anything, a conveyance by him of a right similar to that which she attempted to convey, and was void as against her just as her deed was void as against him. What the effect would have been if H. B. Callender had in fact ratified and affirmed the deed of Fannie M. Callender and the plaintiff had taken without any notice thereof, it is unnecessary now to consider.

Exceptions overruled.

(196 Mass. 449)

LEAVITT v. FIBERLOID CO.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 26, 1907.)

1. NEGLIGENCE—DANGEROUS SUBSTANCES—LIABILITY OF MANUFACTURER—EVIDENCE—SUFFICIENCY.

One who manufactured an article in the ordinary way and with all the precautions to render it as safe for use as was consistent with its nature is not liable for injuries to one who bought the article in the ordinary course of trade, merely on proof of the happening of an accident in the use; both parties being aware that they were dealing with a dangerous article.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 271.]

2. SAME—NOTICE OF CHARACTER OF DANGEROUS ARTICLE.

An obligation rests on one who delivers an article, which he knows or ought to know to be peculiarly dangerous, to give notice of its character or bear the natural consequences of his failure to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 25, 38.]

3. SALES—WARRANTIES—EVIDENCE.

Proof that an agent of a seller stated, while discussing with a buyer the defects in goods previously bought, that he would see that the stock in the future "would be all right," and "would guarantee it to be all right," authorized a finding of a continuing offer of guaranty, which would cover goods bought within a reasonable time thereafter, though no purchase was made at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1278.]

4. EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY.

A written order for and bill of parcels of goods are not a formal contract, which will merge all previous negotiations, and parol evidence of a prior warranty is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2048-2051.]

5. DAMAGES—BREACH OF CONTRACT—MEASURE OF DAMAGES.

A party breaching a contract is liable for all damages following as a natural proximate result of his conduct, or which may reasonably have been within the contemplation of the parties as a probable result of a breach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 291-305.]

6. SALES—EXPRESS WARRANTY—CONSTRUCTION.

A manufacturer of fiberloid sold the same to a buyer for further manufacture. The buyer claimed that some of the goods had ignited at a temperature common in the process of further manufacture. The agent of the manufacturer gave an express warranty against future goods catching fire under such circumstances. Held, that the express warranty was, at most, directed only against a fire being started in the buy-

er's shop from the goods in process of manufacture in the usual way, and of a conflagration in the buyer's shop and the possible destruction of the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 783-787.]

7. SAME—BREACH OF EXPRESS WARRANTY—DAMAGES.

A manufacturer warranted that goods subsequently sold to a buyer should not catch fire, as previous goods sold had done, at a temperature common in the process of further manufacture. The goods subsequently bought did so ignite and caused a loss by fire. *Held*, that the buyer was not limited to a recovery of the difference between the value of the goods delivered and those called for by the warranty, but was entitled to the damages sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1284-1301.]

8. SAME.

Where a manufacturer of fiberloid and the buyer understood that the danger of ignition of the material while being further manufactured was so great as to call for precautions against the danger of fire to the buyer's factory, the manufacturer was not liable for the destruction of the building by fire from such an accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1284-1301.]

9. SAME—IMPLIED WARRANTY.

Where there is a sale by the manufacturer of a product having a specific designation and reasonably capable of being so manufactured that it will contain no latent defect, there is an implied warranty of merchantability, except where circumstances as to inspection or otherwise are such as to indicate that the buyer relies on his own judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 747.]

10. SAME—FITNESS FOR PURPOSE INTENDED.

Where an article ordered of a manufacturer is of a general character, and is not ordered specifically for a particular purpose, there is no implied warranty that it will answer the particular uses of the buyer, though the manufacturer knew that it was intended for a particular purpose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 772-776.]

11. SAME.

Where goods sold by a manufacturer are such that they are liable to take fire when subjected to the heat usually applied in further manufacture, and are not ordinarily manufactured so as not to have that character, there is no implied warranty against inflammability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 754-761.]

12. SAME—MERCHANTABILITY—WARRANTY—COMPLIANCE.

Where goods sold by a manufacturer under a descriptive term known in the trade to a buyer for further manufacture were known to be likely to take fire under the conditions to which they would be subjected, but the goods were properly describable under the term used, and were fit for sale and some valuable use under the description, the implied warranty of merchantability was satisfied.

13. SAME.

Where goods bought from a manufacturer under a known trade designation, as ordinarily manufactured, though highly inflammable, were not commonly liable to take fire when subjected to the usual heat in further manufacture, and there was no inspection or other circumstance showing that the manufacturer and buyer dealt at arm's length, and the goods delivered were liable to take fire in the ordinary process of further manufacture and had no substantial

value for any use, there was a breach of the implied warranty of the manufacturer that the goods were merchantable for the ordinary uses to which goods of that name were put.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 803-805.]

14. SAME—BREACH OF CONTRACT—DAMAGES.

Where there is no fraud on the part of the dealer, the ordinary measure of damages for breach of warranty is the difference in value between the article bargained for and that received.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1284-1301.]

15. SAME.

Where a manufacturer delivered to a buyer an article having different qualities from that ordered, and the defect was not discovered by inspection, the buyer was justified in using the article as he would have used the article ordered, and may recover such damages as a prudent manufacturer would have apprehended would be a proximate result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1284-1301.]

16. TRIAL—EXCLUSION OF EVIDENCE—DISCRETION OF COURT.

Restricting the inquiry into a collateral matter is within the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 86, 130, 131.]

Exceptions from Superior Court, Essex County; Wm. Cushing Wait, Judge.

Action by one Leavitt against the Fiberloid Company. There was a verdict, and both parties bring exceptions. New trial granted on the question of damages.

Arthur Withington and R. E. Burke, for plaintiff. John H. Casey, N. N. Jones, and Ernest Foss, for defendant.

RUGG, J. The declaration contains two counts. The first count is in tort, and alleges that the defendant sold to the plaintiff certain comb stock known as "fiberloid," which it had negligently manufactured, whereby fire ensued while the stock was being used in the ordinary way, causing damage to the property of the plaintiff. The second count is in contract, and alleges that the plaintiff purchased of the defendant who was the manufacturer, fiberloid stock, respecting which the defendant made certain warranties, and that by reason of the stock not being as warranted it took fire, and caused the plaintiff damage.

There was evidence tending to show that the defendant manufactured a substance used for making combs, called in the trade "fiberloid," which both parties knew to be a highly inflammable material. The plaintiff was an experienced manufacturer of combs from this substance, and had bought such stock from the defendant for about three years. In January, 1905, certain stock was bought by the plaintiff of the defendant, which in manufacture worked badly, by blistering and igniting and later, but prior to March, 1905, an agent of the defendant said to the plaintiff, after the latter had made complaint of stock previously furnished, but not at the time any order for stock was given, that in the

future "the stock would be all right, he would guarantee it to be all right." On October 13, 1905, after intervening purchases, the plaintiff ordered by mail certain stock of the defendant, a sheet of which, when put in process of manufacture in the ordinary way, caught fire, and caused the damage to other property of the plaintiff. In the superior court a verdict was directed for the defendant upon the count in tort, and the case was submitted to the jury upon the count upon certain warranties, with instructions to the jury upon the count upon certain warranties, with instructions that the measure of damage was the difference in value of the goods, which the plaintiff ought to have had, and what he did in fact get, and that damage caused to other property of the plaintiff by the ignition of the sheet of fiberloid must be left out of consideration.

1. The verdict for the defendant upon the count in tort was rightly ordered. The defendant was the manufacturer of the goods sold, and they were purchased by the plaintiff in the ordinary course of trade. The order of the plaintiff was for "1 sheet No. 60 shell" fiberloid, and he testified, "I got just what I ordered." The only testimony as to the bad quality of the sheet of fiberloid was of the plaintiff that it caught fire when subjected to the usual temperature for working the material into combs. There was no evidence tending to show knowledge on the part of the defendant of an imperfection in this particular stock, or that it would catch fire at any lower temperature than that at which such material would ordinarily ignite. There was affirmative testimony to the effect that it was manufactured in the ordinary way, and that all the precautions, as to washing and otherwise, rendering it as safe for use as was consistent with its nature, were employed in the processes. Under these circumstances, the mere happening of an accident in the use of the stock is not sufficient to make out a case of negligence on the part of the defendant. *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N. E. 531; *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C. O. A. 1. Both parties were aware that they were dealing with a highly inflammable substance. The duty bore upon the plaintiff as hard as upon the defendant to act with reference to this knowledge. The case is different where the manufacturer or seller is in possession of information not known or communicated to the purchaser. An obligation rests upon the one who delivers an article, which he knows, or ought to know, to be peculiarly dangerous, to give notice of its character or bear the natural consequences of his failure to do so. *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Provost v. Cook*, 184 Mass. 315, 68 N. E. 336; *Huset v. Case Threshing Machine Co.*, 120 Fed. 865, 57 C. O. A. 237, 61 L. R. A. 303. There is lacking in the plaintiff's case the essential

element of knowledge on the part of the defendant of the particular danger of which complaint is made, or of facts from which such knowledge might fairly be inferred, and there is present the element of knowledge by the plaintiff of a hazard in the use of the goods, of the same general character as that of which he complains, namely, an inherent tendency to take fire. See *Lebourdais v. Vitriified Wheel Co.*, 194 Mass. 341, 80 N. E. 482.

2. There was sufficient evidence to support a finding that there was an express warranty by the authorized agent of the defendant. The conversation, from which this might be inferred, occurred between January 2d and March 18th. The agent of the defendant said to the plaintiff, he "would see the stock was all right, he would guarantee it would be all right." Although no purchase was made at this time, it may fairly have been contemplated by the parties that this was a continuing offer of guarantee, and that whatever goods within a reasonable time were bought by the plaintiff of the defendant upon the strength of the statement would be protected by it. The parties had been discussing some goods purchased recently before by the plaintiff from the defendant, which had caught fire or blistered. It was in view of those past events that the statement was made. Its reasonable effect was to reassure the plaintiff that in the future there would be no similar trouble. It is not necessary that the giving of the warranty should be simultaneous with the sale. It is enough if it is made under such circumstances as to warrant the inference that it enters into the contract as finally made. Nor is the fact that the alleged warranty was oral, while the order for and bill of parcels of the fiberloid, which caused the damage, were in writing, enough to exclude the conversation under the rule that a written contract cannot be varied by parol evidence. The letter and bill of parcels were not a formal contract of such dignity as necessarily to indicate that all previous negotiations were merged in them. The evidence as to the alleged guarantee was admissible. *Drew v. Wiswall*, 183 Mass. 554, 67 N. E. 666; *Morton v. Clark*, 181 Mass. 134, 63 N. E. 409; *Durkin v. Cobleigh*, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 82 Am. St. Rep. 436; *Atwater v. Clancy*, 107 Mass. 369; *Vincent v. Leland*, 100 Mass. 432; *Weston v. Boston & Maine Railroad*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330; *North Packing & Provision Co. v. Lynch*, 194 Mass. —, 81 N. E. 891; *Lloyd v. Sturgeon Falls Pulp Co.*, 85 L. T. (K. B. D.) 162; *De Lassalle v. Guilford* (1901) 2 K. B. 215; *Cowdy v. Thomas*, 36 L. T. (Ex. D.) 22; *Palmer v. Johnson*, 13 Q. B. D. 351-357; *Allen v. Pink*, 4 M. & W. 140; *Routledge v. Wothington Co.*, 119 N. Y. 592, 23 N. E. 1111; *Ferrine v. Cooley*, 89 N. J. Law, 449.

Assuming that an express warranty be found to exist, it is necessary to determine the measure of damages to which the plaintiff is entitled. Upon any breach of contract, whether of warranty or otherwise, the defendant is liable for whatever damages follow as a natural consequence and the proximate result of his conduct, or which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of a breach of it. *Goddard v. Barnard*, 16 Gray, 205; *Mowbray v. Merryweather* (1895) 2 Q. B. 640; *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478. The principle is ancient and familiar. The only difficulty lies in its application. A review of some of the cases, wherein the natural and probable consequences of certain acts have been considered, will illumine the path upon the facts now presented. In *Boston Woven Hose & Rubber Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657, 51 L. R. A. 781, 86 Am. St. Rep. 478, there was a warranty by the manufacturer that an iron boiler would bear a pressure of 100 pounds to the square inch of surface. Upon breach of this warranty the plaintiff was held entitled to recover for compensation paid by the purchaser to its employees injured through an explosion of the boiler occurring by reason of a breach of the warranty. See, also, *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Sinker v. Kiddy*, 123 Ind. 528, 24 N. E. 341. In *Manning v. Fitch*, 138 Mass. 273, upon a breach of an agreement not to foreclose a mortgage upon a farm known by the defendant to be used by the plaintiff for the purpose of producing milk, the plaintiff was permitted to recover the money value of the farm to one engaged in that special business. In *Fox v. Boston & Maine R. R.*, 148 Mass. 220, 19 N. E. 222, 1 L. R. A. 702, the plaintiff was permitted to recover as damages for breach of contract by the defendant to deliver apples to a connecting line, so that they would reach Bangor by a certain time, the loss occasioned by reason of a sudden drop in temperature. In *Whitehead & Atherton v. Ryder*, 137 Mass. 366, 31 N. E. 736, on breach of an express warranty that a machine made by an English manufacturer would be fit for peculiar work in this country, the plaintiff was permitted to recover the expenses incurred in a reasonable but unsuccessful attempt to adapt the machine to the purposes for which it was constructed. In *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193, the plaintiffs were held entitled to recover damages in view of a declared purpose on their part to use the machinery bargained for in carrying on the business of a new organization of which they were to be the members. *Derry v. Flitner*, 118 Mass. 131, held that it might be found to have been reasonably anticipated "according to common experience and the usual course of

events" that the wrongful refusal to permit vessels to moor at a place of safety might expose them to storm and cause their loss. In *Turner v. Page*, 186 Mass. 600, 72 N. E. 329, it was stated "that among the natural and probable consequences of negligently letting a pair of horses run away, it is competent to find that they will swerve to one side or the other on account of the acts of persons who try to stop them in a way which would not have been adopted by a prudent man." In *Edgar v. Joseph Breck & Sons Corp.*, 172 Mass. 581, 52 N. E. 1083, upon a breach of warranty for a sale of certain lily bulbs known as "longiflorum," the measure of damages was held to be the difference between the value of the crop which the plaintiff was able to raise from the inferior bulbs furnished and a crop of longiflorums. See *Randall v. Raper*, E. B. & E. 84-90; *O'Brien v. Worcester*, 172 Mass. 348, 52 N. E. 385, held that loss of rents and reasonable compensation for trouble and expense in respect of real estate were among the natural and proximate results of a wrongful discontinuance of a connection of the plaintiff's house with a sewer, and "such as reasonably might be supposed to have been within the contemplation of the parties if at the time of the doing of the act they had taken thought of the consequences likely to ensue." To the same point see *Allen v. Boston*, 159 Mass. 324, 34 N. E. 519, 38 Am. St. Rep. 423. In *Koplan v. Boston Gaslight Co.*, 177 Mass. 15, 58 N. E. 183, it was held that among the natural and probable consequences of suffering gas to accumulate in a chamber, to which others had access, might be found to be the ignition of the gas by natural cause or by the intervention of some person for whom the defendant was not responsible. The natural consequence of a negligent failure to deliver theatrical property for use in previously advertised exhibitions was held to be the loss of the ordinary gross earnings from such exhibitions, in *Weston v. Boston & Maine R. R.*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330. The same rule of damages was established as to delay in the delivery of samples for exhibition at a cattle show, in *Sampson v. London & Northwestern Ry.*, 1 Q. B. D. 274. In *Ingraham v. Pullman Co.*, 190 Mass. 33, 76 N. E. 237, 2 L. R. A. (N. S.) 1087, it was intimated that, if a direct result of a breach of contract to furnish a drawing room for an invalid was injury to the plaintiff's health, recovery might be had therefor. It was determined in *Bradley v. Rea*, 14 Allen, 20, that the natural and probable result of selling animals infected with an infectious disease was the spread of the infection among the other animals. To the same point see *Millet v. Mason*, L. R. 1 C. P. 559. In *Hyde v. Mechanical Refrigerating Co.*, 144 Mass. 432, 11 N. E. 673, the natural consequence of a failure to store fruit at a temperature not exceeding a certain height was held to be

the decay of fruit and consequent loss in its value. To the same point *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 173. *Stock v. Boston*, 149 Mass. 410,¹ decided that the natural result of exposing a water pipe connected with the plaintiff's greenhouse in cold weather, so that it froze, might be the destruction of the plants in the greenhouse. In *Metallic Compressing Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277, 12 Am. Rep. 689, the plaintiff was permitted to recover damages occasioned by the fire, as a natural result of the cutting of a hose through which firemen were throwing streams upon burning buildings. *Peak v. Frost*, 162 Mass. 298, 38 N. E. 518, held that, upon false representations as to a horse bought for breeding purposes, it was competent for the jury to find the expense of keeping the animal for a sufficient length of time to test his capacity to have been contemplated as a direct result of the wrong done. In *Bostock v. Nicholson* (1904) 1 K. B. 725, in a suit for sale of sulphuric acid used for food, which contained arsenic, recoupment was permitted as for a breach of warranty, not only for the value of the acid but for the value of goods rendered useless by being mixed with the poisonous acid. In *Smeed v. Ford*, 1 El. & El. 602, and *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. 88, actions for failure to deliver a threshing machine and breach of warranty of a harvester, respectively, it was held that the loss or serious injury by rain of a crop of wheat might be found to be the natural result of the breach of duty of the defendant. In *Bonadalle v. Bruxton*, 8 Term. 535, upon a breach of warranty upon the sale of a chain cable, damages were recovered not only for the loss of the chain, but also of the anchor. In *Brown v. Edgerton*, 2 Man. & Gran. 279, recovery of the value of a pipe of wine lost by the breaking of a rope warranted fit for use upon a crane was permitted. In *Dickinson v. Newcastle & Gateshead Waterworks Co.*, L. R. 6 Ex. 404, the defendant corporation was obliged by its charter to keep water at a certain pressure in its pipes upon which were fire plugs. The plaintiff suffered a loss by fire by reason of a failure of water. It was argued that the damage was too remote, but *Kelley, C. B.*, said: "What kind of damage can be a more proximate consequence of the want of water than the destruction by fire of a house which a proper supply of water would have saved?"

While none of these authorities, nor of many others to be found upon the subject, present facts exactly like the case at bar, they furnish guidance for its determination. There had been a course of dealing between the plaintiff and defendant respecting fiberloid. It had been claimed by the plaintiff that certain fiberloid which he had bought of the defendant blistered and ignited at a temperature which was common in the process of manufacturing the stock. There were both correspondence

and oral conference upon this subject. There was thus called to the attention of the defendant the specific difficulty which had caused the plaintiff trouble. Thereupon an agent of the defendant gave what might have been found to be an express warranty against the goods catching fire again under these circumstances. Goods of this sort when made in the ordinary way, might be liable to burst into flame under the heat common in their further manufacture, and yet might be merchantable and salable as fiberloid, even though possessing this characteristic. If this be so, there would be no implied warranty against such inflammability, and the plaintiff would have no remedy for ignition under an unqualified purchase in ordinary course of trade. The purpose of an express warranty may have been to secure for the plaintiff additional protection. The natural and proximate result of kindling a fire in a shop, where highly inflammable substance is in process of manufacture, might be found to be a conflagration. But at most the express warranty was directed only against fire being started in such a shop from the goods in process of manufacture in the usual way. It may be found to be a reasonable inference that, if the parties had given any consideration to the consequences likely to ensue from a breach of this warranty, they would have thought of a conflagration in the plaintiff's factory, and the possible destruction of his property. A strong argument arises from many aspects of the evidence that this was not what the parties had in mind in giving and accepting the warranty. But it cannot be said as matter of law that the opposite inference cannot possibly be drawn. It must appear that the conflagration ensued from a breach of the warranty, while the process of manufacture was being conducted in the usual way and with all the safeguards and precautions, which the use of a substance so liable to ignite from slight causes imposed upon the plaintiff, and that it did not result from any heedlessness, oversight or want of ordinary forethought on his part to guard against the ever present danger of fire. The case disclosed upon the record is close as to this point, but falls just within the domain of fact. If the burden is sustained by the plaintiff, both upon the issue that possibility of conflagration caused by the ignition of the fiberloid while being heated by the plaintiff was within the scope of the warranty, and that his injury was caused by a breach of the warranty and not by other agencies, then a case arises where the usual rule, that damages may be recovered for the difference between the value of the goods delivered and those called for by the contract, is not applicable, but where a more liberal one must prevail. *Harriott v. Plimpton*, 168 Mass. 585, 44 N. E. 902; *Merrimack Mfg. Co. v. Quintard*, 107 Mass. 127; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, 28 L. Ed. 86; *Swain v. Schieffelin*, 134 N. Y.

¹ 21 N. E. 871, 14 Am. St. Rep. 430.

471, 31 N. E. 1025, 18 L. R. A. 385; *Parks v. Morris Axe & Tool Co.*, 54 N. Y. 586; *Thoms v. Dingley*, 70 Me. 100, 35 Am. Rep. 310; *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280. But if the jury find that the danger of ignition of the fiberloid in the process of heating was understood by the parties to be so great as to call for such precautions in regard to the place and manner of heating as would make it unlikely that flame from it should be communicated to the building, and if it was expected and understood that the plaintiff would take these precautions, and he failed to do so, the defendant is not liable for the destruction of the building from this cause. In other words, the defendant would not be liable on the larger measure of damages unless the jury find that the plaintiff's building caught fire from this fiberloid while it was being made into combs in the common and ordinary way. The plaintiff's exception as to the rule of damages laid down by the superior court upon the breach of an express warranty must be sustained.

3. The case was submitted to the jury upon the allegations both of express and implied warranty. The verdict was a general one. As a new trial must be had, at which it is conceivable that the jury might find for the defendant upon the issue of express warranty, and for the plaintiff upon that of implied warranty, it is necessary to determine the rule of damages upon this aspect.

It is argued that under the circumstances disclosed there was an implied warranty on the part of the defendant that the stock purchased would prove to be reasonably safe for the uses to which it was put by the plaintiff. Where goods of a character commonly known in trade are ordered by description, and there is no inspection, there is an implied warranty that those furnished will be such as are merchantable under the descriptive term used by the parties. The purchaser is entitled to get what he ordered. *Alden v. Hart*, 161 Mass. 576, 37 N. E. 742; *Murchie v. Cornell*, 155 Mass. 60, 29 N. E. 207, 14 L. R. A. 492, 31 Am. St. Rep. 526; *Day v. Mapes-Reeve Construction Co.*, 174 Mass. 412, 54 N. E. 878; *Gossler v. Eagle Sugar Refining Co.*, 103 Mass. 331. When there is a sale by a manufacturer of a product, having a specific designation and reasonably capable of being so manufactured that it will contain no latent defect, then there is an implied warranty of merchantability, except where circumstances, as to inspection or otherwise, are such as to indicate that the buyer relies on his own judgment, and not on the skill of the manufacturer. *Cunningham v. Hall*, 4 Allen, 263, 273; *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639. But if the article ordered is of a general character, and not for a specifically indicated purpose, even though the manufacturer may know that it was intended by the purchaser to be used in the process of fur-

ther manufacture, there is no implied warranty that it shall answer the particular uses of the purchaser. *Wilson v. Lawrence*, 139 Mass. 318, 1 N. E. 278; *Whitmore v. South Boston Iron Co.*, 2 Allen, 52, 58; *De Witt v. Berry*, 134 U. S. 306, 313, 10 Sup. Ct. 536, 33 L. Ed. 896; *Seltz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837. The parties to the sale in the present case were the manufacturer of fiberloid on the one side, and the manufacturer of combs, in whose business fiberloid was a necessary factor, on the other. Use of the goods purchased in this process of secondary manufacture may have been known to and in contemplation of both parties as the purpose of the purchase. The seller may have known, and the buyer have had a right to assume, that they were designed and reasonably fit to be used by the methods and under the conditions and with the instrumentalities common in that branch of manufacture. But there is nothing to show that the particular instrumentalities or factory conditions, as to exposed flame and other appointments, of the plaintiff were in contemplation of both parties in making the sale. If the goods sold by the defendant were of such a nature that, in the ordinary course of manufacture, they were liable to burst into flame, when subjected to the heat usually applied in process of further manufacture, and were not ordinarily manufactured so as not to have this character, then, in the absence of express warranty, everybody would be presumed to contract with reference to this attribute, and there would be no implied warranty against inflammability. If, with the likelihood to burst into flame under the conditions to which the plaintiff subjected them made known, the goods would still have been properly describable in the market as fiberloid, and have been fit for sale and some valuable use under that designation, then the implied warranty of merchantability would have been satisfied. Under these circumstances they would not have been unfit for market, for sale, or for some profitable use. It was this principle which was applied in *Wilson v. Lawrence*, 139 Mass. 318, 1 N. E. 278. It would then be within the contemplation of the parties that the user of fiberloid for further manufacture would so arrange his factory that the bursting into flame of the material would cause no substantial damage. If, however, the goods as ordinarily manufactured, although highly inflammable, were not commonly liable to burst into flame when subjected to the usual heat in secondary manufacture, and there is no inspection or other circumstance showing that the parties are dealing with each other at arm's length, and the goods, possessing the characteristic of bursting into flame in the ordinary process of further manufacture, have no substantial value for any use and are not properly described in the market as fiberloid,

then there is a breach of the implied warranty of the vendor, when he is the manufacturer, that the goods are merchantable or fit for the ordinary uses to which goods of that name are put. Perhaps a more exact statement is that the seller has failed to perform his contract, by not delivering the thing, which he contracted to deliver, but by delivering a different thing. When such a situation exists, then the parties may be found to have contracted with reference to the possible results of such a breach of the contract. When there is no fraud or deceit, the ordinary rule of damages is that the plaintiff is entitled to recover the difference in value between the article which he bargained for and that which he received. *Bartlett v. Blanchard*, 13 Gray, 429; *Wiley v. Athol*, 150 Mass. 426, 23 N. E. 811, 6 L. R. A. 342. But it may be found that the delivery of an article, having different qualities from that ordered, not discoverable by inspection, reasonably justified the plaintiff in using it as he would have used the article ordered and that thereby injury in excess of the value of the property bought ensued as a proximate result, and that such injury ought to have been apprehended by a prudent manufacturer and seller. If this be found to be so, the vendor may be compelled to indemnify the purchaser against whatever loss might have been anticipated to arise in the ordinary course of events from a failure to supply the goods ordered. For such a breach whether it be described as of contract to deliver or of implied warranty of merchantability, the rule of damage is the same as that heretofore stated in discussing the principles applicable to a breach of an express warranty, but with the limitations and qualifications there set forth. Whatever may be said as to the weight of evidence in the case now before us, it cannot be ruled as matter of law that it is impossible for a jury to find that a natural consequence or a result, which may be found to have been within the contemplation of the parties, as likely to follow from failure to deliver such fiberoid as was ordered, was a fire in the plaintiff's factory. *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 118, 3 Sup. Ct. 537, 28 L. Ed. 86; *Carleton v. Lombard*, 149 N. Y. 137, 43 N. E. 422; *Jones v. Padgett*, 24 Q. B. D. 650; *Jones v. Just*, L. R. 3 Q. B. 197; *Shepherd v. Pybus*, 3 Man. & G. 868; *Drummond v. Van Ingen*, 12 Appeal Cases, 284.

4. Two questions of evidence have been argued. One Nims, a chemist, employed and called as a witness by the defendant, had testified that washing was an important part of the process of manufacture for the purpose of reducing acid in the stock, and not to render it less inflammable. He was thereupon asked, in cross-examination, how many men were employed in washing in the defendant's plant, the offer being made to show that in the practical working of the defendant's plant there was a great differ-

ence in the stock put out. Upon this question and offer the court ruled: "I will exclude the question and save the exception as to how many men they have at work in washing off the acid." It is to be observed that the ruling was upon the specific question as to the number of men, and not upon the broader offer of proof. The number of men employed in a particular process at the defendant's factory had no probative force upon any of the issues in dispute. Any restriction of inquiry respecting such a collateral matter was within the discretion of the trial court. The defendant argues that certain correspondence between the plaintiff and defendant covering a period of time between January 20, 1905, and March 14, 1905, should have been excluded. So far as the contents of any of these letters are material or harmful to the defendant, they bear upon the relations existing between the parties at or about the time of the alleged warranty, and were admissible as tending to throw some light upon its scope and the circumstances under which it was given.

The only error disclosed upon the record being as to the ruling respecting damages, by agreement of parties the entry must be: New trial granted upon the question of damages only.

So ordered.

(196 Mass. 551)

LABBE v. BERNARD et al

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 26, 1907.)

PRINCIPAL AND SURETY—RIGHTS OF SURETIES INTER SE—ASSIGNMENT BY PRINCIPAL TO SURETY.

Where one of the sureties on the bond of a building contractor, on the abandonment of the work by the contractor, completed the work and received the balance of the contract price, he cannot require contribution by the sureties to the expense of the work, without giving credit for the amount received by him for doing the work, though the contractor, after beginning the work and before abandoning it, borrowed money of such surety to enable him to carry on the work, and as security therefor assigned to him all claims and demands under the building contract; such surety taking the assignment with notice of the equitable rights of his co-sureties, which related back to the time of the contract of suretyship.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 605-626.]

Appeal from Superior Court, Bristol County.

Suit by Joseph A. Labbe against Isaac R. Bernard and another. From a decree sustaining a demurrer to the bill and dismissing the suit, plaintiff appeals. Affirmed.

Hugo A. Dubuque, for plaintiff. John W. Cummings and Charles R. Cummings, for defendants.

SHELDON, J. The plaintiff and the defendants were co-sureties upon a bond given by one Rodgers, for the performance of an agreement made by him to grade some land

for a third party for a fixed price. Rodgers entered upon the performance of the contract and completed a little more than one-half of the work, received a part of the agreed price, and then abandoned the contract and absconded. Thereupon the plaintiff as one of the sureties of Rodgers finished the work, at an expense of more than \$800, and either received or became entitled to receive from the third party a sum slightly above this, being the balance of the contract price over what had been paid to Rodgers. The plaintiff now seeks by his bill to compel the defendants to contribute ratably to the amount thus paid by him to complete the work called for by the contract, without giving any credit for the amount which he received for doing it.

If these were all the facts, it is sufficiently manifest that the bill could not be maintained. When the sureties should be called upon to make good the default of Rodgers and should complete the work which he ought to have done, they would become subrogated to all his rights under the contract and entitled to receive whatever part of the contract price had not been paid to him. And the plaintiff, having alone completed the work and received what remained due of the contract price, might indeed charge against his co-sureties, ratably with himself, the cost of completing the work, but he must give like credit for the amount which he received therefor. Whatever he received by reason of his suretyship, whatever security or advantage he derived from the work done in consequence of his suretyship upon this obligation, he must apply to the relief of his co-sureties as well as to his own relief. *New Bedford Institution for Savings v. Hathaway*, 134 Mass. 69, 75, 45 Am. Rep. 289; *Kelly v. Page*, 7 Gray, 213, 214; *Bachelor v. Flske*, 17 Mass. 463; *Owen v. McGehee*, 61 Ala. 440; *Stanwood v. Clappitt*, 23 Miss. 372; *Arcedeckne, In re*, 24 Ch. D. 709; *Steel v. Dixon*, 17 Ch. D. 825.

But the plaintiff's bill avers also that, after Rodgers had begun the work and before he abandoned it, he borrowed money of the plaintiff to enable him to carry it on, and as security therefor assigned to the plaintiff all his claims and demands under the contract. And the plaintiff claims that while he completed the work as a surety and so is entitled to call upon his co-sureties to share the expense thus incurred, he was entitled to the price received therefor as assignee of Rodgers, and so need not bring this into the account for the benefit of the defendants. In our opinion this contention cannot be maintained.

While it is true that the rights of the sureties to the remedies of the principal do not become complete and are incapable of present enforcement until they shall have discharged their principal's obligation, yet their right became an inchoate one as soon as they have entered into the relation of suretyship;

and their equitable assignment of their principal's rights and remedies, when completed by their performance of his obligation, relates back, as against each other and their principal, to that earlier time. *Rice v. Southgate*, 16 Gray, 142; *Lewis v. Faber*, 65 Ala. 460; *Wood v. Lake*, 62 Ala. 489; *Conner v. Howe*, 35 Minn. 518, 29 N. W. 314; *McArthur v. Martin*, 23 Minn. 74; *Forbes v. Jackson*, 19 Ch. D. 615. And all persons who have in the meantime received any such securities or payments from either party to the principal contract, with notice of the facts and of the surety's responsibilities and consequent rights, must in equity hold them for his benefit. *Norton v. Soule*, 2 Greenl. 341; *Atwood v. Vincent*, 17 Conn. 575; *Green v. Ferrie*, 1 Desaus. 164; *Drew v. Lockett*, 32 Beav. 499. The plaintiff being himself one of the sureties and having full knowledge of all the facts it is unnecessary to consider what would have been his rights if he had taken his assignment without notice of the equitable rights of his co-sureties.

Exactly the doctrine here stated was declared under a very similar state of facts by the Supreme Court of the United States in *Prairie State National Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, and by the Circuit Court of Appeals in *First National Bank v. City Trust Co.*, 114 Fed. 529, 52 C. C. A. 313, in each of which cases the contest was between the original sureties upon a building contract and a subsequent assignee from the contractor. It was enforced against the trustee in bankruptcy of the contractor in favor of his sureties on the original contract in *Reld v. Pauly*, 121 Fed. 652, 58 C. C. A. 152. The dissenting opinion of McKenna, Circuit Judge, in *First National Bank v. City Trust Co.*, ubi supra, and the decision in *Dowling v. Seattle*, 22 Wash. 592, 61 Pac. 709, which are the strongest utterances we find against the full extent of the doctrine stated, recognize the right of the sureties of the contractor, as against his assignee in such a case, to hold all the money which has been earned after they have undertaken the work which the contractor has abandoned, and accordingly do not help the plaintiff here. The cases which the plaintiff has cited in support of the well recognized doctrine that a surety who has received from the principal debtor security originally given for another debt due to himself alone, as well as to protect the principal obligation, may apply such security for his own protection wholly, are not applicable and need not be considered.

The case may be stated more succinctly, but with sufficient fullness in another way. If as the plaintiff claims in his bill he completed the work as a surety of the original contractor, he must be held to have received the compensation in the same character; if, as he has argued to us, he received the compensation as assignee of the contractor then he cannot claim against the defendants to

have done the work as a surety. In neither event has he sustained any loss to which he can require his co-sureties to contribute.

The decree of the superior court sustaining the demurrer and dismissing the bill with costs must be affirmed; and it is
So ordered.

(196 Mass. 509)

HILL v. HILL et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 27, 1907.)

1. TRUSTS—PAROL TRUSTS—REPUDIATION BY TRUSTEE—REMEDY OF BENEFICIARY.

Where a grantee, to whom realty is conveyed without consideration under a parol trust unenforceable by Rev. Laws, c. 74, § 1, cl. 4, providing that no action shall be brought on a contract for the sale of land unless the same is in writing, etc., repudiates the trust, the grantor may recover the value of the realty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 607.]

2. DIVORCE—DECREE AWARDED SUPPORT OF CHILDREN—ENFORCEMENT—"CREDITOR."

Under Rev. Laws, c. 152, §§ 10-12, 29, 31, authorizing the attachment of a husband's property on a libel by the wife for a divorce, etc., and chapter 147, § 3, providing that no trust concerning land shall prevent a "creditor" who has no notice thereof from attaching the land, a divorced wife, having no notice of a trust affecting land title to which is in her husband's name, may attach the same in proceedings to enforce a decree requiring the husband to pay for the support of a child of the parties; the word "creditor" including those who have a lien either by a legal or equitable attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 805.]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1726; vol. 8, pp. 7622, 7623.]

3. SAME—MODIFICATION OF DECREE—STATUTORY AUTHORITY.

Under Rev. Laws, c. 152, §§ 25, 29, authorizing the court, after the rendition of a decree of divorce on the petition of either parent, to revise or alter the decree, etc., a wife, obtaining a divorce decree silent as to the custody and maintenance of a child of the parties, may on her petition ask for both, and the court on her petition has power to issue process and to proceed to a decree as on a libel for divorce by her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 803.]

4. SAME—ENFORCEMENT OF DECREE FOR SUPPORT.

A divorced wife, on the husband failing to pay the sums required by decree requiring him to support a child of the parties, attached real estate standing in his name. She had no notice of a parol trust in favor of a third person. The premises were sold. *Held*, that in equity the lien of the wife attached to the proceeds, which lien was superior to the claim of a third person, not only so far as the proceeds were required to pay the costs of the wife's suit and the amount then due, but so far as it authorized the court to provide that the balance should remain in court to await the further order thereof; the court, under Rev. Laws, c. 152, §§ 25, 30, 32, having the right to retain jurisdiction and to revise and enforce its decrees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 805.]

Appeal from Superior Court, Worcester County.

Suit by Ella L. Hill against George H.

Hill, in which Sarah A. Hill filed a petition in intervention. From a decree for plaintiff, and sustaining a demurrer of plaintiff to the petition of the intervenor, she appeals. Affirmed.

George T. Dewey and Charles H. Derby, for appellant. Truman R. Hawley and Thomas A. McAvoy, for appellee Ella L. Hill.

BRALEY, J. In the original decree of divorce which had become absolute, no order for the custody and maintenance of Agnes E. Hill, a minor, and only child born of the marriage, having been made, the former wife, and libellee, brought a petition in which George H. Hill, her former husband, was made respondent, praying for the custody of their daughter, with an order for her maintenance, and that a special precept might issue directing the attachment of his property to secure the payment of any sum which might be awarded. By a decree upon this petition the child was placed in the custody of her guardian, with an order for an annual fixed sum for her support, payable quarterly, and the prayer for process having been granted, an attachment was duly made of his real estate. The payments not having been made, a second petition was brought asking that a sale of the attached property might be ordered to satisfy the arrears. This petition also was granted, and under the decree a sale took place with the payment of the net proceeds into court to await its further order. A period of some four months elapsed when the third and final petition was brought, which after reciting the previous petitions and decrees, alleged that, no payments having been made, a large amount had accrued which should be satisfied out of the fund. Before a decree was entered on the last petition, Sarah A. Hill, mother of the respondent, apparently was allowed to intervene, and having been made a party claimed the proceeds under the terms of a parol trust concerning the land, alleged to have existed between them at the date of the attachment.

While the allegations of this petition are admitted by the demurrer no evidence is recited upon which the decree on the third petition was based. But it is to be inferred from the further recitals, that after sustaining the demurrer, the court found all the substantial averments proved. By the terms of the decree Ella L. Hill was given costs, while the guardian was awarded the arrears due, with a further direction that the balance remaining of the fund after deducting these amounts, should be retained to await the further order of the court. If the attachment had not been made, upon his repudiation of the trust which was unenforceable specifically by reason of Rev. Laws, c. 74, § 1, cl. 4, the appellant could have recovered from her son the value of the estate conveyed. *O'Grady v. O'Grady*, 162 Mass.

290, 293, 38 N. E. 196; *Cromwell v. Norton*, 193 Mass. 291, 79 N. E. 433. If the law were held to be otherwise the statute of frauds would become the effective shield of fraud. *Twomey v. Crowley*, 137 Mass. 184, 185. But *Ella L. Hill* having had no notice of the trust when the property was attached, under the provisions of Rev. Laws, c. 147, § 3, she is to be deemed a purchaser for value unless the argument of the intervenor prevails, that she cannot be considered a creditor within the meaning of the statute. By Rev. Laws, c. 152, §§ 29, 31, the superior court is given authority to issue process of attachment and execution in proceedings for divorce, and may enforce its decrees for an allowance for alimony, or for maintenance of the minor children of the parties "in the same manner as it may enforce decrees in equity." When an attachment is ordered it not only is to be made in the same manner as in actions at law, but the laws governing such attachments are expressly declared to be applicable. Rev. Laws, c. 152, §§ 11, 12. The legislative and judicial tendency has been uniform to assimilate the forms of process, whether intermediate, or final, whereby the remedial functions of our courts of general jurisdiction are exercised. Rev. Laws, c. 152, §§ 10, 11, 12; *Id.* c. 153, §§ 33, 35; *Id.* c. 159, §§ 8, 9; *Id.* c. 162, § 14; *Id.* c. 167, § 80; *St.* 1907, p. 397, c. 453, § 1; *Chase v. Chase*, 105 Mass. 385, 388; *Slade v. Slade*, 106 Mass. 499; *Burrows v. Purple*, 107 Mass. 428; *McCann v. Randall*, 147 Mass. 81, 71 N. E. 75, 9 Am. St. Rep. 666; *Downs v. Flanders*, 150 Mass. 92, 22 N. E. 585; *Place v. Washburn*, 163 Mass. 530, 40 N. E. 853; *Light v. Jacobs*, 183 Mass. 206, 66 N. E. 799; *McCarthy v. Street Commissioners of Boston*, 188 Mass. 338, 340, 74 N. E. 659.

In the commercial and ordinary sense the designation of "creditor" means one to whom a debt is due from another person, but in a more comprehensive sense, and as used in our statutes governing procedure, and relief, the term includes those who have acquired a lien, either by a legal or equitable attachment, or by seizure and levy on execution. *Sewall v. Sewall*, 130 Mass. 201; *Bailey v. Bailey*, 166 Mass. 226, 44 N. E. 143; *Purdon v. Blinn*, 192 Mass. 387, 389, 78 N. E. 462; *Snyder v. Smith*, 185 Mass. 58, 61, 69 N. E. 1089 and cases cited; *Gay v. Ray*, 80 N. E. 693. While in *Leyland v. Leyland*, 186 Mass. 420, 71 N. E. 794, the question whether a decree of divorce, with an order and execution for alimony, where no attachment had been made, nor execution levied, constituted the divorced wife a creditor of her former husband although discussed, was not decided. Yet in *Purdon v. Blinn*, 192 Mass. 387, 78 N. E. 462, it was held that a decree for alimony in gross was a provable debt against an absentee, within the meaning of Rev. Laws, c. 144, § 9, permitting his property to be marshaled for the benefit of cred-

itors. In harmony with this general doctrine, if an attachment of the husband's property previously has been granted, a decree either for costs, alimony, or the support of minor children committed to her care, or to the custody of a stranger obtained in divorce proceedings by the wife, places her in the position of an attaching creditor, who is a purchaser for value as of the date of the attachment. Rev. Laws, c. 152, §§ 10, 25; *Burrows v. Purple*, *ubi supra*; Rev. Laws, c. 147, § 3; *Connihan v. Thompson*, 111 Mass. 270, 271; *Woodward v. Sartwell*, 129 Mass. 210; *Colburn v. Jewell*, 130 Mass. 182; *Atty. Gen. v. Mass. Benefit Life Ass'n*, 173 Mass. 378, 53 N. E. 879. The original decree being silent as to the custody and maintenance of *Agnes G. Hill*, it was open to the former wife to ask for both, and upon her petition the court was clothed with authority to issue process, and to proceed to a decree or decrees, as upon a libel for divorce filed by her. Rev. Laws, c. 152, §§ 25, 29. Upon the sale on execution although the land was converted into money, by force of the attachment, in equity the lien attached to the proceeds, and had priority over any pecuniary claim of *Sarah A. Hill*. *Wiggin v. Heywood*, 118 Mass. 514; *Knowles v. Sullivan*, 182 Mass. 318, 65 N. E. 389. See *Worcester v. Boston*, 179 Mass. 41, 50, 60 N. E. 410. But if the amount which had accrued for the support of the daughter, with the costs of suit was properly allowed, she further claims that the lien was then dissolved, and the balance of the fund should have been paid to her. The object of the attachment was to secure the payment of any allowance decreed to the daughter, or to the former wife, and the court retained jurisdiction upon the petition of either party to the divorce to revise, alter or enforce its original decree, or upon her separate petition thereafter to decree alimony, and an allowance for the maintenance of their child. Rev. Laws, c. 152, §§ 25, 30, 32; *Southworth v. Treadwell*, 168 Mass. 511, 47 N. E. 93. See *Brigham v. Brigham*, 147 Mass. 159, 160, 16 N. E. 780. After a failure by the former husband to comply with the original or later decrees, the correlative right remained, to enforce payment by the levy of successive executions upon the property attached, until it had been entirely exhausted. *Sewall v. Sewall*, 130 Mass. 201, 204; *Downs v. Flanders*, 150 Mass. 92, 22 N. E. 585. At the time the intervening petition was filed, these various statutory rights had become vested in the former wife as incidental to the divorce proceedings, and no excess of jurisdiction having been shown the demurrer was rightly sustained, and the petition denied.

We have decided the case as presented by the parties, who have made no reference to the anomalous character of the participation of a stranger in the principal suit. It is, however, a matter of serious consideration, whether either a wife or children who may

be in necessitous circumstances, should have their primary right to prompt relief postponed to enable an intervener, who has an ample remedy by an independent suit, to litigate an alleged title to property which has been lawfully sequestered for their benefit. *Sewall v. Sewall*, ubi supra; *Downs v. Flanders*, ubi supra. Upon this question we express no opinion. See *Tuck v. Manning*, 150 Mass. 211, 22 N. E. 1001, and *Williston Seminary v. Easthampton Spinning Co.*, 186 Mass. 484, 72 N. E. 67. Compare *Adamian v. Hassanoff*, 189 Mass. 194, 196, 75 N. E. 126.

Decree affirmed.

(186 Mass. 565)

McNICHOLAS v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Judicial Court of Massachusetts. Suffolk. Dec. 4, 1907.)

1. INSURANCE—LIFE INSURANCE—COLLECTION OF PREMIUMS—AUTHORITY OF AGENTS.

A collecting agent of an insurance company issuing a policy requiring a weekly payment of premiums and stipulating that payments of premiums, to be recognized by the company, must be entered "at the time of payment in the premium receipt book," and an agent over him, have authority to correct errors of entry in a premium receipt book.

2. SAME—ACTION ON LIFE POLICY—EVIDENCE.—PREMIUM RECEIPT BOOK—ENTRIES.

In an action on a life policy requiring a weekly payment of premiums and stipulating that payments of premiums, to be recognized by the company, must be entered at the time of payment in the premium receipt book, evidence held to authorize a finding of a sufficient explanation for the failure of all the payments to appear on the book, authorizing a recovery.

3. SAME—DEFENSES—WAIVER.

A company issuing a life policy requiring a weekly payment of premiums, which receives the money of the wife of the insured in consequence of its promise to recognize the truth of her claim as to a disputed payment and to correct the error in the premium receipt book, cannot repudiate liability because the policy stipulated that payments of premiums, to be recognized by the company, "must be entered at the time of the payment in the premium receipt book."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1036-1070.]

4. RELEASE—VALIDITY—INSTRUCTIONS.

On the issue whether a release of the claim on a life policy was procured by fraud of the insurer's superintendent, an instruction that "there is no evidence of fraud in the settlement," and that if there was a dispute between the parties, and the beneficiary knew at the time that there was a compromise, a settlement for a less sum than she claimed, and the insurer was guilty of no fraud and took no advantage of her, the settlement was binding, but if there was no dispute, or if she did not know the effect of the instrument, and she was misled in any way by any misrepresentations, the jury might find that the settlement was not binding on her, was proper, the quoted phrase meaning that there was nothing in the terms of the settlement to show fraud, and the remainder of the charge leaving the question of the superintendent's fraud to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 115.]

5. SAME—EVIDENCE—QUESTION FOR JURY.

Whether a release of a claim under a life policy was procured by the fraud of the insurer, held, under the facts, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 114.]

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by Margaret McNicholas, administratrix of T. J. McNicholas, deceased, against the Prudential Insurance Company of America. There was a judgment for plaintiff, and defendant brings exceptions. Overruled.

Arthur P. Teele, for plaintiff. Chas. T. Cottrell, for defendant.

RUGG, J. The exceptions as to the admission of evidence respecting the payment not entered upon the "premium receipt book," and as to the policy having lapsed thereby, must be overruled. The plaintiff testified that she had made a payment, which was not entered on the book; that she thereupon had a dispute with one Sterling, the regular collector, who refused to make the correction, and thereafter for a time she made no payment; then one Moody, the assistant superintendent of the defendant at its Roxbury office, called and asked her "why she was not paying," to which it was replied that she and Sterling had "had a fuss and he had cheated her out of a week's insurance"; that Moody said, "You go ahead and pay your insurance and I will make it all right, and what he cheated you out I will make it all right, and you need not pay what you are in arrears until you have it good and ready." To her statement that she thought she was too far behind he said he would "guarantee it." She thereupon paid the premium to Moody, who continued to collect other premiums until her husband's death. The plaintiff also testified that ordinarily she paid no attention to what was written in the book by the agent, for she trusted him and did not think he would do anything wrong. This is action such as a reasonably prudent and honest insured might take. As soon as she discovered that the payment she claimed to have made was not properly entered, she remonstrated with the agent, who refused to make the correction. No entry of payment of premiums could be made in the book except by the agent of the company. The plaintiff without resort to the courts could do nothing more to assert her rights. She paid no more premiums, and by her action took the position that she would have nothing further to do with the defendant under this contract. The substance of the conference with Moody may have been found to be that he agreed that the plaintiff was right as to the disputed payment and the agent was wrong, and that the mistake in the failure to enter this payment in the book would be corrected, provided she would resume making payments on the policy, and that the plaintiff assented to this suggestion, relied upon his promise to make

the correction, and did thereupon begin to make payments again. The authority of the collecting agent goes far enough to enable him to correct errors of entry in the premium receipt book. Moody being an agent over Sterling had at least as ample power in this respect as the ordinary agent. She made to Moody nine payments after this time, all of which were duly entered upon the book. But the original error of nonentry of the disputed payment made to Sterling was not corrected in the "premium receipt book."

From these circumstances it was competent for the jury to find a sufficient explanation for the failure of all the payments to appear on the book. They go beyond a mere showing that a payment had been made which was not entered in the book. *McNicholas v. Prudential Ins. Co. of America*, 191 Mass. 304-309, 77 N. E. 756. It was a fraud practiced by the defendant on the plaintiff to receive her money in consequence of its promise to recognize the truth of her contention as to the disputed payment and to correct the error, and, having led her to believe that she had a valid contract, then to refuse to perform the agreement by which she was induced to make the payments. The defendant cannot take the plaintiff's money paid in consideration of its promise to correct an entry of payment, and then repudiate liability because of a clause in the contract of insurance that payments of premiums "to be recognized by the company must be entered at the time of the payment in the premium receipt book." To interpose such a defense involves the fraud of its own agent. The defendant cannot intrench itself behind such a contract as an impregnable fortress against the fraud of itself or its agents. There is nothing inconsistent with this result in the prior decision of this case, nor in *United States v. Robeson*, 9 Pet. 819, 827, 9 L. Ed. 142, relied upon by the defendant. *Hamilton v. Liverpool Ins. Co.*, 136 U. S. 242, 255, 10 Sup. Ct. 945, 34 L. Ed. 419. The payment claimed to have been made to the defendant and not entered in the book might have been found by the jury to have kept the policy alive until after the death of the plaintiff's intestate. No error is disclosed, either in the rulings or refusals to rule on this branch of the case.

2. The trial court at the request of the defendant ruled that "there is no evidence of fraud in the settlement made in this case," but also instructed the jury that "if there was a dispute between the parties and she knew at the time that there was a compromise, a settlement for a less sum than she claimed and the defendant was guilty of no fraud or misrepresentation and took no advantage of her, the settlement is binding, but if there was no dispute or if she did not know, the effect of the papers and she was misled in any way by the situation or anything said, or any misrepresentation, the jury may find the settlement not binding on her." We understand this to mean that there was nothing

in the terms of the alleged settlement to show fraud but that the question as to whether "the defendant's superintendent fraudulently concealed the nature and contents" of the receipt from the plaintiff was left to the jury. This was in accordance with the former decision. 191 Mass., at p. 309, 77 N. E., at page 757.

The evidence of the plaintiff upon the present record is slightly less favorable to her claim than that disclosed in her earlier bill of exceptions, but as now presented she testified that Moody told her at the time the \$15 was paid "that \$15 was the best he could get for her just then." He also had two little slips of paper, saying, "I want you to sign your name on this." Whereupon she started to sign the check and he told her to sign the other, not reading it himself nor asking her to read it, and he took away with him the slip signed (which was afterwards identified as the release) and never told her how much money she was to get nor mentioned paid-up value at all and she thought the \$15 was a "part payment." He had previously called for her policy and the book saying that "he had good news for her," and, at the same time making, and procuring her signature to, the proof of death of the insured. Although there are expressions in other parts of her testimony indicating slightly more frankness on the part of Moody, nevertheless the circumstances are such as to make it a question of fact whether there was not such fraudulent, active, and passive misrepresentation by the defendant's agent as to relieve the plaintiff from the effect of the release. Apart from the release, there was sufficient evidence to make it a question for the jury whether the plaintiff accepted the \$15 as a compromise of a disputed claim or as a payment on account. No error appears as to the way in which the trial court dealt with this branch of the case.

In the opinion of a majority of the court the case was properly submitted to the jury. Exceptions overruled.

(196 Mass. 557)

RADOVSKY v. FALL RIVER SAVINGS BANK.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 26, 1907.)

ASSIGNMENTS — BANK DEPOSITS — BONA FIDE ASSIGNEE.

Plaintiff, having attached certain property belonging to S., agreed to dismiss the attachment in case security was given for the debt, whereupon claimant executed an assignment of a savings bank deposit for \$193 to plaintiff in due form, and the attachment was thereupon discharged. Claimant did not speak or understand English, and in a suit by plaintiff to recover the deposit claimed that the conversation between him and S. which led to the execution of the assignment was conducted in Portuguese, and that S. told him that the assignment was only for \$45, and that it was given for a different purpose. *Held* that, the assignment having been duly executed and plaintiff having received it innocently and for value, the fraud of S. would

give claimant no right to repudiate it as against plaintiff.

Exceptions from Superior Court, Bristol County; Lloyd E. White, Judge.

Action by Joseph S. Radovsky against the Fall River Savings Bank to recover the amount of a deposit which was claimed by Antonio Farias Bronco. The jury found for defendant, and complainant brings exceptions. Sustained.

David R. Radovsky, for plaintiff. Gullford C. Hathaway, for claimant.

KNOWLTON, C. J. This action was brought against the defendant savings bank to recover \$193 claimed by the plaintiff under an assignment from one Bronco, a depositor in the savings bank. The defendant admits the possession of the money as a deposit and avers that it is claimed by Bronco as well as by the plaintiff. Acting under the statute, it declared its willingness to pay the money to the person entitled to it, and petitioned the court to summon Bronco as a claimant to come and establish his claim. There has been a trial between the plaintiff and the claimant, at which the principal question was whether the assignment from Bronco to the plaintiff is valid. The assignment is in proper form, under seal, and it purports to assign the money to the plaintiff and to give him authority to collect it. The consideration for it, according to its recital, was the dissolution of an attachment made by the plaintiff upon the property of one Silvia. The evidence shows that such an attachment was made as security for a debt due the plaintiff from Silvia, and that this assignment was given to the plaintiff's attorney at his office, to stand as security for the payment of the debt. The defense relied on was stated in evidence as follows: The claimant Bronco does not speak or understand English, and the conversation between him and Silvia which led to the execution and delivery of the assignment was conducted in the Portuguese language. The plaintiff's attorney, who received the assignment and discharged the attachment, does not understand Portuguese. According to Bronco's testimony, Silvia told him that the assignment was for only \$45 instead of \$193, and that it was given for a purpose different from that expressed in it. If his statement is true a gross fraud was practiced upon him by Silvia. It is not contended that the plaintiff or his attorney had any knowledge of the fraud, or participation in it.

The jury were instructed that if Bronco used due care in what he was signing, a fraud of this kind practiced upon him by Silvia would invalidate the assignment, even though the plaintiff took it in good faith and for a valuable consideration. This instruction was erroneous. The instrument was duly executed in proper form to bind the claim-

ant, and the plaintiff received it innocently and for value. The fraud of a third person does not affect its validity in the hands of the plaintiff. The execution of it was the claimant's act which made the instrument binding upon him unless he should avoid it for fraud. It was not like an instrument upon which his signature had been forged. The fraud would enable him to avoid it as against the fraudulent party, but it would give him no right to repudiate it as against an innocent holder. This has been decided in many cases, some of which are very similar to the one now before us. *Lucas v. Owens*, 113 Ind. 521, 16 N. E. 196; *Jones v. Swift*, 94 Ind. 516; *Wallace v. Wilder* (C. C.) 13 Fed. 707-715, and cases cited; *Stoner v. Millikin*, 85 Ill. 218; *Yorks County M. & F. Insurance Co. v. Brooks*, 51 Me. 506; *Chase v. Hathorn*, 61 Me. 505; *Martin v. Campbell*, 120 Mass. 126.

Exceptions sustained.

(196 Mass. 543)

SAURES v. STEVENS MFG. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 26, 1907.)

1. APPEAL—VERDICT—REVIEW.

Where there is any evidence on the issues of negligence authorizing their submission to a jury, the Supreme Judicial Court cannot revise the jury's findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

2. MASTER AND SERVANT—DEATH OF SERVANT—DIRECTIONS—QUESTION FOR JURY.

Where intestate received an electric shock from a light in defendant's cellar, into which intestate went at the direction of his superior to get a rat from a bleaching vat, evidence held to require submission to the jury of the question whether intestate acted as a mere volunteer or pursuant to a direct order from his superior.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

3. EVIDENCE—UNCONTRADICTED EVIDENCE—WEIGHT.

In an action for decedent's death while endeavoring to get a rat from a vat pursuant to an alleged direction from his superior servant, the jury were not bound to accept evidence, though uncontradicted, that such superior servant had no authority over the contents of the vat, nor to direct decedent to take the rat from the vat.

4. MASTER AND SERVANT—INJURY TO SERVANT—QUESTION FOR JURY.

Where intestate was killed while endeavoring to get a rat from one of defendant's cloth vats at the direction of H., and defendant's overseer did not deny that H. was the second hand, or that he gave orders in the overseer's absence, it was for the jury to say whether such absence included a mere transient or a temporary one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1063, 1064.]

5. SAME.

Where decedent went into defendant's cellar pursuant to directions from his superior to take a rat from a cloth vat, and died from an electric shock received from a light which he used in such employment, the court properly submitted to the jury the questions whether he was properly in the cellar in the vicinity of the

and whether it was part of decedent's duty to see the light.

1. **Note.**—For cases in point, see Cent. Dig. 34, Master and Servant, §§ 1089-1132.]

SAME—CONTRIBUTORY NEGLIGENCE.

Where decedent went into defendant's cellar as directed by his superior servant, to get from one of the vats, and for this purpose an electric lamp from which he suffered electric shock, and it appeared that he did hold the bulb in his hand, but used the in the ordinary way, the court properly nitted the question whether decedent exercised due care to the jury.

Ed. **Note.**—For cases in point, see Cent. Dig. 34, Master and Servant, §§ 1089-1132.]

SAME—ASSUMED RISK.

Where decedent went into defendant's cellar under instructions from his superior to extract a from a bleaching vat, and received injury, from which he died, from an electric lamp the cellar, and decedent did not know of the dangerous condition of the lamp or its connections, he did not assume the risk.

Ed. **Note.**—For cases in point, see Cent. Dig. 34, Master and Servant, §§ 584, 587.]

SAME—NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of a servant from an electric shock received from a lamp maintained by defendant in its cellar, evidence held require submission of defendant's negligence, permitting the lamp to be and remain in a defective condition, to the jury.

[Ed. **Note.**—For cases in point, see Cent. Dig. 34, Master and Servant, §§ 1010-1030.]

Exceptions from Superior Court, Bristol County; William Schofield, Judge.

Action by Maria Saures, as administratrix of Antone Saures, deceased, against the Stevens Manufacturing Company. A verdict was returned in favor of plaintiff, and defendant brings exceptions. Overruled.

At the close of the evidence defendant requested the court to rule: (1) On all the evidence in the case the plaintiff is not entitled to recover. (2) There is no evidence of the defendant's negligence, and therefore the plaintiff is not entitled to recover. (3) There is no evidence of the due care of the plaintiff's intestate, and therefore the plaintiff is not entitled to recover. (4) It was not a part of the duty of the plaintiff's intestate to use the electric light. In so doing he exceeded his instructions, and therefore the plaintiff is not entitled to recover. (5) There is no evidence that the plaintiff's intestate was properly in the cellar in the vicinity of this electric light.

J. W. & C. R. Cummings, for plaintiff.
Richard P. Borden, for defendant.

SHELDON, J. The verdict in favor of the plaintiff was rendered upon the third count of her declaration; and it is only upon that count that the questions raised by this bill of exceptions are to be considered. They arise upon the defendant's contention that the plaintiff's intestate, Antone Saures, was acting outside the scope of his employment and not as a servant of the defendant when he was injured; that he was not shown to have been in the exercise of due care; and that there was no evidence that his injury

was due to negligence on the part of the defendant. The case is a close one for each of these questions; but if there was any evidence upon which they could be submitted to the jury we cannot revise the finding which has been made. *Hayes v. Moulton*, 194 Mass. 157, 163, 164, 80 N. E. 215.

1. There was evidence upon which the jury could find that Saures, the plaintiff's intestate, was employed by the defendant in its bleaching room, to clean up and do general work; that on the morning of the accident a rat was found in the bleaching room, and that Heddleston, the second hand, who was in charge at the time, gave an order to catch the rat, but the rat got through a hole in the floor into a vat in the cellar, in which cloth was being soaked and cleansed in an acid mixture; that Saures, seeing this, in order to prevent the cloth from being spoiled, took off his clothes, put on his overalls, went into the cellar, and, for the purpose of getting the rat out of the vat, took an electric light which hung from the ceiling of the cellar and which the men were accustomed to take and carry around the vats; and that he was injured by a shock of electricity from the lamp or its wires, which caused his death. The testimony to these facts consisted mainly of statements of Saures himself, admitted apparently without objection under Rev. Laws, c. 175, § 66.

The defendant's counsel has addressed to us an able argument in support of his contention that from these facts Saures must be deemed to have been a mere volunteer in going into the cellar to find the rat, that the order given by Heddleston to "catch the rat" was rather an ejaculation such as all the men were making than an order given in the conduct of the defendant's business; that if it could be considered an order it applied merely to the situation that existed while the rat was running about the floor of the bleaching room, and could not properly be interpreted as a command to go down cellar, take the light and fish the rat out of the vat, especially in view of the fact that the words were addressed to all present, but no one other than Saures went further than to join in the present pursuit of the rat in the bleaching room. *Gouin v. Wampanoag Mills*, 172 Mass. 222, 51 N. E. 1078; *Desautels v. Cloutier*, 189 Mass. 349, 75 N. E. 703, 1 L. R. A. (N. S.) 669, 109 Am. St. Rep. 641; *Bamford v. G. H. Hammond Co.*, 191 Mass. 479, 78 N. E. 115.

But we are of opinion that this question was for the jury. It was for them not only to find whether what was said by Heddleston was an order to the men, but to determine its purport and meaning. They might say that the act of Saures in changing his clothes and going into the cellar was in the presence and met the approval of the second hand, and that this bore upon the scope of his previous order. And the defendant's contention that Heddleston upon his own uncon-

tradicted testimony had no authority over the cloth in this vat and no control over Saures, and so that the defendant was not bound by his order if given, is disposed of by the fact that the jury were not bound to accept this testimony even though uncontradicted. And Hathaway, the defendant's overseer, though called by it to testify, did not deny that Heddleston was the second hand, or that he gave orders in Hathaway's absence. It was for the jury to say whether this included a merely transient or temporary absence. And on the evidence it could not be said that Saures was not acting within the scope of his duty in taking the electric light to see whether the rat was still in the vat, and if so, to get it out. This whole question was for the jury, and the defendant's fourth and fifth requests were properly refused. *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 287, 32 N. E. 161, 34 Am. St. Rep. 275; *Mehan v. Lowell Electric Light Co.*, 192 Mass. 53, 59, 78 N. E. 385.

2. Nor could the defendant's third request have been given. We have already seen that it could have been found that Saures was properly in the cellar and had a right to use the lamp. It also might have been found that this was a portable light, provided and intended to be used around the vats. The burns upon the plaintiff's hands and the absence of any such cuts as would probably have been caused by the broken glass if he had had the bulb in his hands and had thus broken it, would tend to indicate, in connection with the testimony as to previous leaks from the wires, that he did not have the bulb in his hands, but was using the lamp in the usual and ordinary way. *Victoria Martins*, a witness called by the defendant, testified to Saures' statement that he took hold of the wire and not of the bulb. Nor were the jury bound to believe that whenever a witness spoke of "the lamp" he referred to the glass bulb alone in contradistinction to the whole arrangement of wires, bulb and socket which together, according to common speech, constituted the lamp. While the evidence was no doubt meager, it cannot be said that there was no evidence as to the cause of the accident within the rule of *McCarty v. Clinton Gaslight Co.*, 193 Mass. 76, 78 N. E. 739, and cases there cited. Most of the specific contentions made here by the defendant were rather for the jury than for us. In our opinion this question was properly submitted to the jury. *Mehan v. Lowell Electric Light Co.*, 192 Mass. 53, 78 N. E. 385. And for the same reasons and in view of the character of the risk and the fact that Saures seems to have known nothing as to the condition of the lamp or its connections, it cannot be said that he had assumed the risk of the accident which happened.

3. The most difficult point in the case is upon the question of the defendant's negligence; but upon careful consideration of the

evidence stated in the bill of exceptions we are of opinion that this question also was for the jury. If the plaintiff received his shock directly from the wire, as the jury might have found, this would indicate that there was a leakage of electricity resulting from a defective condition of the insulation, the wiring, or the electrical connections, or all of them. This would not be enough to hold the defendant without further evidence of its negligence. *Saxe v. Walworth Mfg. Co.*, 191 Mass. 338, 77 N. E. 883, 114 Am. St. Rep. 613; *Mehan v. Lowell Electric Light Co.*, 192 Mass. 53, 60, 78 N. E. 385. But there was further evidence. From the testimony of Cobal and Rezeins as to the shocks received by them, it might have been found that the same defects had existed, though in a less serious form, for three weeks before the injury to the plaintiff's intestate. Upon the testimony of Hart, Clifford and Dunlap, it might have been found that by proper tests the defect might have been discovered and remedied, and that such tests ought to have been made. The defendant's superintendent testified that he did not know what insulating material had been used where the wires entered the socket of this lamp, and could not state whether there had been any inspection of this wire since its installation. Dunlap, the defendant's chief engineer and electrician, testified that it was his practice to examine the electrical apparatus with a torch or candle "to find out if there were any loose connections, any pulleys rubbing against the wires, if there were any wires too near to a pulley or too near to a pipe, and for bare places in the wire." It cannot be said as matter of law that such examinations came up to the standard of the systematic weekly tests which the defendant's expert witness Clifford testified on cross-examination "would be ample and desirable." Plainly it was for the jury to say both what inspections were made and whether they were sufficient in number and in character. Accordingly the defendant's second request could not have been given. *Cahill v. New England Telephone & Telegraph Co.*, 193 Mass. 415, 79 N. E. 821.

It follows from what has been said that the first request was properly refused, and the case was rightly submitted to the jury.

Exceptions overruled.

(196 Mass. 523)

CITIZENS' LOAN ASS'N v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 27, 1907.)

1. BANKRUPTCY—DISCHARGE OF BANKRUPT— DEBTS DISCHARGED.

A debt is not extinguished by a discharge in bankruptcy, but only the remedy on the debt is at an end.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 764.]

2. ASSIGNMENTS—ASSIGNMENTS OF FUTURE WAGES UNDER EXISTING EMPLOYMENT—VALIDITY.

An assignment of future earnings which may accrue under an existing employment is valid, and the assignee obtains thereby a present right, perfect in itself, requiring no further action on his part, which right may be enforced either at law or in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 20.]

3. SAME.

An assignment, executed February 27, 1905, of future wages which may accrue to the assignor under an existing employment from that date until January 1, 1908, to secure a valid debt due to the assignee, is valid by Rev. Laws, c. 106, § 63, Id. c. 102, §§ 51, 57-67, and Id. c. 189, §§ 32-34, relating to assignments of wages, and is not affected by St. 1905, p. 224, c. 308, or St. 1906, p. 366, c. 390, providing that no assignment of future wages shall be valid for a period exceeding two years, unless made to secure a debt, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 20.]

4. BANKRUPTCY—DISCHARGE OF BANKRUPT—LIENS NOT AFFECTED.

An assignment of wages which may accrue under an existing employment, made before the bankruptcy of the employe, without fraud, to secure a valid debt, and duly recorded, may be enforced, after the employe's discharge in bankruptcy, by the assignee, who did not prove his debt in bankruptcy; the assignment being a lien preserved by Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3450], unaffected by the discharge in bankruptcy.

Exceptions from Superior Court, Worcester County; F. A. Gaskill, Judge.

Action by the Citizens' Loan Association against the Boston & Maine Railroad. There was a judgment for plaintiff on an agreed statement of facts, and defendant brings exceptions. Affirmed.

Plaintiff and defendant are domestic corporations. On February 27, 1905, and for a long time prior thereto, Steven J. Wescott was in the employ of defendant as a conductor. On that day Wescott, for a valuable consideration, and as security for the payment of a note given by him to plaintiff, and for money loaned, assigned to plaintiff all claims which he might thereafter have against defendant for moneys becoming due between that date and January 1, 1908, for services.

Webster Thayer, Hollis W. Cobb, and Fred A. Walker, for plaintiff. Chas. H. Thayer and Alex. H. Bullock, for defendant.

RUGG, J. The single question presented by this appeal is whether an assignment of wages to be earned in an existing employment, given before bankruptcy, without fraud, and upon sufficient consideration, to secure a valid subsisting debt, and duly recorded, can be enforced, after the discharge in bankruptcy of the assignor, as to wages earned in the course of the original employment, by the creditor, who has not proved his debt in bankruptcy. A debt is not extinguished by a discharge in bankruptcy. The remedy upon the debt, and the legal, but not the mor-

al, obligation to pay, is at an end. The obligation itself is not canceled. *Champion v. Buckingham*, 165 Mass. 76, 42 N. E. 498; *Heather v. Webb*, 2 C. P. D. 1. An assignment of future earnings, which may accrue under an existing employment, is a valid contract and creates rights, which may be enforced both at law and in equity, whichever may in a particular case be the appropriate forum. *Tripp v. Brownell*, 12 Cush. 376; *Weed v. Jewett*, 2 Metc. 608, 37 Am. Dec. 115; *Brackett v. Blake*, 7 Metc. 335, 41 Am. Dec. 442; *Hartey v. Tapley*, 2 Gray, 565; *Gardner v. Hoeg*, 18 Pick. 168; *Taylor v. Lynch*, 5 Gray, 49; *Laman v. Smith*, 7 Gray, 150; *St. Johns v. Charles*, 105 Mass. 262; *Lazarus v. Swan*, 147 Mass. 330, 333, 17 N. E. 665; *James v. Newton*, 142 Mass. 366, 8 N. E. 122, 56 Am. Rep. 692. These cases proceed upon the theory that the worker under contract for service, though indefinite as to time and compensation and terminable at will has an actual and real interest in wages to be earned in the future by virtue of his contract. He may recover for an unjustifiable interference with such an employment, as for an injury to any other vested property right. *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 809, 108 Am. St. Rep. 499. It is plain that one may sell wool to be grown upon his own sheep, or a crop to be produced upon his own land, but not that to be grown or produced upon the sheep or land of another. No more can one assign wages, where there is no contract for service. *Jones v. Richardson*, 10 Metc. 481; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357. But profitable employment is a reality. Wages to be earned by virtue of an existing employment are no more shadowy or insubstantial than the fleece of next spring or the crop of the following autumn. Money to accrue from such service is not a bare expectancy or mere possibility, but a substance capable of grasp and delivery. It constitutes a present, existing, right of property, which may be sold or assigned as any other property. Although not in the manual possession of the assignor, it is in his potential possession. The transfer of this potential possession creates the assignee a lienor upon the property right. The holder of such an assignment stands upon a firmer plane than the mortgagee of future acquired property, who has only the right by contract to act betimes in the future for his protection. *Wasserman v. McDonnell*, 190 Mass. 328, 76 N. E. 959. The assignee of wages to be earned under an existing contract gets a present right, perfect in itself, requiring no future action on his part. Contracts for personal service are of such a character that their breach is in appropriate cases enjoined. *Lumby v. Wagner*, 1 De G., M. & G. 604; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622; *Whitwood Chemical Co. v.*

Hardman [1891] 2 Ch. 416. See *Phila. Base Ball Club v. Lajole*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627. It may be taken for granted that the right to future wages to be earned under such a contract does not pass to the trustee in bankruptcy. Nor are we dealing here with a contract as to labor in terms or spirit contrary to public policy, as in *Parsons v. Trask*, 7 Gray, 473, 66 Am. Dec. 502. But on the contrary, assignments of wages are recognized as valid by statute. Rev. Laws, c. 189, §§ 32, 33, 34; Id. c. 102, §§ 51, 57 to 67, both inclusive; Id. c. 106, § 63. The present case is not affected by St. 1905, p. 224, c. 308, or St. 1906, p. 360, c. 300.

Specific performance of contracts to labor like that in question will not be enforced. *Arthur v. Oakes*, 63 Fed. 310-318, 11 C. C. A. 209, 25 L. R. A. 414; *Robertson v. Baldwin*, 165 U. S. 275, 17 Sup. Ct. 320, 41 L. Ed. 715. It is only where labor has been voluntarily performed that the question now presented can arise. It is possible that an agreement to execute an assignment, falling short of the creation of a lien, is, when the wages have been actually earned, enforceable in equity, even after a subsequent bankruptcy or insolvency. We do not decide this, however. *Edwards v. Peterson*, 80 Me. 307, 14 Atl. 936, 6 Am. St. Rep. 207; *Stott v. Franey*, 20 Or. 410, 26 Pac. 271, 23 Am. St. Rep. 132. At lowest the assignment in question became "a specific equitable lien on the fund" (*Triste v. Child*, 21 Wall. 441, 22 L. Ed. 623), or was "an independent collateral agreement given by way of guaranty or other security" for the main debt, and there is no reason why such an agreement should not outlive the remedy upon the debt, to secure which it was given (*Shaw v. Silloway*, 145 Mass. 503, 507, 14 N. E. 783). In either event, it was not dissolved by the bankruptcy. We have considered the contrary authorities of *In re West* (D. C.) 128 Fed. 205, *In re Home Discount Co.* (D. C.) 147 Fed. 538, and *Letch v. Northern Pacific Ry. Co.*, 95 Minn. 35, 103 N. W. 704, with the deference to which they are entitled. They proceed upon considerations as to the effect of an assignment of wages and the rights vesting thereunder in the assignee, as well as public policy pointed out in the latter case, which are inconsistent with what we conceive to be sound reasoning, and opposed to the numerous decisions of this court above cited concerning rights acquired under assignments of wages. In the absence of a decision to the same effect by the Supreme Court of the United States, we cannot accede to them as authoritative. Nor do we perceive anything inconsistent with the conclusion we have reached, in *Clark v. Clark*, 17 How. 315, 15 L. Ed. 77, *East Lewisbury v. Marsh*, 91 Pa. 93, *Christian & Craft Grocery Co. v. Michael Lyons*, 121 Ala. 84-87, 25 South. 571, 77 Am. St. Rep. 80, *Williams v. Chambers*, Q. B. 337, and *Hanover Nat. Bank v. Moyses*, 186 U. S. 102,

22 Sup. Ct. 857, 46 L. Ed. 1113, which are cited as generally supporting authorities in *Re Home Discount Co.*, ubi supra.

The assignment to the plaintiff is a lien which was preserved by section 67d of the bankruptcy act of July 1, 1898 (30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3450]), and was not affected by the discharge in bankruptcy of the assignor. This conclusion is supported by *Mallin v. Wenham*, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233.

Judgment affirmed.

(196 Mass. 487)

BARRETT v. TOWNE et al.

WORTHINGTON v. SAME.

(Supreme Judicial Court of Massachusetts. Hampden. Nov. 26, 1907.)

1. ATTORNEY AND CLIENT—AUTHORITY—TERMINATION OF RELATION.

Where a testator employed counsel to defend his brother in a certain action, not retaining any control over the proceeding, there was not such a relation of attorney and client as would terminate on the death of the principal, under the rule that the death of the principal revokes the agent's authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 127.]

2. EXECUTORS AND ADMINISTRATORS—LIABILITY OF ESTATE—CONTRACTS—SURVIVORSHIP.

Where express words of limitation to the contrary are not found, the presumption is that the promisor intends to bind his personal representatives; and hence, where a testator employed counsel to defend his brother in a certain action from beginning to end and to make the best defense possible, no restriction being placed on the counsel, the contract survived the testator and was enforceable against his executors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 732.]

3. SAME.

Testator employed plaintiffs to defend his brother. Testator's executors notified plaintiff that no liability for further outlay would be recognized unless specifically authorized. Plaintiff asserted his intention to proceed under the contract, and was told that the agreement would be performed. Held to be an assent to conform to its terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 411½.]

4. APPEAL AND ERROR—EXCEPTIONS—WAIVER.

A request for a ruling, which is not argued, will be treated as waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4256-4261.]

Exceptions from Superior Court, Hampden County; William Schofield, Judge.

Separate actions by Harrison J. Barrett and by one Worthington against Edward S. Towne and others, executors. Findings for plaintiffs, and defendants except. Exceptions in both cases overruled.

James B. Carroll and William Hamilton, for plaintiffs. N. P. Avery, for defendants.

BRALEY, J. These are actions of contract to recover for disbursements incurred and professional services rendered at the request of the testator in behalf of his brother, who

had been jointly indicted with the plaintiff, Barrett, for a conspiracy under the provisions of Rev. St. U. S. § 5440 [U. S. Comp. St. 1901, p. 3676]. At the time Barrett was employed to assist in the defense, the contract into which the parties entered is stated by the auditor in these words: "The testator expressed to the plaintiff his desire that on account of his brother's reputation, and his own wish to clear his name, the best possible defense should be made, and as it was impossible for his brother by reason of his physical condition to assist in the preparation, he instructed the plaintiff to undertake the work and he promised and agreed with the plaintiff to pay him one-half of the expenses that might be incurred." The contract with the plaintiff, Worthington, who was engaged in the general practice of law at Washington, where the auditor finds that he had achieved a high reputation for professional skill and ability, is equally comprehensive. The testator then said, that "he wished to engage his services to defend his brother. * * * He wanted him defended from the beginning to the end, and would leave it to the plaintiff to make the best defense possible; that so far as his brother's defense involved the defense of Barrett, * * * If the trial or trials were upon joint indictments, the plaintiff should take up the defense of the two, and if the trial was of Barrett alone upon a separate * * * indictment, then he assumed no pecuniary responsibility for such defense." In reliance upon these respective agreements each plaintiff accordingly devoted himself to the preparation and trial of the case, which took place after the testator's death, and resulted in an acquittal. They are severally barred, however, from recovery, although the actual disbursements made and value of the professional services performed after death comprise in each case very nearly the whole of the claim, if as the defendants assert the performance of the contracts depended upon the continued existence of the life of the testator. In the first case they contend that the promise being strictly personal died with the promisor, while in the second, the relation of attorney and client had been established between the plaintiff and their testator, which also was terminated immediately upon his death. *Browne v. McDonald*, 129 Mass. 66; *Marvell v. Phillips*, 162 Mass. 399, 401, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370; *Gleason v. Dodd*, 4 Metc. 333, 341.

Undoubtedly, at common law, when not coupled with an interest, the death of the principal revokes the authority of the agent. The agency ceases, because the power to act is dependent upon the control and direction of another, which has been withdrawn by death. *Combes Case*, 9 Co. 766; *Farnum v. Boutelle*, 13 Metc. 159; *Marlett v. Jackman*, 3 Allen, 287, 294; *Lincoln v. Emerson*, 108 Mass. 87; *Brown v. Cushman*, 173 Mass. 368, 53 N. E. 860; *Bank of New York v. Vander-*

horst, 32 N. Y. 553, 555; *Long v. Thayer*, 150 U. S. 520, 14 Sup. Ct. 189, 37 L. Ed. 1167. Compare *Cassiday v. McKenzie*, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76; *Ish v. Crane*, 8 Ohio St. 520; *Id.*, 13 Ohio St. 574; *Dick v. Page*, 17 Mo. 234, 57 Am. Dec. 267; *Lewis v. Kerr*, 17 Iowa, 73; *Carriger's Adm'r v. Withington*, 28 Mo. 311, 72 Am. Dec. 212; *Deweese v. Muff*, 57 Neb. 17, 77 N. W. 361, 42 L. R. A. 789, 73 Am. St. Rep. 488. If the plaintiffs had died it may be conceded that the contracts would have then terminated, for performance by them depended entirely upon their personal efforts. *Marvel v. Phillips*, 162 Mass. 399, 38 N. E. 1117, 26 L. R. A. 416, 44 Am. St. Rep. 370; *Kernochan v. Murray*, 111 N. Y. 306, 18 N. E. 868, 2 L. R. A. 183, 7 Am. St. Rep. 744; *Campanari v. Woodman*, 15 C. B. 400. But as no act was required to be done either by the testator himself, or in his name, a complete performance was possible without any direction or intervention on his part. If at his own expense he had procured the attendance of a physician to treat his brother until cured of a physical ailment, or had contracted with a grocer to furnish him provisions for a year, there would be great difficulty in saying that in either instance his death during performance ended all further liability because his estate was not bound. Manifestly such a construction instantly would defeat the very object for the accomplishment of which he purposefully had obligated himself. In principle the present case must be treated as parallel with the illustration. The various services were neither to be performed, nor was the case to be conducted in his behalf. The guilt or innocence of the decedent was not in issue, but that of his brother with whom Barrett had been joined. They only, were the principals and clients, without whose consent and co-operation the case could not be prepared for trial, and without whose authority counsel could not lawfully appear in their defense. After such appearance, they alone would be bound by the acts and admissions of their attorney made in the course of litigation, and until it was finally closed. *Lewis v. Sumner*, 13 Metc. 269; *Wieland v. White*, 109 Mass. 392; *Moulton v. Bowker*, 115 Mass. 36, 15 Am. Rep. 72; *Elliot v. Lawton*, 7 Allen, 274, 83 Am. Dec. 683; *Stone v. Bank of Commerce*, 174 U. S. 412, 422, 19 Sup. Ct. 747, 43 L. Ed. 1028. The employment of the plaintiffs was coextensive with the subject-matter with which the parties dealt, and they were not only engaged to assist in its preparation, but to make "the best defense" of the brother's case. This duty involved securing witnesses and procuring their attendance, with the payment of all necessary incidental expenses which might be necessary either before or during the trial itself. No express limitation of time within which these services should be performed, or the required disbursements made was named. Very plainly the plaintiffs rightly understood that the

testator contemplated and intended that the period of performance should be measured solely by the time which ordinarily would be requisite in the orderly progress of litigation of this class and magnitude. *Adams v. Foster*, 5 Cush. 156; *Folsom v. McDonough*, 6 Cush. 208, 209; *Lowe v. Harwood*, 139 Mass. 133, 29 N. E. 538; *Minneapolis Gaslight Co. v. Kerr-Murray Mfg. Co.*, 122 U. S. 300, 7 Sup. Ct. 1187, 30 L. Ed. 1190.

The general rule is settled, that where express words of limitation to the contrary are not found, the presumption is that the promisor intends to bind his personal representatives. *Harrison v. Conlan*, 10 Allen, 85, 86. See *Mills v. Smith*, 193 Mass. 11, 78 N. E. 765, 6 L. R. A. (N. S.) 865. The intention of the parties furnishes the true criterion, which must be gathered from the language they employ, while each case as it arises must be largely decided upon its particular facts. It was his unqualified purpose to procure an acquittal of his brother through the means of a full preparation of the defense, and the professional efforts of competent counsel, by becoming pecuniarily responsible, as he certainly did, to pay all expenses. *Stone v. Walker*, 18 Gray, 613. But his undertaking went no further. He did not intend to assume the power of control, either by himself, or by a substitute, over the proceedings at any stage. The alleged conspirators while thus receiving the benefit of his aid were left absolutely free to conduct their own case from beginning to end as they deemed best, and the requirements of appropriate legal procedure demanded. If thus construed, each contract remained in force, while this condition of affairs compelled the active continuance of the services of the respective plaintiffs. It therefore survived the death of the testator, and his executors became bound to its performance. *White v. Allen*, 133 Mass. 423; *Elliot National Bank v. Beal*, 141 Mass. 566, 570, 6 N. E. 742; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460; *Phillips v. Blatchford*, 137 Mass. 510, 514; *In re Grapel v. Hodges*, 112 N. Y. 419, 20 N. E. 542; *Janin v. Browne*, 59 Cal. 37, 44; *McCann v. Pennie*, 100 Cal. 547, 35 Pac. 158; *Volk v. Stowell*, 98 Wis. 386, 393, 74 N. W. 118. Nor was this obligation discharged by the conversation between the plaintiff, and one of the executors before any indebtedness on the items in the first case had been incurred. In response to a verbal notice then given, that they would not recognize any liability for further outlays unless specifically authorized, the plaintiff asserted his intention to proceed under the contract. The immediate reply, that the testator's agreement would be performed, must be treated as an assent to conform to its terms.

In the first case, the second, seventh and eighth requests for rulings not having been argued must be treated as waived, and in both cases for the reasons stated, the other

rulings, which are made the subject of the exceptions, were properly refused.

Exceptions in both cases overruled.

(196 Mass. 533)

KINGSBURY et al. v. CHAPIN, Treasurer.
(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 26, 1907.)

1. TAXATION—COLLATERAL INHERITANCE TAX—STOCK OF CORPORATION OF TWO STATES.

Stock of a railroad company, incorporated, doing business, and owning property, not only in Massachusetts, but in neighboring states, but having only a single issue of stock, is "property within the jurisdiction of the commonwealth," under Rev. Laws, c. 15, § 1, St. 1905, p. 481, c. 470, and St. 1906, p. 453, c. 436, authorizing taxation of collateral inheritance, so as to enable the state to subject it to taxation as against a nonresident owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1861-1864.]

2. SAME—VALUE OF STOCK.

For the purpose of a collateral inheritance tax in Massachusetts of stock of a railroad company incorporated, doing business, and owning property not only in the state but in neighboring states, but having only a single issue of stock, the stock should be valued on the basis of representing only that portion of the property of the company situated within the state.

3. SAME—PROPERTY SUBJECT TO TAX—PAYMENT OF DEBTS.

Executors of a nonresident testator, by using the property within the state for payment of debts and legacies, to the exemption of the property in the state of testator's domicile, cannot relieve it from liability to a tax on succession imposed by the law of Massachusetts; but only a proportional part of the property in Massachusetts may be used in making such payment, and the balance is subject to such tax.

Case reserved from Supreme Judicial Court, Worcester County.

Suit by Frederick H. Kingsbury and others, executors, against Arthur B. Chapin, Treasurer and Receiver General, to determine the amount of succession taxes. Both parties objected to the decree of the probate court, and appealed to a justice of the Supreme Judicial Court, who reserved the case for the full court. Affirmed.

Ernest H. Vaughan and Edward T. Eady, for petitioners. Charles A. Williams, for party having like interest with plaintiff. Dana Malone, Atty. Gen., and Fred T. Field, Asst. Atty. Gen., for Treasurer and Receiver General.

KNOWLTON, C. J. This bill is brought by the executors of the will of Julia B. Thayer, late of Keene in the state of New Hampshire, for instructions in regard to the payment of succession taxes claimed in behalf of this commonwealth. A part of the property left by the testatrix was stock in railroad corporations, incorporated in this state, and owning and operating railroads therein which extend beyond the boundaries of the state into other states in which the companies are also incorporated. The corporations referred to are the Worcester, Nashua & Rochester Railroad Company, the Norwich & Worcester

Railroad Company, the Fitchburg Railroad Company, the Boston & Albany Railroad Company, the Providence & Worcester Railroad Company, the New York, New Haven & Hartford Railroad Company, and the Old Colony Railroad Company. The material averments in regard to each of these corporations are substantially the same, so far as they relate to the question in dispute, namely, that they are engaged in the transportation of passengers and freight between the different states, and in interstate commerce and commerce with foreign nations, and are incorporated under the laws of one or more states besides Massachusetts, and own franchises granted by these states, and property, real and personal, tangible and intangible, located in Massachusetts and in one or more of these other states. Although all the statutes of the different states touching the subject were made a part of the evidence, we have been referred to no differences in them, nor to any of their provisions except those stated generally in the bill. We infer from the pleadings, the agreed facts and the arguments that each of these companies is incorporated in each of the states into which its road runs; that in each case the name is the same in each state, and there is recognition by each state of the fact that the corporation is connected with the corporation of the same name in the other state, in such a way that the two, deriving their authority from two different sources, are parts of one general organization engaged in a single general enterprise, and exhibiting activities and owning property in two or more states, while held in the same ownership. It is averred by the petitioners and admitted by the respondent that "in the case of all the railroad companies there is but a single issue of capital stock representing all the property of the said companies." In a sense, such a railroad company is a domestic corporation in each of the states where it is incorporated and owns and operates a railroad. We think that stock in such a corporation is "property within the jurisdiction of the commonwealth," under the language of our statute authorizing taxation of collateral inheritance. Rev. Laws, c. 15, § 1; St. 1905, p. 481, c. 470; St. 1906, p. 453, c. 436. We think it is property within the jurisdiction of the commonwealth in a constitutional sense, such as to enable the state to subject it to taxation as against a nonresident owner. This follows from the decisions and the reasoning in *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372, and in *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 891. See, also, *American Coal Co. v. County Commissioners*, 59 Md. 185; *St. Albans v. National Car Co.*, 57 Vt. 68; *State v. Travelers' Ins. Co.*, 70 Conn. 590, 40 Atl. 465, 66 Am. St. Rep. 138; *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949. That an inheritance of stock in a domestic corporation by a nonresident owner is taxable has been settled in New York. *Matter of*

Bronson, 150 N. Y. 1, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632; *Matter of Fitch*, 160 N. Y. 87, 54 N. E. 701; *Matter of Jones*, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476. See, also, *Attorney General v. New York Breweries Co.* [1898] 1 Q. B. 205, s. c. [1899] A. C. 62. It has also been adjudged that the same rule applies to corporations which are incorporated in two states. *Matter of Cooley*, 186 N. Y. 220, 78 N. E. 939. This case presented the question whether stock of a nonresident testator in the Boston & Albany Railroad Company should be taxed under the inheritance law of New York at its value, treating the stock as representing all the property of the doubly incorporated New York and Massachusetts corporation, or at a less value, treating it as representing only that portion of the property which belonged in the state of New York. It was held that the payment should be on the latter theory. The court said, "The authorities are asserting jurisdiction of and assessing his stock only because it is held in the New York corporation of the Boston & Albany Railroad Company. But we know that said company is also incorporated as a Massachusetts corporation, and, presumably by virtue of such latter incorporation, it has the same powers of owning and managing corporate property which it possesses as a New York corporation. In fact, the location of physical property and the exercise of various corporate functions give greater importance to the Massachusetts than to the New York corporation, and the problem is whether, for the purpose of levying a tax upon decedent's stock upon the theory that it is held in and under the New York corporation, we ought to say that such latter corporation owns and holds all of the property of the consolidated corporation, wherever situated, thus entirely ignoring the existence of and the ownership of property by the Massachusetts corporation. It needs no particular illumination to demonstrate that, if we take such a view, it will clearly pave the way to a corresponding view by the authorities and courts of Massachusetts that the corporation in that state owns all of the corporate property, wherever situated, and we shall then further and directly be led to the unreasonable and illogical result that one set of property is at the same time solely and exclusively owned by two different corporations, and that a person holding stock should be assessed upon the full value of his stock in each jurisdiction. * * * We shall have each state exacting full compensation upon one succession, and a clear case of double taxation. And if the corporation had been compelled, for sufficient reasons, to take out incorporation in 6 or 20 other states, each one of them might take the same view and insist upon the same exaction, until the value of the property was in whole or large proportion exhausted in paying for the privilege of succession to it. While undoubtedly the legislative authority

is potent enough to prescribe and enforce double taxation, it is plain that, measured by ordinary principles of justice, the result suggested would be inequitable and might be seriously burdensome." A similar view was taken in *State v. Metz*, 32 N. J. Law, 199.

It is contended by the petitioners that, with any other construction, the statute, in its application to a case like this, would be unconstitutional, and they refer to the cases in which it is decided that, in assessing a property tax upon a corporation, the property owned by it in another state and the franchise conferred by another state cannot be included in fixing its value. The collection of a tax levied on such a basis would be a taking of property without due process of law. *Louisville & Jefferson Ferry Co. v. Kentucky*, 188 U. S. 385, 23 Sup. Ct. 463, 47 L. Ed. 513; *D., L. & W. Railroad Co. v. Pennsylvania*, 198 U. S. 341, 25 Sup. Ct. 669, 49 L. Ed. 1077; *Union Transit Co. v. Kentucky*, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150. The present case concerns the imposition of an excise tax upon the privilege of passing the title to property on the death of its owner. It is not a property tax, but strictly an excise or franchise tax, although the amount of it may be made dependent to a greater or less extent upon the value of property. It is very plainly shown in *Plummer v. Coler*, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998, that property which is not taxable as such may constitutionally be considered under a statute, in fixing the amount of an excise tax.

Without deciding that the Legislature could not constitutionally include in the value of the stock for the purpose of fixing this tax all property of the corporation wherever situated, we are of opinion that its value for this purpose was intended to be limited by the value of the franchise and property which it specially represents within this commonwealth. In a sense, the stock in each state may be said to represent all the property of the corporation in different states. But the principal reasons for a local act of incorporation in each state relate only to the property in that state. As a domestic corporation, in a strict sense, it is confined to the state which gives it its charter, and when there is also a similar act of incorporation in another state where it has property and does business in the same way, the rights, privileges and obligations which belong peculiarly to domestic corporations should be only those which are recognized in the state where the franchise is granted. So far as the jurisdiction of a state to impose taxation depends upon the ownership of property, it is limited to that which is within the state. In a case like the present, where corporate power is exercised under two franchises of the same kind, granted by two adjacent states, and where the ownership is represented by a single issue of stock, recognized alike by both states, we think that, for jurisdictional pur-

poses and determining values in imposing taxes, the stock in each state should be held to represent only the property within that state. This view is strengthened by the express provisions to that effect in our recent legislation in regard to the taxation of corporate franchises. St. 1903, pp. 448, 449, c. 437, §§ 72-74; St. 1906, p. 572, c. 463, pt. 2, § 212; St. 1906, p. 628, pt. 3, § 126. The rule which we have adopted is made a part of our last act in regard to inheritance taxes. St. 1907, p. 801, c. 563, § 2. In this particular the decree of the probate court is correct.

The remaining question is whether the executors, by using the stock in Massachusetts corporations for the payment of debts and legacies, to the exemption of the property in New Hampshire, could relieve it from liability to a tax upon succession imposed by our law. We are of opinion that they could not. It was decided in *Hooper v. Bradford*, 178 Mass. 95, 59 N. E. 678, that taxes under this statute are to be assessed on the value of the testator's property at the time of his death. The rights of all parties, including the rights of the commonwealth to its tax, vest at the death of the testator. It is true that the interest of a legatee is subject to an accounting; but it is an interest in the existing fund, and it is analogous to that of a cestui que trust. The executors cannot, by independent action in attempting to marshal assets according to their personal wishes, enlarge or diminish the rights of legatees, or of the commonwealth. The property in Massachusetts is subject to the jurisdiction of our courts, and the executors must use and appropriate it according to law. *Greves v. Shaw*, 173 Mass. 205-209, 53 N. E. 372; *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176. The debts, the legacies in Massachusetts exempt from taxation and the expenses of administration are chargeable upon the general assets, as well those in New Hampshire as those in Massachusetts, and only a proportional part of the property in Massachusetts should be used in paying them. The balance is subject to the payment of a tax under the statute. The decision of the probate court upon this part of the case was correct.

Decree affirmed.

(196 Mass. 534)

BONIN v. BALLARD et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 26, 1907.)

1. APPEAL — REVIEW — PRESUMPTIONS — CONTENTION ON APPEAL — EFFECT.

Where several counts of a declaration rest on the averment that plaintiff was an employé of defendants, or one of them, but on appeal plaintiff contends that he was not such employé, directing a verdict for defendant on those counts will not be held error, since it will be assumed that he made the same contention below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3748.]

2. MASTER AND SERVANT — NEGLIGENCE — PLEADING—VARIANCE.

Proof that the stones, one of which fell on plaintiff and injured him, were merely temporarily put in a pile in the quarries operated by defendants, will not support an allegation that plaintiff was injured by reason of some defect in the condition of defendants' ways, works, and machinery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 861-876.]

3. SAME—INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.

Where it appeared from plaintiff's testimony that the fall of a stone which injured him might have been due to the carelessness of a fellow servant, and from defendant's testimony it appeared that it was due to plaintiff's own negligence, and there was no evidence of such unknown danger as to require warning, there could be no recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

4. SAME—RES IPSA LOQUITUR—APPLICATION OF DOCTRINE.

In an action for personal injuries received in a stone quarry, where there was no evidence to show that the ways and appliances of the quarry were in an unsafe condition, or that there was such a state of affairs as made it the duty of the one managing it to give any instructions, warning, or information to plaintiff, the doctrine of *res ipsa loquitur* does not apply.

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Action by Clement Bonin, 2d, against Harry Ballard and another. Directed verdict for defendants, and plaintiff excepts. Exceptions overruled.

The stone quarry where plaintiff was injured was part of the trust estate of John S. Ballard, of which defendant Mary A. Ballard, his widow, was trustee. Defendant Harry Ballard was operating the quarry for the trustee, and was in actual management thereof for her. Count 2 of the declaration alleged that plaintiff was injured by reason of some defect in the condition of the ways, works, and machinery of the defendants.

H. L. Parker, Jr., for plaintiff. Henry F. Harris and Charles C. Milton, for defendants.

SHELDON, J. Apart from the difficulty in the way of maintaining an action against the two defendants jointly (Mulchey v. Methodist Religious Society, 125 Mass. 487, 489), the plaintiff could not recover upon the first count of his declaration because there was no evidence of negligence on the part of the defendant Harry Ballard. As to the other counts, it would perhaps be enough to say that each of them rests upon the averment that the plaintiff was a servant of one or both of the defendants; and, as he has contended in this court, that he did not become and was not such a servant, and may be presumed to have made the same contention in the superior court, the verdict was rightly ordered upon this contention; for if there was no such relation, the plaintiff must fall upon each of these counts. But we prefer to pass upon the merits.

The jury doubtless might have found upon the evidence that although the plaintiff was in the general employ of the People's Coal Company, that company had so lent his services to the Ballard estate that the control over him had passed for the time to that estate, and that at the time of the accident he was a servant of the defendant Mary A. Ballard as the trustee of that estate, and had as against her the rights of a servant. *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328, and cases there cited. There is nothing in *Oulighan v. Butler*, 189 Mass. 287, 290, 75 N. E. 726, inconsistent with this.

But there was no evidence of any defect in the ways, works or machinery of this quarry. The stones of which one fell upon the plaintiff were merely temporarily put in a pile, and could in no sense be considered a part of such ways, works or machinery. *Feeney v. York Mfg. Co.*, 189 Mass. 336, 75 N. E. 733. They were like the pile of boards in *Campbell v. Dearborn*, 175 Mass. 183, 55 N. E. 1042. This pile was not intended to be itself used by the workmen, like the staging in *Prenoble v. Connecticut River Mfg. Co.*, 160 Mass. 131, 35 N. E. 675. Accordingly the action could not be maintained upon the second count of the declaration.

Nor, if we assume that Sullivan could have been found to be a superintendent within the meaning of Rev. Laws, c. 106, § 71, cl. 2, was there any evidence of negligence on his part. It does not appear that he had any reason to suppose that he was sending the plaintiff into a dangerous place without proper warning. It is not shown that there was any such unknown danger as to require a warning. *Sampson v. Holbrook*, 192 Mass. 421, 78 N. E. 127. If the plaintiff's own testimony is to be followed, the fall of the stone that injured him may have been due to the carelessness of his fellow servants in the course they adopted to break up the larger stones. If the defendants' testimony is to be followed, it was due to the plaintiff's own negligence. There could be no recovery upon the third count.

As to the fourth count, it is enough to say that there was no evidence to show either that the ways and appliances of the quarry were in an unsafe condition, or that there was any such state of affairs as made it the duty of Harry Ballard to give any instruction, warning or information to the plaintiff. *Davis v. Forbes*, 171 Mass. 548, 51 N. E. 20, 47 L. R. A. 170; *Kanz v. Page*, 168 Mass. 217, 218, 46 N. E. 620; *Duffy v. New York, New Haven & Hartford Railroad*, 192 Mass. 28, 77 N. E. 1031; *Stuart v. West End Street Railway*, 163 Mass. 391, 40 N. E. 180. The doctrine of *res ipsa loquitur* has no bearing upon this case; and the cases relied on by the plaintiff are not applicable.

Exceptions overruled.

(196 Mass. 563)

TILTON et al. v. TILTON.(Supreme Judicial Court of Massachusetts.
Essex. Nov. 26, 1907.)**WILLS—SET-OFF OF DEBT AGAINST LEGACY.**

Under Rev. Laws, c. 135, § 21, providing that, if a legacy be made to a relative of testator and he die before testator, his issue surviving testator shall "take the same estate which the person whose issue they are would have taken if he had survived the testator," they take the legacy as, under Rev. Laws, c. 141, § 23, the legatee would have taken it, subject to set-off in the probate court of the debts of the legatee to testator's estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1796.]

Case Reserved from Supreme Judicial Court, Essex County.

Petition of Charles H. Tilton and others, executors of George Henry Tilton, deceased, against Palmer Tilton. From a decree of the probate court that the amount due the estate of testator from the father of Palmer Tilton, a legatee under the will, who died before testator, be deducted from the amount of the legacy, the balance to be paid said Palmer Tilton, he appealed to the Supreme Judicial Court, which reserved the case for the full court. Affirmed.

Geo. W. S. Hart and Joseph N. Palmer, for appellant. Frank Paul, for appellees.

KNOWLTON, C. J. The petitioners are executors of a will which contains a legacy of \$3,000 to one Palmer Tilton, a nephew of the testator. This nephew died before the death of the testator, leaving as his only child the respondent, Palmer Tilton. Were it not for the provision contained in Rev. Laws, c. 135, § 21, this legacy would have lapsed. Under that provision the respondent takes it. His father, the original legatee, was indebted to the testator in the sum of \$1,500, and the only question in the case is whether the respondent takes the legacy subject to a set-off or takes the whole of it, absolutely.

It is provided by Rev. Laws, c. 141, § 23, that "a debt due to the estate of a deceased person from a legatee or distributee of such estate, shall be set off against and deducted from the legacy to such legatee, or from the distributive share of such distributee; and the probate court shall hear and determine the validity and amount of any such debt, and may make all necessary or proper decrees and orders to effect such set off or deduction," etc. Except for this new mode of collection of a debt, thus secured to the executors by proceedings in the probate court, this enactment is in accordance with the previous practice and the law in Massachu-

setts. *Allen v. Edwards*, 136 Mass. 138; *Jones v. Treadwell*, 169 Mass. 430, 48 N. E. 339. Under this statute a pecuniary legacy to a debtor of the testator is, in legal effect, a gift of the sum stated, less the amount of the indebtedness due from the legatee.

The precise question is whether the statute which saves a legacy from lapsing puts the estate of the testator in any worse position than it would have been in if the original legatee had survived, or puts the substituted legatee in any better position, in reference to the legacy, than his ancestor would have been in if he had not died.

If we seek to discover the purpose of the Legislature, it pretty plainly appears to be to put the estate and the substituted legatee in the same relations to each other, in reference to the legacy, that the estate and the original legatee would have been in if the latter had survived. The language of the original act, retained without material change in subsequent legislation until the enactment of Pub. St. 1882, c. 127, § 23, gave the issue a right to take the estate "in the same way and manner such devisee would have done in case he had survived the testator," etc. St. 1783, p. 553, c. 24, § 8; Rev. St. 1836, c. 62, § 24; Gen. St. 1860, c. 92, § 28. The substitution of the words, "take the same estate that the person whose issue they are would have taken, had he survived," etc., does not affect the meaning of the statute, as it is a mere re-enactment. *Drew v. Streeter*, 137 Mass. 460-462; *Jones v. Treadwell*, 169 Mass. 430-432, 48 N. E. 339. To take in the same manner as the ancestor would have done is to take subject to a set-off of the indebtedness. Using the word "estate" in its technical sense, and considering the statutes together, the estate which the original legatee would have taken is the ownership of the legacy, diminished by the amount of the indebtedness. The Supreme Court of Kansas gave this meaning to the words, "in the same manner as" in a statute almost identical with the one before us. *Fletcher v. Wormington*, 24 Kan. 259. The same construction was put upon similar words in another statute of this kind in New Jersey, and the opposite view stated in *Carson v. Carson's Ex'r*, 1 Metc. (Ky.) 300, was rejected. *Denise's Ex'rs v. Denise*, 37 N. J. Eq. 163.

The fact that his remedies for the collection of the debt are preserved to the executor against the estate of the original legatee does not affect his right to a set-off in the payment of the legacy, nor enlarge the rights of the substituted legatee. Rev. Laws, c. 141, § 23.

Decree of probate court affirmed.

Mass. 575)

FENEFF v. BOSTON & M. R. R. et al.

Supreme Judicial Court of Massachusetts.
Worcester. Dec. 4, 1907.)

MASTER AND SERVANT—MASTER'S LIABILITY FOR INJURIES TO SERVANT—METHODS OF WORK—RULES.

Where, construing the rule directing engineers not to permit any person, except the man and others necessarily there in the discharge of their duty, to ride on an engine, in connection with the rules conferring on the yardmaster authority, not only over the yard itself, but over employes engaged therein in the train and yard service, it is manifest that, within the limits of the yard, the yardmaster's authority and right of supervision is not curtailed, yard brakeman, riding on a passenger engine at the yardmaster's order to ride on any engine at might furnish the desired accommodation while going back and forth to his work, is not mere licensee.

SAME—CUSTOMARY VIOLATION.

That for at least 15 years it had been customary for yard employes to ride on any engine that might furnish the desired accommodation in going to or returning from their work warrants an inference that, to that extent, a rule directing engineers not to permit any person except the fireman and others necessarily there in the discharge of their duty to ride on the engine had been abrogated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 287.]

3. SAME—WAYS USED IN WORK.

A servant entering on his master's premises to begin work, or leaving them at its close, is not, during the time of his entrance or exit, while using the ways provided, a licensee, but is there by the invitation of the master.

4. SAME—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

Where, though a yard brakeman knew that a switch engine frequently used the track on which he was riding on a passenger engine, he testified from previous observation that before doing so it had waited until the passenger engine went by, and it appeared from his experience as a yard brakeman that he believed switch engines when running through the yard "had the least rights of any train or locomotive," the jury might find that he was not reasonably bound to anticipate that, without waiting, as usual, for the passing of the passenger engine then due, the switch engine would attempt to use the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 987-996.]

5. SAME—ASSUMPTION OF RISK.

A yard brakeman, in riding on a passenger locomotive in returning from his work, only assumes those risks either obvious or known to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 583.]

6. SAME—LIABILITIES FOR INJURIES TO THIRD PERSONS.

A master is answerable for injuries caused by his servant's carelessness while acting within the scope of his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1217, 1218.]

7. SAME—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE.

Evidence in an action for injuries to a yard brakeman in a collision between a passenger engine on which he was riding and a switch engine held to warrant a finding that the operator gave the required signal and opened the switch, permitting the switch engine to enter on the track, when in the exercise of ordi-

nary care he ought to have known that there was every reason to anticipate that the collision which followed might occur.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 979.]

8. SAME—NATURE OF LIABILITY.

Where a yard brakeman's injuries, sustained in a collision between a passenger engine, on which he was riding, and a switch engine, arose solely from the concurrent negligence of two railroad companies, and, though there was no concerted action, yet their combined carelessness in the simultaneous performance of unconnected duties produced the injury, the railroad companies were jointly and severally liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 165.]

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Action by Antoine Feneff against the Boston & Maine Railroad and another for personal injuries. Verdict for defendants, and plaintiff excepts. Verdict set aside, and judgment ordered for plaintiff.

Clarence E. Tupper, for plaintiff. Ralph A. Stewart and Arthur J. Young, for defendant New York Central & Hudson River Railroad Co. Charles M. Thayer and Alexander H. Bullock, for defendant Boston & Maine R. R.

BRALEY, J. The defendants insist that at the time of the accident the plaintiff was either a mere licensee to whom they owed no duty except to refrain from wanton or willful injury to his person, or was guilty of contributory negligence. This defense is untenable. It was undisputed that as a yard brakeman in the employment of the New York, New Haven & Hartford Railroad Company, having completed his work for the day, he was injured while riding within the yard limits on one of its passenger locomotives, which he had boarded for the purpose of going to the Union Station on his way home. The rules of this road conferred upon the yardmaster authority not only over the yard itself, but over employes when engaged therein in the train and yard service, and it was by his express order that the plaintiff had been directed to ride on any locomotive that might furnish the desired accommodation. The rule with which the plaintiff was familiar, and upon which the defendants largely rely, directing engineers not to permit any person except the fireman and others necessarily there in the discharge of their duty to ride on the engine without a pass from the general manager, must be read in connection with the rules relating to the powers of the yardmaster. When thus construed, it is manifest that within the limits of the yard, his general authority, and right of supervision had not been curtailed. It further could have been found from the testimony of the engineer that for 15 years at least it had been customary to furnish similar transportation for the convenience of yard employes. If this state of affairs prevailed, the jury could infer that to this extent the rule had

been abrogated. *Sweetland v. Lynn & Boston R. R.*, 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 98, 64 N. E. 726. It also is unnecessary to decide if the plaintiff had ceased to be a servant, and had become a passenger, as he was lawfully passing over the premises of his employer in its conveyance, which at the time had the exclusive use of the railroad. A servant entering upon his master's premises to begin the day's work, or upon leaving them at its close is not during the time of his entrance, or exit, while using the ways provided, a licensee, but is there by the invitation of the master. The defendants accordingly owed to him the duty, to refrain from acts of negligence which might cause personal injury while he was making his egress in the usual way. *Olsen v. Andrews*, 168 Mass. 261, 47 N. E. 90; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 102, 64 N. E. 726; *Holmes v. Drew*, 151 Mass. 578, 580, 25 N. E. 22. In the uncertain light of the early morning, clouded with mist, a view of the track, and the signal at Washington street, were somewhat obscured from the cab where the plaintiff stood. While he knew that the switching engine frequently used this track, he testified, from previous observation, that before doing so, it had waited at the signal tower until the passenger engine went by. It further appears from his experience as a yard brakeman that he believed such engines when running through the yard "had the least rights of any train or locomotive." Under the circumstances, it was open to the jury to find, that the plaintiff was not reasonably bound to anticipate that without waiting as usual for the passing of the regular engine which then was due, the switching engine would attempt to use the track. If it be said that he assumed the risk attendant upon the time and mode of transportation, the assumption included only those risks which either were obvious or known to him. It cannot be ruled as matter of law, that the possibility of the attempted use of a single track at the same time by another locomotive approaching from an opposite direction the engine where he was riding, and which had the right of way, either was obvious or should have been anticipated. *Wagner v. Boston Elevated Ry. Co.*, 188 Mass. 437, 441, 74 N. E. 919; *Urquhardt v. Smith-Anthony Co.*, 192 Mass. 257, 78 N. E. 410.

The defendants further urge that the engineer was not only careless, but his carelessness is to be imputed to the plaintiff. But without further comment, as the jury could find that in entering, and remaining in the cab, he acted with reasonable caution, so they could find that he possessed no knowledge which reasonably should have led him to anticipate negligence on the part of the engineer. *Shultz v. Old Colony St. Ry. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597. If, however, the impending collision

was due in part to the engineer's fault, yet the impact of the engines followed so closely upon the discovery that it was unavoidable that it became an issue of fact whether the plaintiff, suddenly called on to face an emergency, could have taken any further steps for his safety. *Shultz v. Old Colony St. Ry. Co.*, *ubi supra*. Besides, if the engineer was believed, he had the absolute right to a clear track beyond the point where the accident happened, and while taking every proper precaution, owing to the darkness he neither saw nor heard the switching engine, which displayed no light and gave no warning of its approach, until it was so near that the immediate application of the emergency brake failed to prevent the collision. If he were found to have used reasonable diligence the question of imputed negligence did not arise.

But if the issues of the plaintiff's right of recovery and of due care were for the jury, the defendants deny that there was any evidence of their negligence. It is to be inferred that the group of tracks within the yard was either owned or controlled by the various corporations described in the exceptions, but the arrangement whereby the New York Central & Hudson River Railroad Company maintained a signal tower from which the movements of all trains and locomotives were indicated and regulated, or the Boston & Maine Railroad was conditionally permitted to use the main line of the New York, New Haven & Hartford Railroad Company, is not stated. If not fully conceded by the plaintiff, at least it must be assumed upon the record, that such use was authorized, and it was unquestioned that the signals from the tower were designed for the information and guidance of the employes of whichever company might be using the several tracks. The switching engine could not pass to the main line unless the signal was given, and the switch set by the operator in the tower. If the engineer of this engine relied upon the signal as indicating that the track was clear to the south station, still from the evidence of the witness Studley it was apparent that he then knew, or in the exercise of reasonable care should have known, not only that the passenger engine had not made its trip to the union station, but was due to pass over the same track at any moment.

In brief, upon all the evidence, a jury would have been warranted in finding, that although under the system the usual signal had been given, the switching engine was being run on the time of another locomotive, by the engineer, who was willing to take the chance, without any reasonable expectation of safely making the transit. See *Barry v. Boston Elev. Ry. Co.*, 194 Mass. 265, 80 N. E. 225. If its servant was careless while acting within the scope of his employment, the defendant railroad is answerable to the plaintiff for injuries caused by his negligence.

There also was evidence of the negligence of the remaining defendant. The night oper-

ator who was in charge of the tower at the time of the accident did not testify. But from the evidence of the day operator, it appears that time-tables of all trains, with the contents of which, as well as of their movements, the operator must be familiar properly to display the signals, and operate the switches, were kept in the tower. It further was shown that the switchman's shanty at the grade crossing near the South Station having been connected by telephone, the operators being in doubt as to the coming of the passenger engine, on several occasions telephoned to ascertain if it were on its way, before the switching engine was allowed to use the track. It also was uncontroverted that the switching engine, whose movements were subordinate to regular trains, ran only at intervals when in the judgment of the men at the tower the main track was free. If these facts were found, then the operator on duty, who was the defendant's servant, with knowledge that the passenger engine had not passed, but momentarily might be expected, without taking the precaution to make any inquiry by telephone, gave the required signal, and opened the switch, thus permitting the switching engine to enter upon the main line, when in the exercise of ordinary care he ought to have known there was every reason to anticipate that the collision which followed might occur. *Doe v. Boston & Worcester St. Ry. Co.*, 194 Mass. —, 80 N. E. 814.

In avoidance of this liability the defendant urges, that two or more wrongdoers cannot be held jointly, unless either in fact, or by intentment of law, they co-operate in the perpetration of the wrong, as otherwise there would be a misjoinder of separate causes of action. Undoubtedly this is the general rule where two or more persons voluntarily unite in the act which constitutes the wrong, or the act is committed under such circumstances that they may be reasonably charged with intending the injurious consequences which follow. We refer only to a few illustrative cases. *Brown v. Perkins*, 1 Allen, 89; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Barden v. Felch*, 109 Mass. 154; *Levi v. Brooks*, 121 Mass. 501; *Bath v. Metcalf*, 145 Mass. 274, 276, 14 N. E. 133, 1 Am. St. Rep. 455; *Martin v. Golden*, 180 Mass. 549, 62 N. E. 977; *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745; *Hawkesworth v. Thompson*, 98 Mass. 77, 93 Am. Dec. 137; *Banfield v. Whipple*, 10 Allen, 27, 87 Am. Dec. 618; *Mulchey v. Methodist Religious Society*, 125 Mass. 487, 489; *White v. Sawyer*, 16 Gray, 586, 589; *Perreay v. Kimball*, 8 Allen, 199, 200; *Swain v. Tenn. Copper Co.*, 111 Tenn. 430, 78 S. W. 93; *Hill v. Goodchild*, 5 Burr. 2790. It has been said by an eminent legal author that "In respect to negligent injuries there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authori-

ties." 1 Cooley on Torts (3d Ed.) 246. See Pollock on Torts (7th Ed.) 194. But whatever diversity of opinion there may be elsewhere, the law here must be considered as settled, that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable. *Boston & Albany R. R. Co. v. Shanly*, 107 Mass. 568, 579; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491, 503; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Oughllhan v. Butler*, 189 Mass. 287, 293, 75 N. E. 726; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730. A corresponding liability under similar conditions has been sustained in other jurisdictions. *Colegrove v. N. Y., N. H. & H. R. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628, 631; *Lynch v. Elektron Mfg. Co.*, 94 App. Div. 408, 88 N. Y. Supp. 70; *Tompkins v. Clay St. Ry. Co.*, 66 Cal. 163, 4 Pac. 1165; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; *Matthews v. Delaware & Hudson St. Ry. Co.*, 56 N. J. Law, 34, 27 Atl. 919, 22 L. R. A. 261; *United Electric Ry. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863; *Wilder v. Stanley*, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479; *McClellan v. St. Paul, Minneapolis & Manitoba R. R. Co.*, 58 Minn. 104, 59 N. W. 978; *Allison v. Hobbs*, 96 Me. 26, 28, 29, 51 Atl. 245; *Wabash, St. Louis & Pittsburg Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791. The cases of *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745, *Mulchey v. Methodist Religious Society*, 125 Mass. 487, *Harriott v. Plimpton*, 166 Mass. 585, 44 N. E. 992, *Mooney v. Edison Electric Illuminating Co.*, 185 Mass. 547, 70 N. E. 933, and *Fletcher v. Boston & Maine R. R.*, 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414, upon which the defendant relies as establishing a different rule, are to be distinguished. The first two decided that a master cannot be held responsible jointly with his servant, nor a principal with his agent, for a tort committed by the servant or agent, when acting within the scope of their employment. In the third case, the joint action failed because no proof appeared of any co-operation between the defendants to procure a breach of the plaintiff's contract of marriage, while in the fourth, the measure of damages, as well as the degree of liability being different, and distinct, the liability was said to be several. If in the remaining case, it could have been said that the accident was chargeable solely to the railroad company, upon whom primarily rested the contractual duty of safely transporting the plaintiff, and whose breach of this duty was the proximate cause of the injury, yet the decision in favor of the defendants well might rest, as the opinion states, upon his contributory negligence. In the present case the wrongful act was unintentional, and arose solely from the concur-

rent negligence of the defendants, and while it cannot be said that there was any concerted action, yet their combined carelessness in the simultaneous performance of unconnected duties, produced a single injury to the plaintiff. It thus becomes impossible to ascertain whether one defendant, more than the other, was the efficient cause of the wrong to which each contributed.

The plaintiff, therefore, is entitled to prosecute his suit to final judgment against both defendants, although he can have but one satisfaction in damages. *Oughlilan v. Butler*, 189 Mass. 287, 293, 75 N. E. 726, and cases cited.

The verdict in their favor having been improperly ordered, in accordance with the agreement of the parties, judgment is to be entered for the plaintiff in the sum of \$600. So ordered.

(196 Mass. 431)

MILES v. JANVRIN.

(Supreme Judicial Court of Massachusetts. Suffolk. Nov. 25, 1907.)

1. LANDLORD AND TENANT—AGREEMENT TO REPAIR—LIABILITY FOR FAILURE.

To make a landlord liable in tort for personal injuries to the tenant, or one entering under him, from negligent omission of the landlord to repair steps which are a part of the premises let, it must be shown, not only that the landlord agreed to keep them in repair generally during the term of the lease, but that he agreed to maintain them in a safe condition for the tenant's use; that is, that during the term of the lease, so far as their safety was concerned, the steps were to remain in the control of the landlord, as they would, had there been no lease, with nothing but a right in the tenant to use them—the difference being between the landlord agreeing to maintain the steps for the use of the tenant in going to and from the house leased him, though the steps were a part of the premises let, and demising and letting to him the steps as a part of the premises, of which the house was the main thing, and agreeing to keep the steps in repair.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 631, 632.]

2. SAME—CONDITION AT TIME OF LEASE.

That steps of leased premises were out of repair when the lease was made makes the landlord no more liable in tort for injury to the tenant, or one entering under him, for injuries from the ruinous condition, which the landlord failed to remedy as he had agreed than he otherwise would be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 631, 632.]

3. SAME—MEANING OF AGREEMENT—EVIDENCE.

Where a part of a landlord's undertaking is an agreement in terms to make repairs, and the circumstances are such as to leave the meaning doubtful, it is to be determined, from all the language used and all the circumstances, whether his meaning is to make repairs merely as a mechanic might contract to make them, only on notice that they are needed, or whether his undertaking is intended to be broader, including a duty to observe for himself the condition of the premises and provide for their safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 645.]

4. ACTIONS—PERSONS LIABLE—AVOIDING CIRCUITY OF ACTION.

Where plaintiff, suing a landlord for injuries from want of repairs defendant had agreed, but failed to make, is the wife of the tenant, and for that reason cannot sue the tenant, the question of under what circumstances one can sue the landlord, instead of the tenant, to avoid circuity of action, is not involved.

Exceptions from Superior Court, Suffolk County, C. U. Bell, Judge.

Action by one Miles against one Janvrin, administrator. Verdict for plaintiff, and defendant excepted. Exceptions sustained.

Tort for personal injuries to plaintiff, whose husband hired premises of defendant's intestate in Revere. Before the premises were taken there was an inspection of them, and the condition of the steps was noticed and commented upon. The owner said he would repair them, but the plaintiff and her husband moved in at once and the repairs were not made. Plaintiff fell on the steps and was injured in consequence of their defective condition.

Jas. A. McGeough, for plaintiff. Harri-man & Perkins, Wm. M. Robinson, and J. W. Ramsey, for defendant.

LORING, J. It was held by this court in *Tuttle v. Gilbert Manuf. Co.*, 145 Mass. 169, 13 N. E. 465, that a landlord was not liable for personal injuries suffered by a tenant by reason of the omission on the part of the landlord to repair the floor of a barn which he had agreed to repair as part of the contract of a lease of the barn. And the general doctrine was laid down there that a negligent omission to repair the premises of another is not the ground of an action of tort. The same conclusion was reached in *Cavaller v. Pope*, [1905] 2 K. B. 757; *s. c.* on appeal, [1906] A. O. 428; *Brodman v. Finerty*, 116 La. 1103, 41 South. 329. See, also, *Collins v. Karatovsky*, 36 Ark. 316, 324. These were all cases where the agreement made by the landlord was to make specific repairs.

The presiding judge in the case at bar instructed the jury that there was a difference between an agreement by a landlord to make a specific repair and an agreement by him to keep the demised premises in repair generally during the term of the lease, and that the defendant's liability in the case at bar depended upon the question whether the defendant agreed to put the steps here in question in repair or whether he agreed to keep them in repair generally during the term of the lease.

In our opinion, however, a tenant does not go far enough to charge a landlord in tort for personal injuries caused by an omission to make needed repairs, when he has made proof that the landlord agreed, as one of the terms of the demise, to keep the premises in question in repair generally during the term of the lease. To charge a land-

lord in tort for personal injuries caused by a negligent omission to make needed repairs, not only must the tenant prove that the landlord agreed to keep the premises in repair, but he must go one step further and prove that the landlord agreed to maintain the premises in a safe condition for his (the tenant's) use. That is to say, he must prove that during the term of the lease, so far as their safety is concerned, the premises to be kept in repair are to remain in the control of the landlord (as they would have remained had there been no lease), with nothing but a right in the tenant to use them. In short, that, so far as their safety is concerned, the landlord's relation to the premises to be kept in repair is the same as that of a landlord in case of common passageways in a tenement house, as to which see *Domenicis v. Fleisher* (Mass.) 81 N. E. 191, and cases there collected; the only difference being that in a case like the case at bar the tenant has an exclusive use, while in case of common passageways in a tenement house the use which the several tenants have is not exclusive.

The difference between the two cases is plain. To take the case now before us: It is one thing to agree to maintain a flight of steps for the use of a tenant in going to and from the house of which he has a lease, even where the steps are a part of the premises let; it is another thing to demise and let to him the steps as part of the premises of which the house is the main thing, and agree to keep the steps in repair.

In the first of these two cases it is within the contemplation of the parties to the contract that the tenant of the house is to have a right to use the steps on the footing that they are safe at all times during the period covered by the agreement. In the second, if the landlord omits to make needed repairs when he ought to make them, the tenant has no right to use the premises which ought to have been repaired on the footing that they are in a safe condition; his right against the landlord in such a case goes no further than to have the repairs made at his landlord's expense. In respect to what is within the contemplation of the parties, there is no difference between a contract by the landlord to keep the premises of his tenant in repair generally during the term of the lease and a contract by a landlord to make specific repairs on the premises of the tenant. We repeat: There is a difference between a landlord's agreeing to maintain the premises in a safe condition for the tenant's use and a contract to keep the tenant's premises in repair.

We have said that the landlord is liable if he has agreed to maintain a flight of steps for the use of a tenant in going to and from the house of which he has a lease, even when the steps are a part of the premises let. That requires a word of explanation. Where the arrangement between the landlord and

the tenant is that during the term of the lease the landlord is to be responsible for the safety of a flight of steps which leads from the highway to the demised house, the direct way of carrying that arrangement into effect would be to give the tenant nothing but a right to use the steps. This would leave the steps in the control of the landlord, and being in his control with an agreement to keep them in repair, the case would come within the principle of *Domenicis v. Fleisher* (Mass.) 81 N. E. 191, and within the decision in *Miller v. Hancock*, [1893] 2 Q. B. 177. But in such a case it is possible for the parties to carry out that arrangement by including the flight of steps in the premises demised with an agreement by the landlord to become absolutely liable for the maintenance of the steps in a safe condition during the term of the lease. If such a contract were made by a stranger (for example by a carpenter) the contract would put the flight of steps in the control of the carpenter during the term of the lease, so far as necessary to insure their being in a safe condition, on the principle applied in *Quinn v. Crimmings*, 171 Mass. 255, 50 N. E. 624, 42 L. R. A. 101, 68 Am. St. Rep. 420, and *Wixon v. Bruce*, 187 Mass. 232, 72 N. E. 978, 68 L. R. A. 248. There is nothing to prevent the same contract being made to carry out the arrangement between a landlord and tenant stated above, although, as we have said, the direct way of carrying out such an arrangement would be to give the tenant a right to use the steps only.

In the following cases the rule of *Tuttle v. Gilbert Manuf. Co.*, 145 Mass. 169, 13 N. E. 465, was applied to agreements to keep the tenant's premises in repair generally throughout the term of the tenant's lease. *Davis v. Smith*, 26 R. I. 129, 58 Atl. 630, 66 L. R. A. 478, 106 Am. St. Rep. 691; *Burdick v. Cheadle*, 26 Ohio St. 393, 20 Am. Rep. 767; *Brown v. Toronto General Hospital*, 23 Ont. 599.

The law in New York seems to be in accordance with these cases. *Frank v. Mandel*, 76 App. Div. 413, 78 N. Y. Supp. 855; *May v. Ennis*, 78 App. Div. 552, 79 N. Y. Supp. 896; *Stelz v. Van Dusen*, 93 App. Div. 358, 87 N. Y. Supp. 716; *Sherlock v. Rushmore*, 99 App. Div. 598, 91 N. Y. Supp. 152; *Boden v. Scholtz*, 101 App. Div. 1, 91 N. Y. Supp. 437; *Hagin v. Cayuga Lake Cement Co.*, 105 App. Div. 269, 93 N. Y. Supp. 428; *Dancy v. Walz*, 112 App. Div. 355, 98 N. Y. Supp. 407. See, also, in this connection, *San Filippo v. American Bill Posting Co.*, 188 N. Y. 514, 81 N. E. 463, and *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129, and cases there collected.

Before the case of *Cavaller v. Pope*, ubi supra, there was authority in England to the contrary. It was stated by Lopes, J. (as he then was), in *Nelson v. Liverpool Brewery Co.*, 2 O. P. D. 311, 313, that if the landlord was under an obligation to make exterior

repairs an employé of the tenant could recover for injuries caused by his failure to make needed repairs on a chimney top which fell and caused the injuries to the tenant's employé there complained of. The plaintiff in that case undertook to make out an obligation on the landlord to make exterior repairs by showing a custom by which exterior repairs were made by landlords. The case went off on the ground that all that was proved there was a practice among landlords to make external repairs for their own interest, and that a custom making it obligatory on a landlord to make such repairs was not proved. On the authority of this statement, however, it was ruled by Phillimore, J., in *Cavaller v. Pope*, that a landlord who had agreed to repair the floor of the kitchen let to the plaintiff's husband in consideration of the husband's agreeing to continue his lease of the premises, was liable for injuries suffered by the tenant's wife in falling through the floor which had not been repaired by the landlord in accordance with this agreement. That the original ruling made by Phillimore, J., in *Cavaller v. Pope*, was made on the authority of this statement in *Nelson v. Liverpool Brewery Co.* See *Collins, M. R.* [1905] 2 K. B., at page 762, and *Lord Atkinson* [1906] A. C., at page 431. This ruling was reversed in the Court of Appeals, *Cavaller v. Pope* [1905] 2 K. B. 757, and in the House of Lords [1906] A. C. 428; and the doctrine laid down by Lopes, J., was thereby overruled.

There is a case in the Circuit Court of the United States for the Southern District of New York (*Moore v. Steljes* [C. O.] 69 Fed. 518) in which it was held that a landlord who had agreed to keep the leased premises in repair was liable for injuries suffered by one entering under the tenant, because the cause of the injury in that case antedated the lease. That is to say, because the premises let were a nuisance when let. In the opinion of Wheeler, J., in that case, the liability of the landlord in such a case to a third person was discussed. But there is no discussion there as to the proposition that one entering under the tenant stands on the same footing as a third person in that connection. That is assumed in that opinion without discussion.

If *Moore v. Steljes* were law in this commonwealth, it would not help the plaintiff in her contention that the instructions given in the case at bar were correct. The presiding judge in the case at bar did not tell the jury that the defendant was liable if they found that the steps here in question were in a dangerous condition at the date of the lease. He told them that the defendant was liable here in case he agreed to keep the steps in repair. But although for this reason the decision in *Moore v. Steljes* is not authority for the instructions given, the doctrine in that case, if it is law, will be of importance

in the ultimate disposition of the case at bar. For that reason we stop to consider it.

Moore v. Steljes is not law in this commonwealth. The ground on which it is held that a landlord is liable to a third person for letting premises in a ruinous condition is that maintaining premises in a ruinous condition is a tort as against a third person who is injured by reason of their condition, and letting premises in that condition is authorizing the continuance of the nuisance. See *Dalay v. Savage*, 145 Mass. 38, 12 N. E. 841, 1 Am. St. Rep. 429. But it is not a tort as against the tenant for a landlord to demise to him premises in such a condition that they are a nuisance. See, for example, *Bowe v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471, and *Phelan v. Fitzpatrick*, 188 Mass. 237, 74 N. E. 326, 108 Am. St. Rep. 469, and cases cited. And it is no more a tort as against the tenant and those entering under him to authorize him to continue the premises in that condition than it is to let such premises to him. It is also settled here that one entering under the tenant has no greater rights than the tenant. See, for example, *Dalton v. Gibson*, 192 Mass. 1, 77 N. E. 1035. One of the grounds of decision in *May v. Ennis*, 78 App. Div. 552, 79 N. Y. Supp. 896, was that on which *Moore v. Steljes*, ubi supra, was decided.

There is a case in the Court of Appeals of Kentucky (*Stillwell v. South Louisville Land Co.*, 58 S. W. 696, 54 L. R. A. 325, 22 Ky. Law Rep. 785), not reported in the regular series of its reports, in which it was assumed without discussion that a landlord who had agreed to make repairs on leased premises is liable to make compensation for injuries caused by his failure to make needed repairs. The only point discussed in the opinion in that case is whether the plaintiff there was barred by his contributory negligence. That decision does not help the contention made in support of the charge of the presiding judge in the case at bar, because the agreement in *Stillwell v. South Louisville Land Co.* was an agreement to make specific repairs and therefore, if it is an authority at all, it is an authority that *Tuttle v. Gilbert Manuf. Co.* was wrongly decided. It was admitted by the presiding judge in his charge in the case at bar, and it was admitted at the argument here, that *Tuttle v. Gilbert Manuf. Co.* was rightly decided. This decision, therefore, does not help the plaintiff in his present contention.

The only other case to the contrary is a case in an inferior court in the state of Illinois. *Sontag v. O'Hare*, 73 Ill. App. 432. It would seem from the two cases on the authority of which *Sontag v. O'Hare* was decided (*Mendel v. Fink*, 8 Ill. App. 378, and *Platt v. Farney*, 16 Ill. App. 216) that the porch there in question was a common porch not let to the tenant but which the tenant had a right to use. That is to say, it would seem that that case belongs to the same class of cases

as those relating to the common passageways of a tenement house. Whether that is or is not the true explanation of *Sontag v. O'Hare* is not material here; for if that is not the true explanation of that case all that it amounts to is a decision for which no reasons are given but two decisions which do not support the conclusion to which the court came.

In addition there is a general statement at the conclusion of the opinion in *Thompson v. Clemens*, 96 Md. 196, 211, 53 Atl. 919, 923, 60 L. R. A. 580, "that a landlord under contract to repair may under some circumstances be liable for damages for personal injuries by reason of a negligent failure to make repairs." There is a headnote substantially to that effect where no opinion is reported in *Veal v. Hanlon*, 123 Ga. 642, 51 S. E. 579, and another in *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177, 7 L. R. A. 620, where there is an opinion, but nothing in the opinion which gives countenance to the headnote. In all these cases the plaintiff was held not entitled to recover.

In determining whether an agreement by a landlord with a tenant to keep in repair generally a portion of the premises during the term of the lease is a contract to maintain those premises in a safe condition for the tenant's use, or is a contract to keep them in repair as the premises of the tenant, the necessity of a notice from the tenant to the landlord that repairs are needed before the landlord can be taken to be in default under his contract is important. Where by force of the contract the landlord is to maintain the premises in a safe condition for the tenant's use, no notice is necessary. But where the landlord's contract is to keep the premises in repair as the premises of the tenant during the term of the lease, as matter of implication notice is necessary before the landlord is in default. For cases where it was held that notice was necessary, see *Hutchinson v. Cummings*, 156 Mass. 329, 31 N. E. 127; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472, 474, 33 N. E. 499; *Marley v. Wheelwright*, 172 Mass. 530, 52 N. E. 1066; *Cummings v. Ayer*, 188 Mass. 292, 74 N. E. 336.

It was of cases where the landlord's agreement is to keep the tenant's premises in repair, as distinguished from an agreement to keep them in a safe condition, that *Lathrop, J.*, said in *Galvin v. Beals*, 187 Mass. 250, 252, 72 N. E. 969, 970: "The general rule in this commonwealth must be considered as settled that a tenant cannot recover against his landlord for personal injuries occasioned by the defective condition of the premises let, unless the landlord agrees to repair, makes the repairs, and is negligent in making them. *Bowe v. Hunking*, 135 Mass. 390, 46 Am. Rep. 471; *Tuttle v. Gilbert Manuf. Co.*, 145 Mass. 169, 13 N. E. 465; *McKeon v. Cutter*, 156 Mass. 296, 31 N. E. 389; *McLean v. Fiske Wharf & Warehouse Co.*, 158 Mass. 472, 33 N. E. 499; *Marley v. Wheelwright*, 172 Mass. 530, 52 N.

E. 1066." This was repeated by *Sheldon, J.*, in *Shute v. Bills*, 191 Mass. 433, 437, 78 N. E. 96, 7 L. R. A. (N. S.) 965, 114 Am. St. Rep. 631.

In the class of cases with which we are dealing here, even when the premises are included in the lease, the question for the jury is whether the defendant's agreement was to make the repairs then needed upon the steps, and such other repairs as might be needed from time to time during the term, with an implied understanding that the tenant should look out for the condition of the premises and inform him when anything should be done, or whether it was an absolute agreement to maintain the steps in a safe condition for the tenant and those claiming under him, and relieve the tenant from any duty to provide for their safety. If a part of a landlord's undertaking is an agreement in terms to make repairs, and if the circumstances are such as to leave the meaning doubtful, it is to be determined from all the language used and from all the circumstances, whether his meaning is to make repairs merely as a mechanic might contract to make them, only upon notice that they are needed, or whether his undertaking is intended to be broader, including a duty to observe for himself the condition of the premises and provide for their safety.

It is not necessary in this case to consider under what circumstances an action can be maintained directly against the landlord who has agreed to keep in repair premises demised to a tenant, to avoid circuity of action. See *Payne v. Rogers*, 2 H. Bl. 349; *Lowell v. Spaulding*, 4 Cush. 277, 279, 50 Am. Dec. 775; *Milford v. Holbrook*, 9 Allen, 17, 21, 85 Am. Dec. 735. It is enough in the case at bar to point out that the plaintiff was the wife of the tenant and for that reason could not have sued him; and that not being able to sue the tenant at all she could not sue the landlord to avoid circuity of action.

Exceptions sustained.

(196 Mass. 474)

FULLAM et al. v. WRIGHT & COLTON WIRE CLOTH CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 26, 1907.)

1. SALE — ENTIRE CONTRACT — RIGHT TO REPUDIATE.

A contract of sale of a certain number of cords of wood at a certain price per cord constitutes an indivisible bargain for an entire consideration, though the delivery is to be by car loads, till all the wood is shipped, and payment is to be made each week for the number of cords shipped, so that, wood shipped not being according to contract, the purchaser may repudiate the entire contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales. §§ 171-179.]

2. EVIDENCE—PAROL EVIDENCE—CONTRACT OF SALE.

Though a contract of sale, consisting of a written order and acceptance, cannot be varied by parol, the situation of the parties may be con-

sidered in ascertaining their intention and the meaning of the language used.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2129-2133.]

3. SALE—CONTRACT—CONSTRUCTION.

Defendant being apprehensive, because of a strike at coal mines, that it might be unable to obtain soft coal, which it had been accustomed to use in its annealing furnaces and for making steam, contracted with plaintiffs, who knew of these uses, for a supply of cordwood as a substitute; the contract being for a certain number of cords of dry wood, "largely chestnut, some hardwood, pine, and poplar," to be delivered by car loads. Held, that the wood of each car was to be mixed, so that the combination should be according to description; and it was not enough that all the wood on hand with which to fill the order, if mixed, would meet the description.

Appeal from Superior Court, Worcester County; John F. Brown, Judge.

Action by William F. Fullam and others against the Wright & Colton Wire Cloth Company, based on defendant having ordered of plaintiffs 900 cords of dry wood and having repudiated the contract after five car loads were shipped to it. Judgment for defendant. Plaintiffs appeal. Affirmed.

Webster Thayer, Jere R. Kane, Hollis W. Cobb, and Fred A. Walker, for plaintiffs. Charles M. Thayer and Roy F. Gilkeson, for defendant.

BRALEY, J. If the defendant had the right to repudiate the purchase, because the wood tendered did not correspond with the description under which it was sold, the judgment in its favor must be affirmed. The sale was of the whole quantity, at an agreed price, and hence constituted but one indivisible bargain, although the delivery was to be by car loads instead of in bulk until all had been delivered. *Miner v. Bradley*, 22 Pick. 457; *Clark v. Baker*, 5 Metc. 452; *Young v. Wakefield*, 121 Mass. 91; *Roosevelt v. Doherty*, 120 Mass. 301, 37 Am. Rep. 356; *Barrie v. Earle*, 143 Mass. 1, 8 N. E. 639, 58 Am. Rep. 126; *Stewart v. Thayer*, 168 Mass. 519, 47 N. E. 420, 60 Am. St. Rep. 407; *Tripp v. Smith*, 180 Mass. 122, 61 N. E. 804; *Providence Coal Co. v. Cox*, 19 R. I. 381, 35 Atl. 510; *Wooten v. Walters*, 110 N. C. 256, 14 S. E. 734, 736; *Mersey Steel & Iron Co. v. Naylor* (1884) 9 A. C. 434. But if entire, the contract expressly called for all the wood to be "largely chestnut, some hardwood, pine, and poplar," and this statement must be treated as descriptive of the subject-matter, and is to be regarded as a warranty of the kind and quality. In the performance of their promise the plaintiffs therefore were required to deliver wood in conformity with the description. *Henshaw v. Robins*, 9 Metc. 83, 43 Am. Dec. 367; *Gossler v. Eagle Sugar Refining Co.*, 103 Mass. 331; *Harrington v. Smith*, 138 Mass. 92; *Bowes v. Shand*, 2 A. C. 445; *Filley v. Pope*, 115 U. S. 213, 6 Sup. Ct. 19, 29 L. Ed. 372. It appears from the auditor's findings that when they accepted the defendant's order the plaintiffs had purchased enough wood which in quantity, variety and

quality was more than sufficient to enable them to fulfill their contract. But being on the lot where the various kinds had been cut and corded in separate piles, upon carting it to the cars for shipment, no attempt was made to load each car according to the required assortment. In consequence of this failure the cars forwarded were filled largely with pine, among which was mingled a small amount of chestnut and birch. These consignments the defendant refused to accept, because the wood had not been delivered in the required proportions, and repudiated the entire purchase. It is the contention of the plaintiffs that, if it had been possible to transport the whole at once to the defendant's factory, this would have been a sufficient delivery, even if the several varieties had not been proportionately commingled. See *Wolf v. Boston Veneer Box Co.*, 109 Mass. 68. And as transportation by separate car loads was the only feasible way, as well as in accordance with the manner of shipment under the terms of the contract, the defendants were not justified in their refusal to accept, if the wood placed on the cars was not properly assorted. The consideration however, was entire, even if the plaintiffs were to be paid each week for the number of cords shipped, and whether each car load called for a complete delivery according to the description depends upon the construction given to the contract. It is settled that having been reduced to writing, while the order and acceptance cannot be varied or enlarged by oral evidence, yet the situation of the parties may be considered to ascertain their intention and the meaning of the language used. *Bancroft v. Abbot*, 3 Allen, 524, 526; *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209; *Adams v. Morgan*, 150 Mass. 143, 22 N. E. 708; *Bassett v. Rogers*, 162 Mass. 47, 37 N. E. 772; *Lynn Safe Deposit & Trust Co. v. Andrews*, 180 Mass. 527, 533, 62 N. E. 1061; *Callender, McAusland & Troup Co. v. Flint*, 187 Mass. 104, 72 N. E. 345; *Buffinton v. McNally*, 192 Mass. 198, 78 N. E. 309; *De Friest v. Bradley*, 192 Mass. 346, 352, 353, 78 N. E. 467; *American Malting Co. v. Souther Brewing Co.*, 194 Mass. 80, 80 N. E. 526; *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 80 N. E. 527, 9 L. R. A. (N. S.) 966. It is expressly found that because of a strike at the coal mines the defendant, becoming apprehensive that it might be unable to obtain soft coal which it had been accustomed to use in its annealing furnaces, and for making steam, contracted with the plaintiffs, who knew of these uses, for a supply of cordwood as a substitute. In performance of their contract, to ship wood entirely of one kind, or so sparsely mixed with some of the other varieties, that any benefit from the combination as ordered would be lost, cannot be said by the plaintiffs to be immaterial, because not within the contemplation of the parties, but the combination is rather to be considered as an essential element of the

contract, and for which it was executed. Nor is the effect of this finding lessened by the further statement that the wood shipped could have been used for making steam, for even then only one of the objects of purchase was covered, as the plaintiffs are found to have known. Under the conditions of sale it must be held that each car was to be filled with wood so mixed that it would conform to the description as to variety, and relative qualities. *Henshaw v. Robins*, ubi supra; *Mansfield v. Trigg*, 113 Mass. 350.

The failure of the plaintiffs in delivery to meet this requirement resulted in a total failure of consideration, which justified the defendant in a complete repudiation of the sale. *Henshaw v. Robins*, ubi supra; *Earnshaw v. Whittemore*, 194 Mass. 187, 80 N. E. 520; *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920.

Judgment affirmed.

(196 Mass. 492)

SAYLES v. QUINN.

(Supreme Judicial Court of Massachusetts.
Worcester. Nov. 26, 1907.)

1. APPEAL—HARMLESS ERROR—EXCLUDING EVIDENCE.

Defendant may not complain that evidence was excluded as being improper under a general denial, where he was permitted to amend and present it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4200-4207.]

2. DAMAGES—RECOUPMENT—NECESSITY FOR PLEADING.

Damages claimed by way of recoupment must be specially pleaded.

3. TRIAL—IMPROPER ARGUMENT—COURT'S DISCRETION.

It is within a trial court's discretion either to stop improper argument of counsel or to permit it to proceed and correct the error in the charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 267.]

4. SAME—PROPRIETY OF ARGUMENT.

In an action for compensation for training horses, plaintiff's counsel's statement in argument that defendant did not raise the defense of unskillfulness in training the horses, nor question the bill on that account, until the trial, and that the filing of defendant's amendment, wherein he claimed damages therefor, at the trial, gave plaintiff no opportunity to meet the claim, unless a continuance was asked, was not error, where the court guarded the effect of the argument by stating that the jury could only consider the time of filing the amendment with respect to the evidence plaintiff might be expected to produce on that issue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 316.]

5. EVIDENCE—BURDEN OF PROOF—RECOUPMENT.

In an action for compensation for training horses, the burden was upon defendant to prove the allegations of his plea in recoupment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 119, 120.]

6. CONTRACTS—ACTION FOR PRICE—CHANGE IN PRICE—BURDEN OF PROOF.

Where, in an action for compensation for training horses, defendant claimed that after the

contract was partly performed the price was reduced, the burden was upon him to prove it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1764-1774.]

7. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In an action on a contract, an incorrect instruction that defendant's plea of payment admitted the contract was harmless, where the existence of the contract was admitted throughout the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4219-4228.]

8. TRIAL—INSTRUCTIONS—BURDEN OF PROOF.

Where, in an action for compensation for training horses, defendant pleaded in recoupment damages from plaintiff's unskillfulness, instructions that the burden was upon defendant to show the unskillfulness, and on plaintiff to prove he carried out his contract and acted in a skillful manner, and that if the horses were injured through any failure on his part he had not proved the contract alleged, fairly distinguished between the reasonable skill and care plaintiff was bound to prove affirmatively in order to recover, and the damages resulting from his unskillfulness and carelessness, which defendant claimed by way of recoupment, the burden to prove which was upon defendant.

9. CONTRACTS—PLEADINGS—EVIDENCE—ADMISSIBILITY.

Where, in an action for compensation for training horses, the only issues are whether plaintiff has performed his contract and whether the price had been paid, evidence is inadmissible to show for defendant that one of the horses was well-bred and that he "worked a mile in 2:30."

10. APPEAL—EXCLUSION OF EVIDENCE—INSUFFICIENT SHOWING.

Where certain evidence was not admissible until defendant amended during trial, he may not complain of its exclusion without showing that it was offered after the amendment.

11. CONTRACTS—EVIDENCE—ADMISSIBILITY—ISOLATED FACTS.

Where, in an action for compensation for training horses, defendant pleaded in recoupment damages arising from plaintiff's unskillfulness, it was within the court's discretion to reject evidence that one of the horses had "worked a mile in 2:30" and was well-bred, as proof of isolated facts, unconnected with testimony as to other attributes, especially as the only evidence touching the value of the animals came from defendant's witnesses and was not contradicted.

Exceptions from Superior Court, Worcester County; William Cushing Walt, Judge.

Action by M. T. Sayles against James H. Quinn. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled.

Rufus B. Dodge and Wm. J. Taft, for plaintiff. Webster Thayer, Hollis W. Cobb, and Fred A. Walker, for defendant.

RUGG, J. This is an action of contract on an account annexed to recover for services and disbursements in the care, board and training of two of the defendant's horses under a verbal agreement. The answer was a general denial and payment.

1. Upon these pleadings the defendant offered evidence tending to prove unskillfulness on the part of the plaintiff in training one of the horses and claimed the right to show his damages resulting therefrom. Exception was taken to the ruling that this

could not be shown under a general denial. The defendant thereupon amended his answer, and pleaded in recoupment, and the evidence was admitted. This exception might be disposed of shortly on the ground that the defendant suffered no harm, because he was permitted to amend and present all the evidence upon this subject that he desired. But the ruling was right for the reason that damages claimed by way of recoupment must be specially pleaded. *Hodgkins v. Moulton*, 100 Mass. 309; *Gillis v. Cobe*, 177 Mass. 584-605, 59 N. E. 455. The offer was not alone to prove a failure to perform the contract as claimed by the plaintiff which might have been proven under a general denial, but it was linked with the claim for damages, which was a demand in recoupment and must be set out in the pleadings.

2. During his argument to the jury counsel for the plaintiff stated that the "defendant had never raised the defence of unskillfulness or questioned the bill on that account until the trial, and that the filing of the amendment during the trial gave the plaintiff no opportunity to meet this claim, unless a continuance of the case was asked." Counsel for the defendant seasonably objected to this as being argument upon the pleadings, and excepted to the refusal of the court to interfere. Even if the argument had been objectionable, the court was not bound to stop the counsel, provided adequate instructions were given respecting the matter. *Commonwealth v. Cunningham*, 104 Mass. 565. It is within the discretion of the presiding justice either to interrupt and stop an improper argument of counsel or to permit it to proceed and in his charge correct the error. In his charge the court carefully guarded the effect of this argument, by stating that the jury could only consider the time of filing the answer with respect to the evidence, which the plaintiff might be expected to produce upon that issue. A party, when confronted, during the course of a trial, with a new issue, caused by an amendment to the pleadings, by his opponent, may well prefer to conclude the trial with such evidence as may be at hand rather than to ask for a continuance for the purpose of procuring more. If he elects to do this it is not improper to suggest, by way of argument, that his failure to proffer further evidence upon the particular issue, may be accounted for by the fact that it was raised at a time when he could not conveniently do so. This argument is not one upon the pleadings, but upon the failure to produce evidence, which is generally a proper subject for argument.

3. The charge that the burden of proof is upon the defendant in case of recoupment was correct. *Noble v. Fagnant*, 162 Mass. 275, 286, 33 N. E. 507.

4. The defendant claimed and introduced evidence tending to show that after the contract was made and after it had been par-

tially performed, it was modified to a material extent as to the price to be charged. The trial court correctly ruled that upon this branch of the case the burden was upon the defendant to prove that the price named in the original contract had been changed. This evidence was introduced without objection under a general denial. It was not a claim that the contract as originally made was different as to price from that claimed by the plaintiff, but that there was a subsequent modification of it. This put the burden of proof as to that particular allegation, which was in effect an affirmative one, upon the defendant. *Lothrop v. Otis*, 7 Allen, 435. What was said is not to be construed as shifting the burden of proof from the plaintiff to the defendant. The parties were not in conflict as to the price to be charged in the contract as originally made. The defendant proposed to show a distinct proposition, which would if proved, avoid the effect of the contract as made. When he asserted this distinct matter, the burden rested upon him to prove it. *Powers v. Russell*, 13 Pick. 69, 77; *Potter v. Morland*, 3 Cush. 384, 389; *Delano v. Bartlett*, 6 Cush. 384.

5. It was said in the course of the charge respecting the pleadings, that "there is the further answer set out, that if the defendant ever owed the plaintiff anything, he has paid him the amount. That admits that there was such a contract as the plaintiff alleges, but says that has been made and paid, that the amount due under that contract has been paid." The defendant's exception to this statement must be overruled, for the reason that he does not show that he suffered any harm from it. The whole course of the trial shows that both parties admitted a contract to have been made, which, as to price originally agreed upon, was not in issue. The inaccurate statement that a plea of payment admitted the contract, therefore, did no harm, because a contract was admitted throughout the trial.

6. The defendant objects to that portion of the charge, which states that the burden was on the defendant to show unskillful driving or training. The context in which this statement was made shows that the attention of the court and jury was then directed to the claim of recoupment set up by the defendant. In other parts of the charge the court gave full instructions that the burden was upon the plaintiff to prove that he had carried out the contract which he alleged, and that, as a part of that burden of proof, he must show that he used reasonable care, and acted in a skillful manner in dealing with the horses, and if the horses driven were injured in consequence of any failure on his part, then he had not proved the contract which he alleged. Taking the charge as a whole, it fairly distinguished between the reasonable skill and care which the plaintiff was bound to prove affirmatively that he had used in order that he might recover.

and the damages resulting from his unskillfulness and carelessness, which the defendant claimed by way of recoupment, the burden to prove which was upon the defendant.

7. Two questions of evidence have been argued. The defendant offered to show, as affecting the value of one of the horses, that he had "worked a mile in 2:30," and also that he was a well-bred horse. It does not appear at what stage of the trial this evidence was offered. If before the amendment was filed, it was obviously incompetent. The issues between the parties then were solely whether the plaintiff had performed his contract, as to the price which the parties had agreed upon for the board and care of the horses, and whether it had been paid. Upon these issues it was of no consequence whether or not the horses were well-bred or fast trotters. The defendant, not showing that the evidence was offered after the amendment to his pleadings, does not show that he was injured by the ruling. But even if offered after the pleadings were in their final shape, it was within the discretion of the court to reject the evidence as of isolated facts unconnected with testimony as to other attributes, especially as the only evidence touching value of the animals came from the defendant's witnesses, and was not contradicted by the plaintiff.

Exceptions overruled.

(196 Mass. 571)

In re PLYMPTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Dec. 2, 1907.)

1. EXECUTION—RIGHT TO EXECUTION—RIGHT TO OTHER REMEDY.

A judgment creditor is not obliged to avail himself of his attachment on *meane* process in a suit, but he may elect to proceed by execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 35.]

2. SAME—LEVY—EFFECT ON RIGHTS OF CREDITOR.

A levy by an officer without authority of the judgment creditor, after the arrest of the debtor and his entering into a recognizance, is voidable as against the creditor, and does not affect his rights under the arrest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 274, 1243.]

3. SAME.

After an arrest on an execution has once been made and a recognizance taken, no alias execution authorizing an arrest can be issued, and an alias execution subsequently issued, if satisfaction is not obtained on the first, can run against the estate of the debtor only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, §§ 274, 1242, 1243.]

4. SAME.

Where the return on the first execution set forth an arrest of the debtor, without showing what proceedings followed, and there was a later levy on real estate, which was abandoned, an alias execution could not run against the body of the debtor; and his subsequent arrest and commitment on an execution, improperly issued without either of the certificates prescribed by Rev. Laws, c. 168, §§ 17, 20, relating to arrests on execution, is illegal.

Case Reserved from Supreme Judicial Court, Suffolk County.

Petition by Charles P. Plympton for a writ of habeas corpus for his discharge from imprisonment. Cause reserved for full court. Writ granted.

Harrison Dunham, for petitioner. George Granville Darling, for respondents.

KNOWLTON, C. J. At the hearing upon the writ of habeas corpus which was issued in this case, it appeared that the prisoner was confined in jail under an execution issued upon a judgment in an action at law.

The original execution was duly issued with the usual direction to the officer, in the alternative, to cause payment of the amount named to be made from the goods, chattels or lands of the debtor, and for want thereof, to take his body. An application was made to the district court of northern Norfolk for a certificate authorizing the arrest of the debtor, and notice was duly given him to appear for examination on the charge that he had property not exempt from attachment, which he did not intend to apply to the payment of the plaintiff's claim. See Rev. Laws, c. 168, § 18. On his appearance, after hearing, the court made an order that he assign property to the judgment creditor, with which order he failed to comply, whereupon a certificate of these facts, with the affidavit in behalf of the judgment creditor required by Rev. Laws, c. 168, § 17, and a certificate of the judge that he believed the charges contained in the affidavit to be true, were annexed to the execution. The petitioner was then arrested and taken before a court, where he entered into a recognizance to appear and take the oath for the relief of poor debtors. See Rev. Laws, c. 168, § 30. The officer made the usual return that he arrested the debtor and had him before the justice of the district court. All these proceedings appear to have been regular.

The petitioner protested that they could not go on because his real estate was attached on *meane* process in the suit in which the execution was issued. But the plaintiff was not obliged to avail himself of this attachment. He had alternative remedies, between which he could make an election. *Hoar v. Tilden*, 178 Mass. 157, 55 N. E. 641. Two days afterwards, the officer, without the direction or authority of the judgment creditor, proceeded to levy upon the real estate and to give notice of the levy under the statute. On the following day, by the direction of the creditor's attorney, the levy was abandoned.

There is much ground for contending that this levy would have been void from the beginning if authorized by the judgment creditor, inasmuch as the execution had been served previously by an arrest of the debtor, and he was then under a recognizance which, for the time, stood in the place of the execution for the benefit of the creditor. *Hoar v.*

Tilden, 178 Mass. 161, 55 N. E. 641; Kellogg v. Underwood, 163 Mass. 214, 40 N. E. 104; Thomson v. Sleeper, 168 Mass. 373, 43 N. E. 106. However that may be, a levy made under these circumstances, without the authority of the judgment creditor, was voidable as against him, and could not affect his rights under an arrest which had been made previously. If the officer, instead of then returning the execution to court and procuring an alias execution as he did, had held it to await the result of the proceedings under the recognizance, the court would have put upon it the certificate refusing the oath, and the arrest could have been resumed under it and the petitioner legally committed to jail.

That this would have been the regular course of procedure is shown by the decisions in Ruberg, Petitioner, 166 Mass. 33, 43 N. E. 911, and Morgan v. Curley, 142 Mass. 107-109, 7 N. E. 726. By the express terms of the statute, the certificate authorizing an original arrest, after an examination of the creditor, may be annexed to the original, or an alias or other successive execution. Rev. Laws, c. 168, § 20. But after an arrest upon an execution has once been made and a recognizance taken, no alias execution authorizing an arrest can be issued. "The execution is functus officio, the recognizance stands in its place as the security to the creditor, and his only remedy is by suit thereon." Morgan v. Curley, 142 Mass. 107-109, 7 N. E. 726. An alias execution subsequently issued, if satisfaction is not obtained on the first, can legally run against goods and estate only. Thomson v. Sleeper, 168 Mass. 373, 47 N. E. 106, and cases cited; Kellogg v. Underwood, 163 Mass. 214, 40 N. E. 104. In this case the return upon the first execution set forth an arrest of the debtor, with nothing to show what proceedings followed, and also a later levy upon real estate, which was abandoned. It is at least a grave question whether, upon this return, an alias execution of any kind could be issued legally. But it is quite certain that upon this return without more, an alias execution could not run against the body of the defendant. The subsequent arrest and commitment upon an execution improperly issued, which had upon it no certificate under Rev. Laws, c. 168, § 17, and no certificate under section 20 of the same chapter, were unauthorized and illegal.

Writ of habeas corpus to issue.

(190 N. Y. 35)

FRIES v. OSBORN et al.

(Court of Appeals of New York. Nov. 19, 1907.)

WILLS — CONSTRUCTION — LEGACIES — CHARGE ON LAND — PAROL EVIDENCE OF INTENTION.

Where testator bequeathed pecuniary legacies to various persons, but the will was silent as to his real estate, testator died intestate as to it; parol evidence being inadmissible to show that his personal property was insufficient to pay the legacies after satisfying his debts and

that he intended to make such legacies a charge on the realty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1023-1032.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action for partition by Nicholas C. Fries against Lewis F. Osborn and others. From a judgment of the Appellate Division, affirming an interlocutory judgment in favor of defendants, plaintiff appeals by permission on a certified question as to whether the legacies bequeathed by the will of Michael J. Fries, deceased, are a lien and charge on his real estate described in the complaint. Reversed, and new trial granted.

Edwin A. Nash, for appellant. Clyde E. Shults, for respondents.

HISCOCK, J. This is an action of partition. The appellant and various defendants are the relatives and heirs at law of one Michael J. Fries, who died leaving no descendants. The respondents are relatives of his deceased wife and legatees under his will. The dispute between them is summarized in the question submitted to us, whether certain legacies to the latter are a charge upon real estate of the testator which descended to the former. In the answer which we are about to give to this question we feel constrained to differ with the decisions of the learned courts below, which have held that such legacies were such a charge.

The will which presents the question, outside of clauses respectively directing the payment of debts and funeral expenses and appointing an executor, contains simply and solely the following provision: "Second. I give and bequeath to my brother-in-law, Lewis F. Osborn, the sum of five hundred dollars (\$500.00), and to my sisters-in-law, namely, Ella Harding, Mary Kilbury, Jennie Southgate, the sum of three hundred dollars (\$300.00) each, and my sister-in-law, Dora F. Osborn, the sum of five hundred dollars (\$500.00), and my niece Gladis Kilbury and my nephew Lewis S. Osborn, the sum of five hundred dollars (\$500.00) each." From evidence, much of which was received over sufficient objections and exceptions, the court has found, amongst other things, that the testator left sufficient personal property to pay only a small portion of the legacies after satisfaction of debts; that at the time of making the will he knew the value of his personal property and the amount of his debts; that the father of the decedent's wife had advanced \$1,000 on the purchase price of a farm, deeded to testator and owned by him at the time of his death; that the latter had intended that his wife's relatives should be repaid by will, or otherwise the sum so advanced with interest for many years; that the will was drawn by a person ignorant of the law relating to wills; and, finally, "that the said testator * * * intended to and

did charge the real estate with the payment of the legacies mentioned in his will." Obviously the will under consideration does not expressly charge the legacies upon the testator's real estate. But the rule is invoked that extrinsic evidence may be resorted to for the purpose of showing an intention to so charge such legacies which will be binding in the construction of the will, although express provision to that effect is wanting.

It will, therefore, be well to place before us the rule upon this subject as it has been stated at various times and as unquestionably it now runs. In *Lupton v. Lupton*, 2 Johns. Ch. 614, 623, it is said: "The real estate is not, as of course, charged with the payment of legacies. It is never charged unless the testator intended it should be, and that intention must be either expressly declared, or fairly and satisfactorily inferred, from the language and disposition of the will." In *Beyan v. Cooper*, 72 N. Y. 317, 322, it is said: "There are some rules which are well settled as to the payment or charging of general legacies. One is that the primary fund for the payment of them is the personal estate. It is one to be observed, unless express direction otherwise is found in the will, or there be a clear intent to the contrary to be gathered from the provisions of the will, which may be assisted by the extraneous circumstances of the case." It is further written in this case: "It is said that the mere fact of giving legacies by the testator furnishes a strong probability that he intended that they should be paid if his estate, in any of its parts, was sufficient therefor. It is hardly to be supposed that a man of sense, engaged in the solemn and deliberate matter of making a final disposition of his worldly estate, would trifle with the subject, by making bequests which he did not expect or intend should be satisfied; and, if so, then at first view it seems plausible to say that he must have meant that they should be satisfied from any portion of his estate—from the real, if the personal does not suffice. But yet this idea only imputes to the testator a general purpose that legacies given shall be paid. It does not satisfactorily show that, when giving them, it entered into his mind and formed a part of his intent that they should be so charged upon his real estate as that it should be subject to them as to a lien." In *McCorn v. McCorn*, 100 N. Y. 511, 513, 3 N. E. 480, it is said: "Whether a legacy is charged upon the real estate of the decedent is always a question of the testator's intention. The language of the will is the basis of the inquiry; but extrinsic circumstances which aid in the interpretation of that language, and help to disclose the actual intention, may also be considered."

These decisions simply make application to a specific subject of the general rule that extrinsic evidence may be resorted to within certain limits and qualifications for the purpose of ascertaining the intention of the tes-

tator, and thereby of making clearer and interpreting clauses in his will which otherwise are obscure and of uncertain meaning. But this general rule, wherever laid down, and the rule applicable to the solution of the particular question before us as stated in the citations which we have made, seem to make it sufficiently clear that extrinsic evidence may be utilized only for the purpose of interpreting something which is actually written in the will, that there must be some provision in the will which will serve as a subject for interpretation, and that under the guise of interpretation extrinsic evidence cannot be utilized for the purpose of adding to the will provisions which otherwise are not found there at all. Many cases have been cited by the learned counsel for the respondent, and many more might have been added, in which extrinsic evidence has been allowed to aid the court in interpreting provisions of wills which gave legacies and disposed of real estate, and whereby the conclusion was aided that the devise of the real estate was made subject to the payment of the legacies. But no case has been cited, or, as we believe, can be found, in which it has been decided that evidence extrinsic to the will may be made the basis of construing into the will provisions charging real estate with the payment of legacies where the will as actually written by the testator contained not one word even indirectly relating to this subject, and was absolutely silent upon the subject of the testator's real estate, not taking notice or disposing of it in any way whatever. It seems almost axiomatic that a will cannot create a charge or lien upon real estate when it contains no provision whatever which disposes of or deals with such real estate. The idea of charging real estate with the payment of money by will necessarily seems to imply that the instrument shall take jurisdiction of the former and contain some provision with reference to it, and that it shall not be absolutely silent and barren of any word relating to it. Until some method is adopted of reforming wills after the death of the testator, we fail to see how parol extrinsic testimony can be made to control the testamentary disposition of property as to which the testator has died absolutely intestate.

As we read it, that is this case. The testator has died intestate as to his real estate. His will does not touch it at all. There are no clauses relating to it which may be made the basis of interpretation and construction. We do not see how we are any more entitled upon the record presented to say that the will requires that the legacies be charged upon the unmentioned real estate than we would be entitled to read into the will a provision giving it in whole or part to the legatees named. Perhaps it may be assumed from the evidence and findings that this conclusion defeats what was really the expectation and intention of the testator. If that is so, of course, it is to be regretted.

But it will be only another illustration of the experience that no statute or rule, however wise and conducive to public welfare and safety in its general observance and application, can be so framed that it may not be made by ignorance and carelessness an occasional source of hardship in the individual case.

The question certified to us must be answered in the negative, and the judgment appealed from reversed, and a new trial granted, with costs to abide event.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, O'BRIEN, VANN, and CHASE, JJ., concur.

Judgment reversed, etc.

(189 N. Y. 408.)

PEOPLE v. VAN GAASBECK.

(Court of Appeals of New York. Nov. 1, 1907.)

1. HOMICIDE — CHARACTER OF ACCUSED — PEACEABLENESS.

In a prosecution for murder, evidence in behalf of accused that he enjoyed a good reputation for quietness and peaceableness was admissible, under the rule that evidence may be received to show that accused enjoyed a good reputation in respect to the traits involved in the charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 310-317.]

2. CRIMINAL LAW—CHARACTER OF ACCUSED—PERSONAL KNOWLEDGE OF WITNESS.

Character evidence on behalf of defendant must be limited to the witness' knowledge of defendant's reputation, and cannot be admitted to show the existence of favorable traits of character solely from the personal knowledge and observation of his conduct by the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 844.]

3. SAME—GOOD REPUTATION—EFFECT.

Good reputation in respect to the traits of character involved, if established by accused, is a fact to be considered by the jury in connection with all the other facts in the case in determining whether or not defendant actually committed the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 846.]

4. SAME—NEGATIVE EVIDENCE.

Evidence that witness had never heard anything against the character of accused, while not better proof of his good reputation than evidence that his neighbors generally spoke in commendatory terms of him, is nevertheless admissible to establish good reputation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 840.]

Appeal from Supreme Court, Appellate Division, Third Department.

Cornell Van Gaasbeck was convicted of manslaughter in the first degree. From an order of the Appellate Division (103 N. Y. Supp. 249, 118 App. Div. 511), reversing such conviction, the people appeal. Affirmed.

Fred. Stephan, Jr., Dist. Atty. (Howard Chipp, of counsel), for the People. Augustus H. Van Buren, for respondent.

WILLARD BARTLETT, J. The defendant was indicted for the crime of murder in the second degree, and convicted of manslaughter in the first degree. The crime was charged to have been committed on the 4th day of December, 1905, at the town of Woodstock, in the county of Ulster. The victim of the alleged homicide was Oscar Harrison, a white person about 20 years of age at the time of his death. The defendant is a negro, who at that time was about 55 years old. Harrison was found dead in the dwelling of the defendant near Woodstock on the morning of December 5, 1905, under circumstances which left no doubt that his death had been caused by means of blows upon his head with a blunt instrument, probably a hammer which was lying in the same room. There was no direct evidence tending to show the commission of the crime by the defendant. Harrison, it appeared, had been in the habit from time to time of visiting the house where the defendant lived alone, and had occasionally spent the night there. He was last seen alive there in the company of the defendant, on the day before he was found dead. On the evening of that day the defendant, in an intoxicated condition, visited the post office and country store in Woodstock, and subsequently went to the residence of some colored people named Conine, where he spent the night sleeping in a chair by the fire. There appears to have been nothing unusual, however, in his conduct in this respect, as the testimony tends to show that he had frequently spent the night there in this manner on previous occasions. In the morning one of the Conines suggested to the defendant that he should go over to his house and see what had happened there on the previous night, saying that he (Conine), on his way from Woodstock the evening before, had heard noises, groans, stamping on the floor, and heavy breathing proceeding from the defendant's dwelling. The defendant thereupon went to his own house, being accompanied by Conine, whom he requested to go with him. The defendant went ahead, pushed the door open, and found Harrison lying dead on the floor. He seems to have become agitated at the sight and asked Conine what he should do. Conine advised him to go to a neighbor's and telephone to Harrison's father, and the defendant acted upon this advice, and proceeded to the residence of a neighbor named Wolven, and said to him: "Will you telephone to John Harrison that Oscar is dead in my house. He has poisoned or killed himself in some way, I don't know how." The desired message was sent, and shortly afterward the defendant disappeared from the immediate neighborhood and proceeded to West Saugerties, where he spent the night in the house of an acquaintance, whence he walked the next day to Purling, in Greene county, where he was arrested by a deputy sheriff of Ulster county, named Everett Rosa. The testimony of this

officer tended more strongly than any other evidence in the case to connect the defendant with the commission of the crime. After narrating the circumstances of the arrest and saying that he told the defendant he would have to go back and answer for the body lying dead in his house, this witness testified as follows: "We came to Jennings' Hotel, and I said, 'Corn, you led me a merry chase.' Finally, he said, 'I didn't think I would get as far as I did.' I said, 'What did you lay the fellow out for in that way?' He said (dropping his head), 'I don't know.'" The defendant was sworn as a witness in his own behalf, and said in explanation of his flight that he was scared, but did not know what he was to do, and that when he left Woodstock he had no idea where he was going. He denied having killed Harrison, but did not controvert the truth of the statement which I have quoted from the testimony of the deputy sheriff who arrested him. He declared that the last that he ever saw of Harrison was on the afternoon before the discovery of the dead body, when he started for Woodstock, and that Harrison was outside of the house going towards the dwelling of the Conines. There was considerable evidence in the case tending to show that the relations between Harrison and the defendant had always been friendly, although one witness, who testified to having seen Harrison and the defendant engaged in conversation on the afternoon before the homicide, said that while he could not understand the words which they used, "they were jangling quite sharp."

The questions which are presented for our determination on this appeal relate to the propriety of the exclusion by the trial court of certain proof which was offered in regard to the character of the accused; and I have cited the evidence thus fully to show that, if any error was committed in this respect, it cannot be disregarded in the exercise of our power to render judgment upon an appeal in a criminal case without regard to exceptions which do not affect the substantial rights of the parties. Code of Cr. Proc. § 542. The alleged errors upon which the Appellate Division has reversed the judgment of conviction arise upon exceptions to the exclusion of evidence which the defendant sought to obtain from two witnesses, Charles Merritt and Thomas B. Johnston. Merritt testified that he lived in Kingston; that he had known the defendant probably 25 or 30 years; that the defendant had worked for him on his farm, off and on, 3, 4, or 5 years; that whenever he wanted extra help he used to go and get the defendant; and that he was acquainted with his reputation and his character, so far as it related to whether or not he was of a quiet and peaceable disposition or otherwise. The witness was then asked: "What do you say his reputation is?" This question was objected to on the ground that there had been no

foundation laid for the proof, and on the further ground that it was not the proper way to show character. The objection was sustained, and the defendant excepted. The other witness, Johnston, testified that he was a policeman in the city of Kingston, and had been such for about 19 years; that he had known the defendant 30 years; that he knew him when he was in the city, and knew his character "as to being a peaceable, quiet man." He was then asked: "What do you say of it?" This question was objected to, the objection was sustained, and an exception was taken in behalf of the defendant.

It will be observed that these exceptions present two entirely different questions. The ruling in respect to the evidence sought to be obtained from the witness Merritt was a ruling to the effect, first, that no sufficient foundation had been laid for the introduction of any proof whatever as to the character of the accused; and, secondly, that, even if the witness were qualified to speak on this subject, proof as to the general reputation of the defendant in regard to peaceableness and quiet was not admissible. By the second ruling in respect to the question put to the witness Johnston, the court held that it was not permissible for the defendant to give evidence tending to show that his character was that of a peaceable, quiet man, based upon the personal knowledge and observation of the witness. In our opinion the first ruling was erroneous, and justified and required a reversal of the judgment; but the second ruling was correct. "It is not necessary to cite authorities," says the Supreme Court of the United States in *Edgington v. U. S.*, 164 U. S. 361, 17 Sup. Ct. 72, 41 L. Ed. 467, "to show that in criminal prosecutions the accused will be allowed to call witnesses to show that his character was such as to make it unlikely that he would be guilty of the particular crime with which he is charged." The precise question here, however, relates to the nature of the testimony which such witnesses are permitted to give for this purpose. Must they be confined to a statement of their knowledge of the general reputation of the party whose conduct is under investigation, as seems to be contended by the learned counsel for the appellant; or may they go further, and testify as to his reputation in respect to the particular trait or traits involved in the issue? And, again, must they be confined to the general reputation of the person whose character is in question in respect to such traits; or may they testify to the existence or nonexistence of the particular traits involved basing their testimony upon their personal acquaintance with the party and their observation of his mode of life? The fact sought to be established by evidence bearing upon the character of an accused person is the improbability that the defendant would commit the crime of which he is accused. The evidence being adduced for this purpose, it is

manifestly proper, 'in order that it may be most useful in the guidance of the jury, that it should not be confined to the general good reputation of the defendant, but may be extended to his reputation in respect to the particular traits involved in the accusation. The common practice in this state seems to have been in accordance with this view. Thus, in the bill of exceptions in the celebrated murder case of *Cancemi v. People*, 16 N. Y. 501, a leading authority on the admissibility of evidence of good character in behalf of an accused person, it is stated that defendant's counsel on the trial of the case called 19 witnesses, all of whom testified to the general good character of the defendant for peace and quietness and for honesty and industry. This seems to be the rule generally throughout the Union. In Massachusetts, where the defendant was prosecuted for assault with intent to kill, it was held to be competent for him to call witnesses to testify to his general reputation as a peaceable and quiet citizen. *Commonwealth v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325. In *People v. Ashe*, 44 Cal. 288, which was a prosecution for grand larceny in San Joaquin county, the defendant "introduced evidence of his previous good character for honesty, and proved by credible witnesses who had resided in that county for some 20 years that during all that time his character for honesty was good." Here plainly the expression "character" is used as synonymous with "reputation." In the same state it has been held that, where there is a question at the trial whether the defendant in a criminal prosecution has committed the act charged against him in the indictment, evidence of his previous good reputation in respect to the particular trait involved in the inquiry is admissible for the defense. If such good reputation is established, it is a fact to be considered by the jury, in connection with all the other facts in the case, in determining whether or not the defendant actually did commit the offense of which he is accused. The weight to be given to the evidence of good reputation is, of course, wholly a matter for the jury. The same doctrine is laid down in many other cases too numerous to cite.

It is often found stated in connection with the qualifying rule, which has been almost universally adopted in this country, to the effect that, while the community reputation as to particular traits is admissible upon the question of character, the personal knowledge and belief of the witness must be excluded. 3 Wigmore on Evidence, § 1980. Thus, in *Hirschman v. People*, 101 Ill. 568, where the defendant was tried on an indictment for manslaughter, it was held that he was properly permitted to give evidence of his general reputation in regard to peace and quiet, but that no error was committed in excluding all particular transactions in which he had been concerned tending to prove a

quiet and peaceable disposition on the part of the accused. In *Berneker v. State*, 40 Neb. 810, 59 N. W. 372, the defendant was accused of the crime of receiving stolen property. It was held that he unquestionably had the right to introduce evidence of his character or reputation, which the court regarded as convertible terms, for honesty in the community in which he had resided, or his general reputation for honesty, but that this could not be shown by evidence of particular and specific facts within the knowledge of the witness, purporting to have been gained by personal acquaintance or dealings with the accused. In *State v. Dalton*, 27 Mo. 13, the appellant was tried for a felonious assault with intent to kill. The defendant proved that his general character as a peaceable man was good, but the trial court sustained an objection to further inquiry as to his character for industry, and this was held by the Supreme Court to be a correct ruling, "because, whenever evidence of character is admissible, it is restricted to the trait of character which is in issue, and must have reference to the nature of the charge." "In a criminal prosecution, the good character of a defendant is always admissible; but the law limits the inquiry in such a case to his general character [reputation] as to the trait in issue." *State v. King*, 78 Mo. 555. "The reputation which is the subject of proof in courts as evidence of character means the estimate in which the individual is held by the community, and not the private opinion entertained of him by the witnesses who may be called to testify in reference to such fact." *Jackson v. State*, 78 Ala. 471. When, therefore, a witness is called to prove the good character of the defendant, his testimony should not go beyond the reputation which the defendant sustains in the community as to the particular traits of character, the existence or non-existence of which bear upon the probability or improbability that he would commit or refrain from committing the offense with which he is charged. *State v. Pearce*, 15 Nev. 188. The authorities which have been cited suffice to show that, while the defendant in the case at bar was entitled to give evidence of his general reputation as a man of quiet and peaceable disposition, he was not entitled to prove particular acts indicative of the fact that he possessed traits rendering it unlikely that he would assault his friend. The case of *Sawyer v. People*, 91 N. Y. 667 is cited in behalf of the appellant as holding a different doctrine; but an examination of the record on appeal therein shows that the rulings of the trial court in that case were in precise accordance with the law as we have stated it. Court of Appeals Cases in Clerk's Office, vol. 9, of 1883.

In a few of the states, notably Iowa and Minnesota, the doctrine that the character of the defendant in a prosecution for homicide can be shown only by the evidence of his general good reputation, or his reputation

in the community as a person of quiet and peaceable disposition, is rejected. The courts in those states go further, and hold that a defendant in such a case is entitled to show by the personal observation and knowledge of witnesses called in his behalf that he possesses those traits of character which would render it unlikely that he committed the offense with which he is charged. *State v. Sterrett*, 68 Iowa, 76, 25 N. W. 936; *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769. In the Iowa case it is said: "Evidence that he is reputed to possess certain traits of character may be competent evidence tending to prove that he does possess them; but it is by no means the only competent evidence of that fact. We see no reason why any witness who is shown to have had opportunity for forming a just estimate of his character should not be permitted to testify with reference to it." This view, however, is opposed to the prevailing rule in England as established in *Reg. v. Rowton*, 10 Cox's Crim. Cases, 25, 34, and, as we have seen, to the great weight of American authorities on the subject. Prof. Wigmore, in his scholarly treatise on the Law of Evidence, argues strongly in favor of a rule admitting evidence of personal knowledge and belief concerning the character of an accused person as against the rule which restricts such evidence to the general reputation of the accused in respect to the moral traits at issue in the prosecution, declaring that, so far as practical policy and utility are concerned, there ought to be no hesitation between reputation and personal knowledge and belief. "A perusal of the records of state trials," he says, "will show how natural, straightforward, and useful was this method of asking after belief founded on personal experience and intimacy. Put any one of us on trial for a false charge, and ask him whether he would not rather invoke in his vindication, as Lord Kenyon said, 'the warm, affectionate testimony' of those few whose long intimacy and trust has made them ready to demonstrate their faith to the jury, than any amount of colorless assertions about reputation." 2 Wigmore on Evidence, § 1686. The answer to this argument is found in overwhelming considerations of practical convenience. If a witness is to be permitted to testify to the character of an accused person, basing his testimony solely on his own knowledge and observation, he cannot logically be prohibited from stating the particular incidents affecting the defendant and the particular actions of the defendant which have led him to his favorable conclusion. In most instances it would be utterly impossible for the prosecution to ascertain whether occurrences narrated by the witness as constituting the foundation of his conclusion were or were not true. They might be utterly false, and yet incapable of disproof at the time of trial. Furthermore, even if evidence were accessible to controvert the specific statements of the witness

in this respect, its admission would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation.

It is argued in behalf of the people that no foundation was laid for the proposed testimony by proof that the witnesses were acquainted with the reputation of the defendant. We cannot accede to this proposition as applicable to the witness Merritt. Indeed, he was allowed to state, without objection, that he was acquainted with the reputation of the defendant so far as it related to whether or not the defendant was of a quiet and peaceable disposition. The witness had known the defendant 25 or 30 years, and lived in Kingston, where the defendant had worked up to a period within 5 or 6 years before the trial. The learned county judge in his charge speaks of the house of the defendant, in which the homicide occurred, as being "some few miles distant" from Kingston. While the reputation which is receivable in evidence on the question of character must be confined to the place of residence of the person whose character is under consideration, or the neighborhood of such residence, and the time when such reputation existed must not be too remote, we think that it cannot be held as matter of law that upon the evidence in this record the witness Merritt was not qualified to testify as to the community reputation of the defendant as to peaceableness and quiet. As has already been pointed out, the trial judge himself spoke of the defendant's dwelling as being only a few miles distant from Kingston, where the witness resided; and we are probably authorized to take judicial notice of the fact that the distance between Kingston and Woodstock is not more than 10 miles as the crow flies. See *Mutual Benefit Life Ins. Co. v. Robinson*, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325, where judicial notice was taken of the fact that the distance between two cities exceeded 100 miles. The time limit applicable to evidence of reputation is discussed by Beardsley, J., in *Sleeper v. Van Middlesworth*, 4 Denio, 431, where it was held to have been error to exclude evidence that four years before the trial the witness had already acquired a well-known character in the community where he resided. "No certain limit," said the court, "in point of duration, can be laid down for inquiries like this." In an action for slander in imputing unchastity to a woman, the Supreme Judicial Court of Massachusetts has held that evidence of the female plaintiff's bad general reputation 10 years before the speaking of the words for which the suit is brought was competent; "it being a very general presumption that things which are proved to have once existed in a particular state are to be understood as continuing in that state, until the contrary is es-

tablished by evidence, either direct or presumptive." Metcalf, J., in *Parkhurst v. Ketchum*, 6 Allen (Mass.) 406, 83 Am. Dec. 639.

The questions which have led to the reversal of the judgment in this case below, and the questions which seem almost certain to arise on the new trial, render it proper for us to suggest that a witness may be qualified to testify to the general reputation of a person as to particular traits of character, even though he may never have heard anybody say anything as to whether the person whose character is in question possesses such traits or not. In other words, the testimony of a person who has lived any considerable length of time in the same neighborhood as another to the fact that he has never heard anything against that other person in respect to his peaceableness or quiet behavior or honesty is competent evidence that his reputation is that of a person of pacific disposition and integrity. In *Regina v. Rowton*, supra, Cockburn, C. J., admitted the competency of the evidence of a witness who should say: "I never heard anything against the character of a person of whose character I come to speak." The same learned judge declared that, although given in a negative form, such testimony is the most cogent evidence of a man's good reputation, because one's character does not get talked about until there is some fault to be found with it. Chief Justice Nelson, in delivering the opinion of the old Supreme Court in *People v. Davis*, 21 Wend. 309, assumed that negative evidence was receivable to establish good character provable by reputation. "Character is proved by reputation, and evidence that those who have known a man in the community never heard anything against his reputation as a peaceable man is evidence of good reputation in that respect." W. Allen, J., in *Day v. Ross*, 154 Mass. 13, 27 N. E. 676. A witness is qualified to testify to the reputation of a defendant, where the witness has been in such a position with reference to the defendant's residence or circle of acquaintances that the fact of his hearing nothing against him would have a tendency to show that nothing had been said against him, and, therefore, that his reputation was good. See *Holmes v. State*, 88 Ala. 26, 29, 7 South. 193, 16 Am. St. Rep. 17. It is even competent evidence of the good reputation of an accused person that the witness has been acquainted with him for a considerable time under such circumstances as render it likely that he would have heard what was said about him and that he has never heard anything about his character; "the fact that a person's character is not talked about at all being, on grounds of common experience, excellent evi-

dence that he gives no occasion for censure, or, in other words, that his character is good." *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769. Indeed, as is well said by the Supreme Court of Illinois in *Gifford v. People*, 148 Ill. 173, 35 N. E. 754, "one whose word passes current among his associates and neighbors, or who is received and accepted by society as a virtuous man or woman, or whose honesty is not questioned in the community in which he lives, will ordinarily excite no discussion or comment, and yet every person in the community knows that he or she is accepted, recognized, and reputed to be a truthful, virtuous, or honest person." See, also, *Gandolfo v. State*, 11 Ohio St. 114; *Milliken v. Long*, 188 Pa. 411, 41 Atl. 540. In some instances negative evidence of good reputation has been characterized as the best evidence on the subject. Chief Justice Cockburn, in the *Rowton Case*, already cited, declared it to be the best evidence of a man's character that he is not talked about at all. The Supreme Court of Iowa, in *State v. Nelson*, 58 Iowa, 208, 12 N. W. 253, declined to adopt this view, saying: "It cannot be fairly said that proof that one's neighbors have never heard his character canvassed is better proof of his good reputation than proof that his neighbors generally speak in terms of commendation of his character. All that can properly be said of the kind of negative proof under consideration is that it is competent proof of good reputation and should be accepted and weighed by the jury." In this statement of the law we agree.

Three conclusions are involved in our review of this case: First, that upon a criminal prosecution evidence is receivable in behalf of the accused that he has enjoyed a good reputation in respect to the traits involved in the charge against him; second, that evidence is not receivable in his behalf as to the existence of such traits, when such evidence consists solely of the personal knowledge and observation of his conduct by witnesses, and not of their knowledge as to his reputation in such respects; and, third, that negative evidence is receivable to establish a good reputation. This statement may be of service as a guide to the solution of somewhat perplexing questions in this branch of the law of evidence which frequently arise upon criminal trials.

It follows, from what has been said, that the order of the Appellate Division, reversing the conviction of the defendant, must be affirmed.

CULLEN, C. J., and GRAY, O'BRIEN, VANN, WERNER, and CHASE, JJ., concur.

Order affirmed.

(190 N. Y. 21.)

PEOPLE ex rel. EMPIRE CITY TROTTING CLUB v. STATE RACING COMMISSION et al.

(Court of Appeals of New York. Nov. 19, 1907.)

1. MANDAMUS—DISCRETION—ARBITRARY EXERCISE.

Though mandamus will not generally lie to compel performance of a power, the exercise of which is in the discretion of the officer against whom the writ is sought, the remedy is available if the action of the officer is capricious, arbitrary, unreasonable, or based on false information.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 134.]

2. PLEADING—CONCLUSIONS.

In mandamus to compel the State Racing Commission to grant relator a license to conduct races, allegations in answering affidavits denying that relator had complied with the statute, and that he was entitled to a license, were mere indefinite conclusions, insufficient to raise an issue to defeat a peremptory writ.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 20.]

3. MANDAMUS—GRANT OF LICENSE—HORSE RACING.

The State Racing Commission having no power to allot particular dates on which races on the various tracks may be run, its refusal to grant relator a license to conduct racing because the legal season had been divided among six other tracks in the vicinity of New York and the Saratoga Racing Association, and that to grant relator any dates would interfere with racing on the other tracks, was capricious, arbitrary, and unreasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Mandamus, § 134.]

O'Brien, Edward T. Bartlett, and Hiscock, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Mandamus by the people, on the relation of the Empire City Trotting Club, against the State Racing Commission and others, to compel defendants to issue to relator a license to conduct racing. From a judgment of the Appellate Division (105 N. Y. Supp. 528), reversing an order denying the writ (103 N. Y. Supp. 955), defendants appeal. Affirmed.

Joseph S. Auerbach and Welton C. Percy, for appellants. James Russell Soley, for respondent.

PER CURIAM. Though we do not concur in the doctrine of the majority of the learned Appellate Division that the commission has no discretionary powers over the grant of a license, and that "its judgment related purely to the sufficiency of the acts constituting the corporation, and not to considerations of public or private policy," we are still of opinion that the order of the Appellate Division should be affirmed. While the general rule is that mandamus will not lie to compel the performance of a power the exercise of which lies in the discretion of the officer against whom the writ is sought, to that rule there is the well-recognized exception that the action of the officer must not be capricious or arbitrary, and, if such be the character of the reasons for refusing to act, the writ will lie. Merrill

on Mandamus, §§ 38-41; *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun, 107,¹ affirmed on opinion below, 128 N. Y. 621, 28 N. E. 253; *People ex rel. Schau v. McWilliams*, 185 N. Y. 92, 77 N. E. 785; *Illinois State Board of Dental Examiners v. Cooper*, 123 Ill. 227, 13 N. E. 201. In the very recent case of *People ex rel. Lodes v. Department of Health*, 189 N. Y. 187, 82 N. E. 187, we have said, through Haight, J., referring to the action of the board in revoking a license: "If, however, their action is arbitrary, tyrannical, or unreasonable, or is based upon false information, the relator may have a remedy to right the wrong which he has suffered." There are to be found in the affidavits in answer to the application for the writ denials by the appellants that the relator has complied with the requirements of the statute, and that he is entitled to a license. But these denials in gross are merely of conclusions, and too indefinite to raise an issue to defeat a peremptory writ where the facts should have been explicitly alleged. *Matter of Freel (Sup.)* 38 N. Y. Supp. 143, affirmed 148 N. Y. 165, 42 N. E. 536; *People ex rel. Beck v. Coler*, 34 App. Div. 167, 170, 54 N. Y. Supp. 639; *People ex rel. Goodwin v. Coler*, 48 App. Div. 492-494, 62 N. Y. Supp. 964; *Matter of Pierce, Butler & P. Mfg. Co.*, 62 Hun, 285, 16 N. Y. Supp. 768, affirmed 131 N. Y. 570, 30 N. E. 67. The only specific reasons given by the respondents for refusing to issue the license to the relator are that the racing season allowed by law, to wit, from April 15th to November 15th in each year, has been divided up among six other tracks in the vicinity of the city of New York and the Saratoga Racing Association, that the allotment of dates is a proper regulation of racing, and that to grant the relator any dates would interfere with the racing upon the other tracks. None of these considerations, in our opinion, had the commission the right to entertain, nor should they have had any influence on its action. The object of the statute vesting authority in the commission was to insure that racing in this state was properly and honestly conducted, not to prevent competition between the several racing associations, nor to secure any special pecuniary benefit to any of them. There is no provision in the statute authorizing the commission to allot particular dates on which races on the various tracks may be run, but merely to grant or refuse a license to hold races. If the theory on which the commissioners have acted in this case were to be approved, new incumbents of the office might arbitrarily favor other race tracks and deny the associations owning the present tracks, in which large sums of money have been invested, a license to hold races. Surely the Legislature, when it authorized the incorporation of racing associations, never contemplated that the capital invested in the building of the tracks should be subject to such arbitrary destruction. Though we assume that

¹ 14 N. Y. Supp. 490.

the appellants have acted in entire good faith and in the belief that they possessed the authority they have sought to exercise, we must nevertheless hold that in point of law their reasons for rejecting the application of the relator were capricious and arbitrary.

The order appealed from should be affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, and CHASE, JJ., concur. O'BRIEN, EDWARD T. BARTLETT, and HISCOCK, JJ., dissent.

Order affirmed.

(189 N. Y. 486.)

MUNN v. MASONIC LIFE ASS'N OF WESTERN NEW YORK.

(Court of Appeals of New York. Nov. 19, 1907.)

1. APPEAL—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTION OF FACT—UNANIMOUS AFFIRMANCE.

Where the Appellate Division unanimously affirms a verdict on a question of fact, the question is not reviewable by the Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4324.]

2. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTIONS FOR BENEFIT—LIMITATIONS—CONSTRUCTION OF BY-LAW.

Where the by-laws of an insurance association provide that an action to recover on disputed claims must be commenced within six months from the date of disallowance thereof, and that the amount due on a policy shall become payable 90 days after receipt of satisfactory proofs of death, the denial of the claim before the filing of proofs of death does not start the running of the six-months limitation, but the beneficiary has a reasonable time within which to file proofs of death, and may bring his action within six months after the association has acted in rejection of the claim upon the proofs presented.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Adella E. Munn against the Masonic Life Association of Western New York. From a judgment of the Appellate Division (101 N. Y. Supp. 91, 115 App. Div. 855), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Harry D. Williams, for appellant. Moses Shire, for respondent.

GRAY, J. The plaintiff sued the defendant in order to recover the amount due upon a certificate, or policy, of life insurance, issued by the latter to the former's husband and payable to her as beneficiary. Two defenses were interposed. In the first place, it was answered that the membership of the assured had lapsed, by reason of his failure to pay a certain monthly assessment, and that he had not been reinstated. In the second place, it was answered that this action was not commenced within six months from the date of the disallowance by the defendant of the plaintiff's claim, as was required by

the contract of insurance. The plaintiff recovered a verdict for the amount of her claim, and the judgment thereupon entered was affirmed by the Appellate Division by the unanimous vote of the justices.

The first question raised by the defendant has been conclusively settled by the disposition made below of the case. Whether the defendant had waived the default of the deceased in failing to make due payment of the particular monthly assessment and had restored him to membership, as the plaintiff contended, the trial judge submitted to the jurors for their determination upon the evidence. It was purely a question of fact and has passed beyond our consideration.

The second defense to the action, that the claim was barred by the limitation of time fixed by the by-law for the commencement of an action, was held by the trial court to be untenable, inasmuch as it appeared that the action was commenced before the expiration of the six months allowed by the by-law, when reckoned from the time of the rejection of the claim upon the proofs of death presented. The language of the by-law is that "action to recover payment on account of death or disability claims disputed by the association must be commenced within six months from the date of disallowance of claim." In the same article of the by-laws, in which the foregoing limitation is contained, it is provided that the sum to be paid to the beneficiary of a deceased member "shall become due and payable ninety days, from the date of receipt of satisfactory proofs of death." The defendant-appellant contends that it was not obliged to await the presentation of formal proofs of death before rejecting the plaintiff's claim, and therefore that it was error for the trial court to refuse to submit to the jury the question of the time at which the plaintiff's claim was disallowed. The argument is that there was evidence tending to show that, before the filing of proofs of death and the formal action taken by the defendant thereupon, the plaintiff's claim upon the policy had been "specifically refused and denied," and that more than seven months had elapsed thereafter before the commencement of this action. The assured died in February, 1901. Formal proofs of death were filed in June following, and in July the defendant's secretary communicated by letter to the plaintiff the statement that the board of management had denied her claim for the insurance moneys. This action was commenced in November, some four months thereafter. The ruling of the trial court that the action had been commenced within the period fixed by the by-law was correct. To hold otherwise would be to ignore the agreement of the parties. The by-laws entered into the contract of insurance, and they provided that the liability of the defendant to pay the amount of the insurance should not mature until "ninety days from the date of receipt of satisfactory

proofs of death." Such proofs must, of course, consist in some substantial written form, and must be served upon the defendant. Prior to the expiration of the 90 days, no action upon the policy could be maintained without exposing the plaintiff to the objection that it was prematurely brought. If, as contended for by the defendant, the rejection of the claim was actually in March, the six-months limitation would have expired before the expiration of 90 days from the disallowance of the claim upon the proofs. The time within which to commence an action against the defendant could not begin to run until it had acted in rejection of the plaintiff's claim upon the proofs presented by her. The obligations imposed by the contract, in the respects we are considering, were, on the part of the beneficiary, to furnish satisfactory proofs as to the death of the assured, which the law would require to be done within a reasonable time, and to commence an action, upon a rejection of the claim for the insurance moneys, within six months thereafter, and, on the part of the association, either to notify the claimant of the disallowance of the claim, when made upon the proofs, or to pay the same within 90 days after receipt of the claim. The plaintiff complied with her obligation, and there is no question but that the proofs were filed by her within a reasonable time. She was notified of the refusal to allow her claim, and then properly commenced her action within six months.

In view of the facts of the case, it becomes quite unnecessary to consider the question whether the amendment of the by-laws providing for a short statute of limitations, made after the deceased had become a member of the association, was valid and binding. The consideration of such a question would turn upon the effect upon the contractual relation of the member of his reinstatement after default in payment of his assessment. A by-law forfeited membership in such an event, but empowered the board of directors "to restore the delinquent member" upon his complying with certain specified conditions.

For the reasons given, I advise the affirmance of the judgment, with costs.

CULLEN, C. J., and O'BRIEN, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment affirmed.

(189 N. Y. 490.)

GUILMARTIN v. SOLVAY PROCESS CO.
(Court of Appeals of New York. Nov. 19, 1907.)

1. APPEAL — DECISIONS OF INTERMEDIATE COURTS—POWER TO REVIEW.

An appeal lies to the Court of Appeals from an order of reversal of the Appellate Division made solely on questions of law.

2. MASTER AND SERVANT—INJURIES TO SERVANT—EMPLOYER'S LIABILITY ACT—ACT OF SUPERINTENDENCE.

The direction of a foreman, who had power to stop machinery, that it be stopped, or the failure to so direct, while a condition of the machinery was being remedied which necessitated the loosening of a belt running from the main shaft to a counter shaft, which had become wound around a pulley on the counter shaft, was an act of superintendence, within Employer's Liability Act, Laws 1902, p. 1748, c. 600, making an employer liable for injuries to an employé by the negligence of any person in the service of the employer exercising superintendence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 371, 372.]

3. SAME—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

An employé, when injured, was loosening a belt, running from the main shaft to a counter shaft, which had become wound around the pulley on the counter shaft. The machinery was not stopped, but only slowed down, and, after the lacing of the belt was cut, the loose end struck the employé, and he was drawn over the shaft and injured. *Held* that, though the particular manner in which the injury occurred was quite exceptional, the jury was authorized to find that the work was inherently dangerous and involved liability of accident of some kind.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 958.]

4. SAME—QUESTION FOR JURY.

Where, in an action for injuries to an employé who, when injured, was loosening a belt, running from the main shaft to a counter shaft, which had become wound around the pulley on the counter shaft, there was evidence tending to show that stopping the machinery at the particular time would have involved injury to the plant and product, whether the failure to stop the same was negligence was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1032, 1033.]

5. SAME—ASSUMPTION OF RISK.

Under the express provisions of Employer's Liability Act, Laws 1902, p. 1748, c. 600, the question whether an employé understood and assumed the risk of injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk, is one of fact, subject to the usual powers of the court to set aside a verdict contrary to the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1005, 1068-1132.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Dennis Guilmartin against the Solvay Process Company. From an order of the Appellate Division (101 N. Y. Supp. 118, 115 App. Div. 794), reversing a judgment of the Trial Term for plaintiff and granting a new trial, plaintiff appeals. Order of the Appellate Division reversed, and judgment of the Trial Term affirmed.

A. Lee Olmsted, for appellant. Louis L. Waters, for respondent.

CULLEN, C. J. This action is brought under the Employer's Liability Act, Laws 1902, p. 1748, c. 600, servant against master, to recover damages for personal injuries. The defendant was engaged in the manufacture of soda ash and similar products. The plain-

tiff had been in defendant's employ for a number of years, and for the last portion of the time his duty was to oil the machinery. At the time of the accident a belt in defendant's factory, running from the main shaft to a counter shaft, had become so loose as to wind around the pulley on the shaft. The belt seems to have been stronger than the attachment of the pulley to the shaft, and after it had been drawn as taut as possible from the counter shaft the pulley commenced to revolve on the shaft. To remedy this condition of the machinery it was necessary to loosen the belt. One Mullin was the foreman of the shift or gang to which the plaintiff belonged. Mullin had power to stop the machinery in case of accident or emergency. On being informed of the accident he had the movement of the engine slowed to a certain extent, but did not have it stopped, and then directed the plaintiff, with other workmen, to cut the lacing of the belt; he personally joining in the work. After the belt was cut he directed one of the workmen to throw the loose end on the floor. The shaft pulley being relieved from the strain of the taut belt, again revolved with the shaft and commenced to wind up the belt, the loose end of which struck the plaintiff. He was drawn over the shaft and received injuries which resulted in the loss of his leg. Two questions were submitted to the jury: First, whether Mullin was a person whose sole or principal duty was that of superintendence; second, whether it was negligent not to have stopped the machinery when the plaintiff was put at work to repair the injury to the belt and pulley. The jury found a verdict for the plaintiff. A motion for a new trial was made and denied. From the order denying that motion and the judgment entered on the verdict an appeal was taken, and both were reversed by the Appellate Division by a divided court, and a new trial granted.

The order of reversal states that it was made solely on questions of law, the facts having been examined, and no error found therein, and hence an appeal from the order lies to this court. The ground on which the Appellate Division placed its decision was that the negligence of Mullin in failing to stop the engine, if negligence it was, was the negligence of a fellow servant in a detail of the work for which, under the decisions in *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521, *McCosker v. Long Island Railroad Co.*, 84 N. Y. 77, and *Foster v. International Paper Company*, 183 N. Y. 50, 75 N. E. 933, the master was not liable, and that therefore the defendant's motion to dismiss the complaint made at the close of the evidence should have been granted. We deem this view of the Appellate Division erroneous. The two earlier cases cited by the court below arose before the enactment of the employer's liability act. If the accident in the third case occurred after the enact-

ment of that statute, the action was not brought under that act. Therefore the decision in none of the cases disposes of the present case, which is substantially controlled by our recent decision in *McHugh v. Manhattan Railway Company*, 179 N. Y. 378, 72 N. E. 312, and *Harris v. Baltimore Machine Elevator Works*, 188 N. Y. 141, 80 N. E. 1028, which were based on the employer's liability act. That statute, as said by Judge Gray in the later case, "gave an additional cause of action, because it prescribed that a master shall be liable for the negligence of the superintendent or the person acting as such. At common law such a liability was not recognized, unless the superintending servant was the alter ego of the master with respect to the work." To render the master liable the negligence must not only be on the part of the person who is acting as superintendent, but also in an act of superintendence. But if the act be of that character the fact that in a sense it is a detail of the work will not relieve the master from liability. In the prosecution of many, if not most, works, superintendence is a detail of the work, in the accurate use of that term. It is often so denominated in the older cases, and properly so, because before the statute it was unnecessary to distinguish between negligence of a superintendent and that of a collaborer of the same grade as that of the person injured so far as any liability of the master was involved. The statute has changed this. In the *McHugh Case*, the defendant was held liable for the negligence of a train dispatcher in starting a train. The dispatcher performed that act, doubtless, scores of times a day, and its performance was a mere detail of his ordinary day's work. Therefore the question in any case brought under the statute is not whether the negligent act is a detail of the work, but whether it is a detail of the superintendent's part of the work, or of the subordinate employes and servants. In the present case, had the foreman, Mullin, attempted to stop the engine himself, and so carelessly done the work as to cause injury to other employes, that might very well be deemed the negligence of a co-servant for which the master would not be liable, but the determination of the question whether the machinery should be stopped before the men were put to work on it was of a very different character. None of the other workmen could direct the engine to be stopped. Mullin alone had that power. His direction in reference thereto, or failure to direct, was an act of superintendence. At least, the jury was authorized to so find.

It is contended by the counsel for the respondent that the failure to stop the engine was not a negligent act, and that the accident which occurred was one which could not have been anticipated or foreseen. It requires nothing more than a perusal of the numerous accident cases found in the reports

of this court to show that working on moving machinery involves great danger of personal injury. While it is true that the particular manner in which this accident occurred is quite exceptional, it is equally true that the jury was authorized to find that the work was inherently dangerous and involved liability to accident of some kind. There was evidence tending to show that stopping the machinery at the particular time would involve injury to the plant and product. This might justify a failure to stop the engine, but the evidence on the subject simply presented a question of fact for determination by the jury. The objection that the plaintiff assumed the risk is answered by the provision of the statute, which enacts: "The question whether the employé understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict contrary to the evidence." The Appellate Division might have reversed the judgment on the ground of assumed risk, but in affirming the facts it has refused to exercise that power.

The order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed, with costs in both courts.

GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Ordered accordingly.

(190 N. Y. 6)

GLAZER v. HOME INS. CO.

(Court of Appeals of New York. Nov. 19, 1907.)

1. INSURANCE — ACTIONS — COMPLAINT — PLEADING AND PROOF—WAIVER OF PROOF OF LOSS.

A complaint on a fire insurance policy alleged generally that plaintiff had fulfilled all the conditions of the policy on his part, and that 60 days and more before the commencement of the action plaintiff served upon defendant, as the proofs of loss, the complete inventory of the property destroyed and injured, the quantity and cost of each article and the amount claimed thereon, that it was retained by defendant without objection, and that no further proof was required or furnished. The policy required the furnishing of formal verified proofs of loss within 60 days after the fire, stating the time and origin of the fire, and other matters. *Held*, that the complaint was sufficient to enable plaintiff to avail himself of the waiver if proven, notwithstanding the fact that the word "waiver" was not found in the pleadings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1637, 1640.]

2. SAME—QUESTIONS FOR JURY.

In an action on a fire insurance policy, whether defendant waived the formal proof of loss required by the policy *held* a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1748.]

3. SAME—SUFFICIENCY OF EVIDENCE.

In an action on a fire insurance policy, evidence *held* to sustain a finding that defendant had waived formal proofs of loss required by the policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1725.]

4. SAME — CONTRACT—CONSTRUCTION—PROOF OF LOSS.

The requirement in a fire insurance policy that proofs of loss shall be furnished is a condition that becomes operative only after the capital fact of loss, and, unlike some other conditions, is to be liberally construed in favor of the insured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1340.]

Gray, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Joseph Glazer against the Home Insurance Company. From a judgment of the Appellate Division (98 N. Y. Supp. 979, 113 App. Div. 235), affirming a judgment of the Appellate Term (96 N. Y. Supp. 136, 48 Misc. Rep. 515), reversing a judgment of the City Court of New York, plaintiff appeals.

Roger Foster and Sigmund S. Rotter, for appellant. Alfred B. Nathan, for respondent.

O'BRIEN, J. The plaintiff sought to recover the amount of a loss under a fire insurance policy. The action was brought in the City Court of New York City. The policy insured the plaintiff against loss or damage of certain articles of furniture and personal property contained in the dwelling house where he lived; the building also containing the store in which his business was transacted. There was a fire in the building and some of the furniture was damaged, but not wholly destroyed. The whole controversy arose from a dispute between the parties with respect to the amount of damages. There were negotiations between the parties looking towards a settlement after the fire. The plaintiff claimed \$250, and the defendant's adjuster who examined the property insured offered to settle the claim for \$38, which was refused.

After three trials and at least as many appeals, with varying and conflicting results, the case comes here upon an appeal by the plaintiff, by permission of the court below, from a judgment of the Appellate Division, which affirmed an order of the Appellate Term reversing a judgment in favor of the plaintiff entered upon a verdict in his favor for \$235, and an order denying a motion by the defendant for a new trial. The defendant succeeded upon the appeals in upsetting the verdict upon one or both of two theories, which may be stated as follows: (1) That the plaintiff, having alleged full performance of the conditions of the policy, could not have been allowed to prove a waiver of the conditions on the part of the defendant, and this presented a question of pleading; (2) that even though the plaintiff was entitled to give such proof, under the condition of the

pleadings the proof actually given was not sufficient to authorize the jury to find any waiver, and so the finding was without evidence to sustain it. The defense was based entirely upon the omission of the plaintiff to present the proofs of loss required by the policy. The complaint alleged generally that the plaintiff had fulfilled all the conditions of the policy on his part, and this allegation was followed by another, namely, that 60 days and more before the commencement of the action the plaintiff served upon the defendant, as the proofs of loss, a complete inventory of the property destroyed and injured, with the quantity and cost of each article and the amount claimed thereon, and that the same was retained by the defendant without objection, and that no further proof was required or furnished. While the word "waiver" is not found in the pleading, yet the facts relied upon to establish that defense to the claim that the conditions of the policy were not fulfilled were, we think, sufficiently stated. None of the cases cited decide that under such a statement in a complaint on a policy of insurance the plaintiff could be precluded from asserting that strict compliance with the requirements of the policy to furnish formal verified proofs of loss was waived by the insurer, and so we think that the plaintiff's complaint was sufficient to enable him to avail himself of a waiver if proven.

The provision of the policy in respect to proofs of loss is, in substance, that, if a fire occurred, the insured should give immediate notice of any loss to the company in writing, make a complete inventory of the property lost or damaged, stating the quantity and cost of each article and the amount claimed thereon, within 60 days after the fire, and signed and sworn to by the insured, stating the time and origin of the fire and other matters not material to this appeal. The paper contained a complete inventory of the property damaged or destroyed and the amount claimed on account of each article, which aggregated \$242, but was not signed or sworn to by the insured. It was directed to the defendant at its New York office and received by it shortly after the fire. The defendant sent an adjuster with this inventory to the plaintiff's dwelling, who, with the aid of the inventory, examined the several articles of property and the condition of the same, and entered upon negotiations with the plaintiff for a settlement of the claim. The parties failed to agree upon the amount of the loss, but the adjuster offered to pay \$38 in settlement, which was refused by the plaintiff. It is admitted that this paper was a sufficient notice to the defendant that a fire had occurred, but it is strenuously denied that it was in any sense a compliance with the requirements of the policy. Of course, it was not such a formal paper as the policy required. There can be no dispute about that. The only question is whether the defendant by re-

taining it without any objection until the 60 days had expired, by using it for the purpose of identifying the property and ascertaining for itself the amount of the damage to the various articles covered by the policy, and then entering upon negotiations based upon the contents of the paper for a settlement of the claim, did not lead the plaintiff to believe that no further proofs of loss would be required, and so waived the objection now urged to a recovery. The only dispute between the parties was in regard to the amount of the damages, and the paper sent to and received by the defendant gave to it all the information that it could receive from the most formal proofs furnished in strict conformity with the policy.

We are therefore inclined to think that the circumstances referred to were properly submitted to the jury, and the finding that the defendant waived strict compliance with the terms of the policy cannot be said to be unsupported by any evidence. It is quite impossible to examine the vast list of cases cited upon the question, pro and con, by counsel in any reasonable period of time, and it may be that there is conflict among them. The requirement that proofs of loss shall be furnished is a condition in a policy that becomes operative only after the capital fact of a loss, and, unlike some of the other conditions in policies, it is to be liberally construed in favor of the insured. *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 33 N. E. 475; *Carpenter v. German-Am. Ins. Co.*, 135 N. Y. 308, 31 N. E. 1015.

The order of the Appellate Division, affirming that of the Appellate Term, should be reversed, and the judgment entered on the verdict affirmed, with costs to the plaintiff in all courts.

CULLEN, C. J., and VANN, WERNER and CHASE, JJ., concur. WILLARD BARTLETT, J., not voting.

GRAY, J. (dissenting). I vote for affirmance on the grounds expressed in the opinion of the Appellate Division. I doubt that the waiver was sufficiently pleaded; but, assuming that it was, there was no proof showing, or tending to show, waiver. The notice of October 2d was not proof and the offer of the company to pay the \$38 was properly refused by the plaintiff. He should then have filed his proofs of loss.

Ordered accordingly.

(190 N. Y. 61)

PEOPLE v. MINGEY.

(Court of Appeals of New York. Nov. 19, 1907.)

1. CRIMINAL LAW—APPEAL—APPELLATE DIVISION—AFFIRMANCE—REVIEW.

A conviction having been unanimously affirmed by the Appellate Division, there is nothing for consideration by the Court of Appeals but questions of law raised by appropriate exceptions in the trial court.

2. SAME—EVIDENCE—OBJECTIONS NOT MADE AT TRIAL.

Where, in a prosecution for uttering a forged check, questions asked by the court as to whether the signature on the check was that of the witness' firm, and whether such signature was ever authorized by the firm, were only objected to at the trial because they were asked by the court, and not by the district attorney, an exception thereto did not entitle defendant to object to such questions on appeal as calling for hearsay testimony and for the conclusion of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2635.]

3. SAME—PREJUDICE.

Where, in a prosecution for uttering a forged check, defendant did not claim that M., who was charged to have forged the payee's signature, had ever received any authority from the payee to indorse its name on the check except through R., defendant could not have been prejudiced by questions asked of R. as to whether the signature was that of his firm, the payee, and whether the signature was authorized by the firm, both of which he answered in the negative.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3137-3143.]

Appeal from Supreme Court, Appellate Division, First Department.

Lawrence P. Mingey was convicted of forgery in the second degree, and from an order of the Appellate Division (103 N. Y. Supp. 627, 118 App. Div. 652), affirming such conviction, he appeals. Affirmed.

George M. Curtis, for appellant. William Travers Jerome, Dist. Atty. (Robert S. Johnstone, of counsel), for respondent.

CHASE, J. One Devine gave a check upon the Hamilton Bank of New York city, payable to the Ross Lumber Company, a partnership. The check came to the possession of one Menton, an officer of the D. J. Menton Company, a corporation. He wrote the name "Ross Lumber Company" across the back of the check, and delivered it to the defendant, who was the secretary and treasurer of said corporation, and the defendant deposited the check in a bank in his name. The check was thereafter collected, and the defendant drew the amount thereof from the bank by checks which he asserts were in payment of claims against said corporation. It is claimed by the people that Menton's indorsement of the name Ross Lumber Company on said check was a forgery, and that the defendant uttered said check knowing that the payee's indorsement thereon was forged. The Ross Lumber Company is composed of C. Edward Ross and his brother. It is claimed by the defendant that Menton had authority from C. Edward Ross to indorse the name Ross Lumber Company on said check. At the trial of the indictment the jury rendered a verdict against the defendant, and judgment was entered thereon. From the judgment so rendered an appeal was taken to the Appellate Division of the Supreme Court, where the judgment of conviction was unanimously affirmed, and from such judgment of affirmance an appeal has been taken to this court.

Substantially the only question of fact contested on the trial was as to whether said Menton had authority from C. Edward Ross to indorse the name Ross Lumber Company upon said check. That question, although stoutly contested, was a very narrow and simple one. The record before us contains nearly 300 pages, many of which consist wholly of discussions by and between the court and the defendant's counsel. A large part of the record of such discussions is useless for the purpose of presenting any question that could arise on an appeal to the Appellate Division or to this court. Such a record on appeal merits criticism and condemnation, and the lengthy discussions and statements in the trial court could only have tended to confuse the one all-important issue involved. The judgment of conviction having been unanimously affirmed in the Appellate Division, there is nothing left for the consideration of this court but questions of law raised by appropriate exceptions in the trial court. *People v. Magliore*, 189 N. Y. —, 81 N. E. 774; *People v. Huson*, 187 N. Y. 97, 79 N. E. 835. We have carefully considered the many objections taken by the defendant's counsel during the trial, and also every exception taken by him to the admission or exclusion of evidence and to the court's charge and refusals to charge, and we do not think that any error was committed to the prejudice of the defendant.

We refer specifically to two questions propounded to the witness C. Edward Ross and to the answers given thereto, because, if the witness did not have personal knowledge of what had been authorized by the firm of Ross Lumber Company and proper objections had been made to the latter question, the answer should have been excluded. No objection was taken to the competency of the witness to answer, and in view of the facts appearing in the case, even if the latter question had been properly objected to, the answer did not prejudice the defendant. The court, after calling the witness' attention to the indorsement on the check, asked the witness the following questions to which answers thereto were given as follows: "Q. Is it the signature of your firm? A. No, sir. Q. Was it ever authorized to be signed by your firm? A. No, sir." Counsel for the defendant then said, "Will you kindly note our objection to your honor's question and an exception?" to which the court responded, "Yes." Statements were then made by the defendant's counsel and the court as follows: "Mr. Curtis: I desire to respectfully urge upon the court that, in the sense that every man is entitled to a fair trial, the defendant ought not to be oppressed by the superior learning, experience, and ability of the presiding justice, for whom we all have the most profound respect and the greatest veneration. The law provides a public prosecutor. The law pays him. * * * The Court: I am here to help administer criminal jus-

tice, and all I have done is to ask him to look at the indorsement on the check and then to state if his firm put it there or authorized it, and he said 'No.' If that is improper, I will give you an exception. Mr. Curtis: Will you grant me an exception? The Court: Certainly." It is a fundamental general rule of evidence that a witness must confine his testimony to matters within his personal knowledge, and also that he should not testify to conclusions of fact or of law. Whether a question calls for hearsay evidence or for conclusions is frequently dependent upon other facts and circumstances affecting the witness and his personal knowledge of the subject under consideration. The knowledge of the witness Ross as to whether Menton had authority from the firm of Ross Lumber Company to sign the indorsement on the check depended, among other things, upon whether any person other than the witness had authority to authorize such an indorsement. If the question had been specifically objected to on the ground that it called for hearsay evidence and for a conclusion, it might have resulted in the people showing that the witness could speak of the authority given to Menton by his firm as a fact and not from hearsay, or as a conclusion.

In *Sweet v. Tuttle*, 14 N. Y. 465, 471, the court, referring to a question put to a witness as follows: "On the part and behalf and for whom were the services rendered?"—say: "The question did not call for an opinion, and therefore was not open to objection on that ground. The fact which it called for may have been a conclusion deducible from other special facts, but this could not well appear until the question was answered and the examination then pushed somewhat further. After the inquiry was answered, the plaintiff had a right, if he pleased, to cross-examine, and it might thus have appeared that the fact stated by the witness was a mere deduction of his own mind from the special circumstances of the transaction." In *Nicolay v. Unger*, 80 N. Y. 54, 57, the court say: "It is not difficult to see that it is entirely competent to prove under some circumstances as a fact what under others might be regarded as a mere conclusion of law and would be clearly inadmissible. There are cases which hold that where the question involves a fact clearly within the knowledge of the witness, and not the expression of an opinion upon facts proven, it is admissible. *De Wolf v. Williams*, 69 N. Y. 621; *Knapp v. Smith*, 27 N. Y. 277; *Sweet v. Tuttle*, 14 N. Y. 465; *Davis v. Peck*, 54 Barb. 425." No objection whatever was made to the question when it was asked of the witness, and, although the court gave the defendant an exception as we have shown, a reference to the discussion between the court and the counsel for the defendant shows beyond controversy that the defendant did not at any time object to the question upon any ground other than that it was asked by the court,

instead of the district attorney. It further conclusively appears in the record that the defendant did not claim that Menton had ever received any authority from the Ross Lumber Company to indorse its name on the back of the check, except through C. Edward Ross, the witness who was being examined. Defendant, therefore, could not have been prejudiced by the question and answer even if he had properly objected thereto.

That the defendant's counsel did not intend to object to the question on the ground that it calls for hearsay evidence or for a conclusion is further shown by his contention in this court. In his brief it is stated: "The attention of the learned court is called to the following exception on page 12, folio 36. * * * On page 13 at folio 39 the exception taken there was a good one. The attitude of the court and its expression are not justified." These references are to the exceptions taken in connection with the questions, answers, and subsequent discussions which we have quoted herein. No other reference is made to such exceptions by the defendant's counsel in his brief, except that in connection with a statement that the defendant had not had a fair trial he says: "It will be observed that up to this time a great percentage of the questions of the prosecution have been put by the court." No error was committed on the trial that requires a reversal of the judgment.

The judgment of conviction should be affirmed.

CULLEN, C. J., and GRAY, O'BRIEN, WERNER, and WILLARD BARTLETT, JJ., concur. VANN, J., absent.

Judgment of conviction affirmed.

(190 N. Y. 1)

COMMERCIAL WOOD & CEMENT CO. v.
NORTHAMPTON PORTLAND
CEMENT CO.

(Court of Appeals of New York. Nov. 19, 1907.)

CORPORATIONS — AUTHORITY OF EXECUTIVE COMMITTEE—STATUTORY PROVISIONS.

Section 9 of the general corporation law of Delaware (22 Del. Laws, p. 762, c. 394) provides that the business of every corporation shall be managed by a board of directors, which may designate two or more of their number an executive committee, which to the extent provided by resolution, or the by-laws of the company, shall exercise the powers of the board of directors in the management of the business and affairs of the company. A by-law of defendant, a corporation, provided that the directors should have the general management of the company's property and the regulation of its affairs, and provided for the selection by them of an executive committee which could exercise any powers of the board, subject at all times to the orders of the directors. At a meeting of defendant's executive committee, a contract was made with plaintiff, but a meeting of directors had already been called by the secretary for the afternoon of the same day, and it was held within two hours after the contract was executed by direction of the executive committee. A copy of the

contract being transmitted to them, the directors passed a resolution, a copy of which was sent to plaintiff the same day, notifying it that the "proposed contract" was under consideration, and that plaintiff was to take no action under it until the board had acted thereon. Subsequently the directors by formal resolution rejected the contract. Held, that the executive committee had no power to execute the contract, that plaintiff was chargeable with knowledge of its lack of authority, and defendant was not bound thereby.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Commercial Wood & Cement Company against the Northampton Portland Cement Company. From a judgment of the Appellate Division (100 N. Y. Supp. 960, 115 App. Div. 388), affirming a judgment of dismissal, plaintiff appeals. Affirmed.

See 84 N. Y. Supp. 1121, 87 App. Div. 633.

L. Laffin Kellogg, for appellant. Harmon S. Graves, for respondent.

GRAY, J. The plaintiff and the defendant are corporations organized under the laws of the state of Delaware, and having offices for the conduct of their business in the city of New York. The business of the defendant is the manufacture and sale of cement, and that of the plaintiff the marketing and selling of that material. A contract was executed by their presidents, whereby the agreement of the defendant was that the plaintiff should be its sole selling agent for the entire output of its cement for a term of years, and this action was brought by the plaintiff to recover damages for the breach of the contract. The defense interposed to the action was, in brief and so far as material to be stated, that the contract was executed by the direction of the defendant's executive committee, and that that committee was without power to make it. Upon the trial of the action, the court dismissed the complaint, upon the ground that the contract was an unusual and extraordinary one, which the executive committee was not authorized to make. The Appellate Division affirmed the judgment in favor of the defendant, with some difference of opinion as to the grounds. One of the grounds assigned was the same substantially as that taken by the trial court, and another ground was that the contract was invalid, for the lack of any consideration in the existence of mutual obligations of the contracting parties.

I think that the executive committee of the defendant's board of directors was without authority, under the circumstances, to obligate the defendant by this contract. By section 9 of the general corporation law of the state of Delaware (22 Del. Laws, p. 762, c. 394), it is provided that "the business of every corporation * * * shall be managed by a board of not less than three directors. * * * The board of directors may, by resolution, * * * designate two or more of their number to constitute an executive committee, who, to the extent provided in said resolution, or in the by-laws of said company, shall have

and exercise the powers of the board of directors in the management of the business and affairs of the company," etc. A by-law of the defendant provided that the directors "shall have the general charge of the management of the company's property, and the regulation and government of its affairs," and further provided for the selection by them of an executive committee of five members, who should "have authority to exercise any powers of the board when the board is not in session, * * * subject at all times to the orders of the directors." The term of office of the directors was one year. At the time when the meeting of the executive committee was held, at which this contract was entered into on behalf of the defendant, a meeting of the board of directors had already been called by the secretary for the afternoon of the same day. The session of the board was held within two hours after this contract had been executed by the direction of the executive committee, and, a copy of the contract having been transmitted to them, the directors passed a resolution notifying the plaintiff that the "proposed contract" was under consideration, and that it was to take no action under it until the board of directors had acted thereon. A copy of the resolution was sent the same day to the plaintiff. At a subsequent date, the board of directors, by formal resolution, disapproved of, and rejected, the contract, of which action the plaintiff was notified.

Under the circumstances, it is very clear that the executive committee acted not only improperly, but unauthorizedly. For corporate purposes, the calling of a meeting of the board of directors suspended the power of the executive committee meanwhile to act in governmental matters. The authority conferred by the by-laws upon the executive committee was to exercise the powers of the board when it was not in session; but, within the spirit and intendment of the by-laws, a session of the board had been so far moved, if not initiated, by the previous calling of a meeting, as to preclude such exercise by the committee meanwhile in the administration of the company's affairs. By the law of its organization, as well as by the by-laws adopted for the management of its business, the directors were given the general and responsible charge of the management of the company's property and business. In delegating authority to those of their number who had been selected to form an executive committee, it was intended, and plainly implied, that such subordinate agency of the board of directors should not exercise any powers of government, when the board itself was about to sit for that purpose. The committee was made by the by-law "at all times subject to the orders of the directors," and to undertake the execution of a contract, involving the conduct of the corporate business and affecting its property, after the session of the directors had been called, was in violation of the by-

law. The plaintiff, in dealing with the executive committee of the defendant, was chargeable with a knowledge of the law and of the extent of the authority conferred upon that agency of the board. In thus entering into a contract with the defendant, the plaintiff was put upon its inquiry as to the scope of the powers of the executive committee to bind the corporation thereby. It was bound to know that the committee was always subject to the orders of the board, and that the field for executive action was only free to it when the directors had not themselves appropriated it. It would be an extraordinary proposition to maintain, as it seems to me, that a committee, appointed to exercise the powers of the board, when it was not in session, could conclude the corporation by action taken in anticipation of the actual convening of the directors under the notice of the secretary. That would be a vicious assumption, or usurpation, of power. The officers of the plaintiff took the chance, if failing to inform themselves of the right of the executive committee to act, of the validity of such a contract, or of its being adopted by the board, and, being notified the same day that the board would pass upon the proposed contract, it is difficult to perceive a plausible basis for plaintiff's cause of action.

I think that the executive committee of the defendant had no power to execute any such contract, and that the plaintiff was chargeable with knowledge of its lack of authority. I think that it could be shown that the contract itself was of that unusual nature, in the obligations sought to be imposed upon the defendant and in the provision for its continuance over a period of five years, without the possibility of terminating it within that time, as to render its execution something in excess of the implied power of the committee. But, if I am right in the views which I have already expressed, it is not necessary to consider that feature of the case.

For the reasons which I have given, I think that the judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment affirmed.

(190 N. Y. 19)

SIMSON v. PARKER et al.

(Court of Appeals of New York. Nov. 19, 1907.)

1. MUNICIPAL CORPORATIONS — PROPERTY — POWER TO SELL AND CONVEY — CHARTER REGULATION.

Tonawanda Charter, § 19, tit. 20 (Laws 1905, p. 782, c. 357), which provides that the board of public works may sell to a person outside the city the right to make connections with and draw water from the city's mains, and fix the prices and conditions therefor, if thereby the water supply of the city and its inhabitants shall not be insufficient, is not in violation of

Const. art. 8, § 10, providing that no city shall give any money or property to aid a person, or be allowed to incur any indebtedness except for city purposes, since the sale of property for which the city has no use is in no sense a gift to the buyer nor is an obligation necessarily incurred in making such sale a creation of indebtedness for other than a city purpose.

2. SAME—CONTRACTS IN GENERAL—POWERS OF BOARD OF PUBLIC WORKS.

Under Tonawanda Charter, § 19, tit. 20 (Laws 1905, p. 782, c. 357), which provides that the board of public works may sell a person outside the city the right under certain conditions to make connections with and draw water from the city's mains, a contract with a corporation to supply water to its works outside the city was properly executed by the board of public works, and no authority from the common council was necessary for its execution.

3. SAME—CONSTITUTIONAL PROVISIONS.

Under Tonawanda Charter, § 19, tit. 20 (Laws 1905, p. 782, c. 357), which provides that the board of public works may sell a person outside the city the right under certain conditions to make connections with and draw water from the city's mains, if thereby the water supply of the city and its inhabitants shall not be insufficient, a contract imposing upon the city the obligation to furnish a corporation's plant outside the city such water as it may require during a given period, and providing that, in case of failure to furnish such water, the city shall be liable for all damages caused thereby to the corporation, is invalid, since the charter authorizes only a sale of surplus water as such surplus may exist from time to time.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William P. Simson against Charles B. Parker and others. From a judgment of the Appellate Division, affirming a judgment for defendants, plaintiff appeals. Reversed, and judgment directed for plaintiff.

James McCormick Mitchell, for appellant.
Evan Hollister, for respondents.

CULLEN, C. J. This action is brought by a taxpayer of the city of Tonawanda to have a certain contract between the board of public works of said city and the Jewett Company, a manufacturing corporation, whose works and plants are situated without the city limits, for a supply of water to said plants and works, adjudged illegal, void, and a waste of the city's property, and to have all parties enjoined from acting thereunder. At the time of the execution of the contract the city of Tonawanda had, as found by the courts below, waterworks and a plant of sufficient capacity and equipment to furnish a daily supply of 15,000,000 of gallons, while the daily consumption of water in said city did not exceed 4,500,000 of gallons. By section 19, tit. 20, of the charter of the city it was provided: "Said board of public works may sell to a corporation or individual outside of the city, the right to make connections with the mains for the purpose of drawing water therefrom, and fix the prices and conditions therefor; but the board shall not sell or permit the use of water under this section if thereby the supply for the city or its inhabitants shall be insufficient." Laws 1905, p. 782, c. 357. Acting under this au-

thority, the board of public works made the contract in controversy. The Jewett Company's works were situated about a mile beyond the city boundaries. The contract in substance provided that the city should, during a period of seven years, furnish the Jewett Company, at their works, all the water that said Jewett Company or other parties occupying their premises might desire to use for commercial or domestic purposes and for fire protection, which could be delivered through a six-inch main. The city was to furnish a meter at the Jewett works to measure the water consumed. The Jewett Company was to lay the main, but, in case the cost thereof should exceed the sum of \$4,500, such excess was to be paid by the city. It was to pay the city for all water furnished exceeding 50,000 gallons daily six cents a thousand gallons. The first 50,000 gallons per day was to be paid for by the Jewett Company, at the termination of the contract period, by transferring the main to the city, provided that the city had complied with the terms of its contract. The Jewett Company was given the option to renew the contract for an additional term of seven years. The contract contained the further provision that, in case of the failure of the city to supply the stipulated quantity of water, it should be liable to the Jewett Company for all damages occasioned by such default, and should pay the expense to which the Jewett Company might be put in getting water from another source. The learned referee has found that the cost of laying the main from the city line to the Jewett works would not exceed the sum of \$4,500, that the expense of furnishing the meter would not exceed \$350, and that the cost of maintaining the main would be substantially insignificant. He held the contract valid, and that decision has been affirmed by the Appellate Division.

The counsel for the appellant insists that the power conferred upon the board of public works by the section of the charter cited is in violation of section 10, article 8, of the Constitution, which provides that no city shall give any money or property to or in aid of any individual, association, or corporation, or be allowed to incur any indebtedness, except for city purposes. We think this claim destitute of merit. The sale of city property for which the city has no use is in no sense a gift to or in aid of the person to whom the sale is made. Nor is an obligation necessarily incurred in making the sale in any sense a creation of an indebtedness for other than a city purpose. The authority granted by the statute was to sell merely surplus water, and, if the right existed to sell the water, the expenditure incurred in effecting the sale was unquestionably made for a city purpose. It is easy to imagine cases where under the guise of prosecuting a

city work a city might be authorized to incur expenditures which, in reality, were not for city purposes. This, however, is not such a case. Under the provision of the charter the contract was properly executed by the board of public works, and no authority from the common council was necessary for its execution. But we are of opinion that the contract in this case exceeded the authority granted by the charter to the board of public works and that, therefore, it is illegal and invalid.

The charter authorizes the board to sell the right to make connections with the mains for the purpose of drawing water and to "fix the prices and conditions therefor." It may be doubted whether the provision for paying for the first 50,000 gallons of daily supply by the transfer of the main to the city at the expiration of the contract term is not a barter or trade rather than the sale authorized by the statute. But on this we need not dwell, for the other provisions of the contract necessarily condemn it. The statute expressly forbids the board to sell or permit the use of water, if thereby the supply for the city or its inhabitants should become insufficient. In other words, the statute authorizes only a sale of surplus water as such surplus may exist from time to time. Instead of limiting the obligation of the city to furnish water solely to such surplus, the contract imposes an absolute obligation to furnish such water as the Jewett Company may require during a period of either 7 or 14 years, as the Jewett Company may elect, and expressly provides that, in case of failure to furnish water, the city shall be liable for all damages caused thereby to the Jewett Company. Instead of being a contract for the sale of surplus water, which is all that the statute authorized or contemplated, it is simply an ordinary contract between vendor and vendee to furnish during a specified term such quantity of water as the vendee might require. No authority to make such a contract is given by the statute. If such authority were given by the statute, the claim of the appellant, that the statute was in conflict with the Constitution as authorizing the city to embark in an enterprise which was not a city purpose, would not be wholly without force.

The judgment of the Appellate Division and that entered upon the report of the referee should be reversed, and judgment directed for the plaintiff declaring the contract void and enjoining the defendants from proceeding thereunder, with costs to the appellant in all courts.

GRAY, O'BRIEN, VANN, WERNER, WIL-
LARD BARTLETT, and CHASE, JJ., con-
cur.

Judgment accordingly.

(190 N. Y. 111)

REED v. PROVIDENT SAVINGS LIFE ASSUR. SOCIETY OF NEW YORK
(REED et al., Interveners.)

(Court of Appeals of New York. Nov. 26, 1907.)

1. INSURANCE—LIFE INSURANCE—NATURE OF CONTRACT.

A life insurance policy is not a contract of indemnity, but a contract to pay money upon insured's death in consideration of certain payments being made during his life.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 172.]

2. SAME—INSURABLE INTEREST—WAGER POLICY.

Though a policy of insurance issued upon the application of one having no insurable interest in the life insured is a wager policy prohibited by law, a person may insure his own life and provide in the contract that the money shall be payable to any one whom he shall appoint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 138.]

3. SAME—CONTRACT TO PROCURE INSURANCE ON ANOTHER'S LIFE.

Plaintiff made an agreement with insured, whereby insurance was to be taken out upon his life, of which his children were to be the principal beneficiaries and to be named as such in the policies. Plaintiff was to keep the policies in force until insured's death by paying all premiums, and from the proceeds was to be reimbursed his advances of premiums, with interest on his payments, and be paid a substantial sum in addition. Policies were obtained, in some of which the children were named as sole beneficiaries, in others plaintiff was joined with them, and one was made payable to plaintiff and his assigns. *Held*, that the insurance was effected by plaintiff under the agreement, upon the insurable interest of insured's children, and he could be held to its performance as their trustee, even though some of the policies named him as a beneficiary.

4. SAME—INSURABLE INTEREST.

The fact that one policy was made payable to plaintiff alone did not affect the insurable interest.

5. SAME—CREDITORS.

Plaintiff, having advanced money under the agreement, had an insurable interest as creditor, upon which a subsequent policy could be based, notwithstanding his interest was less than the amount of the policy, and he was entitled to payment of his debt from the proceeds of the insurance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 162.]

6. SAME—PREMIUMS—TENDER AFTER REFUSAL TO RECEIVE.

Where an insurer refuses to accept a premium on the ground that it is tendered too late, insured is not required to make further tenders on recurring premium dates.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 930.]

7. COSTS—PERSONS ENTITLED—INTERVENERS.

Where the right of interveners in an action at law would have been subverted through plaintiff without their intervention, which did not change the character of the action, they are not entitled to costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Costs, § 343.]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Theodore F. Reed against the Provident Savings Life Assurance Society of

New York, in which John O. Reed and others intervene. From a judgment of the Appellate Division (112 App. Div. 922, 98 N. Y. Supp. 1111), affirming the judgment of the Special Term, plaintiff and defendant society appeal. Modified and affirmed.

This action was brought by the plaintiff to recover from the defendant, the Provident Savings Life Assurance Society of New York, the amount due upon a policy of life insurance issued upon the life of Benjamin F. Reed in favor of the plaintiff, nominated therein as "creditor." The complaint alleged that the plaintiff was a nephew of the assured and his creditor to the amount of upwards of \$8,000. The defendant company denied that the plaintiff was a creditor, or that he had any insurable interest in the life of the assured, alleged a lapse of the policy by reason of the failure to pay certain premiums due thereon, and, as a separate defense, alleged the existence of a certain contract, made by plaintiff with the assured and his children for the procurement of insurance upon the life of the assured for the benefit of the children. Fraud was also charged against the plaintiff with respect to the creation of the indebtedness alleged by him. The children of the assured became parties defendant to the action, with the consent of the defendant, upon their motion to be allowed to intervene, and, answering the complaint, they alleged, in substance, that the policy was intended to be payable to plaintiff only to the extent of his actual interest as creditor, and, with great fullness, set forth an agreement between the plaintiff, the assured, and themselves to effect life insurance practically as the answer of the company had set it out. The policy of insurance recites that the defendant, "In consideration of the application hereof and of the conditions and agreements on the back of this policy, all of which are a part of this contract, * * * doth promise to pay to Theodore F. Reed, creditor (the beneficiary of the policy), or to the legal representatives or assigns of said beneficiary, the sum of \$10,000," etc. The application for the insurance was signed by the deceased as the person to be insured, and gave the name of the plaintiff "as the beneficiary on whom the insurance is desired" and as a creditor of the assured. The trial court formulated its decision in findings of fact and conclusions of law. It appears therefrom that in 1887, in the state of Michigan, the plaintiff and the assured had entered into a contract in relation to the taking out upon the life of the latter of insurance to the extent of \$25,000 and that the children of the assured were parties to that contract; that that amount of insurance was to be kept in force until the death of the assured; that the premiums and assessments thereon would be advanced and paid by the plaintiff; that he should receive from the proceeds of such insurance the amount which he had advanced, with 10 per

cent. interest, and the sum of \$5,000, in addition thereto; that the children should be named as beneficiaries in the policies, and that they should receive the balance of the insurance moneys. In pursuance of that contract, the assured had submitted to medical examinations, and had executed applications for policies, and the plaintiff had procured in 1887 policies of life insurance to be issued, aggregating \$25,000 in amount. Those policies had named the children of the assured as beneficiaries and the plaintiff had paid all the premiums, or assessments, upon them up to the time of the death of the assured, in 1896. Upon the failure in 1889 of two of the insurance companies which had issued policies, other insurance policies had been substituted and of these the policy in suit is one, and it had been made payable to the plaintiff, or his assigns. It was found that the premiums and assessments which the plaintiff had paid upon this policy amounted, with interest, to the sum of \$3,395.81, and that, at the time of decedent's death, the \$25,000 of insurance, on which plaintiff had agreed to pay the premiums, consisted in the present policy and in two other policies—one for \$10,000 issued by the Massachusetts Benefit Association and the other for \$5,000 issued by the Bay State Beneficiary Association. It was also found that the proofs of death were duly furnished to the defendant society; that the conditions of the policy, on the part of the assured, had been performed; that the plaintiff, in pursuance of the same contract, had collected from the Bay State Association \$5,000, the amount of its policy and had appropriated the sum to his own use; that he had obtained upon the policy of the Massachusetts Association the sum of \$2,500, and that the balance thereof was collected by the defendants, the Reed children, who paid to the plaintiff, according to their contract, an amount, which, together with the said \$2,500, represented all payments by him upon said policies and upon the policies of the two societies which had previously failed. As conclusions of law it was found that there was due from the defendant society upon its policy, less certain unpaid premiums and interest thereon, the sum of \$14,428.11; that of such amount the plaintiff was entitled to receive the sum of \$3,395.81 (that being the amount found to have been paid as premiums upon the policy in suit), and the Reed children were entitled to receive the balance. There was judgment accordingly, which, as finally perfected, awarded costs and allowances, by way of costs, to the Reed children, as well as to the plaintiff. The judgment has been unanimously affirmed at the Appellate Division, and, from the judgment of affirmance, the plaintiff and the defendant society have appealed to this court.

Charles F. Brown and W. H. Van Steenberg, for appellants. George Richards, for respondents.

GRAY, J. (after stating the facts as above). The facts in dispute have been finally settled by the unanimous affirmance of the judgment. The situation, as presented, is one where the interests of the parties are evident, and but few questions of law of any importance have survived the disposition made below of this case. In 1887 a contract was made by the plaintiff with Benjamin F. Reed and his children, pursuant to which policies of insurance, to the aggregate amount of \$25,000, were to be taken out upon Reed's life, of which his children were to be the principal beneficiaries and they were to be named, as such, in the policies. These policies were to be kept in force until the death of the assured, and the plaintiff agreed to pay all the premiums and assessments. From the proceeds of the insurance he was to be reimbursed the amount advanced by him, with 10 per cent. interest (the legal rate in the state of Michigan, where the contract was made), and, in addition, he was to receive the sum of \$5,000; the remainder of the insurance moneys being payable to the children of the assured. This contract was so far carried out that, upon applications signed by the deceased, the plaintiff procured the issuance of four policies, aggregating in amount \$25,000, by the Massachusetts Benefit Association, the National Benefit Society, and the Equitable Reserve Fund Life Association; the children being alone named as beneficiaries in two policies issued by the first-named company, and, in those issued by the two latter companies, being jointly named with the plaintiff, who was described as nephew and creditor. The plaintiff performed his agreement to keep the policies in force by the payment of all premiums, or assessments, and, when the two last-named insurance companies failed in 1889, he procured to be issued, still carrying out the contract, two other policies in their place, one of which, for \$10,000, is the one involved in this action. In renewing, however, that particular insurance, the policy was made payable to the plaintiff, or his assigns. At the death of the assured, the policies of life insurance were in force, and \$15,000 of their amount have been paid over by the other two insurance companies. The plaintiff collected \$5,000, the amount of one of the other policies, and from the proceeds of the other policy for \$10,000 he has received with the assent of, or from, the Reed children a sum of money sufficient to reimburse him for his payments of premiums upon the insurance policies, other than the one in question. The Reed children being in this action as parties, the judgment distributed between them and the plaintiff the amount found due upon this policy, giving to the latter so much of it as would reimburse him for what premiums, or assessments, he has advanced thereon.

It is argued for the appellant company that the plaintiff had no insurable interest in the life of the assured, and that the policy

issued by it was therefore void. As nephew of the deceased he certainly had no insurable interest; but he represented in himself other interests. The application for the policy represented him to be a creditor of the applicant upon whose life the insurance was solicited. Whether, if this had been the mere contract of the assured with the company, the policy, in such case, would have been valid without reference to the insurable interest of the appointee, or payee, in the life assured, presents a question not difficult to answer, upon authority or upon principle. A life insurance policy is not a contract of indemnity. It is a contract to pay a sum of money upon the death of the assured, in consideration of certain payments being duly made at fixed periods during his life. If the insurance is made upon the application of one who has no insurable interest whatever in the life insured, it is a wager policy—that is to say, a speculative contract—which the law condemns. But a person may insure his own life and provide in the contract of insurance that the money shall be payable to any one whom he may appoint, or assign the policy to. What will distinguish the one contract from the other is the fact as to the party actually contracting with the insurer and the distinction is substantial and controlling accordingly. See *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282-287, 84 Am. Dec. 280; *Valton v. Nat. Fund L. Assur. Co.*, 20 N. Y. 32-38; *Olmsted v. Keyes*, 85 N. Y. 593-598; *Dalby v. India, etc., Assurance Co.*, 15 C. B. 365.

In this case I think we must hold, upon the facts as they have been found, that the insurance was applied for and was effected by the plaintiff; but, also, that he had an insurable interest in the life to be insured. In the first place, it appears that all of the insurance was procured in pursuance of the contract between the plaintiff, the assured, and his children. It was to be maintained by the plaintiff for their benefit and they were to be named as the beneficiaries; but the plaintiff was to be compensated by the repayment from the proceeds of the policies of the amount of his advances of premiums, or assessments, with interest, and by the payment of a substantial sum in addition. This and the other policies, therefore, were based upon the insurable interest of Reed's children, who were represented, and financially assisted, by the plaintiff. By their agreement, he acted for them and he could be held to the performance of the contract, if necessary, as their trustee. In causing the present policy to be issued in his name alone, the fact of the insurable interest was in no wise affected; for the finding is that it was procured in pursuance of the contract. In the second place, however, the plaintiff personally did have an insurable interest as a creditor of the assured when this policy issued. It is the fact, and it is so found, that at the time he had already

advanced and paid the premiums, or assessments, upon the \$25,000 of life insurance, taken out some two years previously. To the extent of his payments, he was, under the contract, a creditor of the assured. It did not affect the fact of the personal indebtedness that the plaintiff might be repaid from the proceeds of the insurance. The assured was a debtor for the premiums paid by the plaintiff to maintain the insurance on his life. If there was an insurable interest in the plaintiff when this policy issued, the legal liability of the company is established, and it is of no consequence that the plaintiff's interest, as a creditor, was less than the amount of the policy. See *Olmsted v. Keyes*, supra; *Wright v. Mutual Ben. Life Association*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749. The Reed children have been brought into the action (and this upon the express consent of the company), and their rights could be, and they were, adjusted, without prejudice to the company. *Wright v. Mutual Ben. Life Association*, supra. The policy having been validly issued and the plaintiff having procured it pursuant to the agreement that he should do so for the benefit of the Reed children, the insurer is not in a position to complain that others than the payee named are entitled to some of the insurance moneys. If the Reed children had not been brought into the action, the plaintiff could have collected the insurance moneys, and he, then, would have held their portion as a trustee. On this phase of the case, I find no reason for disturbing the judgment below.

It is contended that the policy lapsed by reason of the nonpayment of certain premiums. The trial court has found that the plaintiff paid all the premiums, or assessments, down to January 12, 1895, about a year before the death of the assured and that the company refused to accept the premium which was due, and which was tendered to it, on that date. It seems that the refusal of the company was upon the ground that the tender of the premium was made too late; but the finding, as to that fact, is that it was duly tendered. It is argued, however, that the subsequent premiums should have been paid, or tendered, and that the failure to do so caused the policy to lapse. The refusal of the company to accept the premium due in January, 1895, was a perfectly good reason for not offering to pay subsequent premiums. If the company's refusal had a legal basis, the contract of insurance was at an end by reason of the violation of the terms of the contract. Its attitude was, and has continued to be, one of repudiation of its obligation to the plaintiff. After its refusal, he was not required to perform the vain and useless act of making further tenders on recurring premium dates. *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286-293; *Hayner v. Am. Popular Life Ins.*

Co., Id. 435-439; *Misell v. Globe Mut. Life Ins. Co.*, 76 N. Y. 115, 120. Provision was sufficiently made in the judgment for the deduction of unpaid premiums, with interest thereon to the date of the death of the assured, from the amount of the policy. *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516, 528, 29 Am. Rep. 200.

I think that the objection of the company to the award of two bills of costs against it, one to the plaintiff and another to the Reed children, is good. The plaintiff was entitled to his costs, as of course; but I can conceive no legal reason for awarding another bill to the Reed defendants. The action was not in equity, where costs might be awarded in the discretion of the court. It was at law upon a single contract of insurance running to the plaintiff. If he was not individually entitled to all of the moneys due upon it, he would receive and hold them as trustee for the Reed children. Their intervening did not change the character of the action. If they voluntarily came into it, however convenient for purposes of adjustment, or as a measure of protection, it would be unjust and without authority in the statute, so far as I am aware, to compel the company to pay to them an additional bill of costs and an allowance. See *Roberts v. N. Y. Elev. R. R.*, 155 N. Y. 31, 39, 49 N. E. 262. Whether they were in or out of the action, their rights were worked out through the plaintiff, under the contract which I have heretofore spoken of.

No other questions, in my opinion, require consideration by us. I advise that the judgment appealed from should be modified by striking therefrom the award of costs and of an allowance to the defendants Reed and Davidson, and that, as so modified, the judgment should be affirmed, without costs in this court to either party as against the other.

CULLEN, O. J., and O'BRIEN, WILLARD BARTLETT, and CHASE, JJ., concur. VANN, J., concurs in result. WERNER, J., absent.

Judgment accordingly.

(190 N. Y. 76.)

THOMAS W. FINUCANE CO. v. BOARD OF EDUCATION OF CITY OF ROCHESTER.

(Court of Appeals of New York. Nov. 19, 1907.)

1. APPEAL — DECISIONS OF INTERMEDIATE COURTS—QUESTIONS REVIEWABLE.

On appeal from the judgment of the Appellate Division modifying a judgment in accordance with a stipulation and unanimously affirming it as modified, only questions of law can be considered.

2. CONTRACTS—BUILDING CONTRACTS—STIPULATIONS—WAIVER—EFFECT.

Where certain of the specifications in a building contract as to the material to be used for the finished floors were waived at the request of the contractor, and, on account of the change, the cost to the contractor for the floors

was reduced a specified sum, the owner was not entitled to a reduction of the contract price nor to a counterclaim to the amount of the reduction of the expenses.

3. EVIDENCE—PAROL EVIDENCE—ADMISSIBILITY.

Stipulations in a contract for the construction of the superstructure of a building authorizing the contractor to recover the expenses suffered from the owner's failing to deliver the building on a designated date, and requiring the contractor to advance the work to certain points of completion by specified dates, and fixing the time for the completion of the work, are not ambiguous, and parol evidence of conversations of the parties at the time of the execution of the contract is inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2071.]

4. DAMAGES — CONTRACTS — BUILDING CONTRACTS—CONSTRUCTION—RECOVERY.

A contractor for the superstructure of a building, who is entitled to be placed in control of the building on a designated date and to damages in not obtaining control on that date, and who is given the control about two months later, cannot recover for loss of profits on work that he could have done, except for the crowded condition of his shop, arising from the storage of doors, window casings, and other interior finishing intended for the building, since he must have known when such articles would be required in the building.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 332, 333.]

5. ARBITRATION AND AWARD — AGREEMENT — REVOCATION.

An agreement that arbitrators shall be appointed in case a controversy arises between the parties to the agreement, or an agreement to arbitrate a pending controversy, is subject to revocation at any time before a final submission to the arbitrators for their decision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, §§ 64, 65.]

6. SAME.

Where a contractor, on failure of the owner to keep its agreement to arbitrate, brought an action at law for damages, the owner was entitled to present any material evidence on the issues as against the objection that, before it could maintain its defense, it must show that it had complied with the contract as to arbitration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Arbitration and Award, § 30½.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Thomas W. Finucane Company against the board of education of the city of Rochester. From a judgment of the Appellate Division (101 N. Y. Supp. 1121, 115 App. Div. 920), modifying a judgment granting insufficient relief and affirming it as so modified, plaintiff appeals. Reversed, and new trial granted conditionally.

James M. E. O'Grady, for appellant. William W. Webb (John M. Stull, of counsel), for respondent.

CHASE, J. The plaintiff entered into a contract with the defendant to erect the East High School in the city of Rochester, not including excavations and foundations therefor. After (as claimed by the plaintiff) the contract had been performed and the building completed, a controversy arose between the parties as to the amount to be paid to

the plaintiff in settlement of its demands. The plaintiff brought this action, alleging a balance due it of \$18,500 on the stipulated contract price, \$3,072.74 for certain alterations in the work, and \$30,739 damages under paragraph 18 of the contract, which we will herein further mention. The defendant, answering the plaintiff's complaint, denied many of the material allegations thereof, and interposed various counterclaims. The issues were referred to a referee, and he made findings of fact and conclusions of law upon which he directed judgment in favor of the plaintiff for \$25,099.38 and judgment was entered thereon accordingly. The plaintiff appealed therefrom to the Appellate Division of the Supreme Court, where the judgment was modified by adding a small amount in accordance with a stipulation of the respondent, and as so modified the judgment was unanimously affirmed. An appeal is taken to this court, but only questions of law can be considered.

The tenth finding of fact is as follows: "That the specifications required that all finished floors should be thoroughly kiln dried and taken from the kiln directly to the machine and then direct to the building, and only as fast as wanted for laying; that, at the request of the plaintiff, this provision of the specifications was waived so as to allow the plaintiff to have the flooring kiln dried in the southern states where it was purchased, and put through the planing and matching machine there before being shipped here for use, and that, on account of such change, the expense to the plaintiff of such floors was reduced by \$7 per 1,000 feet and 101,000 feet of flooring was used in said building; and that the defendant is entitled to a counterclaim against the plaintiff or to a deduction from the contract price of \$707 on this account with interest thereon from June 1, 1903, to this date which amounts to \$66.34."

The facts stated in such finding are wholly insufficient to sustain the conclusion of law therein. The other findings negative any claim that the plaintiff failed to perform its contract so far as it relates to the floors. The counterclaim is not based upon findings that the floors were not of the material required by the specifications, or that they were not planed, matched, kiln dried, laid, and finished as therein provided. The fact that the specifications, so far as they relate to the place where the flooring should be kiln dried, were waived by the defendant, and that the plaintiff was allowed to have the material kiln dried in the southern states where it was purchased, is not sufficient on which to charge the plaintiff with the amount saved by it through procuring a lower price for the kiln dried flooring in such southern states. The intention of the plaintiff in requesting the defendant to waive the provision of the specifications in regard to the place where the flooring should be kiln dried was doubtless for the express purpose of enabling it to

make a better bargain for itself in purchasing such kiln dried flooring. The consent to have the flooring kiln dried in the southern states was unconditional. If, at the time the flooring was laid, it was kiln dried as contemplated by the specifications, and the completed floors are in all respects according to the specifications, there is not in the findings any basis for the counterclaim against the plaintiff. If the defendant claimed that the flooring absorbed moisture in being transferred to the school building, or in any other way the flooring became or was injured, or that the completed floors were inferior to the floors required by the specifications, it should have shown such injuries or inferiority upon the trial and obtained a finding to that effect by the referee.

The eighteenth paragraph of the complaint is as follows: "Whatever damage or expense the contractor may suffer or be put to by reason of the owners not delivering the building on August 1st shall be considered and paid for by the owner as an extra, and the character, amount, and valuation of such extra shall be audited by the architect. In case such character, amount, or valuation is not agreed to, the same shall be referred to three arbitrators to be appointed as follows: One by each of the parties to this contract and the third by the two thus chosen, and the decision of any two of such arbitrators shall be final and conclusive, and each of the parties shall pay one-half of the expense of such arbitration. * * *" The purpose of that paragraph of the contract is apparent. The other parts of the contract assume that the foundations for the building will be completed by August 1, 1901, and that the plaintiff will on that day have complete possession thereof under its contract. It provides that the plaintiff shall advance its work to certain points of completion by specified days, and that the building shall be wholly completed by August 1, 1902. The contract also contained a provision as follows: "Said contractor shall and will proceed with said work and every part and detail thereof in a prompt and diligent manner, and shall and will wholly finish said work according to said drawings and specifications, and in default thereof said contractor shall pay to the owner ten dollars for every day thereafter that said work shall remain unfinished as and for liquidated damages." The contract was not actually signed by the parties until August 2, 1901, and the foundations were not then completed, and could not be completed for some period of time thereafter. They were not completed and ready for the plaintiff until October 10, 1901. Paragraph 18 of the contract was made necessary by reason of the delay in such foundation work.

When the plaintiff's president was being examined, his attention was called to paragraphs 6 and 18 of the contract, and he testified that at the time the contract was executed he had some conversation with the

president of the defendant. The record then shows the following question, objection, ruling, and statements: "Q. Will you state to us what that conversation was? (Objected to as incompetent, irrelevant, and immaterial. The contract is the best evidence of its terms and any conversation would be incompetent and immaterial if he intended to controvert or change the terms of the written contract, and, if it was not intended for some such effect, it would be immaterial and irrelevant.) Mr. O'Grady: Clause 6 of the contract seems to be without any ambiguity, but nevertheless the learned counsel and myself differ very materially as to the interpretation of it apparently from my statement of what I think it means and from what he has already stated he thinks it means, and therefore I offer this testimony for the purpose of simply clarifying that section showing the meaning of it. Mr. Stull: Surely the counsel cannot make the conversation material because an opponent does not agree with him as to his construction of the meaning of it. The Referee: What do you contend it means? Mr. Stull: I contend it means that the work should be continued in a prompt and diligent manner. (Objection sustained. Exception.)" The ruling was right. Neither of the paragraphs of the contract mentioned were uncertain or ambiguous, and the best evidence of the meaning of the parties in a plain and unambiguous written contract is the contract itself. The court excluded other testimony offered by the plaintiff relating to its alleged loss of profits on work that it could have done, except for the crowded condition of its shops arising from the storage of doors, window casings, and other interior finish intended for the school building. As the control of the building after October 10, 1901, was in the hands of the plaintiff, we agree with the referee that the plaintiff knew or should have known when the doors, window casings, and other interior finish to be made in its shops would be required in the building, and it should have so directed the making of such interior finish as not unnecessarily to have interfered with its other shop work. The testimony offered to show such loss of profits, if otherwise admissible, was properly excluded for the reason stated.

The plaintiff also complains because the defendant failed to agree with it in referring their matters in difference to arbitrators as provided by the contract. The provisions of the contract relating to arbitration were wholly executory. An agreement that arbitrators shall be appointed in case a controversy arises between the parties to the agreement or an agreement to arbitrate a pending controversy is subject to revocation at any time before a final submission to the arbitrators for their decision. The opinion of this court in *People ex rel. Union Ins. Co. v. Nash*, 111 N. Y. 310, 18 N. E. 630, 2 L. R. A. 180, 7 Am. St. Rep. 747, is fairly stated in the headnote as follows: "Both at com-

mon law and under the Code of Civil Procedure (section 2383) a submission to arbitration may be revoked by any party thereto at any time before the matter has been finally submitted to the arbitrators for their decision; and this is so although the agreement to arbitrate provides against any revocation and by its terms the party seeking to revoke for a valuable and executed consideration expressly waived and abandoned the right to revoke. Such stipulations, like other executory agreements, if broken simply, leave the other party to seek redress by action for damages."

As the close of the plaintiff's case, when the first witness was called by the defendant, counsel for the plaintiff objected to any affirmative evidence being given on behalf of the defendant on the ground that, before it could maintain its defense, it must show that it had complied with the terms of the contract as to arbitration as a condition precedent to maintaining any defense on its part in this action. As the defendant failed to keep its agreement in regard to arbitration, the plaintiff brought this action at law to recover its damages. The parties in this, like all other actions, are entitled to present to the court any pertinent and material evidence relating to the issues joined by the pleadings. There are no other questions that in our judgment require consideration in the opinion.

The judgment should be reversed, and a new trial granted, with costs to abide the event, unless the respondent stipulates to modify the judgment by adding thereto \$707, with interest thereon from June 1, 1903, in which case the judgment, as so modified, is affirmed, without costs to either party in this court.

CULLEN, C. J., and GRAY, O'BRIEN, VANN, and WILLARD BARTLETT, JJ., concur. WERNER, J., not voting.

Judgment reversed, etc.

(190 N. Y. 24)

KESSLER et al. v. HERKLOTZ et al.

(Court of Appeals of New York. Nov. 19, 1907.)

1. PAYMENT—RECOVERY—MONEY PAID BY MISTAKE—EVIDENCE.

In an action to recover money paid under a mistake as to whose account it should be charged to, the money having been paid in pursuance to instructions in a telegram, the exclusion of the telegram upon the theory that plaintiffs were bound by their allegations as to its effect was erroneous, for, even if its admission should vary such allegations, the court might have allowed an amendment in this respect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 295.]

2. SAME.

A recovery for money paid under a mistake of fact can only be had where it is shown that the mistake was of a material fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, §§ 272-281.]

3. SAME—SUFFICIENCY OF EVIDENCE.

In an action to recover money paid under a mistake as to whose account it should be charged to, evidence examined, and held to show that there was no mistake as to any material fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 295.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Alfred Kessler and others against John D. Herklotz and others. From a judgment of the Appellate Division (101 N. Y. Supp. 413, 115 App. Div. 522) entered on a verdict for plaintiffs, defendants appeal. Reversed, and new trial granted.

George A. Strong, for appellants. Howard Taylor, for respondents.

CULLEN, C. J. This action is brought to recover money claimed to have been paid by mistake under the following circumstances: The plaintiffs were bankers and commission merchants, and the defendants were brokers, both doing business in the city of New York. Garbrecht & Co. was a business firm in Bremen, Germany, and Luerman & Son a firm of bankers in the same city. Garbrecht & Co. were the agents of the defendants, who secured for them orders in Germany for the purchase and sale of coffee, cotton, and cereals. These orders were to be executed in New York, and were of a speculative character. Garbrecht guaranteed the defendants for all claims against customers introduced by him arising out of the business transacted between the parties. The collection of margins was made through Garbrecht, and he was paid by sharing in the defendants' commissions. All the transactions had with Garbrecht's customers were charged or credited on defendants' books to Garbrecht personally. Garbrecht made up statements in the name of defendants' firm, and delivered them to the German customers. Prior to February 4, 1904, Luerman & Son had been operating through the defendants, with the result that they had become indebted to the defendants in something over \$27,000. On that day Garbrecht & Co. sent a written statement of the account to Luerman & Son, and asked that a cable remittance be made to the defendants that morning for the sum of \$25,000. No response seems to have been made to this demand. On the following day Garbrecht made another statement, which showed that the debit balance due from Luerman had been increased to \$37,598.75, and asked them to make a cable remittance to the defendants of \$35,000. Thereupon, and on the same day, Luerman & Son cabled to the plaintiffs a message which, as alleged in the complaint, "requested plaintiffs to pay to defendants \$35,000 for account of Garbrecht." Upon the receipt of this cablegram, the plaintiffs paid the defendants \$35,000, stating that it was made on account of Garbrecht, and the defendants gave them a receipt to that effect. On February

9th Luerman & Son failed, and on the 10th the plaintiffs cabled Garbrecht: "Paid Herklotz, Corn & Company \$35,000 fifth February for your account, as per instructions from Luerman's. Please confirm by cable, our expense." To that Garbrecht replied by cable, "Not our but Luerman's account." Upon the receipt of the answer from Garbrecht the plaintiffs demanded of the defendants a return of the money so paid to them, on the ground that Garbrecht had not authorized the payment, with which demand the defendants refused to comply. Thereupon the plaintiffs brought this action.

The telegram from Luerman to the plaintiffs does not appear in the evidence; the court having excluded it on the objection of the defendants upon the theory that the plaintiffs were bound by the allegations as to its effect contained in the complaint. It did appear, however, from the testimony of one of the plaintiffs, that the cablegram also contained this direction: "Draw on us three days or ten days." The plaintiffs did not draw any draft on Luerman, but on February 5th instructed him to pay their correspondent, a Bremen bank, the sum of 317,040.95 reichsmark three days after the receipt of the letter, and on the same day advised said bank of their instructions to Luerman. This sum is far more than the equivalent of \$35,000, and must have included other claims against Luerman. At the close of the plaintiffs' case the defendants moved for a nonsuit, which being denied, and the defendants offering no evidence, the court instructed the jury to find a verdict for the plaintiffs and ordered defendants' exceptions thereto to be heard in the first instance in the Appellate Division. The Appellate Division by a divided court overruled the exceptions, and directed judgment to be entered on the verdict.

It would be much more satisfactory if we had before us the exact language of the cablegram from Luerman to the plaintiffs, and we think the learned trial court erred in its exclusion. Even if the effect of such admission were to vary the allegations of the complaint as to its import, the court might readily have allowed an amendment of the pleading in this respect. We must, however, deal with the record as it is before us. At the threshold of the case is presented the question whether it was under any material mistake of fact that the plaintiffs were induced to make the payment, for the mistake must be of a material fact to entitle the plaintiffs to relief. *Southwick v. First National Bank of Memphis*, 84 N. Y. 420; *Dammann v. Schulting*, 75 N. Y. 55. If there was no such mistake, then the action must fail, regardless of the question whether the payment was made in such a manner as to preclude the plaintiffs from recovery, even if paid under mistake. The defendants were Luerman's creditors. Their agent, Garbrecht, directed Luerman to make payment by a cable transfer or order of money directly to the defend-

ants in New York. In compliance with this demand, the cablegram was sent and payment was made by the plaintiffs, and the money received by the defendants or Luerman's debt. So far as Luerman and the defendants are concerned, the money was paid by the one party and received by the other for the precise purpose that both parties intended. Therefore the only question is whether there was any statement in the cablegram which misled the plaintiffs into making the payment. The theory of the plaintiffs in this respect is that by the cablegram they were led to believe that the payment was made on Garbrecht's account, while it was in reality on Luerman's account. This is the mistake of which they complain and which they assert entitles them to recover the money paid by them. But at this point the inquiry arises: What interest had the plaintiffs in the matter, whether the payment was made to Garbrecht's account or Luerman's account? This must depend on the terms of the cablegram as construed in the light of the course of business between the parties and the testimony given by the plaintiffs on the trial. It is stated in the complaint that the message "requested plaintiffs to pay to the defendants \$35,000 for account of Garbrecht." Now, if the effect of the words "for account of Garbrecht" was to pledge the credit and liability of Garbrecht to the plaintiffs for the amount they might pay the defendants, while Garbrecht had given Luerman no such authority, doubtless there was a material mistake of fact under which the payment by the plaintiffs was made. It seems, however, very clear, in the light of the plaintiffs' own evidence, that the cablegram was not subject to that construction, and that the plaintiffs themselves did not so interpret it. The learned counsel for the respondents admitted on the argument that, had Garbrecht paid Luerman for the cable transfer, the plaintiffs could have even no apparent claim against Garbrecht under the cablegram. It seems idle to argue that the plaintiffs acted on any responsibility of Garbrecht & Co., when, for aught they knew or could know, Luerman had already been paid, which would ordinarily be the case. The testimony of one of the plaintiffs makes the case still clearer. He details the ordinary course of business: "We supposed that he was acting as banker for Garbrecht. By acting as banker for Garbrecht, I mean that if some one comes to me—say that our customer has asked me to make a payment to the other side [Europe] for his account—I will do so, and I will recover the money from the man here. He will either give me—if he is not known, he has to pay the money before I send the cable. If he is a good man or anything of the sort then I say, 'All right, you need not pay until to-morrow.' I supposed that Garbrecht on the other side had gone to Luerman & Son and got them to send this message to us, to act as bankers for him in that way. We

assumed, if we thought about it, that he had made some satisfactory arrangement with Luerman & Son." This testimony shows, what we would naturally assume, that to make a foreign payment on account of a person does not import nor suggest a loan or advance by the foreign banker to that person, but merely indicates the person to whom the payment is to be credited by the payee, and that in making the payment the banker making it gives exclusive credit to his correspondent who directs the payment. Garbrecht had made a satisfactory arrangement with Luerman & Son. He told them to cable the defendants \$35,000, and they did so. The account on which the payment was to be made was properly designated as Garbrecht, for that was the name in which Luerman's account with others was kept on the defendants' books. There was no relation of principal and agent between the plaintiffs and Luerman. The relation between the plaintiffs and Luerman was simply that of debtor and creditor as the statement of the accounts between them might be at any particular time. This is not a case of an agent paying his own debts with his principal's money. I see no reason why, in the absence of any collusion with his debtor, the creditor of a banker in one country may not, in satisfaction of his debt, take a bill of exchange or a cable transfer of money payable in another country and hold the proceeds when collected with as good a title as if he had bought either for a payment made at the time. Of course, if the defendants or Garbrecht, knowing that Luerman was insolvent, had conspired with him to obtain the money from the plaintiffs, who might advance it on Luerman's credit in ignorance of insolvency, Luerman intending not to repay the plaintiffs, that would be a fraud for which all would be liable. There is no evidence of fraud, however, in this case, except it may be surmised from the fact of Luerman's becoming bankrupt on the 9th of the month, that he was not in a flourishing financial condition on the 5th; but there is nothing to show that either the defendants or Garbrecht knew of his insolvency, much less that either of them entered with him into any scheme to defraud the plaintiffs.

As I read the opinions of the judges who wrote for the majority of the Appellate Division, I do not see that either of them has placed his decision on the express ground that the cablegram purported to pledge the responsibility of Garbrecht for the repayment of the moneys advanced by the plaintiffs. One of those learned judges says the plaintiffs "knew nothing of the dealings between the defendants and Garbrecht & Co., or between Garbrecht & Co. and Luerman & Son. Presumably Garbrecht & Co. had arranged with Luerman & Son to have deposited with defendants a sum upon which they could draw, or with which they could deal in the ordinary course of international

business. This is the fair meaning of the direction to pay or place 'for the account of Garbrecht & Co.' If, in fact, Garbrecht & Co. had made no arrangements with Luerman & Son to place the money to their credit with defendants, and had not authorized it to be done, then the plaintiffs paid over the money under a mistake." Assuming for the argument only that the learned judge is correct in his statement of what presumption would arise from the cablegram, the plaintiffs had no possible interest in what Garbrecht & Co. might do with the money. If the credit was given exclusively to Luerman, then all that the plaintiffs were required to do was to comply with Luerman's directions. It mattered nothing to them whether Garbrecht or any one else had ordered the payment of this money, so long as the credit or responsibility of the person alleged to have ordered the payment was not pledged. It is said by another learned judge: "It is proven that Garbrecht disclaimed and disavowed the relation imputed to him to the transaction, and did not authorize the payment to be made on his account and would not adopt it. The plaintiffs were misled by Luerman's cable message and paid the money to the defendants through mistake." Here, again, we are brought to the question already discussed. If the cablegram purported to pledge Garbrecht's credit, undoubtedly he could repudiate the transaction as unauthorized by him. But, if it did not purport to impose any liability on Garbrecht, there was nothing in the transaction for him to repudiate. The money paid was not his, and the claim on which it was paid also was not his, but his principal's. Therefore, in whatever aspect we view the case, its determination (at this stage) turns on the single proposition that the plaintiffs in paying the defendants relied solely on the responsibility of Luerman, and neither in fact nor in their belief extended any credit to Garbrecht. Hence there was no mistake as to any material fact.

The judgment should be reversed, and new trial granted, costs to abide the event.

GRAY, O'BRIEN, VANN, WERNER, WIL-
LARD BARTLETT, and CHASE, JJ., concur.

Judgment reversed, etc.

(190 N. Y. 66)

In re SNYDER.

SNYDER v. DE FOREST WIRELESS
TELEGRAPH CO. et al.

(Court of Appeals of New York. Nov. 19, 1907.)

1. ATTORNEY AND CLIENT—LIEN FOR SERVICES—MONEY PAID INTO COURT.

Where money was paid into court on a settlement between the parties, without the consent of plaintiff's attorneys, who had a contract for a contingent fee, the attorneys had a lien on the entire fund so deposited, both under the express provisions of Code Civ. Proc. § 66, and under the order for settlement which directed

payment of the proceeds into court, to "respond to the lien of plaintiff's attorneys," without any limitation on the amount to stand as security for such services.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 400.]

2. SAME—CONTRACT BETWEEN ATTORNEY AND CLIENT—PROVISION AGAINST SETTLEMENT.

A provision in a contract between attorney and client for a contingent fee, that the client should not make a bona fide settlement without the attorney's consent, was contrary to public policy and invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 407.]

3. SAME — CONTINGENT FEE — SETTLEMENT — QUANTUM MERUIT.

A contract for attorney's services provided for payment of a percentage of any recovery, and prohibited a settlement without the attorney's consent. Held that, though the provision restraining settlement was invalid, it was so connected with the clause fixing the compensation that neither could be sustained, so that, the client having settled the litigation without the consent of the attorneys, they were not bound to accept the percentage of the settlement in satisfaction for their services, but could recover the reasonable value thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 355.]

Edward T. Bartlett, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Henry B. Snyder against the De Forest Wireless Telegraph Company and others, in which plaintiff Snyder applied for payment out of court of moneys deposited to the credit of the action, to which James A. Allen and Roger Foster, his attorneys in the original action, objected. From an order of the Appellate Division, objectors appeal. Reversed, and judgment of Special Term affirmed.

See 99 N. Y. Supp. 644, 113 App. Div. 840.

This is an appeal from an order reversing an order of the Special Term which appointed a referee to determine the value of legal services performed by the appellants in order that the amount of their lien upon certain moneys paid into court might be determined. Said order appealed from also permitted the respondent Snyder, who was the client of said appellants, to withdraw from court a certain amount of the moneys held therein.

Roger Foster, for appellants. George P. Breckenridge, for respondent.

HISCOCK, J. The appellants, who are practicing attorneys, made a written agreement with the respondent for the prosecution by them in his behalf of litigation against various parties under a plan of contingent compensation. Said agreement, amongst other things, originally provided that the attorneys should receive for their services one-third of the proceeds of said litigation or the proceeds of the sale of certain stock, and nothing else; also, that neither party to the agreement should "settle any of said litigations without the consent of each of the other parties." Subsequently

this agreement was modified so as to provide that the compensation should be one-half instead of one-third. Various actions and proceedings were instituted under this retainer, and, as is claimed by the appellants, services of much value were rendered to the client. After a time Snyder entered into negotiations with the parties whom he was prosecuting for a settlement of the litigation, and not only without the consent of his attorneys, but in spite of their protest made an agreement for such settlement for the sum of \$7,500. Still later a motion was made by the party with whom Snyder had made his agreement for an order settling and discontinuing the litigation for the sum agreed upon, and to which motion both Snyder and the appellants were made parties. Notwithstanding the opposition of the latter, and after the consideration of quite voluminous affidavits presented by the attorneys and the client, respectively, in opposition to and in support of the settlement, an order was made granting the motion upon payment into court of the sum of \$7,500 "to respond to the lien of the plaintiff's attorneys." Some time later, a motion having been made by the client to withdraw one-half of this sum in accordance with the terms of the agreement between him and his attorneys, the court directed a reference to ascertain the value of the services which the attorneys had rendered in order that the amount of their claims and lien upon the fund might be determined before Snyder withdrew any money. This was done upon the theory that Snyder, by making a settlement in violation of the wishes of his attorneys, had so broken his contract that the latter were no longer limited to the terms of their agreement for their compensation, but were entitled to recover from the fund for the value of their services on the basis of quantum meruit. As already indicated, the Appellate Division took the view that this order was improper, holding that the attorneys were limited so far as their lien upon the fund in court was concerned to the compensation fixed by the original agreement and relegated for any further relief to an action against their client for breach of contract. We think that the disposition made by the learned justice at Special Term was correct, and that it was error to reverse the order then made and substitute the one from which this appeal is now taken.

Some propositions involved in the appeal seem quite clear. The attorneys had a lien upon the moneys paid into court for the amount or value of their services, whatever it might be. This was secured to them by section 66 of the Code, and, in addition, the order allowing the settlement of the litigation and directing the payment of the proceeds into court expressly provided that the latter should "respond to the lien of the plaintiff's attorneys" without any limitation upon the amount for which the said lien

should be allowed. If the clause prohibiting a settlement without the consent of the attorneys is valid, the client has prevented them from carrying out their contract, and they are entitled to treat it as terminated and recover the actual value of services rendered before the breach without reference to the terms of the original contract. If the clause prohibiting the settlement without the consent of the attorneys is void as against public policy, so that it may be repudiated by the client, but yet is so connected with the clause prescribing the percentage of recovery which the attorneys were to receive as compensation that the latter clause falls with it, then, again, the attorneys must be entitled to recover the value of the services rendered by them upon the basis of actual worth. While the adoption of either view, therefore, would render necessary an appraisal of the value of appellants' services, it is proper to determine which one shall prevail, assuming that the latter one is permissible, and in this determination the first and fundamental question will be as to the validity of the clause prohibiting a settlement.

It has been decided so often and so fully that attorneys may undertake litigation for a compensation contingent upon their successful efforts that it is unnecessary to refer to the decisions upon that point. But this court, so far as I am aware, has never yet decided the naked proposition now urged upon us that an attorney, in furtherance of his contract for a contingent compensation, may reserve a veto power upon the right of his client to make in good faith an honest settlement of his claim, and I think it would be unwise and opposed to sound public policy to so decide now. In the first place, a decision upholding such a contract would confer upon one person occupying a position of trust toward another unusual power over the latter in the control and management of his own property, for we must not forget that the attorney has only a lien upon the client's cause of action which still remains the property of the latter. It is not too much to assume that such power would at times be the source of abuse as between the two parties. But more important than any such personal and private considerations is the one of public concern that such contracts would prove added obstacles to that quieting of disputes, and to that adjustment and settlement of litigation which always has been and always should be favored by the acts of Legislatures, the decisions of courts, and the expressions of public opinion; for, in my judgment, there is no need of long argument to demonstrate that such contracts would prove such obstacles. We have before us in this very litigation an illustration of the manner in which they would be utilized if so permitted to prevent settlements even when the attorney and client were involved in no other differences than those of an honest opinion

about the amount which ought to be realized from the litigation. And, if this result would have happened where reputable attorneys were prosecuting what we are entitled to assume was legitimate litigation with due regard for the rights of their client, it requires no long vision to see how frequently the power would be used by reckless or unscrupulous attorneys to prolong litigation for the sole purpose of forcing a defendant or client or both to pay additional tribute in order to secure that settlement and peace which they desired, and public policy commended.

It is urged that this power is necessary for the protection of attorneys. Courts are not unmindful of the fact that the system of contingent compensation has the merit of affording to certain classes of persons the opportunity to procure that prosecution of their claims which otherwise would be beyond their means, and that the attorney should be protected from any dishonest attempt to deprive him of his compensation. On the other hand, no one having had an opportunity for observation can well close his eyes to the fact that this same system many times promotes litigation which is so unjustifiable that it does not even rise to the level of being speculative, and which, being carried forward by unlawful and forbidden methods, leads sometimes to the enforcement of unjust recoveries from unfortunate defendants, sometimes to the exaction of unconscionable compensation from ignorant or helpless clients, and always to stirring up discord and lawsuits. In view of the relief which courts render against settlements made with the dishonest purpose of cheating attorneys of their just compensation, it does not often happen that a reputable attorney undertaking legitimate litigation for a contingent compensation is deprived of his just dues, and there seems to be no substantial necessity for approving a form of contract which would enable unworthy members of the profession to increase existing evils through a power to manipulate and nullify any disposition upon the part of their clients to settle their differences. While, as stated, the courts of our own state do not appear to have passed upon this precise question, whatever has been said upon this general subject of the right of a client to settle litigation without interference by his attorney confirms the view now being presented.

In *Lee v. Vacuum Oil Co.*, 128 N. Y. 579, 27 N. E. 1018, the attorneys for the plaintiff had an agreement for a contingent compensation with a clause providing that no settlement should be made without their consent. After recovery of judgment, a settlement was made without the consent of the attorneys, and subsequently a motion was made on behalf of them and of the client herself to vacate the settlement upon the ground of fraud. The question presented, therefore, arose between the attorneys and the opposite party and upon facts somewhat different from those before us. Still what was said by the court

is pertinent to the general subject now being discussed. In its behalf Judge Ruger wrote as follows: "We are of the opinion that the existence of such a lien in favor of the attorneys does not confer a right on them to stand in the way of a settlement of an action which is desired by the parties, and which does not prejudice any right of the attorneys. We do not think that such an agreement deprives a party of the right to control the management of his own cause, and to determine when the litigation shall cease and how far it shall be extended. The client still remains the lawful owner of the cause of action, and is not bound to continue the litigation for the benefit of his attorneys when he judges it prudent to stop, provided he is willing and able to satisfy his attorneys' just claims. In fact, the lien under the agreement was intended for and operates only as a security for the attorneys' legal claims, and, unless those are prejudiced by the client's contract, she has unrestricted control of the subject of the action, and the terms upon which a settlement shall be effected." *Fischer-Hansen v. Brooklyn Heights R. R. Co.*, 173 N. Y. 492, 66 N. E. 395, was an action brought to enforce the lien of the plaintiff upon a judgment which he had recovered for a client against the defendant, and which judgment the latter, after notice of the attorney's lien, had secretly settled with the client, who was financially irresponsible. In writing in that case in behalf of a unanimous court, Judge Vann laid down principles which certainly guide us in the direction of the conclusions already stated. Referring to the lien given by the Code to the attorney upon his client's cause of action, he wrote as follows: "The statute says that the lien (given by the statute) cannot be affected by any settlement between the parties before or after judgment; but does it mean that no settlement whatever can be made without the consent of the attorney? It clearly means this, unless the lien is impliedly transferred to the proceeds of the settlement. But did the Legislature, in its effort to protect attorneys, intend to sacrifice the client by preventing him from making an honest settlement of his own cause of action? Did it intend to overturn the ancient and honored rule of law that settlements are to be encouraged by giving the attorney power to insist that the litigation must continue until he consents that it should stop? Did it intend to so tie the hands of the client that he could not settle his own controversy without the permission of his attorney? A cause of action is not the property of the attorney, but of the client. The attorney owns no part of it, for a lien does not give a right to property, but a charge upon it. As it is merely incidental, and for the purpose of security only, it would not be reasonable to hold that the Legislature intended it should be the means of blocking an honest and genuine adjustment of controversies. We think the lien is subject to the right of the client to settle

in good faith, without regard to the wish of the attorney, and we so held in the *Peri Case*, 152 N. Y. 521, 46 N. E. 849, where we declared that 'the existence of the lien does not permit the plaintiff's attorney to stand in the way of a settlement.' * * * The Legislature did not intend to make the lien the chief thing, nor to compel the client to abdicate his position as principal in favor of the agent or attorney whom he employed in order to secure his rights. It did not intend to prevent him from dealing with his own property as he saw fit, provided he exercised his honest judgment, and took no advantage of his attorney." In other states an abundance of authority is to be found for the doctrine that a clause prohibiting the client from making a settlement of his litigation without the consent of his attorney is void as against public policy. *Huber v. Johnson* (Supreme Court of Minnesota) 68 Minn. 74, 70 N. W. 806, 64 Am. St. Rep. 456; *North Chicago, etc., R. Co. v. Ackley*, 171 Ill. 100, 49 N. E. 222, 44 L. R. A. 177; *Lewis v. Lewis*, 15 Ohio, 715, 716; *Key v. Vattler*, 1 Ohio, 132; *Davis v. Webber*, 66 Ark. 190, 49 S. W. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81. These views lead to the conclusion that appellants are not entitled to recover from their client upon the quantum meruit upon the ground that the clause prohibiting a settlement was legal, and, therefore, his acts in disregard thereof a breach of contract.

But I do think that they may still recover upon that basis upon the other theory suggested. The clause in the contract fixing the value of the services at a certain percentage of the recovery was connected with the provision that the attorneys should have a voice in any settlement and in determining the amount of any recovery by that process. The two clauses were manifestly part of a single plan. Therefore, when the client takes advantage of the invalidity of one clause and repudiates it, the other one cannot stand alone, but must fall with it, and the result of this again is to permit the attorneys to recover for the services which they have actually rendered according to their real value and independent of the original provision in the contract upon this subject. *Davis v. Webber*, supra; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563; *Stearns v. Felker*, 28 Wis. 594.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs.

EDWARD T. BARTLETT, J. (dissenting). I agree with my Brother **HISCOCK** that the appellants, the attorneys, are entitled to some form of relief in this proceeding. I am, however, unable to agree with the conclusion reached by him that an agreement between an attorney and client, creating a lien upon the cause of action, cannot lawfully contain the provision that neither party shall settle the litigation without the consent of the

other. If it be the fact that this court has never passed upon the validity of such a clause in a contract, I am of opinion that it is valid. I see no reason why counsel entering upon a long and difficult litigation for an impecunious client should not protect himself against a premature and ill-advised settlement of the litigation by the client. These contracts are under the strict supervision and scrutiny of the court, and I am unable to see anything in contravention of public policy when this clause appears to have been entered into in good faith by both parties. In the absence of such a clause, it has been frequently held in this state and elsewhere that the client may negotiate an honest and reasonable settlement at any time. There is no reason in my judgment why this right cannot be waived.

The Special Term held that the attorneys had a lien upon the \$7,500 paid into court on the settlement, and that, the original contract having been abandoned by the action of the clients, it was competent for the attorneys to go before a referee and prove the reasonable value of their services. If the services, however, were proved to exceed in value the \$7,500 paid into court, the clients would in my opinion be liable for the excess in an action by the attorneys to recover damages for a breach of the contract.

The order of the Appellate Division should be reversed and the order of the Special Term modified, so as to provide that, if the attorneys prove their services to be in value exceeding the sum of \$7,500 paid into court, they may bring an action against the clients to recover this balance as damages for a breach of the original contract, and as so modified affirmed, with costs and disbursements in the Appellate Division and in this court.

CULLEN, C. J., and O'BRIEN, HAIGHT, VANN, and CHASE, JJ., concur with **HISCOCK, J.** **EDWARD T. BARTLETT, J.,** reads dissenting opinion.

Ordered accordingly.

(190 N. Y. 41)

WOOLVERTON v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Court of Appeals of New York. Nov. 19, 1907.)

INSURANCE—EMPLOYER'S LIABILITY INSURANCE—DUTY TO REPORT ACCIDENTS—NEGLECT OF SERVANT.

Under the provision of a policy indemnifying one against liability for injuries to others from its teams, that assured, on the occurrence of an accident and also on receiving information of a claim on account of an accident, shall give immediate notice of the accident or claim to the insurer, insured is not excused from giving notice of an accident merely because none of its general officers or directors or any one who had the duty of adjusting differences between it and the insurer had knowledge thereof; but, while the knowledge of the driver who caused the accident is not imputable to insured, yet, if he reported it to one whose duty it was in the ordinary and natural conduct of the busi-

ness to receive reports of accidents and transmit them to the general superintendent, and he failed to transmit such knowledge, insured is chargeable for his delay and neglect.

Appeal from Supreme Court, Appellate Division, First Department.

Action by William H. Woolverton, as president of the New York Transfer Company, against the Fidelity & Casualty Company of New York. From a judgment of the Appellate Division (100 N. Y. Supp. 1151, 114 App. Div. 911), affirming a judgment of the Trial Term (89 N. Y. Supp. 292, 96 App. Div. 275) on a verdict for plaintiff, defendant appeals. Reversed.

Charles C. Nadal, for appellant. John L. Hill, for respondent.

CULLEN, C. J. The action is brought on an employer's liability insurance policy whereby the New York Transfer Company, a joint-stock association, of which the plaintiff is president, was indemnified against liability for injuries to persons or property resulting from any accident caused by the horses or vehicles of the insured in the transportation of goods or freight. The controversy arises under the following provision of the policy: "The assured, upon the occurrence of an accident and also upon receiving information of a claim on account of an accident, shall give immediate notice in writing of such accident or claim, with full particulars, to the company at its office in New York City, or to the agent, if any, who shall have countersigned this policy." The facts are as follows: On September 5, 1895, a truck of the plaintiff's, driven by one Hannan, we must assume, collided with an open car, injuring a boy named Mills who was riding thereon, though Hannan denied and still denies that any such collision occurred. A short distance from the scene of the occurrence Hannan was stopped by a policeman and taken back to the scene of the accident, where some discussion ensued as to the cause and nature of the accident. Hannan walked away. That evening Brady, a police officer, was directed by the police sergeant to find Hannan. Brady, after making inquiry of several persons, found that the truck belonged to the New York Transfer Company. He went to the company's office at No. 52 Nassau street, and told the person in charge there of the accident. He was directed to go to another stable in Williamsburg, where he was further directed to call upon a man named Sparks at Pier 27, North river, Manhattan. The police officer went there, saw Sparks, told him of the occurrence, and from the details recited by the police officer Sparks identified the driver as being Hannan. He stated that Hannan had then gone for the day. The next morning the police officer again went to Sparks, and found that Hannan had been there and left. Hannan was not arrested; the police officer failing to obtain a warrant for him. Hannan testified that on the first or second day after the accident Sparks, who

was the head of the freight department, asked him about the accident, and he told Sparks exactly what had occurred. Evidence was given by the mother and father of the injured boy to the effect that on September 15th Sparks came to their house with Hannan, and inquired about the accident; that they told Sparks the boy had been knocked off by a wagon, and that he was in the hospital at the time; that Sparks asked them what they wanted to do about it, and was told in reply that the case was in a lawyer's hands. The first report made by Sparks to the general manager of the company was on October 2d, and on the following day the first notice of the accident was given by the plaintiff to the defendant by letter. On October 21st the summons and complaint in an action to recover damages for the injuries to Mills were served on the plaintiff, and the next day they were sent with a letter to the defendant. The defendant refused to defend the suit on the ground that the plaintiff had not given immediate notice of the accident, as required by the policy. The plaintiff defended the action and was cast in damages. Thereupon it brought this suit to recover the amount of that judgment and its expenses in defending the suit.

This action has been three times tried. At the first trial the complaint was dismissed on the ground that the plaintiff had failed to give notice of the accident immediately after its occurrence, as required by the policy. The judgment then entered was reversed by the Appellate Division of the Second Department, which held that it was a question of fact for the jury whether the information received by Sparks or Hannan was sufficient to induce them to believe that Hannan's truck had caused the accident, and to make it their duty to report the occurrence to their superiors. 48 App. Div. 439, 62 N. Y. Supp. 1044. The case was next tried in conformity with the rulings of the Appellate Division, and the question of fact above stated submitted to the jury, who found a verdict for the defendant. Again an appeal was taken to the Appellate Division (this time to the First Department), and again the judgment was reversed, the court holding: that neither the knowledge of Hannan, the driver, nor of Sparks, the freight agent, was imputable to the plaintiff, and that to charge it with the duty of giving notice to the defendant the knowledge must be brought home to the general superintendent or other officers of the plaintiff association. 96 App. Div. 279, 89 N. Y. Supp. 292. The third trial was had in accordance with the principles laid down by the appellate court. The plaintiff recovered a verdict, and the judgment on that verdict has been unanimously affirmed by the Appellate Division. The only questions subject to review in this court are therefore exceptions to the instructions given to the jury.

The trial court charged: "The knowledge of Hannan and the information of Sparks in

no wise constituted notice of the accident to the transfer company. Their knowledge is not to be deemed the knowledge of the transfer company. What they heard of the accident is not to be deemed as having been heard by the transfer company. It was only when notice was brought to the general superintendent or to one of the officers of the company, some one holding an executive position in the company, either the president, the secretary, the treasurer, a member of the board of managers, that notice was had by the plaintiff. Notice given to an employé, such as Hannan or Sparks, who had no duty resting upon him respecting this insurance, who had no duty upon him regarding the giving of notice of an accident to the casualty company, who had no duty imposed upon him regarding the adjustment of any differences between the transfer company and the casualty company under this policy, was not notice to the plaintiff. In other words, it was not until the superintendent or one of the officers, or managers, to whom I have referred, had heard of this accident, that the time began to run to notify the casualty company that it had happened. That is the interpretation which has been put by the higher court upon that provision of the policy, and which interpretation is binding upon you and upon me." To the several parts of this instruction the defendant duly excepted. These instructions were substantially repeated to the jury under several requests to charge made by the plaintiff, to the allowance of which the defendant also excepted.

Thus the jury in the first instance were expressly told that nothing short of information reaching the general superintendent or other general officers or directors of the association, or at least some one who had the duty of adjusting differences between the association and the insurance company, was sufficient to impose on the plaintiff the duty of giving notice to the insurance company. We think that this instruction is not the law. The appeal has been argued on behalf of the respondent mainly on the assumption that the rules of law governing the imputation to the principal of notice received by an agent control the disposition of the case. This is a mistaken view. The question presented here is not one of mere notice. An instance where the question involved would be merely of notice would arise under the recording act, as between a subsequent purchaser for value who records his deed and a prior purchaser who had failed to record his. In that case, if the subsequent purchaser has notice or knowledge of the prior conveyance, his title is subject to that conveyance. But there rests on him no duty to make inquiry or to exercise vigilance to discover if there are any unrecorded conveyances. It is true that facts may come to his knowledge which may make it incumbent on him to make further investigation, but such obligation arises solely from the facts of which he has knowl-

edge. In other words, his legal duty in the premises is passive. He is not bound to act without knowledge. He is not bound in the first instance to seek knowledge or information. In the present case the situation is the reverse. The duty imposed on the insured by his covenant is not passive, but active. Strictly construed, the insured would be bound to give notice immediately after the accident whether he knew of the occurrence or not. This, of course, would be a wholly unreasonable construction and must be rejected. *Trippe v. Provident F. Society*, 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 432, 37 Am. St. Rep. 529. The condition of the policy is to be interpreted as meaning after the insured has become apprised of the accident, provided, however, he exercises reasonable diligence to acquire information. There is therefore cast upon him the duty of so regulating his business that he may be apprised with reasonable celerity of any accident that may occur in its conduct. Of course, the duty, as already said, is not absolute. It requires only that reasonable care should be taken to acquire the information. If, despite the exercise of reasonable care, the insured fails to acquire the information till after a lapse of time, but, on its acquisition, gives prompt notice to the insurance company, he complies with the obligation of the policy. Where, however, a master employs many servants and the duty of acquiring information of accidents as they occur is necessarily committed to servants or agents, if the acquisition of such information is an affirmative duty on his part, we cannot see why he is not responsible for the negligence or fault of the servants to whom he intrusts the duty to the same extent as he would be responsible for their negligence or misconduct in any other obligation to third persons. It has been held by the courts below that the plaintiff discharged fully its whole obligation when it promulgated to its servants rules adapted to apprise the association of accidents, whether those servants complied with the rules or not. We see no principle on which that doctrine can rest. There are few exceptions to the general rule that a master is liable for the negligence of his agents or servants in the conduct of his business, such as a charity hospital for the fault of physicians or nurses, a steamship company for the faults of the ship surgeons, but none of them cover this case. In *Critten v. Chemical Nat. Bank*, 171 N. Y. 219, 63 N. E. 969, 57 L. R. A. 527, we distinctly overruled a contention substantially the same as that now before us. In that case it was contended that a depositor discharged his duty to the bank when he intrusted the verification of his returned checks to a clerk, and was not responsible for the manner in which the clerk discharged that duty. We held that if such a duty existed, as we declared it did, the employer was responsible

for the fault of his clerk to the same extent as he would be for the clerk's fault in the conduct of his business in any other respect. Nor do we see what necessary connection there is between the duty of adjusting differences with the insurance company, or serving notice upon it, and the duty of finding out about accidents. They might be committed to the same person, but usually they would not. In the printed rule on this subject, which the plaintiff posted in its stables, the drivers were directed to make report of accidents to the stable foreman, not to any one having charge of the insurance business of the company.

While we thus hold that the plaintiff was chargeable for the delay and neglect of its agents or servants in failing to apprise it of an accident, the occurrence of which they had acquired knowledge or information, this principle must be confined to those agents whose duty it was, either by express regulation of the plaintiff, or by their supervision and control in the natural and proper conduct of business over the subordinate servants by whom the accident had been caused, to transmit such knowledge to their superiors or the company, on which question the notice posted in plaintiff's stables was not conclusive. The courts below have properly held that the knowledge of Hannan, the driver, was not imputable to the plaintiff. The accidents against which the insurance was obtained would in most cases be occasioned by the faults of the company's servants. Considering the natural tendency of a man to conceal or excuse his own fault, it would be unreasonable to expect that in every instance he should report an accident, or, if he did, report it so dispassionately that the master would be aware of the real danger or liability in which he might stand. Nor should the master be charged with the knowledge or information of a co-servant of the same grade or rank as the one causing the accident. The case of Sparks is different. He was the freight agent at the pier on the North river. There is a great conflict in the testimony as to his duties and the extent of his supervision and control over the drivers of the trucks. The drivers reported to him every morning, and received instructions from him what goods or packages to carry, and to what places to carry them. It is contended by the respondent that this was the sole extent of his control over the drivers and his duty towards them. On the other hand, there was testimony to the effect that, in the ordinary course of business, it was the duty and practice of Hannan and the other drivers to report any accident to Sparks. It is not necessary to dilate on the testimony. It is sufficient to say there was some evidence in the case which would authorize a jury to find that in the ordinary and natural conduct of the business it was the duty of Sparks to receive reports of accidents and transmit them to the general superintendent. If this

were the case, then the plaintiff was chargeable with the delay of Sparks.

The learned counsel for the respondent relies upon the case of *Mandell v. Fidelity & Casualty Company*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291, which arose under a similar policy to that now before us, as an authority for the proposition that the master must have personal knowledge of the accident before any obligation on his part can arise under this clause of the policy. It must be conceded that the opinion of the Supreme Court of Massachusetts supports his claim. It was there held that the plaintiff was not chargeable with knowledge of the accident because his servants had such knowledge. "Neither his driver, stableman, nor foreman were his agents for the purpose of giving notice to the [insurance] company." So far as drivers, stablemen, and the like are concerned, we concur in the declaration of the learned Massachusetts court, but, as to the superior agents or employés whose duty it is to supervise the conduct of the subordinate servants and to report to the master accidents or casualties caused by such inferior servants, we must adhere to the views we have already expressed.

The other objections taken by the appellant to the recovery at the trial court, we think are not well founded, and need no discussion, but, for the errors in the charge to the jury which we have pointed out, the judgment below must be reversed and new trial granted, costs to abide the event.

O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.

(190 N. Y. 99)

OLCOTT et al. v. BALDWIN et al.

(Court of Appeals of New York. Nov. 19, 1907.)

1. TRUSTS—EXECUTORS WHO ARE TRUSTEES—RIGHT TO COMMISSIONS—WILLS.

Under a will, the first three paragraphs of which prescribe duties that are clearly executorial, and the fourth of which in terms gives directions to the executors as such, and which, among other things, gives testator's daughter money to be paid her immediately after his death to meet expenses before payment to her of income as thereafter directed, and the fifth paragraph of which provides that all the rest, residue, and remainder of his estate, after meeting the preceding provisions of his will, he gives to his executors in trust, to pay the income to his daughter, which trust fund cannot be determined till the completion of the duties of the executors as such, the duties of the executors and trustees are distinct, and a time is contemplated when the duties of the executors, as such, shall cease, and their duties as trustees shall commence, so that they may receive commissions, not only as executors, but as trustees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 437.]

2. SAME—TRANSFER OF PROPERTY TO TRUSTEES—EVIDENCE.

Though to entitle persons named in a will as executors and trustees to commissions as

trustees, besides those as executors, they must have actually entered on their duties as trustees, and an accounting as executors and a transfer of the trust fund to the trustees pursuant to a decree is the most satisfactory proof of the completion of their duties in one capacity and the commencement of their duties in the other capacity, such decree is not the only means of proving that the transfer has actually been made.

3. SAME—COMMISSIONS—RECEIVING NOTES.

Where executors deliver as cash to themselves, as trustees appointed by the will, a note held by testator, they are entitled to commissions as trustees for receiving it, as though it had been collected.

4. SAME—WAIVER OF COMMISSIONS.

A trustee, under a trust to provide support for the cestui que trust, waives his right to commissions on income by paying over to the cestui que trust the income for 18 years without deducting the commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 454.]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by J. Van Vechten Olcott and another, as executors of Theodore F. Vall, deceased, against William D. Baldwin, individually and as surviving executor of and trustee under the will of Nahum Sullivan, deceased, and others. From so much of the order of the Appellate Division (98 N. Y. Supp. 1109, 112 App. Div. 921) as affirms a judgment of the Supreme Court, entered in the county of Kings, October 25, 1905, William D. Baldwin, individually and as such surviving executor and trustee, and others, appeal. Modified and affirmed.

William S. Lewis and Perry J. Fuller, for appellants Helen R. Baldwin, Martin Sullivan Baldwin, and for Delevan Munson Baldwin and others by guardian ad litem. William H. Brady, for appellant William D. Baldwin. J. Hampden Dougherty, for respondents.

CHASE, J. Nahum Sullivan died September 26, 1884, a resident of the state of New Jersey, leaving a will which was duly admitted to probate in the orphans' court of Essex county, N. J., October 20, 1884, and letters testamentary were issued by said court to Theodore F. Vall and William D. Baldwin. By his will he made certain specific bequests. He also gave to his only daughter a legacy "of five thousand dollars in cash to be paid immediately after my decease to enable her to meet necessary expenses incurred before the payment to her of the income of my estate as hereinafter directed." He also gave to a brother "five hundred dollars yearly during his life, to be paid to him by my executors in half yearly payments, the first payment to be made at the end of six months after this will takes effect." He also gave to a sister "three hundred dollars yearly to be paid to her by my executors in equal half yearly payments, the first payment to be made at the end of six months after my decease." He then provided by his will as follows: "Fifth: All the rest, residue and

remainder of my estate both real and personal, after meeting the foregoing provisions of this my will I give, devise and bequeath to my executors hereinafter named in trust however for the uses and purposes following: All the use, interest and income of my said residuary estate I direct my said trustees to give and pay over to my said daughter, Helen R. Baldwin, during her life if she survives me. In case my said daughter dies leaving issue either before or after this will takes effect I direct that my said trustees upon my death or the death of my said daughter as the case may be, divide my said residuary estate into as many equal portions as there are children of said Helen R. Baldwin and immediately give, convey and assign to each of such children as then be of full age if any, his or her share and keep the share of such children as may be minors safely invested for their use paying to each enough in their judgment for proper support and education of such child, and giving, conveying and assigning to each child absolutely his or her share on reaching the age of twenty-one years, provided that in case of the death of any such child or children of my said daughter leaving issue either before or after the death of my said daughter the share or shares of such child or children shall go to his or her or their issue, and provided further that in case of the death of any child without issue after the death of my said daughter the share of such deceased child shall go to the surviving child or children in equal parts if there be more than one. And I further direct that in case of the death of my said daughter leaving no children, or in case of the death of all such children without issue before attaining the age of twenty-one years, my said residuary estate shall in either event be, by my said trustees divided into two equal parts; the first of said one-half parts shall be paid, conveyed and assigned to the heirs of my brother, Thomas Sullivan, deceased, and the other of said one-half parts to my brother, Jeremiah Sullivan, or to his heirs, if he then be deceased." An exemplified copy of said will was filed in the surrogate's office of the county of New York on December 11, 1884, and on December 29, 1884, upon the application of said executors, ancillary letters testamentary were duly granted to them by the Surrogate's Court of the county of New York.

Helen R. Baldwin, the daughter of the deceased, is living. The sister of the deceased mentioned in his will died before his death, and the legacy to her lapsed. The brother of the deceased mentioned in his will died December 22, 1893. Theodore F. Vall, one of said executors, died July 16, 1903, a resident of the state of New York, leaving a will which was duly probated in the county of New York on July 23, 1903, and letters testamentary were duly issued to the plaintiffs. Nahum Sullivan did not die seised of any real estate. He was at the time of his death

a member of a partnership doing business in the name of Sullivan, Vail & Co., in New York City, and the personal property of which he died possessed consisted principally of his interest in said partnership as a general and also as a special partner. The said Theodore F. Vail was a partner in said firm, and he was also a partner in the firm which continued in the name of Sullivan, Vail & Co. after the death of said Nahum Sullivan. No inventory of the estate of Nahum Sullivan was ever filed, and no accounting was had prior to the bringing of this action. This action was commenced on the 4th day of February, 1905, for an accounting and for a decree that upon accounting the estate of said Theodore F. Vail, deceased, be relieved and discharged from all further liability to the estate of said Nahum Sullivan, deceased. An accounting has been had herein and a judgment as prayed for in the complaint has been entered, which has been affirmed by the Appellate Division. An appeal has been taken to this court, but the only questions to be considered upon this appeal relate to the amount of commissions to which the estate of said Theodore F. Vail and the defendant William D. Baldwin are entitled. By the judgment herein, the estate of Theodore F. Vail, deceased, has been allowed full commissions on the estate of said Nahum Sullivan, deceased, by reason of said Theodore F. Vail having been an executor, and also one-half full commissions for his receiving the rest, residue, and remainder of said estate as trustee, together with full commissions on the gross amount of the income on said rest, residue, and remainder during the lifetime of said Theodore F. Vail, deceased.

The said William D. Baldwin has been allowed full commissions as executor, together with full commissions on the income of said rest, residue, and remainder. The said William D. Baldwin contends that he should have been allowed one-half full commissions for receiving as trustee the rest, residue, and remainder of said personal estate the same as allowed to the estate of Theodore F. Vail, deceased. Helen R. Baldwin contends that no commissions should have been allowed either to the estate of Theodore F. Vail, deceased, or to William D. Baldwin, on the income of said rest, residue, and remainder. The residuary legatees of said rest, residue, and remainder contend that no commissions should have been allowed to the estate of Theodore F. Vail, deceased, or to William D. Baldwin as trustees, and they also contend that no commissions should have been allowed either to said estate of Theodore F. Vail, deceased, or to William D. Baldwin as executor for paying out that part of the personal estate which remains in the hands of the surviving executor. The trial court has adjudged that, after the probate of the will of Nahum Sullivan, said executors converted his assets into money and paid his funeral and testamentary expenses, debts, and obligations, and that they

paid and satisfied the specific and general legacies contained in his will, and fully completed and discharged their duties as such executors. It is further adjudged by the trial court that, upon the functions and duties of the said executors being fully discharged and completed, the rest, residue, and remainder of said estate became a trust fund for the benefit of the testator's daughter and was held by said trustees as such, and that for a number of years prior to the said Vail's decease they acted solely as trustees of the residuary trusts created by said will. At the time of the death of said Theodore F. Vail the residuary estate was substantially all invested in bonds secured by mortgages upon real estate.

The distinctive facts which determine whether the same persons are entitled to compensation as executors and also as trustees in respect to the same estate are stated in 18 Cyc. 1160, as follows: "Where, by the terms of the will, the two functions with their corresponding duties coexist and run from the death of the testator to the final discharge, interwoven, inseparable, and blended together so that no point of time is fixed or contemplated in the testamentary intention at which one function should end and the other begin, double commissions or compensation in both capacities cannot be properly allowed. But executors are entitled to commissions as executors and also as trustees where under the will their duties as executors and trustees are separable, and their duties as executors having ended, they take the estate as trustees and afterward act solely in that capacity." The will in this case is not like the wills construed in *Matter of Slocum*, 169 N. Y. 153, 62 N. E. 130, and in *McAlpine v. Potter*, 126 N. Y. 285, 27 N. E. 475, where in each case all of the testator's property was given to the executors to be held and disposed of by them for all the uses and purposes in the will provided. In this case the first three paragraphs of the will prescribe duties that are clearly executorial, and the fourth paragraph in terms gives directions to the executors as such. The fifth paragraph gives the rest, residue, and remainder of the estate of the testator to the executors, in trust, and directs them as trustees to give and pay over the net income and the corpus of such rest, residue, and remainder as therein specifically provided, and upon certain contingencies the trust fund is to be subdivided and held in separate parts or shares.

The intention of the testator to have the rest, residue, and remainder held as a trust fund from a point of time subsequent to his death appears not only from his separately stating the duties of the executors and of the trustees, but from the fact of his giving and bequeathing to his daughter \$5,000 to be paid to her immediately after his death to enable her to meet necessary expenses incurred before the payment to her of the income on the

trust fund. The trust fund could not be determined until the completion of the duties of the executors. We are of the opinion that the duties of the executors and trustees are distinct, and that the will contemplates a time when the duties of the executors shall cease and their duties as trustees shall commence. This conclusion is sustained by the following cases: *Hurlburt v. Durant*, 88 N. Y. 121; *Matter of Mason*, 98 N. Y. 527; *Matter of Babcock*, 52 Hun, 510, 5 N. Y. Supp. 634; *Matter of Beard*, 77 Hun, 111, 28 N. Y. Supp. 305; *Laytin v. Davidson*, 95 N. Y. 263; *Johnson v. Lawrence*, 95 N. Y. 154; *Matter of Curtiss*, 9 App. Div. 285, 37 N. Y. Supp. 586, 41 N. Y. Supp. 1111; *Matter of Willets*, 112 N. Y. 289, 19 N. E. 690; *McAlpine v. Potter*, 126 N. Y. 285; *Matter of Johnson*, 57 App. Div. 494, 67 N. Y. Supp. 1004; *Matter of Union Trust Co.*, 70 App. Div. 5, 75 N. Y. Supp. 68; *Jewett v. Schmidt*, 83 App. Div. 276, 82 N. Y. Supp. 49. To entitle persons named in a will as executors and as trustees to double commissions, they must have actually entered upon their duties as trustees. An accounting as executors and a transfer of the trust fund to the trustees pursuant to a decree of a court of competent jurisdiction is the most satisfactory proof of the completion of their duties in one capacity and the commencement of their duties in the other capacity, but such judicial decree is not the only means of proving that the transfer has actually been made. *Johnson v. Lawrence*, supra; *Laytin v. Davidson*, supra; *Matter of Reed*, 45 App. Div. 196, 61 N. Y. Supp. 50; *Matter of Johnson*, 57 App. Div. 494, 67 N. Y. Supp. 1004; *Matter of Hogarty*, 62 App. Div. 79, 70 N. Y. Supp. 839; *Jewett v. Schmidt*, supra; *Hurlburt v. Durant*, supra. The findings and judgment of the trial court relating to such transfer should be sustained.

Although it is found that all the property was converted into money by the executors, it is claimed by some of the appellants that one note held by the testator remains uncollected in the hands of the trustees, and that no commissions should be allowed thereon. Where securities are accepted as cash, commissions should be allowed thereon the same as if they had been converted into money and the money reinvested. *Robertson v. de Brulatour*, 188 N. Y. 301, 80 N. E. 938. Where executors deliver to themselves, as trustees appointed by a will, securities the amount or value of which constitute the principal of a trust fund, they assume a new position with distinct duties and responsibilities, and become entitled to commissions for receiving and paying out the same as principal. *Robertson v. De Brulatour*, supra; *Code Civ. Proc.* § 3320. The trust estate in this case amounted to more than \$100,000, and the judgment should have given William D. Baldwin, as trustee, one-half commissions for receiving such trust fund. From the death of Nahum Sullivan, at least until the death of said Theodore F. Vail, the assets of the es-

tate of Sullivan remained in the possession of Sullivan, Vail & Co., and the cash items of both principal and income were left with said partnership. Helen D. Baldwin received from the trustees, through Sullivan, Vail & Co., the net income of the trust fund from time to time during all of that period. It is alleged by the plaintiffs in their complaint that she was "paid the net income of the said residuary estate * * * until the date of the death of said Theodore F. Vail." It is adjudged by the trial court that the trustees "paid the net income of said residuary estate to the said Helen R. Baldwin until the date of the death of the said Theodore F. Vail."

It appears from the record that although the trustees at the beginning of their duties as trustees credited the income account with an item of \$1,596.92 that belonged to principal account, and that such erroneous entry remained uncorrected during all the time prior to the commencement of this action, Mrs. Baldwin received payments of income in varying amounts, usually made about once a month, and that semiannual interest was charged against her upon overdrafts. It does not seem to be disputed that her overdrafts were substantially continuous, and that from June 30, 1885, to November 30, 1903, a period of more than 18 years, a statement of the income account was made by the trustees semiannually, upon which statement interest was computed and charged against Mrs. Baldwin on such overdrafts. To what extent Mrs. Baldwin was a party to such semiannual statements of the income account does not appear. It cannot be disputed, however, that such semiannual statements were made by the trustees, and that the full income was knowingly and intentionally paid over annually or more frequently as the net income. Some time in 1889 the trustees were talking about an accounting and Baldwin said to Vail: "If there is anything due on your commissions, I should think it would be a good plan to take whatever is about right. We can easily see what it is." Thereupon, and on June 26, 1889, \$1,000 and on July 11, 1889, a further sum of \$500, was paid to Vail on account of commissions. Baldwin testifies that these payments were made generally on account of commissions, and that he does not know what account Mr. Vail intended to have it charged against. That it was not paid out of income is made entirely clear from the fact that the income account at that time was largely overdrawn. It further appears that these amount could not have been paid from income or intended to have been paid from income by reason of the fact that the trust at that time had only continued about four years and the total commissions on income received at that time did not amount to more than about one-third of the amount taken by Mr. Vail on account of commissions. At the time these commissions were taken no commissions had ever been paid to Mr. Vail

either as executor or trustee, and it is reasonably clear from the testimony mentioned that general commissions were then contemplated, and not commissions upon income. From the time that the duties of the executors ceased, and they took upon themselves the duties of trustees, the income on the trust investments held by them constituted an independent fund, and their commissions thereon were payable only from such fund. The trustees upon paying over such income or fund to the beneficiary were legally entitled to retain their commissions thereon. *Hancox v. Meeker*, 95 N. Y. 528; *Matter of Mason*, 98 N. Y. 527. Where, through a long series of years, trustees voluntarily pay the income from a trust fund to the beneficiary as the full net income thereon, it is a waiver by such trustees of their commissions.

The court, in *Spencer v. Spencer*, 38 App. Div. 403, 56 N. Y. Supp. 460, referring to a case where trustees for nine successive years had rendered their accounts to the beneficiary, and paid over the income without claiming commissions, say: "The difficulty in his case is not that he did not take his commissions each year from the income, but that he paid over the whole income to the beneficiary. He was not put to the alternative of either taking his commissions or paying their amount to the beneficiary. There was a third course open to him—that was to retain the amount of his commissions in the trust. The income was the sole fund from which the trustee's commissions were payable. He could not by paying over to the cestui que trust the amount of the commissions in one year create a charge or lien on the income of the beneficiary in future years. The interest of the beneficiary in the rents and profits was, by the express terms of the statute, incapable of anticipation or assignment; and neither the acts of the trustees or of the cestui que trust could avoid this provision. We do not mean to say that this rule is to be carried so far as to exclude the possibility of any unintentional error resulting in an overpayment in one year being corrected in the next. But in this case the trustees have for nine successive years rendered their accounts to the beneficiaries without claim for commissions and have paid over the whole net income. By this course they have lost the right to commissions. *Hancox v. Meeker*, 95 N. Y. 528." We adopt the language quoted as being applicable to this case. The intention of the testator in creating the trust fund was to provide an uninterrupted income for his daughter to enable her to pay her necessary expenses during her life, and, that there should not be a period of time even between his death and the establishment of the trust fund from the proceeds of which she would receive an income, he gave to her the legacy of \$5,000 for the express purpose of paying her necessary expenses during that period of time. The result of the trustees paying to her the full income for 18 years without de-

ducting their commissions, and then reserving to themselves the entire income until the commissions so accumulated were paid, would be to give to the beneficiary years of plenty followed by a period when her income would be entirely withheld. Such an allowance of commissions at this time would interfere with the plain purpose of the will. It does not affect the determination of the question that the kindness and liberality of Vail in paying over the income for many years as desired by the beneficiary is now followed by a great lack of generosity on her part. The finding that the trustees did not intend to waive their commissions on the income is in conflict with the other findings of the trial court, and wholly contrary to the evidence.

The judgment should be modified by giving to William D. Baldwin one-half full commissions for receiving the trust fund as trustee, and by striking therefrom the provisions granting to the estate of Vail and to William D. Baldwin commissions on the income of the trust fund. It should also be modified by charging the plaintiffs with \$1,500 paid to said Vail in his lifetime on account of commissions, and deducting the same from the amount allowed to them as commissions on the principal fund, and, as so modified the judgment should be affirmed, without costs to either party in this court.

CULLEN, C. J., and GRAY, O'BRIEN, VANN, WERNER, and WILLARD BARTLETT, JJ., concur.

Judgment accordingly.

(189 N. Y. 474.)

PEARSALL v. NEW YORK CENT. & H. R. CO.

(Court of Appeals of New York. Nov. 19, 1907.)

1. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS.

A locomotive engineer is a co-servant of the fireman and of an employé in charge of a switch and semaphore signals, and the employer is not liable in a common-law action for injuries received by the engineer in consequence of the negligence of the fireman or employé.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 500, 503.]

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a locomotive engineer injured by the derailment of his train by a misplaced switch was guilty of contributory negligence held, under the facts, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

3. SAME—BURDEN OF PROOF.

In an action against a master for injuries to a servant, the burden is on the plaintiff to show some act or omission by the defendant that caused or contributed to the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 894-905.]

4. APPEAL — DECISIONS OF INTERMEDIATE COURTS—QUESTIONS REVIEWABLE.

Where the decision of the court below is not unanimous, the sufficiency of the evidence is reviewable in the Court of Appeals.

5. MASTER AND SERVANT—ADOPTION OF RULES FOR THE SAFETY OF SERVANTS—NEGLIGENCE.

On the issue of the negligence of a railroad in failing to adopt rules for the protection of its servants, the question is not whether the rules adopted are the safest that could be devised for guarding against accidents, but whether the rules in force are reasonably sufficient, when observed, to protect the servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 285.]

6. SAME—INJURY TO SERVANTS—NEGLIGENCE—EVIDENCE.

In an action against a railroad for injuries to an engineer by the derailment of his train by a misplaced switch, evidence examined, and held insufficient to show negligence of the company in failing to adopt rules guarding against accidents, but to show that the accident was due either to the blunder of the fireman or of the employé in charge of the switch and the semaphore signals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 969-971.]

7. SAME—RULES—SUFFICIENCY.

Negligence cannot be imputed to a railroad company on the sole ground that it failed to adopt the same methods for operating its road that other roads had in use, since, before it can be said that the plan of the other roads is the safest, it must be shown that the conditions are the same, and that the result of experience is in favor of their methods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 285.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by David A. Pearsall against the New York Central & Hudson River Railroad Company. From a judgment of the Appellate Division (97 N. Y. Supp. 1143, 112 App. Div. 904), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

A. H. Cowie, for appellant. A. D. Jenney, for respondent.

O'BRIEN, J. The plaintiff was seriously and permanently injured on the 12th of September, 1901, at about 2 o'clock in the morning of that day, by the derailling of the train upon which he was the engineer at a place called Eastwood, a few miles east of Syracuse, on the West Shore Railroad, which constituted a part of the defendant's system. The train was westbound, a fast express, in charge of the plaintiff as engineer, and, after crossing a bridge east of the point where the accident occurred, was running at the rate of 40 or 50 miles an hour. The primary cause of the derailment and consequent injury to the plaintiff was that a switch, connecting a cross-over with the main passenger track on which the plaintiff's train was running at high speed, was not set or locked for the main track, but for the crossing.

The principal use and purpose of this diagonal crossing was to enable the defendant to transfer freight trains from the West Shore Road to the Central, and it led off in an easterly direction to the defendant's great yard at De Witt, where connection was made with the main track of the Central. The switch was usually kept set for this cross-over

track, as there was very heavy traffic upon it. If the switch at this crossing had been set for the main track, instead of for the crossing, the accident would not have happened. The defendant had a switchman at the crossing, whose business it was to change the switch for the main track when necessary, and to properly operate the semaphore signals, intended to give notice to trains on the main track when it was safe to go on and when there was danger. The plaintiff, when approaching the point where the accident occurred, did not himself look out from his engine in order to see whether the signals reported danger or safety, but left that duty to the fireman who reported to him that all was right. The plaintiff's reason for not looking out for himself was that he was rounding a curve at the time, and, it being necessary that he should be on the right of the engine, the smokestack, locomotive, barrel of the engine and headlight obstructed his vision so that he could not see the danger signal on the semaphores until it was too late to stop the train. If the accident resulted from the blunder of the fireman in reporting to the plaintiff that all was right when danger was obvious, or from neglect on the part of the operator who had charge of the switch and the semaphore signals, they were co-servants for whose negligence the defendant is not liable; this being a common-law action. There was no claim that these men were incompetent, or that the switch or semaphores were improperly constructed, or located, or that there was any defect in the signals, or, if there was, that the defendant had notice of the defect in time to repair it or cure the defect. The trial court, in substance, so instructed the jury. The finding of negligence cannot be supported by the proof on any of these features of the case. The defense of contributory negligence on the part of the plaintiff, in view of all the circumstances, the speed of the train, the condition of the track rounding the curve after a rain, the darkness of the night, and the assurance of the fireman that all was right, could not be ruled against the plaintiff as matter of law. We are inclined to think that the conduct of the plaintiff in failing to look out and observe the danger signals himself, instead of leaving that duty to the fireman, and in not stopping the train in time to avoid the accident, presented a question for the jury on the issue of contributory negligence.

The difficulty with the plaintiff's case is the absence of any proof of negligence on the part of the defendant. The burden was upon the plaintiff to give proof of some act or omission on the part of the defendant that caused or contributed to the accident. Since the decision of the court below was not unanimous, the question whether there was any evidence to support a finding of negligence on the part of the defendant is open for review in this court. The learned counsel for the plaintiff,

as I understand his argument, rests that feature of his case entirely upon the neglect or omission of the defendant to enact and promulgate some rule that, if executed or followed, would have prevented such an accident, and that was the question which the learned trial judge submitted to the jury. It was left to the jury to say whether the rules in force by the defendant to guard against such accidents at the crossing in question were sufficient, or whether some other and better rule could not have been devised by the defendant in order to conduct its business at the point in question with a greater degree of safety. The rule which the learned counsel for the plaintiff insists should have been adopted by the defendant is formulated in his printed argument as follows: That switches should be required "to be kept locked and set right for the main track at all times, and that, whenever it was necessary for any train to cross over across the main track to any side track or connection, they may do so provided no passenger train be due, and that a flagman be sent in both directions so as to properly protect any approaching train." There was evidence given to the effect that the same, or a similar rule, had been adopted and was in operation upon other railroads in this state. The defendant's answer to this contention is substantially this: That the track crossing the main track at this point was used much more than the main track, and that its system of semaphore signals and the block system was equivalent to and safer than the system contended for by the plaintiff, and that different roads had different systems for the accomplishment of the same purpose of safety. Comparing the rule contended for by the plaintiff with that in force by the defendant at the time of the accident, it will be observed that its successful operation to avoid accidents is made to depend much more upon the vigilance and fidelity of the switchman and flagman, and much less upon the fixed and permanent signals from the semaphores, known to the plaintiff and other employees as indicating danger or safety.

But the real question is, not whether the defendant adopted by its rules the safest plan that could be devised for guarding against accidents, but whether the rules in force were reasonably sufficient, when observed, to protect its servants from such accidents as resulted in personal injury to the plaintiff in this case. The accident occurred for the reason that the switch was set right for the cross-over track and wrong for the main track upon which the plaintiff's train was running. This situation could be known to all by a system of signals from the semaphores, which the rules prescribed. A red light was a danger signal and a white light a signal of safety. On the night in question the semaphore on the main track east of the crossing displayed a red light, and the semaphore for the cross-over track displayed a white light, indicating that the switch was

set right for the cross-over, and hence safety for trains on that track, but wrong for the main track, and hence danger for the plaintiff's train. It cannot be doubted that, if these signals had been observed and acted upon by the defendant's servants, the accident could not have happened, since it was the plaintiff's duty to stop his train until the danger was over by a proper adjustment of the switch for the main track. While the semaphore on the main line was set against the plaintiff's train, the fireman claimed that the red glass on the arm did not entirely cover the light, so that the real situation could not be plainly seen. If it be true that the red glass did not entirely cover the white light, the plaintiff was not misled, since he says that, as soon as he saw the light, he knew that it was a danger signal, and instantly did all in his power to stop the train, that he had no doubt what the signal meant, and that it was his duty to stop at once. Moreover, the defendant had another rule to the effect that "a signal imperfectly displayed, or the absence of a signal at a place where a signal is usually shown, must be regarded as a danger signal and the fact reported to the superintendent."

It is difficult to avoid the conclusion that the real cause of the accident was the blunder of the fireman in assuring the plaintiff that all was right at the switch, when the signals at the cross-over track and on the main track showed the contrary. If, however, the semaphore on the main track did not on that occasion perform its full function of displaying the danger signal, it was not, so far as appears, in consequence of any defect in the appliance which the defendant knew, or should have known, but rather the fault of the operator at the switch. The cross-over track connecting the main tracks of the West Shore with the main tracks of the Central at De Witt was of considerable length and was in constant use for the transfer of cars from one of these roads to the other, and it seems that the switch was kept set for that track and changed only for the main track when the signals called for the change. It is difficult to see how the rule which it is said the defendant should have adopted could be an improvement upon the plan in use at the time of the accident. But, however that may be, it seems to us that the method adopted by the defendant for transacting its business at the point in question was reasonably safe, and that is all that can be required. The defendant's officers could not anticipate any unusual danger from the plan when put into operation, especially in view of the fact that, while it was in use for many years, no accident had happened that could lead men of ordinary prudence to change it for the plan suggested.

Negligence cannot be imputed to the defendant upon the sole ground that it failed to adopt the same methods for operating its road at the point in question that some other

roads had in use. Before it can be said that the plan of the other roads was the safest, we would have to know that the conditions were the same, and, moreover, that the result of experience was in favor of that method. So long as the defendant maintained a safe roadbed, rails, and switches, employed competent co-servants, and had enacted reasonable rules for guarding and protecting the cross-over and main tracks by the use of semaphores and signals, indicating plainly whether there was danger or safety, it discharged its whole duty to its employes. Even if it could be seen or found as a fact that the method in use by the other railroads mentioned in the record was better or safer, the master is not guilty of negligence for not discarding a plan which was reasonably safe, and had proved to be so as the result of long experience.

On the main issue in the case, which was the defendant's negligence in its failure to promulgate some other rule or plan of operating trains at the crossing, there was no evidence to submit to the jury. *Sisco v. Lehigh & H. R. R. Co.*, 145 N. Y. 296, 39 N. E. 958; *Corcoran v. D. L. & W. R. Co.*, 126 N. Y. 673, 27 N. E. 1022; *Berrigan v. N. Y., L. E. & W. R. R. Co.*, 131 N. Y. 582, 30 N. E. 57; *Smith v. N. Y. C. & H. R. R. Co.*, 88 Hun, 468, 34 N. Y. Supp. 881, affirmed 153 N. Y. 664, 48 N. E. 1107.

The judgment should be reversed, and a new trial granted, costs to abide the event.

CULLEN, C. J., and VANN, WERNER, and CHASE, JJ., concur. GRAY, J., not sitting. WILLARD BARTLETT, J., not voting.

Judgment reversed, etc.

(190 N. Y. 12)

DRAPER et al. v. OSWEGO COUNTY FIRE RELIEF ASS'N.

(Court of Appeals of New York. Nov. 19, 1907.)

1. WORDS AND PHRASES—"WAIVER."

Waiver is the voluntary abandonment or relinquishment of some right or advantage.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831-7832.]

2. ESTOPPEL—"EQUITABLE ESTOPPEL."

The doctrine of equitable estoppel is that a person may be precluded by his conduct from asserting a right to the detriment of another who, entitled to rely upon such conduct, has acted upon it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 121.

For other definitions, see Words and Phrases, vol. 3, pp. 2497-2508; vol. 8, p. 7655.]

3. INSURANCE — WAIVER — APPLICATION OF DOCTRINE.

The doctrine of waiver as applied to insurance is invoked to relieve against forfeitures, and no consideration is required nor any prejudice or injury to the other party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 943.]

4. SAME—ESTOPPEL—KNOWLEDGE BY INSURER OF FACTS INVALIDATING POLICY.

The rule that an insurance company cannot defeat recovery on a policy issued by it, by

proving the existence of facts rendering it void where it had knowledge of the facts when the policy was issued, rests on the doctrine of estoppel, and not on that of waiver.

5. SAME — CONTRACT — CONSTRUCTION — EXCEPTION FROM RISK INSURED AGAINST.

A provision in a fire insurance policy that the insurer shall not be liable for a loss resulting from an open fire built by insured with his knowledge and consent within 50 feet from any insured building is not a condition, the breach of which works a forfeiture but is an exception from the risk insured against.

6. SAME—ESTOPPEL TO DENY LIABILITY UNDER POLICY.

After a loss under a fire insurance policy, the directors who visited insured to adjust the loss informed him that they could not adjust it because the fire was occasioned by a cause excepted from the policy, and advised him to take certain steps prescribed by the by-laws. In consequence thereof, insured prepared proofs of loss, and appeared before the directors at their request, and at his own expense, where he was examined, but no formal action was taken. There was no misrepresentation by the officers of the association. *Held*, that the association was not estopped to deny liability under the exception in the policy.

Appeal from Supreme Court, Appellate Division; Fourth Department.

Action by Oliver S. Draper and another against the Oswego County Fire Relief Association. From an order of the Appellate Division (101 N. Y. Supp. 168, 115 App. Div. 807), reversing a judgment for plaintiffs and an order denying defendant a new trial, plaintiffs appeal. Affirmed.

Irving G. Hubbs, for appellants. S. C. Huntington, for respondent.

CULLEN, C. J. This action was brought to recover upon a fire insurance policy issued by the defendant, which is a corporation incorporated under the provisions of chapter 362, p. 540, Laws 1880, entitled, "An act to provide for the formation of county co-operative insurance companies." The seventh by-law of the defendant, which was printed in full on the policy, provided: "Where fire is used in any building upon the premises within one hundred feet of any insured building for the purpose of making sugar or stripping tobacco or curing hops or drying apples this association will not be liable for any loss resulting from such fire. Nor will this association be liable for any loss resulting from any open fire, built by the insured with his knowledge or consent, within fifty feet from any insured building." On April 24, 1905, the plaintiffs' buildings were destroyed by fire. The fire was caused by a spark from an open fire (bonfire) which the plaintiffs ignited to burn up rubbish, and which fire was 40 feet distant from the barn. Section 10 of the by-laws provided: "In case of loss by fire or lightning the loser shall give notice to the secretary and director of the subordinate grange and said director shall notify the directors of two adjoining granges within five days, whereupon the said directors shall proceed to examine the loss or damage and to adjust the same. In case the parties cannot

agree, then said directors shall notify the president, who shall call the board of directors together to adjust the same, and their decision shall be final." Three of the defendant's board of directors went to the place of the fire for the purpose of adjusting the loss. They found that the fire was set within 50 feet of the barn, and told Draper that they could not adjust the loss, but would make out proofs of loss so they could be presented to the board of directors. Proofs of loss were made and verified by Draper and by him sent by mail to Welling, the secretary of the defendant. Thereafter a meeting of the board of directors was called, and Potter, one of the directors, wrote to the plaintiff Draper, informing him of the date of the meeting and stating that the directors desired him to be present. Draper went 40 miles to Oswego, the place of the meeting, paying his fare both ways, attended the meeting, was examined as to the loss, and told that he could be excused. No formal action in relation to the adjustment of the loss by the board of directors appears to have been taken. Nothing further was done and this action to recover the loss was commenced. At the close of the evidence, the defendant moved to dismiss the complaint, which motion being denied and exception to that ruling taken the cause was submitted to the jury, which found a verdict for the plaintiffs. The learned trial judge charged that lighting the bonfire was a breach of the condition of the policy, and the plaintiffs could not recover unless the jury should find the defendant had waived that breach. He said: "It was a condition made for its benefit, and if, for one reason or another, it chose to say, 'We will not defend ourselves because of the breach of that condition. We will allow you to build a fire as you did, and will pay you in case a loss results,' then the plaintiffs may recover notwithstanding the breach of that condition. Such a waiver may be made by express language to that effect, or the company may make such a waiver by acts from which the intention to waive may be inferred or from which a waiver follows as a legal result. Where, after knowledge of the forfeiture of a policy the insurer recognizes its continued validity, does acts based thereon, and requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as a matter of law waived, and such a waiver need not be based upon any new agreement or upon estoppel. It exists when there is an intention to waive unexpressed, but clearly to be inferred from the circumstances, or when there is no such intention in fact, but the conduct of the insurer has misled the insured into acting upon a reasonable belief that the company has waived some provision of the policy." Waiver was the only issue submitted to the jury, and to the submission of that issue the defendant excepted. The Appellate Division reversed the judgment entered upon the verdict and the order denying defendant's motion for a

new trial, the order of reversal stating that it was made upon questions of law only, the facts having been examined and no error found therein.

The law as to what constitutes a waiver was correctly laid down by the trial judge substantially in the language used by this court in *Kiernan v. Dutchess County Mut. Insurance Company*, 150 N. Y. 190, 44 N. E. 698, and repeated in *Walker v. Phoenix Insurance Company*, 156 N. Y. 628, 51 N. E. 398. But the question remains whether the doctrine of waiver is applicable to this case. While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A waiver is the voluntary abandonment or relinquishment by a party of some right or advantage. As said by my brother Vann in the *Kiernan Case*: "The law of waiver seems to be a technical doctrine, introduced and applied by the courts for the purpose of defeating forfeitures. * * * While the principle may not be easily classified, it is well established that, if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to abandon or not to insist upon the particular defense afterwards relied upon, a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked." The doctrine of equitable estoppel, or estoppel in pais, is that a party may be precluded by his acts and conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it. The rule prevailing in this state, that an insurance company will not be permitted to defeat a recovery on a policy issued by it by proving the existence of facts which render it void where it had full knowledge of the facts when the policy was issued (*Robbins v. Springfield F. & M. Ins. Co.*, 149 N. Y. 477, 44 N. E. 159), rests rather on the doctrine of estoppel than on that of waiver. As already said, the doctrine of waiver is to relieve against forfeiture. It requires no consideration for a waiver, nor any prejudice or injury to the other party. The provision cited from the policy in this case, however, is not a condition the breach of which works any forfeiture. It is simply an exception from the risk insured against. In other words, the policy does not cover a loss arising from any of the causes specified in the by-law; but nevertheless it remains in full force and effect until the subject-matter of the insurance is destroyed. During the burning of this bonfire, had the plaintiffs' barn caught fire from any other cause, even from another bonfire more than 50 feet distant from the building, the plaintiffs would have been entitled to their insurance. *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310, 29 Am. Rep. 149. To recover in this case, it was therefore necessary for the plaintiffs to establish, not that the defendant waived the breach of a condition of the poli-

cy, but that in some way the obligation of the defendant was so extended as to include loss from a bonfire situated within fifty feet of the insured buildings. There is no pretense that any oral contract between the parties included such a loss; and hence there can be no right to a reformation of the policy. The only other ground on which the plaintiffs could succeed was by establishing that the defendant has estopped itself from denying that the loss fell within the terms of the policy by some action or conduct which had misled the plaintiffs to their injury.

There is no evidence in the record to support such a claim. Shortly after the fire one of the plaintiffs was informed by the three directors who visited him that they could not adjust the loss because the fire was occasioned by a cause excepted from the policy. They directed the preparation of proofs of loss and referred him to the board of directors. This was the course of procedure prescribed by the by-laws. There was no misrepresentation by any of the officers of the defendant. The plaintiff knew how the fire was caused, and his attention had been called to the exceptions in the risks insured against. The expenditures incurred by him in preparing the proofs of loss and attending the meeting of the directors were made with full knowledge of the facts. It might have happened that the directors would allow or compromise his claim, at least that was the only chance the plaintiffs had of being paid their loss in whole or in part. No expenses incurred in the plaintiffs' unsuccessful efforts can be justly charged to the action of the defendant.

The views we have expressed are supported by authorities in other states. In *Knights, etc., v. Foot*, 166 Ind. 367, 77 N. E. 738, a policy of a life insurance company excepted death during pregnancy. The insured died while pregnant. It was held that the limitation contained in the policy was an exception, not a condition, and that the doctrine of waiver had no application. In *McCoy v. Association*, 92 Wis. 577, 66 N. W. 697, 47 L. R. A. 681, suicide was excepted in an insurance policy. Death having been caused by suicide, it was held that neither waiver nor equitable estoppel could uphold a recovery. We are not disposed to go to the length of the learned Supreme Court of Wisconsin, but are inclined to the opinion that an insurance company may estop itself from denying that an excepted cause of loss is covered by its policy. The Supreme Court of Indiana in the case cited from that state intimates the same view.

It has been suggested that, under the decision we are about to make, insurance companies, to avoid the law of waiver, will change the terms of their policies, and, instead of inserting conditions the breach of which render a policy void, provide that in case of such a breach the policy shall not cover the loss. There is no such danger. A pro-

vision of the kind suggested would be just as much a forfeiture as if expressed in the form now in use, that the policy shall be void.

The order of the Appellate Division should be affirmed and judgment absolute entered against the plaintiffs on the stipulation, with costs in all courts.

GRAY, O'BRIEN, VANN, WERNER, WIL-LARD BARTLETT, and CHASE, JJ., concur.

Ordered accordingly.

(169 Ind. 316)

TOLEDO, ST. L. & W. R. CO. v. LONG.
(No. 20,577.)

(Supreme Court of Indiana. Nov. 28, 1907.)

CONSTITUTIONAL LAW—CLASS LEGISLATION.

Burns' Ann. St. 1901, §§ 7056, 7057, providing that every company, corporation, or association doing business in the state shall be required to pay its employees, engaged in manual or mechanical labor, at least once a month, and prescribing a penalty for noncompliance, is violative of the fourteenth amendment of the federal Constitution, as imposing on companies, corporations, and associations, burdens not imposed on individuals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 651-655.]

Appeal from Circuit Court, Clinton County; Joseph Claybaugh, Judge.

Action by Charles J. Long against the Toledo, St. Louis & Western Railroad Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed, and new trial granted.

Guenther & Clark, Clarence Brown, and Chas. A. Schmettan, for appellant. A. H. Boulden and Henry N. Spaan, for respondent.

MONKS, C. J. This action was brought by appellee, an employé of appellant, for the recovery of wages for manual labor; also to recover penalties and attorney's fees under sections 7056, 7057 Burns' Ann. St. 1901, being sections 1 and 2, c. 21, p. 36, Acts 1885. An answer and counterclaim were filed by appellant. A trial of said cause by jury resulted in a verdict in favor of appellee for the wages, penalties, and attorney's fees; and over a motion for a new trial judgment was rendered thereon against appellant. Several of the causes for a new trial call in question the right of the appellee to recover said penalty and attorney's fees under said sections of the statute.

It is insisted by appellant that said sections 7056, 7057, supra, are in violation of the fourteenth amendment of the Constitution of the United States, citing, among other authorities, the following: *Railroad Co. v. Morris*, 65 Ala. 193; *Railroad Co. v. Moss*, 60 Miss. 641; *San Antonio, etc., R. Co. v. Wilson*, 4 Willson, Civ. Cas. Ct. App. § 324, pp. 567-576, 19 S. W. 910; *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 253, 41 L. Ed. 666; *Davidson v. Jennings*, 27 Colo. 137, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. Rep. 49.

Said sections read as follows: "Sec. 7056.—(1) That every company, corporation or association now existing, or hereafter organized and doing business in this state, shall, in the absence of a written contract to the contrary, be required to make full settlement with, and full payment in money to, its employes, engaged in manual or mechanical labor, for such work and labor done or performed by said employes for such company, corporation or association at least once in every calendar month of the year.

"Sec. 7057.—(2) If any company, corporation or association shall neglect to make such payment, such employe may demand the same of said company, corporation or association, or any agent of said company, corporation or association, upon whom summons might be issued in a suit for such wages, and if said company, corporation or association shall neglect to pay the same for thirty days thereafter, said company, corporation or association shall be liable to a penalty of one dollar for each succeeding day, to be collected by such employe in a suit (together with reasonable attorney's fees in said suit) for wages withheld: provided, That said penalty shall in no instance exceed twice the amount due and withheld."

It will be observed that said sections, so far as they affect employers, only apply to "every company, corporation or association," and, so far as their employes are concerned, only apply to those "engaged in manual or mechanical labor for every company, corporation or association," but deny the right to such of their employes as are not "engaged in manual or mechanical labor." Employes of an individual, although engaged in manual or mechanical labor for such individual, are excluded from the benefit of said sections of the statute. They give the right to recover penalties and attorney's fees to a certain class of employes of companies, corporations, and associations, but deny such right to the same class of employes of an individual engaged in the same business under the same conditions. They impose new burdens on "every company, corporation and association" doing business in the state, while an individual engaged in like business under like circumstances and conditions is left without any such burden. This brings said sections within the rule declared in *Bedford Quarries Co. v. Bough*, 168 Ind. —, 80 N. E. 529, and the cases there cited, and upon the authority of said case we hold that they are unconstitutional.

Appellant urges that said sections are unconstitutional for other reasons, but as they are unconstitutional on the ground mentioned the same are not considered. As said sections do not put railroads in a class by themselves, as does the employer's liability act, we are not required to determine whether or not such a classification, if made, would render said sections valid as to railroads.

Other questions are argued; but, as they

are either not properly presented in the brief or may not arise on another trial, they are not considered. It follows that the lower court erred in overruling appellant's motion for a new trial.

Judgment reversed, with instructions to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

(169 Ind. 409)

ELLIS v. STATE. (No. 21,048.)

(Supreme Court of Indiana. Nov. 26, 1907.)

INTOXICATING LIQUORS—OFFENSES—SELLING LIQUOR TO MINOR—EVIDENCE.

Evidence held to sustain a conviction for selling liquor to a minor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 300-320.]

Appeal from Circuit Court, Adams County; R. K. Erwin, Judge.

Lafayette Ellis was convicted of selling liquor to a minor, and he appeals. Affirmed.

Peterson & Moran, for appellant. James Bingham, Atty. Gen., and White, Dowling & Carvins, for the State.

HADLEY, J. Appellant was found guilty of selling liquor to a minor. The only question he presents in this appeal is the correctness of his conviction. He insists that it was erroneous and contrary to law, because his guilt was not established beyond a reasonable doubt by sufficient evidence.

Three lads together went into appellant's saloon. They had not previously known appellant. They all testified that Egley bought three glasses of beer. Two testified that the beer was purchased of the bartender, but could not say whether appellant was or was not the bartender. The third testified positively that the defendant, whom he pointed out, was the man who sold the beer to Egley. The defendant himself denied the sale, and of ever seeing the boys, to his knowledge. The trial was by the court. The witnesses were all before him. He had opportunity to observe their manner as witnesses. The body of the evidence convinced him of appellant's guilt beyond a reasonable doubt, and we cannot disturb the judgment.

Judgment affirmed.

(169 Ind. 376)

PRINCESS AMUSEMENT CO. v. METZGER, Chief of Police, et al. (No. 20,984.)

(Supreme Court of Indiana. Nov. 26, 1907.)

1. INJUNCTION—VOID ORDINANCES.

That a city ordinance is void is not alone sufficient ground for enjoining its enforcement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 155.]

2. MUNICIPAL CORPORATIONS—ORDINANCES—PROHIBITION OF SKATING RINK—VIOLATION—NUISANCE.

The erection of a building to be used as a skating rink is not a violation of an ordinance

which prohibits the location, erection, and maintenance or establishment and maintenance of a skating rink, and makes a rink erected in violation thereof a nuisance, and therefore the building itself is not a nuisance.

3. INJUNCTION—SUBJECTS OF RELIEF—ENFORCEMENT OF CITY ORDINANCE—ANTICIPATED VIOLATION OF RIGHT.

The enforcement of an ordinance prohibiting the establishment and maintenance of a skating rink will not be enjoined, where plaintiff, who contemplated erecting one, was proceeding upon the mistaken theory that the ordinance prohibited the mere erection of the rink without obtaining the city's permit, since prosecution for violation of the ordinance was not impending or imminent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 9.]

4. SAME—ACTIONS—SUFFICIENCY OF ALLEGATIONS.

In an action to enjoin the enforcement of a city ordinance, an allegation that a city officer, acting under an ordinance prohibiting the establishment and maintenance of a skating rink, threatens to and will continue to enforce the ordinance by refusing to consider applications and specifications for the construction of the building, does not show an enforcement or an attempt to enforce the ordinance, where the construction of the building would not be a violation of the ordinance.

5. APPEAL—BRIEFS—FAILURE TO INCORPORATE COMPLAINT.

Where appellant fails to set out in its brief a paragraph of the complaint, or a succinct statement thereof, as required by Supreme Court Rule 22 (35 N. E. v.), requiring appellant's brief to contain "a concise statement of so much of the record as fully presents every error and exception relied on," etc., he waives the determination of its sufficiency on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3093.]

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Action by the Princess Amusement Company against Robert Metzger, as chief of police, and others, to enjoin the enforcement of an ordinance. Judgment for defendants, and plaintiff appeals. Affirmed.

William S. Taylor and Charles A. Weathers, for appellant. Frederick E. Matson, C. D. Bowen, and Joseph F. Cowern, for appellees.

MONKS, C. J. This suit was brought by appellant against the city of Indianapolis, its chief of police, board of public safety, and building inspector to enjoin the enforcement of an ordinance of said city on the ground that the same is void. The separate demurrer of each appellee to said complaint for want of facts was sustained to each paragraph thereof, and, appellant refusing to plead further, judgment was rendered in favor of appellees.

The errors assigned call in question the action of the court in sustaining said demurrers. It appears from the first paragraph of complaint which is set out in appellant's brief, as required by clause 5 of rule 22 of this court, that appellant is a corporation organized under the laws of this state; "that defendant Thomas A. Winterowd is the duly appointed, qualified, and acting building inspector of the city of Indianapolis, Ind.,

charged with the duty of approving all plans and specifications of buildings to be constructed in Indianapolis, and it is made his duty to approve all plans complying with the city ordinances and laws of Indianapolis, Ind.; that, in pursuance to the provisions of its articles of incorporation, plaintiff purchased and is now the owner of the following described real estate in Marion county, Ind. [describing it]; that plaintiff purchased same for the purpose of building thereon and operating a skating rink, and paid therefor more than \$17,000; that at the date of said purchase there was no city ordinance or state law prohibiting the owning, building or, operating of a skating rink in Indianapolis; that at said date there existed a city ordinance authorizing the licensing and operation of skating rinks; that there is now, and was at the date of said purchase, a dwelling house used for resident purposes within less than 100 feet of said real estate; that the plaintiff purchased said real estate for the purpose of building thereon a hall to be used as a public hall and as a health resort, and especially to be used as a skating rink; that in pursuance to said purpose and authority, and at great cost, the plaintiff caused to be prepared by a skillful and learned architect plans and specifications for the construction of a beautiful and spacious hall, which plans and specifications of said proposed building in all respects complied with all the laws and regulations of the city ordinance of Indianapolis, Ind., regulating the construction of such buildings, except as hereinafter set out; that plaintiff proposes and intends and will use said building as a public hall and for conducting a skating rink, within reasonable hours, for a part of the year, from 9 a. m. to 11 p. m. o'clock; that the same will be conducted and maintained in an orderly and legitimate manner and in such manner as to not be a private or public nuisance, and in such a manner as not to annoy or injure the public; that no disorderly or immoral conduct will be allowed; that said building will be constructed of brick and the very best building material and will be modern in all respects; that the defendants know such to be the purpose of plaintiff; that subsequent to the organization of plaintiff and the purchase of said lots, and, for the purpose of preventing plaintiff from constructing said building and operating therein a skating rink as aforesaid, there was duly passed by the city council of Indianapolis, and approved by the mayor thereof, an ordinance which is in words and figures as follows [setting out said ordinance]; that, after the passage of said ordinance, plaintiff filed with defendant Thomas A. Winterowd, inspector of buildings, plans and specifications for said building, and that same complied with all the ordinances of Indianapolis regulating buildings of this character, except the skating rink ordinance hereinbefore set out, and requested an approval of same and a permit to build said hall; that said defendant

Winterowd, as building inspector, admitted that said plans and specifications entitled plaintiff to an approval and a permit to build, except for the provisions of said skating rink ordinance; that the defendant Winterowd declared that, under the provisions of said skating rink ordinance, it was unlawful to construct such a building, and that it was unlawful for him, as building inspector, to give his approval to the plans and specifications or authorize a permit for the construction of same, and that he would not at any time in the future consider said plans or give his approval thereto, and that he would abate the construction and operation of a skating rink; that the said defendant Winterowd, acting under said invalid ordinance, threatens to, and will, in violation of plaintiff's rights, continue to enforce said skating rink ordinance by refusing to consider any and all applications and specifications for the construction of the building hereinbefore referred to on said real estate. That the defendant Winterowd, as building inspector, and the defendants Lew W. Cooper, Charles W. Tutewiller, and William Schoppenhorst, constituting the board of public safety of Indianapolis, and Robert Metzger, chief of police of Indianapolis, and the city of Indianapolis, are threatening to, and will, in violation of plaintiff's rights, wrongfully and without authority enforce against the plaintiff, its officers, employees, and agents said invalid skating rink ordinance, in order to prevent plaintiff from constructing a skating rink hall according to the plans and specifications hereinbefore referred to, and are threatening to, and will, unless restrained, cause the arrest of the plaintiff's officers, agents, and employees if plaintiff attempts the construction of said hall or operation of a skating rink in said hall; that they will cause the arrest and imprisonment of plaintiff's said agents, officers, and employees and the assessment of fines against the plaintiff, and in divers other ways harass and injure the plaintiff, and prevent it from constructing or operating said building as a skating rink, and thereby prevent plaintiff from the lawful use of its said property to its very great irreparable injury; that plaintiff has no adequate remedy at law to prevent said wrongful act." Said paragraph further alleges the grounds upon which said skating rink ordinance is claimed to be void. Then follows a prayer that defendants and each of them be enjoined from enforcing said skating rink ordinance.

Said ordinance provides: "That it shall hereafter be unlawful for any person, partnership or corporation to locate, build, erect and maintain, or to establish and maintain any skating rink for roller skating in the city of Indianapolis within one hundred feet of any dwelling house used for resident purposes" or "within any block or square upon which there is a church or public school building." "Any person, partnership or corporation violating any provision of the ordinance shall be

finned in the sum of one hundred dollars for the first offense and the sum of twenty-five dollars for each additional offense and every day said ordinance is violated shall constitute an additional offense." Section 4 of said ordinance provides that "any skating rink for roller skating erected or established in violation of this ordinance shall be deemed a nuisance, and may be abated as such; and it is hereby made the duty of the building inspector of the city of Indianapolis to abate the same as a nuisance by proper steps taken." It is proper to say that the mere fact that an ordinance of the city is void does not furnish sufficient ground for enjoining its enforcement. 22 Cyc. 891, 892; 2 High on Inj. (4th Ed.) 1244; McQuillan's Municipal Ord. § 285; Smith v. Smith, 159 Ind. 388, 389-391, 65 N. E. 183; City of Rushville v. Rushville, etc., Co., 132 Ind. 575, 587, 28 N. E. 853, 15 L. R. A. 321; Davis v. Fasig, 128 Ind. 271, 276, 27 N. E. 726. It will be observed that locating, building, erecting, or establishing "any skating rink for roller skating" within the prohibited limits is not a violation of said ordinance, unless it is also maintained as such. The same may be located, built, erected, or established without committing any offense under said ordinance if not maintained for that purpose. It is clear from the provisions of said ordinance that there can be no prosecution against appellant or its officers for a violation thereof until said building is erected and maintained as "a skating rink for roller skating." It follows that the same cannot be deemed a nuisance under section 4 of said ordinance, unless maintained as "a skating rink for roller skating." The nuisance under said section consists in maintaining the building for the purpose made unlawful by said ordinance, and not in the building itself. In such case it is only the unlawful use that can be abated. 1 Am. & Eng. Ency. of Law, 78b, and note 4; Bloomhuff v. State, 8 Blackf. 205; Barclay v. Commonwealth, 25 Pa. 503, 64 Am. Dec. 715; Brightman v. Inhabitants, etc., 65 Me. 426, 20 Am. Rep. 711; Gray v. Ayres, 7 Dana (Ky.) 375, 32 Am. Dec. 107, and note page 111; Ely v. Supervisors, 36 N. Y. 297; Welch v. Stowell, 2 Doug. (Mich.) 332. It appears from said paragraph that the building has not been erected for the reason that the inspector of buildings has refused, and will continue to refuse, to grant the proper permit therefor on account of the ordinance complained of. It is the theory of appellant as shown by said paragraph that it has no right to, and cannot legally, erect said building without first obtaining a permit so to do from the building inspector of said city. It is evident, therefore, that the threatened prosecutions of appellant and its officers for a violation of said ordinance alleged in said paragraph are not impending or imminent, nor is there any showing or reasonable ground for believing that said city or its officers are about to commence the prosecutions or cause the arrests

alleged. Under such facts, there is no ground for injunction even if said ordinance is void as claimed by appellant, a question we need not and do not decide. 1 High on Inj. § 22, p. 37; 2 Beach on Inj. § 1301; 1 Spell. on Inj. § 660; 22 Cyc. 757, 758; 16 Am. & Eng. Ency. of Law (2d Ed.) 361; Smith v. Smith, 159 Ind. 388, 65 N. E. 183; Pugh v. Irish, 43 Ind. 415; Board v. Smith, 48 Kan. 331, 29 Pac. 505; City of Kansas v. Hobbs, 62 Kan. 868, 62 Pac. 324, and cases cited; Mason v. City of Independence, 61 Kan. 188, 59 Pac. 272, and cases cited; City of Hutchinson v. Delano, 46 Kan. 845, 350, 26 Pac. 740, and cases cited; Lester & Co. v. City of St. Louis, 169 Mo. 227, 234, 235, 69 S. W. 300, and authorities cited; Brookline v. Mackintosh, 133 Mass. 215; Newark Aqueduct Bd. v. Passaic, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55, and cases cited.

The allegation that said building inspector, "acting under said invalid ordinance, threatens to, and will, in violation of plaintiff's rights, continue to enforce said skating rink ordinance by refusing to consider any and all applications and specifications for the construction of the building hereinbefore referred to on said real estate," does not show an enforcement of or an attempt to enforce the skating rink ordinance by said building inspector. If the theory of appellant that said skating rink ordinance is void is correct, it may be that said paragraph shows that said building inspector is refusing to perform his duty under the ordinances regulating the erection of buildings in said city; but, as this is not an action to compel him to perform any duty, we express no opinion on that question. In such case the remedy, if any, is an action to compel the building inspector to issue the building permit to appellant, and not a suit for injunction. If said ordinance is valid, however, no such action can be maintained. It follows that the demurrer was properly sustained to said first paragraph. As appellant has failed to set out in its brief the second paragraph of the complaint, or a condensed or succinct statement thereof as is required by rule 22 of this court (55 N. E. v), it has waived the determination of the sufficiency thereof to withstand the demurrer for want of facts. *Schreiber v. Worm*, 164 Ind. 7, 9, 10, 72 N. E. 852; *Tuthill, etc., Co. v. Holliday*, 164 Ind. 13, 14, 72 N. E. 872. Judgment affirmed.

(169 Ind. 370)

BALTIMORE & O. R. CO. v. FREEZE. (No. 20,969.)

(Supreme Court of Indiana. Nov. 26, 1906.)

1. JUDGMENT—CONCLUSIVENESS—JUDGMENT OF COURT OF OTHER STATE—VALIDITY—GARNISHMENT—JURISDICTION.

Statutes of Illinois provide that wages earned and payable without the state shall be exempt from garnishment in cases where the cause of action also arose outside of Illinois, unless the defendant is personally served with

process. A creditor sued in a justice's court in Illinois a debtor residing in Indiana, and garnished his employer, who was indebted to him for wages earned and payable in Indiana, and who, as such garnishee, was compelled to pay the judgment recovered against the debtor. In a subsequent action in Indiana, by the debtor against the garnishee for wages, the latter claimed a credit for such sum paid by it as garnishee. There was no evidence that the cause of action in the garnishment suit arose outside of Illinois. *Held*, that want of jurisdiction of the justice in such garnishment suit was not apparent, and the court erred in striking the transcript of the proceedings and judgment in that suit from the evidence.

2. COURTS—JURISDICTION—DECISION AS TO JURISDICTION.

Every court possesses the power of determining its own jurisdiction, both as to the parties and subject-matter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 153.]

3. JUDGMENT—COLLATERAL ATTACK—JUDGMENTS OF INFERIOR TRIBUNALS.

Where an inferior tribunal is required to decide on facts essential to its jurisdiction, its judgment thereon is conclusive against collateral attack, unless want of jurisdiction is apparent on the face of the proceedings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 909.]

4. SAME—DECISION ON JURISDICTIONAL QUESTION.

A decision on a jurisdictional question, expressly or impliedly rendered, has the same binding effect on the parties as a decision on any other matter within the cognizance of the court, and the error in that respect must be corrected in the same manner as other errors are corrected.

5. EVIDENCE—PRESUMPTIONS—LAWS OF OTHER STATES.

The law of Illinois is, in the absence of any showing to the contrary, presumed to be the same as that of Indiana.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101.]

6. JUDGMENT—CONCLUSIVENESS—JUDGMENT OF COURT OF OTHER STATE—FAITH AND CREDIT.

A judgment of the court of one state when sued on, pleaded, or introduced in evidence in another state is entitled to receive the same faith and credit that is accorded to it in the state where rendered.

7. GARNISHMENT—DUTY OF GARNISHEE—DISCLOSURE.

Where the principal defendant in a garnishment proceeding has personal knowledge of the suit, the garnishee is not bound to go further than to look to the jurisdiction of the court, act fairly, and make a full disclosure.

Appeal from Circuit Court, DeKalb County; E. A. Bratton, Judge.

Action by A. John Freeze against the Baltimore & Ohio Railroad Company. From a judgment of the circuit court for plaintiff, rendered on appeal from a judgment of a justice's court, defendant appeals. Reversed, with directions.

Calhoun, Layford & Shuan and J. E. & J. H. Rose, for appellant.

MONTGOMERY, J. Appellee brought this action before a justice of the peace upon a demand due him for wages. He recovered a judgment, from which appellant appealed to the circuit court, wherein a second judgment was recovered. It is charged upon this ap-

peal that the trial court erred in overruling appellant's motion for a new trial.

An action upon account was brought by Roy W. Loucks against appellee and appellant as garnishee defendant before a justice of the peace of Cook county, Ill., and judgment rendered therein for \$18.90, which judgment appellant as such garnishee was compelled to pay and did pay. In this action appellant claimed, but was denied, credit for the sum paid by it upon that judgment. The trial court first received in evidence, but subsequently struck out the transcript of proceedings before the Cook county justice. Appellant alleged as reasons for a new trial error in the assessment of the amount of recovery, the same being too large, that the decision of the court is not sustained by sufficient evidence and is contrary to law, and that the court did not give full faith and credit to the judicial proceedings of a sister state, but, in violation of the Constitution of the United States, erroneously struck out and rejected a duly certified transcript of such proceedings and judgment. It appeared from appellee's testimony that he had resided at Garret, Ind., for 17 years, and had been in the employ of appellant continuously for about one year prior to September, 1903; that the actual amount due him from appellant as wages for the month of September, 1903, was \$50.37; that he knew his wages for that month had been "stopped" in Chicago; and that on October 2, 1903, he executed a paper containing a schedule of his property to be used in any case pending there whereby his wages were attached. He testified that he wrote a letter inclosing such schedule October 23, 1903, to Pam Calhoun and Glennon, attorneys in Chicago, asking them to attend to the matter for him, and that on October 10, 1903, he wrote a letter to the Light Collection Agency, with reference to the proceedings pending against him in Chicago, from which letter introduced in evidence it appears that he had received notice that said agency had garnished his wages for the month of September, and claimed that he could defeat the garnishment by appeal, but would pay the amount of the debt without any costs. He further testified that in June, 1904, appellant tendered him a pay voucher for the amount of his wages less the Chicago garnishment, which he refused solely on the ground that it was not for enough money.

Appellant introduced in evidence numerous statutes of the state of Illinois with reference to the jurisdiction of justices of the peace, and covering the jurisdiction and procedure in cases of attachment and garnishment, and the right of appeal from their judgments to the circuit or county court of the county in which the justice resides. Appellant also introduced a properly certified transcript of the proceedings had and judgment taken before the Cook county justice of the peace, which transcript contained all the notices, affidavits, and proceedings required by the statutes, in-

cluding a copy of the verified answer filed in the case by appellant as garnishee defendant, in which answer an indebtedness of \$50.60 was admitted to be owing, and it was further claimed that appellee was a resident householder of Indiana, and as such under the laws of that state was entitled to an exemption of \$600 in personal property, and, further, that said sum of \$50.60 was due for wages earned by appellee and payable to him outside of the state of Illinois. It was further shown by the evidence that the first suit in attachment against appellant was dismissed on April 4, 1904, and a new suit immediately brought before the same justice, of which latter suit he was notified by letter, the receipt of which he acknowledged. Judgment was rendered in the second suit on the 27th of May, 1904, for \$18.90, and paid by appellant. Appellee in rebuttal introduced the following statute approved July 1, 1903: "Be it enacted by the people of the state of Illinois, represented in the General Assembly: That wages earned out of this state, and payable out of this state, shall be exempt from attachment or garnishment in all cases where the cause of action arose out of this state, unless the defendant in the attachment or garnishment suit is personally served with process; and, if the writ of attachment or garnishment is not personally served on the defendant, the court, justice of the peace or police magistrate issuing the writ of attachment or garnishment shall not entertain jurisdiction of the cause, but shall dismiss the suit at the cost of the plaintiff." It was agreed by the parties that the wages for which this action was brought were earned and payable within this state, and that all the statutes introduced in evidence were in force April 3, 1904, and thereafter until the time of the trial. The court below on motion struck out the Illinois transcript from the evidence, for the reason that it did not appear that the justice had jurisdiction over the person of appellee, under the statutes of that state. The Illinois statute of 1903 provides that wages earned and payable without the state of Illinois should be exempt from garnishment in cases where the cause of action sued on also arose outside of that state. It appears from the agreement of parties that appellee's wages were earned and payable outside the state of Illinois, but there was no evidence that the cause of action upon which the garnishment proceedings were predicated arose without that state. It is manifest, therefore, that upon appellee's theory want of jurisdiction over his person by the Illinois justice was not apparent, and the court was not justified in striking the transcript from the evidence. The court erred in striking out this transcript in any view of the matter. A complaint was filed before the Cook county justice upon a cause of action apparently within his jurisdiction, and proper notices were given to acquire jurisdiction over the persons of the de-

fendants. Appellant filed an answer disclosing the residence of the principal defendant, and the character of the fund garnisheed, which presumably were all the facts within its knowledge, and sufficient with the other pleadings and papers on file to invoke the judgment of the court upon the subject of its own jurisdiction. Every court possesses the power of determining its own jurisdiction, both as to the parties and the subject-matter of the action. It is well settled that, when an inferior tribunal is required to ascertain and decide upon facts essential to its jurisdiction, its judgment thereon is conclusive against collateral attack, unless the want of jurisdiction is apparent on the face of the proceedings. A decision on a jurisdictional question, either expressly or impliedly given by a tribunal, has the same binding effect upon the parties as a decision on any other matter within its cognizance in any pending case or proceeding, and an error in this respect must be corrected in the same manner as other errors are authorized to be corrected. *Van Fleet on Collateral Attack*, §§ 62, 63; *Gold v. Pittsburgh, etc., R. Co.*, 153 Ind. 232, 246, 53 N. E. 285; *Hlatt et al. v. Town of Darlington*, 152 Ind. 570, 53 N. E. 825; *Forsythe et al. v. City of Hammond*, 142 Ind. 505, 521, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; *Rhodes, etc., Co. v. Mattox et al.*, 135 Ind. 372, 34 N. E. 326, 35 N. E. 11; *Stoddard et al. v. Johnson*, 75 Ind. 20, 30; *Board, etc., v. Markle*, 46 Ind. 96; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215; *Evansville, etc., R. Co. v. City of Evansville*, 15 Ind. 395, 419. The law of Illinois, in the absence of any showing to the contrary, is presumed to be the same as that of our own state. *Blerhaus v. Western Union Teleg. Co.*, 8 Ind. App. 246, 263, 34 N. E. 581, and cases cited. We must accordingly proceed upon the assumption that the courts of Illinois would hold a judgment of a justice of the peace, apparently valid on its face, conclusive upon the parties when called in question collaterally. See *Rice v. Travis*, 216 Ill. 249, 74 N. E. 801. The judgment of the court of one state, when sued on, pleaded, or introduced in evidence in another state, is entitled to receive the same faith, credit, and respect that is accorded to it in the state where rendered, so, if valid and conclusive there, it is so in all other states. *Davis v. Lane*, 2 Ind. 548, 54 Am. Dec. 458; 23 Cyc. 1546, and other cases cited.

There is no showing that appellant failed to disclose any defense of which it had knowledge in the proceeding before the justice of Cook county, Ill., and, it appearing that appellee had personal knowledge of that suit, the following quotation is peculiarly applicable: "We need not here undertake to state the measure of the garnishee's duty in all cases, but it may be said, so far as the main action is concerned, that, where the principal defendant has personal knowledge of the suit, the former is not bound in any event to go further than to look to the jurisdiction, act

fairly, and make a full disclosure." *Baltimore, etc., R. Co. v. Adams*, 159 Ind. 668, 66 N. E. 43, 60 L. R. A. 396; *Baltimore, etc., R. Co. v. Hollenbeck*, 161 Ind. 452, 69 N. E. 136. Upon the facts shown in evidence, it is manifest that the court below did not give that faith and credit to the proceeding and judgment of the Illinois justice required by section 1 of article 4 of the Constitution of the United States, and erred in excluding the transcript of such proceedings and judgment from consideration.

The judgment is reversed, with directions to sustain appellant's motion for a new trial and for further proceedings not inconsistent with this opinion.

(169 Ind. 403)

MYERS v. STATE. (No. 21,023.)

(Supreme Court of Indiana. Nov. 26, 1907.)

1. NUISANCE—CRIMINAL PROSECUTION—STATUTES.

The criminal offense act (Acts 1905, p. 709, c. 169, § 535), punishing one who erects or uses any building for business which by causing noxious exhalations becomes injurious to the comfort and property of individuals or the public, section 537, punishing one who puts the carcass of any dead animal on any common, street, or alley, etc., to the annoyance of any persons of the state, create two distinct offenses, the first section punishing the conducting of a business that is of a character to emit unwholesome odors in a place that injuriously affects the health or comfort of the public or of individuals, and the second section relates but to a single act, the placing of a carcass of any dead animal in a specified place, etc., to the annoyance or injury of citizens.

2. INDICTMENT—DUPLICITY.

An indictment alleging that accused operated, near public highways and residences of divers inhabitants, a grease and fertilizer factory; that he hauled to the factory carcasses of dead animals, cut the same to pieces, cooked the bodies thereof, and caused offensive smells to escape; that large quantities of blood and offal of the bodies were permitted to run over the floor of the building; that he stored in the building and threw out on the ground nearby large quantities of the cooked meat and bones, whereby the air in and about the factory became noxious, and that the inhabitants residing in the neighborhood and the persons traveling on the highways were injured thereby—charges an offense under the public offense act (Acts 1905, p. 709, c. 169, § 535), punishing one who maintains any building for any business which by occasioning noxious exhalations becomes injurious to the comfort and property of individuals or the public, and does not charge an offense under section 537, punishing one who puts the carcass of dead animals on any field, street, etc., to the annoyance of any persons, and it is not bad for duplicity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 334–400.]

3. NUISANCE—INDICTMENT.

An indictment alleging that accused maintained a factory near public highways and residences of inhabitants, and that, by reason of the manner of operating the factory, smells emitted therefrom rendered the air impure and unhealthful, and injured the inhabitants residing in the neighborhood and the persons traveling on the highways, sufficiently shows that the public was injuriously affected under the public offense act (Acts 1905, p. 709, c. 169, § 535),

punishing one who maintains any building for any business which, by causing noxious exhalations, becomes injurious to individuals or the public.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Chris Myers was convicted of a nuisance, and he appeals. Affirmed.

L. E. Ritchey, for appellant. James Blingham, Atty. Gen., and White, Dowling & Cavins, for the State.

HADLEY, J. Appellant was convicted on an indictment charging him, in a single count, with maintaining a nuisance. His motion to quash the indictment, on the ground that two distinct, substantive offenses were charged in the same count, was overruled. The prosecution is under the public offense act of 1905 (Acts 1905, p. 584, c. 169), section 535 of which act, so far as the same affects the averments of the indictment, follows: "Whoever erects, maintains, continues, or uses any building, structure, or place for the exercise of any trade, employment, or business, * * * which, by occasioning noxious exhalations, or noisome or offensive smells, becomes injurious to the health, comfort and property of individuals, or the public, * * * shall, upon conviction, be fined not less than ten nor more than five hundred dollars." Section 537 provides, in part: "Whoever puts the carcass of any dead animal * * * or any spoiled meat, or any putrid animal substance * * * upon any common, field, meadow, lot, road, street, or alley, * * * to the annoyance or injury of any persons of this state, shall, on conviction, be fined not less than one dollar nor more than one hundred dollars." The indictment charges that one Chris Myers, on the 1st day of June, 1905, and continually to and since, to and including the day of making this presentment, at said county and state, near unto divers public highways and near residences of divers inhabitants, of said state, did unlawfully and injuriously maintain, operate, and control a certain building and factory, to wit, a grease and fertilizer factory, then and there fitted with boiler, engine, furnace, vats, and tanks, situate (upon certain described real estate). And the said Chris Myers did then and there continuously, up to the day of making this presentment, unlawfully haul and cause to be hauled to said factory a large number, to wit, 300 bodies of dead horses, cows, mules, and hogs that had died of various diseases, and did then and there unlawfully and injuriously skin, cut to pieces, tank, and cook the bodies of said animals, and during the cooking of said animals and cooling thereof, steam, noisome and offensive smells, stench, and stinks escaped from said tanks and vats, and large quantities of blood and offal of said bodies were and are permitted to run over the floor of said building, and upon the ground about the same; and that said animals were and are skinned upon the ground

near unto said buildings, so that the earth under and about said buildings is saturated with the blood and offal of said bodies, and the same, becoming putrid and rotten, stench, smells, and stinks arise therefrom, and large quantities of the cooked flesh and bones of said animals are stored in said building, and thrown upon the ground near unto said building, which said flesh, becoming putrid, decayed, rotten, and offensive, smells and stench arise therefrom; that, by reason of the unlawful maintaining, conducting, and operating said building and factory, as aforesaid, occasioning the smells and stench as aforesaid, the air in and about said factory and building is saturated with noxious and noisome odors, and is thereby rendered and made impure, unhealthful, and offensive, and the inhabitants residing in the neighborhood of said factory and buildings and the persons travelling upon said highways are annoyed and injured thereby.

We are unable to accept the position taken by appellant that single count of the indictment contains two separate and distinct substantive offenses—one under section 535 and the other under section 537, supra. It is safe to affirm that it was the legislative intent to cover by the above sections distinctly different acts. It will be noted that section 535 denounces the use or maintenance of any building, or any place for the carrying on of any trade or any business, which by occasioning noxious exhalations, or noisome smells, becomes injurious to the health and comfort of individuals, or the public. What is aimed at by this section is the conducting of a trade or business that is of a character to emit noxious and unwholesome odors in a place that injuriously affects the health or comfort of the public or of individuals; while section 537 relates, not to the carrying on of a trade or business, but to a single act, namely, the placing of the carcass of any dead animal, or spoiled meat, or any putrid animal substance, upon any field, lot, etc., to the annoyance or injury of citizens. Bearing in mind the distinction between the two sections, it is plain that no averment of the indictment has reference to section 537. The first branch of the charge is that the defendant "did unlawfully and injuriously maintain, operate, and control a 'building and fertilizer factory,'" and what is termed the second branch of the indictment consists wholly of a description of the manner in which the factory was operated, and the things done that constituted the nuisance, namely, the daily hauling to the factory of a large number of bodies of dead animals that were decaying and putrid, skinning and cutting up said bodies on the ground near the building whereby the ground became saturated with the blood and offal of said animals, cooking the putrid flesh of said animals in vats, storing in the building and throwing out upon the ground nearly large amounts of the cooked meat and bones, whereby noxious, offensive, and unwholesome odors

were evolved, rendering the air in and about said building impure, sickening, and offensive, and whereby the inhabitants residing in the neighborhood of said building and traveling upon said highways were and are annoyed thereby. The indictment contains surplus matter; but it cannot be justly condemned for duplicity.

It is further contended that the indictment does not state a public offense, in this: that it fails to show that the factory was located in a public place, or that any part of the public was within the radius of the atmosphere that became filled and impregnated with the noisome and unwholesome odors and smells emitted from the factory. It is averred that the defendant maintained the nuisance "near unto divers public highways, then and there situate, and also near unto the dwelling houses and residences of divers inhabitants of said state; * * * that, by reason of the manner aforesaid of operating said factory and the smells and stenches emitted therefrom as aforesaid, the air in and about said building and factory is filled and impregnated with noxious, sickening, and offensive odors, and thereby rendered impure and unhealthful, and the inhabitants residing in the neighborhood of said factory and building and the persons traveling on said highways are annoyed and injured thereby." We think the facts stated sufficiently show that the public was injuriously affected.

In *Acme Fertilizer Company v. State*, 34 Ind. App. 346, 350, 72 N. E. 1037, 1038, 107 Am. St. Rep. 190, the charge was that the "defendant did erect and maintain a public nuisance to the injury of many citizens of the state of Indiana by erecting a factory, etc., * * * near the dwelling houses and homes of divers citizens of said county, * * * and did wrongfully create and suffer to escape from said building into the open air, divers noisome, offensive, and poisonous smells, so that the air for a great distance * * * was thereby impregnated with said smells and rendered noisome and offensive and injurious to the health, comfort, and property of many citizens of the state of Indiana residing in the neighborhood of said building," and it was held sufficient as showing an injury to the public. In *Commonwealth v. Perry*, 139 Mass. 198, 29 N. E. 856, under a similar statute, it is charged that the alleged nuisance was "near the dwelling houses of divers good citizens of said commonwealth and also near divers streets and highways there situate"; and it was held that the words, "and the air thereabouts was greatly filled and impregnated with many noisome, offensive, and unwholesome smells and odors, and has been corrupted and rendered insalubrious, to the great damage and common nuisance of all the citizens of said commonwealth there being, dwelling, passing, and repassing," were sufficient for the same purpose. Likewise in *Horner v. State*, 49 Md. 277, where the charge was "near unto divers roads and streets, and

near unto the dwelling houses of divers inhabitants of the state [the defendant maintained the nuisance complained of], * * * the words "divers noisome, offensive, and unwholesome smokes, smells, and stenches were from there emitted and issued, so that the air was then and there greatly filled and impregnated with said smoke, smells, and stenches, and was and is rendered offensive, and unwholesome, to the great damage to the inhabitants of the state, there inhabiting and passing through said roads and highways," were held sufficient to aver a public injury. Judgment affirmed.

(169 Ind. 339)

**SOUTH EAST & ST. L. RY. CO. et al. v.
EVANSVILLE & MT. V. E. RY. CO.**
(No. 20,906.)

(Supreme Court of Indiana. Nov. 26, 1907.)

**1. STREET RAILROADS—HIGHWAYS—RIGHT TO
CROSS OTHER RAILROADS.**

A railroad constructing its track across a highway acquires only the privilege of crossing in transportation of freight and passengers, subject to all private uses to which the highway may be devoted under the law, including the right of an interurban railroad to locate on the highway and cross the track, pursuant to the authority of the board of county commissioners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 112–114.]

2. EMINENT DOMAIN—COMPENSATION—NECESSITY OF MAKING.

The owner of a steam railroad is not entitled to compensation for the crossing of its track at a public highway intersection by an electric interurban road built on the highway with the consent of the board of county commissioners.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 171–179.]

**3. CONSTITUTIONAL LAW—DETERMINATION OF
CONSTITUTIONAL QUESTIONS—NECESSITY OF
DECISION.**

Acts 1901, p. 461, c. 207, and Acts 1903, pp. 92, 125, cc. 34, 59, providing for proceedings and compensation for the crossing of steam railroad tracks by the tracks of electric interurban roads at places not within the limits of any highway, and declaring that the acts shall not abridge the right, under existing laws, of an interurban road to locate its road on a public highway crossing the tracks of any steam railroad at a highway intersection without special proceedings, relate wholly to crossings of interurban railroads with other railroads at other places than highway intersections, and do not grant an interurban road the right to cross a steam railroad at a highway crossing, and the court on determining the right of an interurban road to cross a steam railroad at a highway crossing will not determine the constitutionality of the acts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 43.]

4. STATUTES—TITLE OF ACTS—SUFFICIENCY.

The title of Acts 1903, p. 521, c. 167, entitled "An act concerning highways," is broad enough to cover a provision authorizing an interurban electric railroad to build its road on any public highway on procuring the consent of the board of county commissioners; the right of an interurban electric railroad to cross a steam railroad track at a highway crossing

being incident to the franchise granted to operate an electric road on a public highway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 178.]

5. APPEAL—QUESTIONS IN LOWER COURT—FACTS ADMITTED.

Where, in an action by a steam railroad to enjoin an interurban electric railroad company from crossing its track without acquiring the right by condemnation proceedings, both the complaint and answer allege that the electric railroad "is a corporation organized under the laws of the state" and engaged in the construction of a line from one city to another, the objection of the steam railroad, raised for the first time on appeal, that there is no statute under which a railroad such as that described in the answer can be incorporated, is untenable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1066.]

Appeal from Circuit Court, Posey County; O. M. Welborn, Judge.

Action by the South East & St. Louis Railway Company and another against the Evansville & Mt. Vernon Electric Railway Company. From a judgment for defendant rendered on overruling a demurrer to the answer, plaintiffs appeal. Affirmed.

C. A. De Bruler, for appellant. F. P. Leonard, for appellee.

MONTGOMERY, J. Appellants, as owners of a steam railway extending from Evansville to East St. Louis, brought this action to enjoin appellee from constructing an interurban electric railroad across their track without first acquiring the right so to do by condemnation proceedings. Appellee answered the complaint as follows: "Defendant, for answer to plaintiffs' complaint herein, says that said defendant is a corporation duly organized and incorporated under the laws of the state of Indiana governing the organization, incorporation, construction, and operation of electric interurban railways, and as such is now engaged in the construction of a line of interurban electric railway from the city of Evansville, Ind., to the city of Mt. Vernon, Ind., to be operated as such an electric railway between such points only upon the completion of the same. Defendant further avers that, in the construction of its said road, it is necessary to cross the track of the plaintiffs' road at a point about four miles east of the city of Mt. Vernon; that such point is within the limits of a certain public highway, of Posey county, Ind., a highway along, over, and across which defendant is authorized by the board of commissioners to construct an electric railroad by order made by said board August 8, 1905, and that in crossing plaintiffs' track said defendant's track touches upon the right of way of plaintiffs' and their track within the lines of said highway only; that defendant in making said crossing intends to cross plaintiffs' track at grade and to and is using a standard railway crossing, to wit, the kind of crossing commonly used for such purposes; that in making and placing such crossing

defendant will so construct and is so constructing the same in a sufficient manner not unnecessarily to impair the usefulness or injure the plaintiffs in their franchises, and so as to afford proper security for life and property in the operation of plaintiffs' and defendant's road." Appellants' demurrer to this answer, on the ground of insufficient facts, was overruled, to which ruling appellee excepted, and, declining to plead further, final judgment was rendered in favor of appellee. The sufficiency of appellee's answer is the only question presented for decision by this appeal.

Appellants' counsel contends that the construction of an electric interurban railroad along a public highway across the track of a steam railroad is a taking of private property within the meaning of the constitutional provisions, and cannot be done without first causing compensation therefor to be assessed and paid or tendered. Street railroad and other kindred companies have been authorized since 1879 to locate and construct their tracks along and upon a rural highway by procuring consent of the board of commissioners of the county in which such highway is situated. Sections 5465, 5466, 5467, 5468, Burns' Ann. St. 1901. Appellee's answer avers that its railroad was located upon the highway described in pursuance of consent so to do obtained from the board of commissioners of the county. It is further alleged that the appellee proposed to construct a standard crossing in such manner as not unnecessarily to impair the usefulness or injure the franchise of appellants; and so as to afford security to life and property in the operation of both roads. It does not appear from the pleadings whether the railroad was senior or junior to the highway crossed. We need not decide whether seniority would enlarge the rights of the railroad with respect to the matter under consideration, since, at all events, the exercise of its franchise over the crossing was subject to the burden of the public easement in the highway. Assuming that the railroad was constructed across the highway, its owners thereby acquired merely the privilege of crossing in the transportation of freight and passengers, subject to all proper uses to which the highway might be devoted under the law. The owners of the railroad were bound to know that a street or interurban railroad might thereafter be lawfully located upon such highway and across the track at that point. The board of commissioners, in whom the authority was lodged, determined that the location and construction of the interurban road upon the highway would subserve the convenience of the traveling public. When appellants obtained the privilege of crossing this highway, they did it with the knowledge and upon the condition that they must submit to such growing inconveniences as might result from the development of the country, among which would be the wants and demands of the pub-

lic for better facilities in traveling. Appellants complain that their track will be cut and their private rights invaded. Such interference must have been contemplated when their road was located across a public highway. It appears that the crossing is to be made at the expense of appellee, and in such manner as to cause the least practicable interference with the operations of appellants' road, and, in our opinion, no encroachment upon the legal rights of appellants is threatened, and none of its property will be taken or damaged in contemplation of law. Our conclusion, therefore, is that the owners of a steam railroad are not entitled to recover compensation for the crossing of its track, at a public highway intersection, by an electric interurban road built upon such highway with the consent of the board of commissioners of the county, nor can such crossing be enjoined until compensation therefor shall have been assessed and paid or tendered. Chicago, etc., Ry. Co. v. Whiting Str. Ry. Co., 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 284; 3 Elliott on Railroads, § 1135; Southern Ry. Co. v. Atlanta Ry. & Power Co., 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; General Electric Ry. Co. v. Chicago, etc., Ry. Co., 184 Ill. 588, 597, 56 N. E. 963; Chicago, etc., Ry. Co. v. West Chicago St. Ry. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; Pittsburgh, C. & St. L. Ry. Co. v. West Chicago St. R. Co., 156 Ill. 385, 40 N. E. 1014; Louisville & N. R. Co. v. Bowling Green R. Co., 110 Ky. 796, 63 S. W. 4; Elizabethtown, etc., R. Co. v. Ashland, etc., St. R. Co., 96 Ky. 347, 26 S. W. 181; Chicago, B. & Q. R. Co. v. Steel, 47 Neb. 741, 66 N. W. 830; Kansas City, etc., R. Co. v. St. Joseph, etc., R. Co., 97 Mo. 457, 10 S. W. 826, 3 L. R. A. 240; Lynn & Boston R. Co. v. Boston & Lowell R. Co., 114 Mass. 88; Morris & Essex R. Co. et al. v. Newark, etc., Ry. Co., 51 N. J. Eq. 379, 29 Atl. 184; West Jersey R. Co. v. Camden, etc., Ry., 52 N. J. Eq. 31, 29 Atl. 423; Atchison, T. & S. F. Ry. Co. v. General Electric Ry. Co., 112 Fed. 689, 50 C. C. A. 424; Dubois, etc., R. Co. v. Buffalo, etc., Ry. Co., 149 Pa. 1, 24 Atl. 179; Market St. Ry. Co. v. Central Ry. Co., 51 Cal. 583; New York, etc., R. Co. v. Forty Second St., etc., R. Co., 50 Barb. 309.

Appellants' counsel contends that the act of March 11, 1901 (Acts 1901, p. 461, c. 207), the act of February 26, 1903 (Acts 1903, p. 92, c. 34), and the act of March 3, 1903 (Acts 1903, p. 125, c. 59), are all unconstitutional and void, and cannot confer upon the appellee the right to cross appellants' right of way and tracks. The first of said acts provides for special proceedings and compensation for crossings only at places "not within the limits of any street or highway"; and the last two acts in substance stipulate that their provisions shall in no wise impair or abridge the right, under existing laws, of any street, interurban, or suburban railway company authorized to locate its road upon a public

highway to construct such road across the tracks and right of way of any railroad at a street or highway intersection, without first obtaining consent of the owner of the railroad to be crossed, and without special proceedings. It is quite plain that the provisions of each of said acts relate wholly to crossings of street, interurban, and suburban railroads with other railroads at places outside of public highway intersections. None of said acts purports to grant the right asserted, and the sufficiency of appellee's answer does not depend upon the validity of any of them, hence we are not warranted in determining the constitutional questions suggested.

The act of March 29, 1879 (Acts 1879, p. 175, c. 78), empowered any street railroad or "other company organized under the laws of the state of Indiana, for similar purposes," desiring to build a street railway upon any highway outside of a city, to do so after procuring consent of the board of commissioners of the county. It is also provided by "An act concerning highways," approved March 8, 1905 (Acts 1905, pp. 521, 533, c. 167), that any such company "desiring to build an interurban electric railway outside of any city or town on any public highway may do so by procuring the consent of the board of commissioners of the county in which such highway is situated." It is argued that the latter act cannot clothe appellee with authority to cross appellants' track, inasmuch as the subject of railroad crossings is not embraced in the title. The title is broad enough to cover, and the body of the act does effectually authorize, the location, construction, and operation of electric interurban railroads upon public highways. It has already been stated that appellants merely have the franchise or privilege of passing over the intersection in the proper operation of their road, subject to the right of the public to use the highway in all ways and by all means heretofore or hereafter legally authorized. The right to operate an electric interurban railroad, designed to facilitate public travel, upon and along the highway, was one of the reserved uses of the public. The right to cross appellants' track was necessarily incident to the franchise granted by the county board to construct and operate the electric road upon the public highway. It follows that there was no requirement that the subject of railroad crossings be mentioned in the title of this act.

It is finally contended that there is no statute in Indiana under which a railroad, such as that described in the answer, can be incorporated, and for that reason appellee has no right to cross appellants' right of way and track. Both appellants' complaint and the answer assailed aver that appellee "is a corporation organized under the laws of the state of Indiana," and engaged in the construction of an electric interurban railway. This objection was not made one of the grounds of appellants' complaint for injunc-

tion, but is suggested for the first time in appellants' brief in challenging the sufficiency of appellee's answer. If it were conceded that appellants could raise such question in this collateral way, still as the matter stands before us it is admitted that appellee is duly incorporated under the laws of this state, and has been granted the right by the proper authority to construct a railroad upon the public highway described, and is apparently acting within its charter rights. There is nothing in the answer to advise us whether or not appellee owns and operates a street railroad within either of the terminal cities, in connection with its proposed interurban road, and we are not to be understood as intimating that such fact is at all necessary. It will suffice to say that upon the admitted facts appellants' objection is clearly untenable.

Our conclusion is that appellee's answer is sufficient, and the court did not err in overruling appellants' demurrer thereto for want of facts.

The judgment is affirmed.

(169 Ind. 319)

CHICAGO & E. R. CO. v. LAWRENCE.
(No. 20,853.)

(Supreme Court of Indiana. Nov. 26, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

In an action against a railroad company for the death of a switchman caught between an engine and a car which had been kicked onto a spur, evidence held insufficient to show the switchman's meaning in the use by him of the words "she will clear," applied to the car when it was placed on the spur, as bearing on the question of his contributory negligence in failing to discharge his duty of seeing that the car was placed so far in on the spur that trains on the principal track with their crews working and riding on them, could pass in safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 987, 996.]

2. TRIAL — VERDICT — SPECIAL INTERROGATORIES.

Where, in an action against a railroad company for the death of a switchman caught between an engine and a car kicked onto a spur, the question whether the car had been moved after the switchman placed the car on the spur was material and was controverted, a special interrogatory submitting the question whether a member of the crew, immediately after the car was placed and left standing on the spur, said to the switchman, referring to the car, "Will she clear?" and whether the switchman answered, "She will clear," was erroneous, because it assumed as a fact that the car, when it caused the switchman's injuries, was standing in the same spot it occupied when he announced it was "in the clear."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 841.]

3. SAME.

It is not error to overrule a motion for a more specific answer to a special interrogatory which should not have been given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 852.]

4. EVIDENCE—OPINION EVIDENCE — CONCLUSION OF WITNESS.

In an action against a railroad company for the death of a switchman caught between an

engine and a car kicked onto a spur, a question whether it was the duty of the switchman to determine, when a car was set on a spur, whether it was sufficiently in on the spur so that an engine might pass with safety to the crew, was objectionable, as calling for a conclusion of law or ultimate fact, since the duty to set the car in a particular manner to meet particular emergencies depended on the character of the employment and the rules thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149-2151.]

5. SAME.

In an action against a railroad company for the death of a switchman, a question whether there were at the time of the accident any written rules of the company governing switchmen was properly excluded, as the rules should be exhibited, identified, and introduced, and their interpretation was not for the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149-2151.]

6. SAME.

In an action against a railroad company for the death of a switchman caught between an engine and a car which had been kicked onto a spur, the question whether, if the switchman had been facing the west with his left hand holding the grabiron, with his lantern in his right hand, he could, by the light of the lantern, have seen the car on the spur, was improper, for the answer depended on the knowledge of the witness of the power of the lantern, the strength of the switchman's vision, the density of the darkness, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149-2151.]

7. APPEAL — HARMLESS ERROR — ERRONEOUS EXCLUSION OF EVIDENCE.

Error, if any, in excluding evidence subsequently admitted, is not prejudicial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4200-4203.]

8. MASTER AND SERVANT—INJURY TO SERVANT — NEGLIGENCE.

Where an action against a railroad company for the death of a switchman was founded on its negligence in disobeying a city ordinance, a rule of the company that persons in accepting employment assumed all risks was immaterial; the company having no power to relieve itself by contract from the effect of disobeying the ordinance, and a disobedience by it was not a hazard assumed by the switchman.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 166, 168.]

9. SAME—EVIDENCE.

In such action a rule that the company desired its employees not to incur risk from which they could protect themselves, and enjoined on them to take time necessary to do their duty with safety to themselves, was properly excluded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 947.]

10. SAME — CONTRIBUTORY NEGLIGENCE — WEIGHT AND SUFFICIENCY.

In an action against a railroad company for the death of a switchman caught between an engine and a car which had been kicked onto a spur, evidence held to authorize a finding of the switchman's freedom from contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 987-996.]

On petition for rehearing. Overruled.
For former opinion, see 79 N. E. 363.

HADLEY, J. Guided by the points and arguments of appellant's counsel in their

brief on petition for a rehearing, we have re-examined the questions involved in this case, and feel reassured that the conclusions we announced in the original opinion are correct.

Appellant's counsel, however, insist that certain questions arising under the motion for a new trial were not waived, and should be decided. The first relates to the court's action in overruling the appellant's motion to require the jury to make more definite and direct answers to certain interrogatories submitted to it, and which it had attempted to answer. The motion was addressed to a half dozen or more interrogatories, but only three of the number, to wit, 40, 41, and 53, have been presented for review by a motion for a new trial. The interrogatories relate to the setting of a car of coal in upon a spur from the principal track. Lawrence, the decedent, was at the time the rear, or field, brakeman, and as such it was his duty to see that the car was placed on the siding at a distance from the frog that would clear the principal track. He had accompanied the car in onto the spur, and answered the inquiry of a fellow brakeman, "She will clear." The three interrogatories in the record are, in substance, as follows: "(53) Did Oscar Collins, a member of the same switching crew, immediately after the coal car was placed and left standing on the spur track (where it stood at the time Lawrence received his injuries), say to Lawrence, referring to the coal car, 'Will she clear?' and did Lawrence answer 'She will clear'? Ans. Collins made such inquiry, and received an affirmative answer, but no evidence to show that the car was at the point where Lawrence received his injuries at the time he answered Collins." "(40) Did Lawrence, by the use of the words, 'She will clear,' mean that said car was standing in far enough on the spur track, so that all engines, with their crews working and riding on and about them, could pass and repass said car with safety to said crews and each member thereof? Ans. No evidence what he meant. (41) Q. If you answer the last question 'Yes,' did Lawrence exercise his own judgment in determining whether the car would clear? Ans. No evidence as to how he determined it."

With respect to No. 40, we do not see how it was possible for the jury to make a more positive answer. So far as appellant has pointed out, or we are able to discover, there was not a shadow of evidence before the jury that "in the clear," meant anything more than that the car was far enough in to enable a train on the main track to pass it without collision, or that it meant that it was far enough in to enable engines with their crews working or riding on or about them to pass and repass with safety to the crews. There was evidence to the effect that the company had no clearance posts at the place, and no written or printed rules relating to the setting of cars on sidings, and no rule defining what should constitute or be

understood by the term setting a car "in the clear." The yardmaster, in testifying for the railroad company, in answer to the question, "What do you mean by 'in the clear?'" said: "I mean that the car should be in far enough to clear with safety all men working between the tracks. They should be in far enough for all the employes to ride back and forth with safety." The witness on cross-examination was asked if he drew his conclusions as to the duties of the decedent, in relation to the setting of the coal car, from any written or printed rule of the company, and he answered, "No, sir; only from practical work." The yardmaster gave the jury, not what was generally meant by the decedent and other employes of the company by the words "in the clear," but what he meant as gathered from practical work, and not from any rules or definitions from the company. The evidence further shows that Lawrence had been working with that engine and switching crew, as field or rear brakeman, but three days, and there was not a particle of evidence before the jury to show that he had ever been instructed or informed as to how far a car should be placed from the passing track to be deemed in the clear, or to show whether he understood that a car would be "in the clear" when only far enough in to avoid collision with a passing train, or whether it should be far enough in to afford room and safety for employes between the car and a passing train. As to what he meant everything was in uncertainty. In this state of the evidence, it is plain that the jury could not have answered interrogatory No. 40 any more definitely than it did. Any different answer would necessarily have been founded on guesses and conjectures. And, as was said in a recent case, "verdicts must stand upon evidence, and not upon surmise or conjecture." *Railway Co. v. Miller*, 149 Ind. 490, 508, 49 N. E. 445.

Interrogatory No. 41 was to be answered only in the event the jury answered No. 40 in the affirmative, which it did not do. But, it may be said, with respect to the merits of the question, that every syllable that has been written concerning the absence of evidence relating to the fact inquired of in the preceding interrogatory may be applied with equal accuracy and force to No. 41.

Number 53 rests upon no sounder basis. In the first place, it artfully assumes as an established fact that the coal car when it caused Lawrence's injuries was standing in the same spot it occupied when he announced it was "in the clear." Whether the car had been moved after Lawrence placed it to the place where the injury occurred was a material and controverted fact relating to contributory negligence, and the court had no right to assume the fact to exist, one way or the other. The interrogatory should not have been submitted to the jury in the first instance, and it was not error to overrule the motion for a more specific answer. The

only competent part of the interrogatory was fully and specifically answered. *Railway Co. v. Goddard*, 25 Ind. 185, 191. Appellant's counsel in the examination of one of appellee's witnesses asked him the following question, which the court ruled, on appellee's objection, need not be answered: "Q. You may state if it was one of the duties of the rear switchman, at the time Lawrence was injured, to determine when a car was set in on a spur track, whether the car was sufficiently in on the spur track, so that an engine might pass with safety to the crew and all persons working or riding on the train." This question called for a conclusion of law or ultimate fact that was within the province of the jury, under proper instructions from the court, and not proper for the witness to draw. The duty to set the car in a particular manner to meet particular emergencies altogether depended on the character and limitations of the employment as the same may be defined and illustrated by the terms of the contract, and established rules and customs of the particular employment. It would have been proper to have inquired about what acts of service belonged to the position of field switchman, and which the decedent would have been held to have agreed to perform by his acceptance of the position, or to have introduced any pertinent rule of the company, or established custom with which he was acquainted, and from these subsidiary or evidentiary facts it was the province of the jury to determine the main, or ultimate, conclusion of duty. Men of equal qualification might differ as to whether it was the decedent's duty to set the car at a particular distance from track 72 under all the other facts and circumstances that surrounded him at the time, and the determination of such questions are generally for the jury. The question is well illustrated in the case of *Furniture Company v. Colvin*, 32 Ind. App. 398, 412, 69 N. E. 1032. For the same reasoning applied to a complaint, see *Pittsburgh, etc., Co. v. Lighthelser*, 163 Ind. 247, 251, 71 N. E. 218, 660; *Pittsburgh, etc., v. Peck*, 165 Ind. 537, 540, 76 N. E. 163. There are a number of other like questions relating to the duty of the decedent that are ruled by the same principle.

The further question was asked and refused. "Q. You may state whether or not it had been the custom and had been for a considerable time previous to this injury, for the defendant company in its Hammond yards to use railroad engines for switching purposes." The question was wholly immaterial and properly refused. A witness was asked whether or not there were, at the time of the accident, any written or printed rules of the company, governing the duties of field switchmen in the Hammond yards, concerning the placing of cars on switches leading off from the main track. The court refused the question, holding that the rules themselves should be first exhibited, identi-

fied, and introduced, and that their interpretation was not a matter for the witness. This was correct. During this witness' cross-examination the further question was asked and refused. "Q. If Lawrence had been facing the west, with his left hand holding the grabiron, with his lantern in his right hand, could he, by the light of the lantern, have seen the coal car?" An answer to the question must have depended upon the witness' knowledge of the power of the lantern, the strength of Lawrence's vision, the density of the darkness, etc., and, in the absence of such knowledge, the witness' answer must necessarily have been founded on surmise and conjecture, and was correctly refused. Besides, no harm could have resulted to appellant, for the witness proceeded to state the lantern's probable radius of light, and that there were no intervening objects between the engine and coal car.

The court also denied the introduction of the following rules of the company: "Rule 203. * * * All persons are notified that in accepting or retaining employment with the company, they thereby assume all risks incident to such employment, including the risks arising from the acts of co-employees." Rule 207, which was to the effect "that the company desired its employees not to incur risk from which they could protect themselves and enjoined upon them, to take, in all cases, the time necessary to do their duty with safety to themselves, and not subject themselves to unnecessary risks." With respect to the first, the rule is wholly immaterial since the action is founded on the negligence of the defendant in disobeying a city ordinance, against which the company had no power to relieve itself by contract, nor was it a hazard assumed by the decedent in his employment. The second is but an exhortation to care, and we do not see how it could aid the jury in determining the case upon its merits.

Finally, it is insisted that the verdict is not sustained by sufficient evidence. There is no dispute but the defendant was operating in its switchyard within the city of Hammond a locomotive, backward and forward, in the nighttime, without a headlight on the rear or outer end of the tender, in defiance of an ordinance forbidding it. This sufficiently established the negligence of the defendant. On a very dark night, while the locomotive was running backward without a headlight on the then forward end of the tender, the decedent, while climbing out of the cab of the engine to the ground in the discharge of duty, was caught and crushed between the engine cab and a coal car standing on a spur but 8½ inches from the passing locomotive. It is at least strongly probable, if the headlight had been on the forward end of the tender, where the ordinance provided it should be, the decedent would have seen the dangerous proximity of the car in time to have avoided it.

But it is earnestly urged by appellant's counsel that the evidence shows, without controversy, that the decedent, by his own carelessness and inattention to business, contributed to his own injury. There is no conflict in the evidence as to the following facts: The deceased was a mature man, possessed of all his faculties, and of ordinary judgment. He had been working as rear or field switchman, with the crew and locomotive with which he was engaged at the time of his injury for three days. The company had no written or printed rules defining the duties of field switchman in setting cars from a main track onto a spur, or the distance such cars should be set in on the spur, or at what distance from the passing track should be deemed "in the clear." There was a custom prevailing in the yard at the time by which employes determined when a car was in the clear by placing one foot on the inner side of the nearest rail of the passing track and extending the arm and hand toward the standing car, and, if the car was not thereby touched by the finger tips, it was held to be "in the clear"; but there was no evidence that the decedent had knowledge of such custom, either actual or constructive. When the coal car was kicked in on the spur, Lawrence rode it in, and, when it stopped, he answered the inquiry of a fellow switchman that, "It will clear." The two switchman then returned to the train, which proceeded northward, passing by the standing car that had just been placed, the locomotive then headed to the north, and having a brilliantly burning headlight in front. The engineer was at his station on the right of the locomotive, and, when passing the car, was looking at an object on the right of the road, and did not see the car standing on the left. The fireman was also at his post on the left of the engine, and from the headlight on the head of the locomotive did see, as they passed, the car standing on the spur. In about five minutes the train returned southward to do some work on the spur track referred to. The locomotive was again backing, drawing some cars after it, and having no headlight on the then advancing end of the tender, but a signal lantern. When the train began its return southward, Lawrence got into the cab of the engine. When they had arrived in the vicinity of the spur intersection, Lawrence, with a signal lantern in his right hand, and facing outward and seizing the grabiron of the cab, with his left hand, stepped out and down onto the step of the cab, and was there caught and crushed between the cab and the coal car, which at that moment was standing but 6½ inches from the cab of the engine. There were no lights or clearance posts near the place of injury and plenty of room on the spur to set the car in a place of safety.

It should be borne in mind that the burden of proving contributory negligence rested upon the defendant. To establish such fact appellant has but three facts to rely upon: (1)

It was Lawrence's duty to set the car far enough in on the spur to be in a position of safety to passing trains on track 72. (2) Did he place it and announce that it would clear? (3) Within five minutes after placing it he was injured by the car by reason of its being in a dangerous proximity to track 72. These facts do not necessarily make out a case of contributory negligence. If the car had been safely set on the spur by the decedent, and had been moved by some force from a place of safety to a place of danger, without the knowledge or fault of the decedent, he was blameless. It must be presumed that he was blameless. The jury was justified in finding the general presumption strengthened by the facts that after the car had been set the train of cars, locomotives, and crew passed by it without any collision or interference, and without its being observed, in the brilliant headlight of the locomotive, by any one on the train, except by the fireman, who testified he saw the car as they passed, but he was not asked by either party where it was, or how near it was to track 72. The evidence shows that the spur was on about the same level of track 72. There was no evidence whatever as to whether the wind was blowing, or whether other cars were being shifted on the spur, or that the coal car, when it caused the injury, was standing at the same place where it was left by the decedent. The defendant failed to ask the fireman how far away from the cab of the engine the car was standing as they passed it going north. The onus being upon the defendant to establish the decedent's negligence in setting the car, we are unable to say that the facts and circumstances described were not sufficient to justify the jury in its conclusion that contributory negligence was not made out.

Petition overruled.

(169 Ind. 397)

WILLIAMSON v. HAUSER et al. (No. 21,020.)

(Supreme Court of Indiana. Nov. 26, 1907.)
HIGHWAYS—DISCONTINUANCE—PROCEEDINGS—APPEAL.

Acts 1905, p. 523, c. 167, § 5 (Burns' Ann. St. Supp. 1905, § 6730), relating to proceedings before the board of commissioners for the location, vacation, etc., of highways, provides for the filing by a landowner, etc., of an application for damages with the board at any time before it has taken final action. Section 9 (page 524) provides that, if any resident freeholder shall remonstrate against the public utility of the highway, reviewers may be appointed. Section 10 (page 524) provides for appeals from orders of the commissioners to the circuit court. *Held*, that a landowner who did not appear before the commissioners cannot present an application for damages or a remonstrance that the proposed vacation is not of public utility for the first time in the circuit court on appeal.

Appeal from Circuit Court, Huntington County; J. T. France, Special Judge.

Petition by Henry Hauser and others to the board of commissioners of Huntington county to vacate a highway. Petition allow-

ed, and Lydia Williamson, a landowner, appealed to the circuit court. Judgment for petitioners, and Williamson appeals. Affirmed.

Kenner & Kenner and C. K. Lucas, for appellant. Spencer & Branyan, for appellees.

JORDAN, J. This proceeding was instituted by appellees on January 29, 1906, before the board of commissioners of Huntington county to vacate a certain highway. The action is based upon section 1 of an act of the Legislature "concerning highways," approved March 8, 1905 (Acts 1905, p. 521, c. 167; section 6726, 4 Burns' Ann. St. Supp. 1905). This section provides "that whenever twelve freeholders of any county, six of whom shall reside in the neighborhood of the highway proposed to be located, vacated or a change therein made, shall petition the board of commissioners of such county for the location, vacation or change thereof, such board, if satisfied," etc. Upon filing the petition in this case, the board of commissioners, as required, appointed viewers, who subsequently filed their report, setting forth therein that the proposed vacation of the highway in controversy would not be of public utility. Thereupon Hauser, one of the petitioners, filed objections in the nature of a remonstrance to this report, alleging that the vacation would be of public utility and requested that reviewers be appointed. The board of commissioners appears to have complied with this request and reviewers were accordingly appointed, who thereafter reported that the vacation of the highway would be of public utility, and that it ought to be vacated. Upon the filing of this report, the board on May 7, 1906, ordered and adjudged that the road be vacated. Appellant did not appear in the proceedings before the board of commissioners. On June 6, 1906, she filed an affidavit with the county auditor, alleging therein that she was the owner of certain land described, which she averred adjoined or was contiguous to said highway, and she further alleged that the vacation thereof would affect her said land, and damage the sale thereof. She further stated in her affidavit that she was not a party to "the cause as presented before the commissioners' court." On the same day, June 6, 1906, she filed with, and to the approval of, the auditor of the county her appeal bond, wherein she recited that she had appealed to the circuit court from an order of the board of commissioners made in said proceeding on May 7, 1906. Upon the filing of the affidavit and bond, the auditor appears to have certified all the papers and entries in the case to the Huntington circuit court. At the September term, 1906, of that court, appellant appeared therein, and over the objections and exceptions of appellees was, by the court, permitted to file, for the first time, what is termed a "plea" or "answer in the nature of a remonstrance."

This paper is in two paragraphs. The first recites "that now comes Lydia Williamson, and, as an answer in the nature of a remonstrance," etc., and then proceeds to allege that said remonstrator is the owner of land abutting on the highway described in the petition, and that she is affected thereby, in this: That the proposed vacation "will entirely cut off ingress and egress to a cemetery, and will discommode and inconvenience the entire neighborhood," and will not be of public utility. Wherefore she prays that the court dismiss the petition. The second paragraph set out facts tending to show that she will be damaged by the vacation of the highway, and damages in the sum of \$500 are demanded. Appellees successfully moved to strike out the first paragraph of said remonstrance. After the trial court had ruled upon several other motions, the case was submitted to the jury for trial. The jury returned a general verdict against appellant, and along with this verdict returned answers to interrogatories. These special findings, however, are not set out in the record. Appellant unsuccessfully moved for a judgment in her favor upon the answers to interrogatories, and she also moved for a new trial upon the statutory grounds, and for the further reason that the court erred in overruling her motion to require appellees to open and close the case. The motion for a new trial the court denied, and rendered judgment on the verdict against appellant. She appeals, and assigns as error, first, "that the court erred in striking out the first paragraph of the remonstrance"; second, "in overruling the motion for new trial." The only errors discussed by her counsel relate to the rulings of the court in striking out the first paragraph of the remonstrance and in denying the motion to require appellees to assume the opening and closing of the case at the trial.

The act upon which this proceeding is based appears to be a revision of the statute concerning highways enacted in 1853. It may be said to supersede section 6727, Burns' Ann. St. 1901, and the intervening sections to and including section 6854. These sections of the act of 1853 make provision for the location, change, vacation, and repair, etc., of public highways. Many of the provisions of the latter statute have been, with some changes, substantially re-enacted in the act of 1905, supra. Under the circumstances, the decisions of this court in cases originating under the old law will, as far as applicable, afford ruling precedents upon questions arising under the law of 1905. Section 5 of this latter act, as did the provisions of the old statute, provides for the filing of a remonstrance or application for damages before the board of commissioners at any time before that tribunal has taken final action in the matter by any landowner through whose lands the highway in question passes, etc. Section 9 of the act provides

that, in the event any resident freeholder of the county shall remonstrate against the public utility of the highway, then and in that event the board of commissioners may appoint reviewers, etc. Section 10 provides that, if a majority of the reviewers report against the public utility of the proposed location, change, or vacation, the petition therefor shall be dismissed, etc. The section further provides that an appeal shall lie to "the circuit court from any such order dismissing such petition or ordering such highway established as provided in section 102 of this act." The latter provision, which reads, "as provided in section 102 of this act," is evidently a mistake or inadvertence on the part of the draftsman, for it will be found upon examination that section 102 has no reference or relation whatever to appeals. It is manifest that section 123, instead of the section mentioned, was intended. This latter section provides that, "except as otherwise provided in this act, any person aggrieved by any decision of the board of commissioners of any county in any proceeding in relation to highways may appeal therefrom within thirty days to the circuit court of such county by filing a bond, with surety and penalty, to be approved by the auditor of such county, conditioned for the due prosecution of such appeal and the payment of cost," etc.

Under the facts in this case and the decisions applicable thereto, it is well settled that appellant had no legal standing or right to present, for the first time, in the circuit court on appeal an application for damages arising out of the proposed vacation of the highway, or an objection or remonstrance on the ground that such vacation is not of public utility. As the facts disclose, she wholly failed to appear before the board of commissioners and exercise her right under the statute to set up and claim damages on account of the vacation of the highway, or to object or remonstrate for the reason that such vacation was not of public utility. In support of the rule which we affirmed, see *Forsythe et al. v. Kreuter et al.*, 100 Ind. 27; *Lowe v. Ryan*, 94 Ind. 450; *Breitwieser v. Fuhrman*, 88 Ind. 28; *Green v. Elliott*, 86 Ind. 53; *Metty v. Marsh*, 124 Ind. 18, 23 N. E. 702; *Indianapolis, etc., R. Co. v. Hood*, 130 Ind. 594, 30 N. E. 705. In *Metty v. Marsh*, supra, which was a proceeding instituted before the board of commissioners to locate and construct a public ditch, it is said: "It has so often been adjudged by this court, in cases analogous to this, that no matter not put in issue before the board of commissioners can be tried on appeal to the circuit court, that but little can be said in elaboration of the principle." The *Indianapolis, etc., R. Co. v. Hood*, supra, was a proceeding for laying out a highway, instituted before the board of commissioners. In that case the railroad company, on account of the negligence of its attorney, did

not appear before the board and file a remonstrance or claim for damages. In the circuit court on appeal it unsuccessfully offered to file a remonstrance. It was held in that case that the trial court did not err in refusing to permit appellant company to file its remonstrance and tender an issue thereon. In passing upon the question, this court, by Elliott, J., said: "It is firmly settled that in cases of this character objections must be appropriately presented to the board of commissioners, or they cannot be made available in the circuit court on appeal." As appellant, under the circumstances, had no right to file her remonstrance in the circuit court, as she did, consequently the action of the court in sustaining the motion to strike out the first paragraph thereof was right or at least harmless. For the same reason she is not in a position in any manner to assail the decision of the trial court in denying her demand to require appellees to assume the burden of opening and closing the case. It is possibly true, as counsel for appellant suggest, that upon the unfavorable report made by the first viewers against the public utility of the vacation of the highway that the board of commissioners was not authorized by the statute to appoint reviewers, as was done. This question is not before us; hence we advance no opinion thereon. See, however, *Doctor v. Hartman*, 74 Ind. 221.

For the reasons stated, there is no available error presented by the record.

Judgment affirmed.

(169 Ind. 410)

BALTIMORE & O. S. W. R. CO. v. EVANS.
(No. 21,069.)

(Supreme Court of Indiana. Nov. 26, 1907.)

1. CARRIERS—PASSENGERS—TICKET—EFFECT.

That part of a railroad ticket providing that its use was limited to the purchaser and the dependent members of his family, and that a transfer would involve its forfeiture, constituted a contract between the purchaser and the carrier, by the limitations of which he bound himself by accepting the ticket.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1020.]

2. SAME—LIMITATIONS—USE OF TICKET.

In consideration of a reduced rate of fare, a carrier is entitled to prescribe reasonable limitations and confine the use of a ticket to the purchaser and the dependent members of his family, and provide for forfeiture in case of transfer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1020.]

3. SAME—FORFEITURE—SUBSEQUENT USE—EJECTION.

Where a 20-trip ticket sold at a reduced rate was limited to use by the purchaser and the dependent members of his family, and provided for forfeiture in case of transfer, and the purchaser permitted persons to use the ticket who were not entitled to do so, he himself was not thereafter entitled to use unexpired portions thereof, but the carrier was authorized to refuse it and eject him for refusal to pay fare except with the ticket.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1423.]

4. SAME—WAIVER OF FORFEITURE.

A carrier did not waive its right to exact a forfeiture of a ticket because of previous improper use by the purchaser of the ticket, though it had subsequently honored the ticket for transportation, in the absence of proof that in so doing it had knowledge or notice of the forfeiture.

5. SAME—EJECTION—GROUNDS.

A carrier, sued for ejection of a passenger, was not precluded from relying on a forfeiture of his ticket for misuse, because the conductor at the time of the ejection erroneously refused to accept the ticket because it had expired.

Appeal from Circuit Court, Clark County; H. C. Montgomery, Judge.

Action by Sargent W. Evans against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Edward Barton and Chas. L. Jewett, for appellant. J. K. Marsh, for appellee.

JORDAN, J. Action by appellee to recover damages on account of an alleged wrongful expulsion by appellant railroad company from its train of cars. Appellee, as complainant below, alleges in his complaint, *inter alia*, that the defendant railroad company is a corporation organized and existing under the laws of the state of Indiana; that it is a common carrier, and for more than two years last past has been engaged in operating for the carriage of passengers, for hire, a railroad running from Cincinnati, Ohio, into and through the state of Indiana; that part of its said line passes through Clark county, in said state of Indiana, to the city of Louisville, in the state of Kentucky. It is further averred that the town of Otisco, in Clark county, in which town the plaintiff had resided for over 20 years, is a station on said line of railway. On November 9, 1904, he purchased from the defendant's agent in charge of its station office at said town of Otisco a "20-trip family ticket," which it kept for sale at said station, paying for such ticket \$8. This ticket had attached thereto 20 coupons, each of which entitled the plaintiff to be carried over defendant's road between said stations of Otisco and the city of Louisville, upon any and all of its trains stopping at the former station. The time for which the ticket was good for use on defendant's road was limited to four months from November 9, 1904, the date of purchase, making the date of expiration March 9, 1905. It is further charged that, through and by the mistake and negligence of defendant's selling agent, the ticket was made to expire on March 9, 1904, said date being written on the ticket by defendant's agent at the time of the sale thereof. The complaint alleges other facts going to show that on December 2, 1904, plaintiff boarded one of defendant's trains at the town of Otisco for the purpose of being carried thereon as a passenger to the city of Louisville, Ky.; that, when he took passage on said train, he had in his possession

the ticket in controversy, which still had attached thereto four unused coupons, each of which entitled him to be carried either way between the aforesaid stations; that the agent of the defendant, the conductor in charge of said train, called upon plaintiff to pay the regular fare from Otisco to Louisville; that, in response to said request and demand, plaintiff presented to said conductor the ticket in question with its four coupons attached. On examination thereof, the conductor refused to honor it, and declined to accept any of its coupons so attached as evidence that plaintiff had paid his fare, and was therefore entitled to be carried as a passenger over said railroad. The conductor demanded that he either pay the regular fare from Otisco to the city of Louisville or leave the train. It is further charged that the conductor contended that because and for the reason that the date, March 9, 1904, as written on the first page of the cover thereof, as the time upon which the ticket would expire, that said ticket was no longer good, and did not entitle plaintiff to be carried thereon. Plaintiff alleges that he explained to the conductor that said date must be a mistake, and that March 9, 1904, as written upon the ticket was intended for March 9, 1905, the date of expiration. The complaint alleges that, notwithstanding said explanations as given by the plaintiff to the conductor to show that his ticket had not expired, the latter still refused to honor it, and then and there requested that plaintiff pay his fare from Otisco to Louisville, which payment he refused to make on the ground that he was entitled to be carried over defendant's road upon said ticket. Thereupon, as charged, the conductor caused the train to be stopped, and then wrongfully, and in a rude and insolent manner, and in the hearing and presence of the other passengers, ejected plaintiff from the train. The pleading closes with the allegation that by said expulsion the plaintiff was greatly outraged, humiliated, etc., and damages are demanded in the sum of \$3,000. In the light of the facts alleged, it is manifest that plaintiff bases his action herein wholly upon tort, and not upon contract.

The defendant unsuccessfully demurred to the complaint for want of facts, and thereafter filed an answer in five paragraphs; the first being the general denial. The second paragraph of the answer avers: "That the coupon ticket mentioned in plaintiff's complaint was a special rate ticket, sold at a reduced rate in consideration that the same should be purchased, held, and used by the plaintiff in conformity with the contract printed and written upon said ticket and made part thereof. Said ticket was called a '20-trip family ticket,' and contained 20 coupons, each one of which entitled the plaintiff, or a dependent member of his family, to passage between Otisco station and Louisville station on defendant's rail-

road when presented and used under the conditions named in said contract. Said contract was partly printed and partly written on said ticket, and a copy of the material parts thereof is filed with and made a part of this answer, marked 'Exhibit A.' The defendant avers that the plaintiff purchased said ticket at a reduced and less rate than the regular rate of fare between said stations of Otisco and Louisville in consideration of the agreements and obligations upon the plaintiff in said contract contained, and, among others, the following agreement and obligations on the part of the plaintiff." This agreement or contract is embodied in the paragraph, and is the same one hereinafter set out in the evidence. The paragraph then proceeds to allege, or show, that the plaintiff, after the purchase of the ticket alleged in his complaint, but previous to December 2, 1904, the date of the expulsion, had violated and broken said contract by transferring said ticket to certain persons named and mentioned in said pleading; that such transfer of the ticket consisted in plaintiff allowing and permitting each of the aforesaid named persons to use it and travel upon one of the coupons thereof over defendant's railroad between the stations of Otisco and Louisville; that neither of the persons so using said ticket, as aforesaid, was a dependent member of plaintiff's family. It is further averred that plaintiff, by reason of the wrongful transfers of the use of said ticket, had, under its terms and conditions, forfeited all of his rights thereunder before December 2, 1904, and therefore was not at the time the ticket was presented to the conductor, as alleged in the complaint, entitled to passage thereon upon defendant's said train of cars. With some exceptions, the fourth paragraph of the answer is substantially the same as the second. It sets out the contract embraced in the ticket in like manner as does the second, and charges, among other things, that after the purchase of said ticket on November 9, 1904, by plaintiff, but prior to December 2, 1904, to wit, on November 19th of the latter year, plaintiff violated said contract, and thereby forfeited all of his rights under the ticket to be carried over appellant's railroad, for the reason and because on said November 19, 1904, he sold and transferred, in consideration of \$1.00 to him paid, the use of said ticket to one Bessie Kirk and her sister, and permitted them to take and have possession of the ticket and use four of the coupons attached thereto for passage of the aforesaid named persons over defendant's railroad from Otisco to the city of Louisville and return; that said Bessie Kirk and her sister were not dependent members of the plaintiff's family, nor were they in any manner connected with the same. It is further averred that, after using said ticket, the aforesaid parties returned it back to the plaintiff, and that thereafter, upon the occasion al-

leged in his complaint, he attempted to use it for his passage from Otisco to Louisville; that the ticket so presented by plaintiff to defendant's conductor, as charged in the complaint, was the same ticket which the plaintiff had previously sold and transferred to said Bessie Kirk and her sister, as hereinbefore alleged. Plaintiff successfully demurred to the second, third, and fourth paragraphs of the answer, and replied to the fifth. As he, in his complaint, only disclosed or exhibited such provisions of the ticket in question as were favorable or available to him, it was the right or privilege of defendant to set up in its answer any of its provisions or stipulations, and thereby seek to avail itself of such affirmative defense. Under the issues as joined between the parties, there was a trial by jury and a verdict returned in favor of the plaintiff, assessing his damages at \$100. Defendant moved for a new trial, assigning as grounds therefor that the verdict was not sustained by sufficient evidence, that it was contrary to law, and that the court erred in giving and refusing certain instructions. This motion was overruled, and judgment was rendered on the verdict. The errors assigned and relied upon for reversal are predicated upon the rulings of the trial court in sustaining the demurrer to the second, third, and fourth paragraphs of answer and in denying the motion for a new trial.

The evidence in the record may be said to establish the following facts: Defendant is an incorporated railroad company, engaged as a common carrier in operating the railroad as alleged in the complaint. Plaintiff is a resident of the town of Otisco, in Clark county, Ind., and is engaged at that place as a retail merchant. This town is a station situated on defendant's railroad about 25 miles distant from the city of Louisville, Ky. The regular fare for single passage between Otisco and Louisville is 69 cents. At the office of defendant in said town it kept for sale what is known as a "20-coupon family ticket." This ticket contained 20 coupons, each of which was good for a single passage over defendant's road either way, between the aforesaid stations, and was sold and issued for \$8, which made the fare or rate for a single trip between Otisco and Louisville 40 cents, less than two-thirds of the regular fare. These tickets, in consideration of such reduced fare, were sold under a special contract, and their use was expressly limited to the purchaser and the dependent members of his family. The ticket in dispute was introduced in evidence at the trial by plaintiff. It was shown that the latter purchased it on November 9, 1904, from defendant's agent at said station of Otisco. The date of purchase was stamped on the back, or cover, thereof. The ticket had attached thereto 20 coupons, each of which was good for passage either way between the aforesaid mentioned stations. On a part of the ticket, in a

place provided for that purpose, the name of plaintiff as purchaser thereof was written in ink, as was also the date on which the ticket would expire, viz., four months from the date of sale. It appears that defendant's selling agent, through a mistake, wrote March 9, 1904, as the time of the expiration of the ticket, instead of March 9, 1905, as it should have been. Plaintiff, after the purchase of this ticket, used it himself for passage over defendant's road. He also appears to have permitted other persons to use it, as herein-after shown. On December 2, 1904, four of the coupons remained unused. The ticket, as given in evidence, omitting the coupons, is as follows:

Issued by the Baltimore & Ohio Southwestern Railroad Co.

Twenty-Trip Family Ticket. Good for Mr. S. W. Evans between Louisville and Otisco on or before March 9, 1904.
Form L 35. 4029 4 Months.

Contract.

Each coupon, when not detached from the contract is good for one passage on any passenger train of the Baltimore & Ohio Southwestern Railroad Co., stopping at stations named on this ticket, for the person named on the reverse side of this cover, or for dependent members of family, under conditions named in contract.

Must be used within the dates named on first page of cover.

O. P. McCarty, Gen'l Pass'r Agt.

The Baltimore & Ohio Southwestern Railroad Co.

Twenty-Trip Family Ticket Contract.

1st. It is hereby expressly understood and contracted by the purchaser of this ticket, that it is good for use of person named hereon, or for dependent members of family, and must be used within four months from date of sale; that a transfer of it for one or more trips involves its forfeiture.

2nd. It is good only on such regular passenger trains as stop at the stations named hereon, and allows transportation of personal baggage or small parcels of marketing only.

3rd. That this ticket must be presented to the conductor who will detach a coupon for each and every ride, and it will be void after the date specified thereon.

4th. That this ticket is, and shall be, considered the only valid evidence that fare is paid, and, in case it is lost or mislaid, local rates must be paid to conductors and fares so collected will not be returned, nor will a duplicate free ticket be issued therefor.

Form L/35. O. P. McCarty, Gen'l Pass'r Agt.

On December 2, 1904, plaintiff, desiring to go to Louisville on business, boarded a passenger train of defendant's road for that city. He had in his possession at that time the ticket in controversy, which then contained four unused coupons. It appears that he was not acquainted with the conductor in charge of the train. In response to the conductor's demand for his fare, he presented and tendered the ticket in question. On an examination thereof, the conductor appears to have contended that the ticket had expired. This plaintiff denied, and pointed to the date of the ticket, and claimed that there must

be a mistake in the date of expiration, which, as he asserted, he had not before discovered. The date of sale, as it appeared upon the ticket, was dim, and the conductor, as he testified at the trial, was unable "to make it out." He appears to have made a second examination, and again informed plaintiff that the ticket was "an old one," and was not good, and requested him to either pay his fare or leave the train. Plaintiff, in response to this, said, "Put me off," and refused to pay the required fare. The conductor then stopped the train and directed plaintiff to get off, which he accordingly did, testifying at the trial that he did so because the conductor ordered him to leave the train or pay his fare. He declined to pay the fare demanded, on the ground that his ticket was good and he was entitled to be carried thereon. No force or violence whatever appears to have been used by the conductor to eject him, and no harsh or insulting language was employed by the conductor on said occasion. After alighting from the train, plaintiff started on his return to his home at Otisco, which was something over two miles from the place where he left the train. On the road, he stopped and visited for some time at the home of his married daughter, who lived near the highway over which he was traveling. He arrived at his place of business in Otisco in about three hours from the time he left the train. On the next day he went to Louisville over defendant's road. He, by his own undisputed admission and statement, fully established upon the trial that a short time after he purchased and accepted the ticket in controversy, but prior to December 2, 1904, he permitted and allowed his married son, Henry Evans, and also the wife of the latter, to use the ticket for passage over defendant's road between Louisville and Otisco and return. His said son was a man of family, 36 years of age, and resided with his family in the city of Louisville. The time Henry Evans and his wife were permitted to use the ticket for passage was upon an occasion when they were visiting at the home of plaintiff. These parties in no manner are shown to have been dependent members of plaintiff's family. On another occasion, after plaintiff had purchased and accepted this ticket, and a short time only before December 2, 1904, he transferred or turned over the ticket to a Miss Katie Kirk to be used by her and her sister, Bessie Kirk, for passage over defendant's road from Otisco to Louisville and return. Miss Kirk, as shown, procured the ticket from plaintiff on Saturday, and on the Monday following, after she and her sister had used it for passage over defendant's road from Otisco to Louisville and return, she returned it to plaintiff, and paid him for the use of the four coupons \$1.60. Neither of the Kirk sisters were dependent members of plaintiff's family, nor in any manner connected therewith.

There is no evidence to show that defendant company at the time plaintiff was expelled, or prior thereto, had any knowledge or notice that he had misused his ticket by allowing or permitting the persons heretofore mentioned to use it for passage over its road, nor that it, with knowledge of such misuse, assented thereto. Neither is there any evidence to show that any of the defendant's conductors at the time they accepted the ticket for the passage of Henry Evans and his wife, or for passage by the Kirk sisters, knew or had any knowledge that the aforesaid parties were not dependent members of plaintiff's family and that plaintiff was misusing his ticket.

The principal question argued by appellant's counsel, in discussing the alleged erroneous rulings of the court in sustaining the demurrer to the second and fourth paragraphs of the answer and in refusing to charge the jury as requested by appellant in instruction number three, and also as raised or presented by the undisputed facts established by the evidence, is: Was appellee, at the time he was expelled from the train in controversy, legally entitled to be carried as a passenger upon the ticket in question, and can his expulsion under the facts be justified by appellant in this action on the ground that he, prior to his removal from the train, had violated or broken the contract contained, or expressed, in the ticket, and therefore had forfeited his right to be carried as a passenger over appellant's road upon said ticket? Counsel for appellant in his brief, in discussing the forfeiture branch of the case, says: "I treat the mistake of the agent in dating the ticket and its obliterated condition at the time it was presented as beside the question, and argue it from the standpoint of a valid ticket originally, and upon which the dates had been correctly stated. In other words, assuming that this ticket, instead of showing on its face that it expired March 9, 1904, had shown that it would not expire until March 9, 1905, and had been presented by Evans under the circumstances disclosed by the answer and the evidence, was Evans rightfully on the train and entitled to be carried to Louisville upon the ticket?" In fact, it may be said that the theory of appellant upon this phase of the case, as presented by the second and fourth paragraphs of its answer and by instruction number three as requested but refused, and under the undisputed facts established by the evidence, is that appellee, by having permitted or allowed the ticket in question to be used by persons, as hereinbefore shown, who were not dependent members of his family, to travel thereon for one or more trips over appellant's road, thereby, under its terms and conditions, forfeited his right to further use the ticket for passage, and that upon his refusal or failure to pay his fare, under the circumstances, on the occasion of his expulsion, appellant's agent was justified in requiring him to leave the train, as shown by

the evidence, and that he cannot recover in this action. Counsel for appellee, however, deny the sufficiency of the paragraphs of the answer, and further contend that the facts relied upon under the evidence as operating or involving the forfeiture are not sufficient, for the reason that a forfeiture is not favored by law. They further assign and argue that appellant cannot justify in this action the expulsion of appellee at the time and upon the occasion in question, because its conductor placed the right to demand or require that appellee either pay his fare or leave the train, not upon the ground that he had forfeited his ticket, because he had violated the contract in the use thereof, as shown, but upon the ground that the ticket was an old one, or had expired. Consequently it is asserted that appellant must be held to be estopped from availing itself of the forfeiture of the ticket in this action. They further argue that, if the ticket was forfeited because it had been transferred and misused as shown, then, as it appears, that after such usage, but before December 2, 1904, appellant had honored it for appellee's passage without objection, the alleged forfeiture must thereby be considered as waived.

It is settled beyond dispute that the part of the ticket in controversy, whereby its use for passage over appellant's road is expressly limited to appellee and the dependent members of his family and the further stipulation, or condition therein that its transfer for one or more trips should involve a forfeiture, constituted a contract between appellant and appellee, and he, by accepting the ticket at the time of its sale, assented to such limitations, terms, conditions, or stipulations, and consequently is bound thereby. *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79; *Pullman Palace Car Co. v. Taylor*, 65 Ind. 153, 32 Am. Rep. 57; *Pittsburg, etc., R. Co. v. Higgs*, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; 6 Cyc. pp. 570, 571. It is as equally well settled that, in consideration of the reduced rate or fare for which the ticket was sold or issued by appellant to appellee, it had the right to expressly prescribe therein reasonable limitations, conditions and terms upon which it was to be used; or, in other words, it had the right, as it did, to limit or confine the use of the ticket for passage over its road to appellee and the dependent members of his family, and to further stipulate or provide, as was virtually done, in effect at least, under the express provision that the transfer by appellee of its use for passage for one or more trips to a person not a dependent member of his family should operate as or involve a forfeiture of the ticket, or of appellee's right thereunder. *Post v. Chicago, etc., R. Co.*, 14 Neb. 110, 15 N. W. 225, 45 Am. Rep. 100; *Drummond v. Southern Pacific R. Co.*, 7 Utah, 118, 25 Pac. 733; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 Sup. Ct. 50,

33 L. Ed. 290; *Pennington v. Philadelphia*, etc., R. Co., 62 Md. 95; *Rahilly v. St. Paul*, etc., R. Co., 66 Minn. 153, 68 N. W. 853; *Eastman v. Maine Central R. Co.*, 70 N. H. 240, 46 Atl. 54; *Levinson v. Texas*, etc., R. Co. (Tex. Civ. App.) 43 S. W. 1032; *Freidenrich v. Baltimore*, etc., R. Co., 53 Md. 201; *Houston*, etc., R. Co. v. *Ritter*, 16 Tex. Civ. App. 482, 41 S. W. 753; 3 *Thompson on Negligence*, § 2583; 4 *Elliott on Railroads*, § 1599.

The question presented and decided in *Freidenrich v. Baltimore*, etc., R. Co., *supra*, is quite analogous to the one raised in this appeal by counsel for appellant in respect to the forfeiture of appellee's ticket. The action in the case last cited was instituted by appellant, *Freidenrich*, to recover damages for an alleged wrongful expulsion from the cars of appellee. It appears that he had purchased from the railroad company a commutation ticket, good for passage over appellee's road between Baltimore and Washington for three months from the date of issue, February 1, 1877. This ticket, not being an ordinary passenger ticket, was sold and issued by the company only upon special terms and stipulations prescribed or designated on its face. Among these were the following: "To be used *only* by M. A. *Friedenrich* between Baltimore and Washington from February 1, 1877, to April 30, 1877. If found in the hands of any one but the party in whose name it is issued this ticket will be forfeited and taken up." (Our italics.) Before the expiration of the time limit, appellant boarded at Baltimore one of the railroad company's cars for the purpose of being carried on his ticket to Washington. After the train was a few miles beyond Baltimore, the conductor in charge thereof took up appellant's ticket, and demanded that he pay the usual passenger fare. On what ground the conductor based his right to take up appellant's ticket is not disclosed by the case as reported. Appellant, on refusing to pay his fare, was accordingly put off the train by the conductor; no force or violence, or harsh language being used by the latter in removing him. The principal facts upon which the railroad company relied at the trial to justify the act of its conductor in removing appellant from its train were: That the ticket in question had been used for passage over its railroad by persons other than appellant after it had been issued to him, but before the time of his expulsion from the car. Upon a trial by jury, defendant company had a verdict in its favor and the plaintiff appealed, and claimed on appeal that the trial court erred in giving certain instructions, or charges, to the jury, wherein it was substantially stated that, if the jury found that the ticket in evidence was purchased under a special contract between the plaintiff and defendant, by which the plaintiff agreed that in consideration of the price paid therefor that it should be used only by him in riding on the cars of the defendant during the time limited by the terms

thereof, and between the stations designated therein, and was to be forfeited and taken up if used for such purpose by persons other than the plaintiff, then if the jury further found from the evidence that said ticket was used by persons other than the plaintiff in riding in defendant's cars, and that the agents of the defendant, after such use of said ticket by persons other than the plaintiff, took up said ticket, then by the terms and conditions of such agreement the rights and privileges given and granted by such ticket became forfeited, and the defendant or its agents had the right to take up such ticket whenever found, even in the hands of the person to whom it was issued. The trial court further charged that, if the jury believed that the plaintiff was ejected from defendant's cars at the time and place and under the circumstances detailed by him in the evidence, nevertheless he was not entitled to recover under the pleadings and evidence if the jury further found from the evidence that any person or persons other than plaintiff himself had previously used the same ticket, riding or traveling on its cars between the cities of Baltimore and Washington provided the jury further found that the defendant's conductors or collectors did not know that the person or persons who had so previously used the ticket was or were rightfully entitled to use it, and being the same person or persons to whom the ticket had been actually issued. The charge further advised the jury that, if they found from the evidence that "the plaintiff at the time and place where he was ejected from defendant's cars was riding or traveling thereon with the commutation ticket in evidence in the case, nevertheless the possession of such ticket did not entitle him to use it in riding or traveling on defendant's cars if the jury shall further believe from all the evidence that such ticket had previously to that time been used by a person or persons other than plaintiff in riding on said train and between the cities of Baltimore and Washington with the knowledge and consent of the plaintiff." The court approved and sustained these charges as announcing a correct principle of law applicable to the case, and held that the ticket was properly taken from appellant, if before the time of such taking it had been used by any person other than appellant with his connivance, and, if so used, the railroad company's agent had thereafter the right to take it up, even in the hands of appellant himself, to whom it was issued. In considering the question in that appeal, the court said: "It [the ticket] was the subject of contract between the company and the passenger, and the conditions and stipulations annexed became mutually binding so soon as the ticket was issued by the one and accepted by the other. The company thereby became bound to carry appellant on its cars according to the terms of its undertaking, and he, on his part, was bound by all of the terms and conditions up-

on which the ticket was issued. Among these conditions, as before stated, was its forfeiture if used by another person, and, if so used, it was to be taken up." Evidence in that case was given to prove that after the issue of the ticket, but before the expulsion of appellant, it had been used for transportation over the company's railroad by persons other than appellant. It is true, as a primal rule, that forfeitures are not favored either in equity or at law. It follows from this principle that provisions or stipulations of doubtful intent in instruments or documents providing for forfeitures are to receive a strict construction against the person for whose benefit they are inserted. There is, however, no room for the application of this principle to the provision or stipulation contained in the contract herein involved. It is not impressed with any doubtful intent or meaning as to what was intended by the parties thereto. Appellant and appellee, by the express stipulation or provision that the use of the ticket should be limited to him and the dependent members of his family, and that the "transfer for one or more trips involves a forfeiture," certainly understood and contemplated what the legal results or consequences would be—i. e., forfeiture—in the event of a transfer of the use of the ticket to persons other than the dependent members of his family in violation of the stipulation in the contract.

The case of *Eastman v. Maine Central R. Co.*, supra, was an action in assumpsit to recover the price of certain coupons of a mileage ticket. The question of forfeiture of this ticket by the plaintiff was raised and presented in that action on the ground that he had violated the contract under which the ticket had been sold and issued to him by allowing a person other than himself to use it for passage over defendant's road. Under its terms, the ticket in question was limited to the use of the purchaser and provided for a forfeiture in the event it was presented by a person other than the one in whose name it had been issued. After the violation of the contract by the plaintiff in allowing another person to use his ticket for transportation, it was taken up by the company's conductor as forfeited and returned to the company's general office. The court in that case denied the right of the plaintiff to recover, justifying under the facts the right of the company's agent in taking up the ticket. In considering the question of forfeiture, the court in that case, by Blodgett, C. J., said: "The plaintiff made the contract voluntarily and understandingly and the responsibility for its termination rests solely with himself. There is no rule better settled or more just in itself than that the parties who voluntarily and understandingly enter into such contracts must be governed by their terms, and are subject to the legal consequences of their violation. Having intentionally violated the express conditions of his contract, the plaintiff's mileage

book justly became forfeited in accordance with those conditions, and for the resulting pecuniary loss to him there is nobody to blame but himself. In such a case the law affords no relief. A party cannot maintain an action founded upon his own dishonesty and fraud."

In like manner in the case before us, under the facts, it may be asserted that appellee, of his own free will, in order to secure a reduced fare over appellant's road, entered into the special contract upon which the ticket was sold or issued to him, and he must be held to be controlled by the express or positive terms and conditions as therein prescribed, to which he assented, and under the law must be subjected to the legal consequences which he agreed should follow for his intentional violation of the contract. His wrongful transfer or use of the ticket which he permitted by persons as disclosed in the evidence was in fraud of appellant's rights under the contract and, if he could so misuse his ticket with impunity, then the stipulation or condition in the contract against such transfer or use would be futile, and of no avail to the railroad company. By the terms "involves its forfeiture," as employed in the contract, the parties thereto certainly contemplated that the usual meaning accorded to the word "involves" was intended. As defined by our lexicographers, the following, among others, is given as the definition or meaning of the word "involve": "To imply"; "to include"; or "necessitate as a result or legal consequence." See word "Involve," *Standard Dictionary*; 23 Cyc. pp. 352, 353.

In the case of *Insurance Company of North America v. Martin*, 151 Ind. 209, 51 N. E. 361, the forfeiture of a fire insurance policy was involved on the ground that a transfer of the property insured, before its destruction by fire, had been made in violation of a stipulation in the policy providing that, if a transfer of the property was made without the consent of the insurance company, the insurance should cease from the date of such transfer. In that appeal, in reviewing the question as there raised, we affirmed that the alienation of the insured property, in violation of the prohibition or condition contained in the policy, ipso facto avoided or invalidated the policy, unless the transferee, with the consent of the company, had taken an assignment of the policy. We perceive no reason why a similar or like rule is not applicable to the question of forfeiture involved in this appeal. By the voluntary transfer of his ticket, as shown under the facts, in violation of the positive stipulation or condition embraced in the contract, appellee may be said to have ipso facto terminated or forfeited his right to longer use the ticket for transportation over appellant's road. Consequently, at the time of his expulsion, he had no right to require appellant company to carry him over its road on said ticket, unless it had legally waived the wrongful transfer by

him of his ticket, and, in the absence of such waiver, it was his duty upon the occasion in question to either pay his fare or leave the train, as he was requested by appellant's conductor. There is, however, under the pleadings upon which the cause was tried no issue of waiver in the case. Again, upon another view, it may be said in answer to the contention of counsel for appellee that the appellant waived his right to exact a forfeiture for the reason that after the transfers in question it honored the ticket, but, as previously shown, there is nothing going to disclose that the railroad company in so honoring appellee's ticket had any knowledge or notice whatever that he in any manner had incurred a forfeiture thereof. The authorities affirm that a waiver is the intentional relinquishment of a known right and there can be no waiver by a person unless distinctly made with a full knowledge of the right or rights which he intends to waive. *Ohlo, etc., Buggy Co. v. Anderson Forging Co.* (Ind. Sup.) 81 N. E. 574, and authorities there cited; *Bucklen v. Johnson*, 19 Ind. App. 406, 49 N. E. 612, and authorities there cited.

As hereinbefore mentioned, counsel for appellee claims that appellant under the facts cannot be permitted to justify the act of its conductor in declining to accept appellee's ticket and in removing him from the train upon his refusal to pay his fare, because the conductor assigned as a reason for his right in so doing the ground that the ticket was an old one, and had expired, instead of assigning or giving as reasons therefor that appellee had forfeited his right to be carried upon the ticket. This contention is untenable. If his right to be transported over appellant's road on the ticket in question had, at the time of his expulsion, been terminated or forfeited on account of his violation of the contract, it is of no material importance that the act of the conductor in not accepting the ticket and in removing him from the train was technically placed on the wrong ground. It does not appear either that appellant or its conductor at that time had any knowledge that appellee had forfeited his right to use the ticket for passage. Again, it may be said that back of the act of the conductor was the fact that appellee's right to be longer carried upon the ticket had been lost or forfeited, and that the ticket, therefore, was invalid. That fact appearing, it certainly can make no material difference that the conductor at the time in question assigned the wrong reason or ground for his action in the premises. A case on parity upon the point as here presented is the *Louisville, etc., R. Co. v. Klyman*, 108 Tenn. 304, 67 S. W. 472, 56 L. R. A. 769, 91 Am. St. Rep. 755. That was an action by the plaintiff below to recover damages for the attempt of the railroad's conductor to forcibly expel

him from its train. The ticket involved in that case was issued to appellee, and was good under its terms only for a continuous passage by him between points or places therein named. He appears to have violated the provisions of his ticket by stopping over, without the consent of the railroad company, at a certain intermediate station after he had commenced his journey upon the ticket in question. After the lapse of several days, he again resumed his journey over the defendant's road. The conductor in charge of the train which he boarded challenged his ticket on the ground that it was "out of date," and demanded of him his fare, and, upon his refusal to pay, stopped the train and was in the act of forcibly expelling him therefrom when a fellow passenger interposed and paid for him the required fare, thereby preventing his expulsion. It was held in that appeal that by reason of the plaintiff's stopping over in violation of the terms and conditions of his ticket he had forfeited his right to any longer travel thereon, and that the railroad company was not precluded in the action from setting up or availing itself of the forfeiture of the ticket as a defense by reason of the fact that its conductor, in refusing plaintiff transportation on the ticket, gave as a reason therefor that the ticket was "out of date," instead of that his right to be carried thereon had been forfeited. In passing upon the question as raised in that case, the court said: "On the defendant's theory of the facts, the ticket had become invalid for any and every purpose, and, that being true, no particular legal importance should be attached to the reason assigned by the conductor for its rejection. If the ticket was invalid, it can make no difference that a wrong reason, as plaintiff contends, was assigned for its invalidity. Whatever the reason given, the fact of invalidity and the plaintiff's lack of right to proceed remain the same."

Counsel for appellee, in the argument in his brief, urges some objections against the transcript on the ground of an alleged defective præcipe. These objections, however, were not stated or given in the points in his brief, but are made for the first time in his argument thereon. For this reason, under the rules of the court, they are not considered.

It follows, and we so conclude, for the reasons herein stated, that under the facts established by the evidence appellee was not entitled to recover and the verdict of the jury should have been for appellant. The court erred in denying the motion for a new trial.

Judgment reversed and cause remanded, with instructions to the lower court to grant appellant a new trial.

(100 Ind. 383)

ROSS v. STATE (No. 21,009.)

(Supreme Court of Indiana. Nov. 28, 1907.)

1. CRIMINAL LAW—ELEMENTS OF CRIME—COMPULSION.

The compulsion which will excuse a criminal act must be present, imminent, and impending, and of such a nature as will induce a well-grounded apprehension of death or serious bodily harm if the act is not done.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 43.]

2. SAME—EVIDENCE—ADMISSIBILITY.

On a trial for arson, proof of accused's mental weakness and want of will power, and of threats of a third person made a short time prior to the alleged offense, consisting of the third person drawing a revolver on accused and threatening to kill her, and putting her in fear at the time, is inadmissible to prove compulsion which would free accused from criminality; there being nothing to show that the act of the third person had anything to do with accused committing the crime charged.

3. SAME—RECEPTION OF EVIDENCE—PROOF OF CONNECTING EVIDENCE.

Where the relevancy of evidence offered is not apparent, or it is apparently irrelevant, but other facts make it relevant, the party offering it must state its connection with other facts and promise to make proof thereof, and thereby disclose the relevancy to the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1611.]

4. SAME.

In disclosing the facts which a party promises to introduce to establish the relevancy of evidence offered, the facts should be stated, and not the conclusion of the person making the offer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1611.]

5. SAME—DISCRETION OF COURT.

Where connecting evidence is essential to render other evidence relevant, the court may, in its discretion, first require the introduction of the connecting evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1611.]

Appeal from Circuit Court, Tipton County; J. F. Elliott, Judge.

Abbie Ross was convicted of arson, and she appeals. Affirmed.

L. B. Nash and E. T. Teeter, for appellant. James Bingham, Atty. Gen., and White, Dowling & Cavins, for the State.

MONKS, C. J. Appellant was convicted of the crime of arson, under section 2014, Burns' Ann. St. Supp. 1905 (Acts 1905, p. 665, c. 169, § 371). The only error assigned is that the court erred in overruling the motion for a new trial. The only causes for a new trial not waived call in question the action of the court in refusing to admit certain evidence offered by appellant. We need only set out two of these offers to determine all the questions presented by appellant.

During the progress of the trial counsel for appellant, after asking a question to which the state objected, made the following offer to prove: "We offer to prove by this witness that he was acquainted with the defendant's mental condition at the time of the commission of the alleged offense, and

that she was weak in will power, easily persuaded, timid, and shy. We offer to show this, not for the purpose of proving the unsoundness of mind on the part of this defendant, but to show that she acted under duress at the time of the commission of the alleged offense." Appellant afterwards made the following offer to prove in answer to a question to which the state had objected: "Now, the defendant offers to prove in response to such question that a short time prior to the commission of the alleged offense that one Silas Ray drew a revolver on this defendant and threatened to kill her, thereby putting her in fear at the time." It is said in Gillett's Criminal Law (2d Ed.) § 7: "The necessity or compulsion which will excuse a criminal act must be clear and conclusive, and must arise without the negligence or fault of the person who insists upon it as a defense. The alternative presented must be instant and imminent, and there must be, if not a physical, at least a moral, necessity for the act. The Argo, 1 Gall. 150.¹ * * * If a person is compelled to commit a crime by threats of violence sufficient to induce a well-grounded apprehension of death or serious bodily harm in case of refusal, this excuses him." Stephen in his Digest of Criminal Law, art. 31, says: "An act which, if done willingly, would make a person a principal in the second degree, or an aider and abettor in a crime, may be innocent if the crime is committed by a number of offenders, and, if the act is done because, during the whole of the time it is being done, the person who does it is compelled to do it by threats on the part of the offenders instantly to kill him, or do him grievous bodily harm if he refused, but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offense." Again, in McCoy v. State, 78 Ga. 490, 3 S. E. 768, the court says: "It must be obvious to the deliberate judgment of every reflecting mind that much less freedom of will is requisite to render a person responsible for a crime than to bind him by sale or other contract. To overcome the will so far as to render it incapable of contracting civil obligation is a mere trifle compared with reducing it to that degree of slavery and submission which will exempt from punishment." See Bishop, Crim. Law (8th Ed.) §§ 346-355; 1 Whart. Cr. L. (10th Ed.) § 94; 1 Russell on Crimes (8th Am. Ed.) pp. 16, 17; Clark & Marsh. Cr. L. (2d Ed.) § 83; 12 Cyc. 161; 1 McLain's Crim. Law, §§ 136, 137; People v. Repke, 103 Mich. 459, 61 N. W. 861; Thomas v. State, 134 Ala. 126, 33 South. 130; Arp v. State, 97 Ala. 5, 12 South. 301, 19 L. R. A. 357, and notes, 38 Am. St. Rep. 137; Leach v. State, 99 Tenn. 584, 42 S. W. 195; State v. Fisher, 23 Mont. 540, 59 Pac. 919; Bain v. State, 67 Miss. 557, 7 South. 407; State v. Nar-gashian, 28 R. I. 299, 58 Atl. 953, 106 Am. St. Rep. 715, and notes, pp. 721-728; Burns

¹ Fed. Cas. No. 516.

v. State, 89 Ga. 527, 15 S. E. 748; Beal v. State, 72 Ga. 200; Rizzolo v. Commonwealth, 126 Pa. 54, 17 Atl. 520; Republica v. McCarty, 2 Dall. (Pa.) 86, 1 L. Ed. 300; United States v. Vigo, 2 Dall. 346, 1 L. Ed. 409, Fed. Cas. No. 18,621; United States v. Haskell, Wash. C. C. 402, Fed. Cas. No. 15,321. In *Bain v. State*, supra, it was held that a person on trial for perjury cannot defend on the ground that his false testimony was given under fear engendered from threats against his life before going to court. The court said: "We can conceive of cases in which an act criminal in its nature may be committed by one under such circumstances of coercion as will free him from criminality. The impelling danger, however, must be present, imminent, and impending, and not to be avoided." In *Burns v. State*, supra, the court said: "The danger must not be one of future violence, but of present and immediate violence at the time of the commission of the forbidden act. Thus, where the forbidden act is perjury by a witness at a coroner's inquest, the danger of death or dismemberment at some future time, in the absence of all danger at the time of testifying, will not excuse."

It is manifest that the evidence of appellant's mental weakness and want of will power, and threats of Ray, stated in said offers, would not be admissible as independent testimony to prove the kind of compulsion or coercion essential to free her from criminality in setting fire to and burning said dwelling house. There was nothing in the second offer to prove that indicated that the act of Ray in drawing his revolver on appellant and threatening to kill her as stated in said offer had anything whatever to do with her committing the crime charged. *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182, 185; *Leverich v. State*, 105 Ind. 277, 280, 4 N. E. 852; *Osburn v. State*, 164 Ind. 262, 271-273, 73 N. E. 601. The rule is that where the relevancy of the evidence offered is not apparent or is apparently irrelevant, but other facts made it relevant, it is the duty of the party offering it to state its connection with such other facts and promise to make proof thereof, in order that its relevancy may be disclosed to the court. In disclosing the facts which he promises to introduce to establish the relevancy of the evidence offered, the facts themselves should be stated, and not the conclusion of the person making the offer to prove. 1 *Elliott on Evid.* § 191; 2 *Elliott's Gen. Prac.* § 576; 9 *Ency. of Evid.* 171-173; *Browning v. Hight*, 78 Ind. 257; *Curry v. Bratney*, 29 Ind. 195; *Heady v. Brown*, 151 Ind. 75, 77, 78, 49 N. E. 805, 51 N. E. 85; *Lewis v. Lewis*, 30 Ind. 257; *Chamness v. Chamness*, 53 Ind. 301, 303; *Grover, etc., Co. v. Newby*, 58 Ind. 570; *Baker v. Swan*, 32 Md. 355; *Boland v. Louisville, etc., R. Co.*, 106 Ala. 641, 18 South. 99; *Ashley's Adm'rs v. Robinson*, 29 Ala. 112, 65 Am. Dec. 387, 389; *Abney v. Kingsley*, 10

Ala. 355, 44 Am. Dec. 491, 493, and cases cited; *Lawson v. State*, 20 Ala. 65, 56 Am. Dec. 182, 185; *Bendernagle v. Cocks*, 19 Wend. (N. Y.) 203, 205, 206. As was said in 2 *Elliott's General Practice*, § 576: "Such evidence ought to be rejected, unless the party offering it states how he expects to make it relevant and promises to introduce the proper evidence to make it so." It is within the discretion of the trial court, however, to require the connecting evidence to be first introduced. *Nordyke v. Shearon*, 12 Ind. 346. Even if said offered evidence could have been made relevant by proof of other facts, a question we need not, and do not, decide, as counsel for appellant did not state how he expected to make said offered evidence relevant or promise to introduce other evidence to make it so under the authorities above cited, the court did not err in excluding the same.

The other offers to prove made by appellant were open to the same objection, and the court did not err therefore in rejecting the evidence.

Judgment affirmed.

(169 Ind. 346)

MARION TRUST CO. v. BENNETT et al.
(No. 20,947.)

(Supreme Court of Indiana. Nov. 26, 1907.)

1. STATUTES—GENERAL AND SPECIAL LAWS—INSURANCE COMPANY—CHARTER—AMENDMENT.

Where an insurance company was organized by Acts 1832, p. 144, c. 133, providing that it should have a capital stock of \$100,000, an amendment thereof by Acts 1873, p. 162, c. 65, providing that the capital stock might be increased from time to time to such additional sum or sums as might be determined by a vote of the majority in value of the stockholders, was a violation of Const. art. 11, § 13, providing that corporations other than banking corporations should not be created by special act; a change in the amount of a corporation's capital stock being fundamental and not authorized without legislative authority.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 86, 87.]

2. SAME.

The term "create," as used in Const. art. 11, § 13, prohibiting the Legislature from creating other than banking corporations by special act, should not be given a literal interpretation, but should be so construed as to prohibit such a change in a corporation organized under a valid law as would materially extend its powers and privileges.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 86, 87.]

For other definitions, see Words and Phrases, vol. 2, pp. 1708, 1709.]

3. CORPORATIONS—INCREASE OF STOCK—VALIDITY—SALE—LIABILITY OF PURCHASER.

Where a special act authorizing an insurance corporation to increase its capital stock was void, the contract of a subscriber to such stock was without consideration and unenforceable either by the corporation or its receiver.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 195, 315.]

4. SAME—ESTOPPEL.

A subscriber to stock in an insurance company issued under the authority of an uncon-

stitutional statute was not estopped to deny his liability on such subscription because he had voted the stock and participated in the management of the corporation by virtue thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 180, 454.]

5. APPEAL—FINDINGS—REVIEW.

While the Supreme Court in general has no power to add to a special finding, it may give effect to an undisputed fact in evidence in order to uphold the judgment on the theory that the defect in the finding is one of form which may be amended in the Supreme Court as authorized by Burns' Ann. St. 1901, § 670.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3617-3621.]

6. INSURANCE—CORPORATIONS—INSOLVENCY — STOCK SUBSCRIPTION—EVIDENCE.

In an action by a receiver of an insurance company for subscriptions on unpaid stock, evidence held to require a finding that the subscription was for stock issued under an unconstitutional statute, and not for the valid stock which the corporation was originally authorized to issue.

Appeal from Circuit Court, Vanderburgh County; Louis O. Rasch, Judge.

Action by the Marion Trust Company, as receiver, etc., of the Citizens' Insurance Company of Evansville, Ind., against Henry S. Bennett and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Iglehart & Taylor and W. H. Latta, for appellant. De Bruler, Welman & De Bruler, for appellees.

GILLETT, J. This action was brought by appellant, the receiver of the Citizens' Insurance Company of Evansville, Ind., against appellees, Alexander Hutchinson, Henry S. Bennett, and Isaac H. Odell. The case is before us on exceptions to the court's conclusions of law.

It appears from the findings that said company is an insurance corporation, organized under an act of the General Assembly approved February 3, 1832, as amended by an act approved March 6, 1873, and that on August 1, 1890, said company increased its capital stock from \$100,000 to \$200,000. The firm of Bennett & Odell, who were agents for said company, became the owner of 240 shares of its stock, of the par value of \$50 each, and on February 3, 1894, they executed to said company certain notes for the balance due on said stock, payable as calls were made. About one month later Bennett bought Odell's interest, and immediately thereafter Bennett formed a partnership with Hutchinson for the purpose of carrying on the fire insurance business, which partnership continued down to the bringing of this action. It is stated in one of the findings that Hutchinson assumed all of the liabilities of the firm of Bennett & Odell; but, taking the findings as a whole, and reading them in the light of the evidence, we think that it should be understood that the fact was that, when Odell retired, Bennett assumed and agreed to pay all of the debts of the firm, and that Hutchinson, in terms, guaranteed said contract, but that

as said stock notes were omitted from the list of liabilities furnished Hutchinson at the time, and as he had no actual notice or knowledge that the stock was not paid for, it was not his intent to guarantee the payment of said notes. When Hutchinson became a partner, the stock certificates passed into his hands, but they were never transferred to him upon the books of the corporation, and he gave the certificates to Odell. In the same year, however, Odell was notified by Hutchinson to return such certificates, and he notified the insurance company that he was the owner of said stock, and not to transfer it to Odell. Bennett brought an action in his own name to secure possession of such certificates, and, as a result, they were turned over to his attorneys, where they have since remained. It is found that it was to the advantage of said firm to have said stock; that, after the receiving of said notice, the insurance company at all times recognized Hutchinson and Bennett as the owners of said stock; and that until a date in 1898 Bennett voted said stock, and, by virtue thereof, acted as a director of said company. During 1398 two calls of 10 per cent. each were issued by the directors of the corporation, and, upon the appointment of a receiver thereof, the court ordered an assessment of 50 per cent. additional. The special act under which the Citizens' Insurance Company of Evansville, Ind. (originally known as the "Lawrenceburgh Insurance Company"), was incorporated, provided that it should have a capital stock of \$100,000 (Acts 1832, p. 144, c. 138), while the act of 1873 provided that said capital stock "may be increased from time to time to such additional sum or sums as may be determined upon by a vote of the majority in value of stockholders" (Acts 1873, p. 162, c. 65).

The first question which presents itself is whether the provision just quoted is in violation of section 13 of article 11 of the state Constitution, which provides that "corporations, other than banking, shall not be created by special act." This prohibition relative to the creation of corporations does not admit of exact definition. It is evident, however, that the provision should be so interpreted as to render it impossible for the General Assembly by special law to alter an existing charter in such manner as, in effect, to make a new corporation. In re Bank of Commerce, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489; Town of Longview v. City of Crawfordsville, 164 Ind. 117, 73 N. E. 78, 68 L. R. A. 622; 1 Morawetz, Private Corporations, § 12; Clark on Corporations (2d Ed.) 39. To give a close or literal interpretation to the word "create" would make it possible, after a corporation had been brought into existence under a valid law, so to fashion the organization as practically to bring upon the people of the state the evil of special privilege which it was de-

signed to avoid. A change in the amount of the capital stock of a corporation, like a change in the objects thereof, is fundamental, and cannot be made without clear legislative authority. *Railway Co. v. Allerton*, 18 Wall. (U. S.) 233, 21 L. Ed. 902; *McNulta v. Cornbelt Bank*, 164 Ill. 427, 45 N. E. 954, 56 Am. St. Rep. 204; *Note to Peck v. Elliott*, as reported in 38 L. R. A. 616; *Clark on Corporations* (2d Ed.) 346. What, then, shall be said of a special act which attempts to change a corporation of limited capital stock to one in which the whole matter of the extent of the capital stock is left to the stockholders? It is clear, in our opinion, since the corporation in question was limited to \$100,000 capital by the act of its creation, that the provision of the act of 1873, whereby there was attempted to be conferred upon the association the capacity of infinite growth, so that it might bulk with the largest of corporations, was unconstitutional and void, as an attempt to create an insurance corporation by special act. The undertaking of a subscriber to the capital stock of a corporation must find a correlative in the capacity of the corporation, if it be a going concern, to deliver such stock, and, if the association be without capacity in that behalf, the undertaking of a subscriber is a nudum pactum.

It is urged that Bennett and Hutchinson are estopped by their conduct to deny their liability. The receiver in this case does not pretend to represent the interest of any particular creditor, but to represent all, irrespective of their having grounds of estoppel. In these circumstances, it can only be said that he stands on no higher plane than the corporation itself. As between the corporation and its stockholders, subscriptions to a wholly unauthorized issue of stock cannot be validated on the principle of estoppel. In *Stace and Worth's Case*, L. R. Ch. App. 632, an attempt was made to charge certain holders of such an issue of stock on the ground that they had accepted shares, that their names appeared on the register of shareholders, and that they had sat as directors of the corporation. Vice Chancellor James, however, declared: "This was a void agreement with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all there is to fix those gentlemen on the list of stockholders."

Upon the question under consideration the case of *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, is the leading authority. In that case the law under which the corporation was organized authorized any corporation to increase its capital stock in any amount not exceeding double its authorized capital. The corporation, after so increasing its capital, had made two further issues of stock, and the question was as to the right of its assignees in bankruptcy to recover on an assessment ordered by the court against a holder of

shares in the corporation on account of his subscription to the over issues; it appearing that, in addition to accepting the stock, he had attended by proxy the meetings of the stockholders at which the third and fourth issues were voted. The court said: "In this case the attempt to increase the stock of the company beyond the limit fixed by its charter was ultra vires. The increased stock itself was therefore void. It conferred on the holders no rights, and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders, and the stock of the third and fourth by another, in a contest between them the latter would have been excluded from all participation in the management of the company, or in its profits. To decide that the holders of stock issued ultra vires have the same rights as the holders of authorized stock is to ignore and override the limitations and prohibitions of the charter. We think it follows that, if the holder of such spurious stock has none of the rights, he can be subjected to none of the liabilities of a holder of genuine stock. His contract to pay for spurious shares is without consideration, and cannot be enforced. It is insisted, however, that the defendant having attended by proxy the meetings at which the increase of the stock beyond the limit imposed by law was voted for, and having received certificates for the stock thus voted for, and after such increase the company by its agents having held itself out as possessing a capital of \$400,000 and invited and obtained credit on the faith of such representations, he is now estopped from denying the validity of the stock and his obligation to pay for it in full. We think that he is not estopped to set up the nullity of the unauthorized stock. It is true that it has been held by this court that a stockholder cannot set up informalities in the issue of stock which the corporation had the power to create. *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Chubb v. Upton*, 95 U. S. 663, 24 L. Ed. 523; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818. But those were cases where the increase of the stock was authorized by law. The increase itself was legal and within the power of the corporation, but there were simply informalities in the steps taken to effect the increase. These, it was held, were cured by the acts and acquiescence of the defendant. But here, the corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity, nor bind him or the corporation. 'A distinction must be made between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which, or upon the terms upon which, they have been issued.' The holders of shares which the company had no power to issue, in truth, had nothing at all, and are not contributors. * * *

As forcibly suggested by counsel, a creditor,

who has been defrauded by misrepresentation of the real capital of the company, has his remedy in an action of tort against all who participated in that fraud. But the wrong done to him cannot entitle the entire body of creditors who have not suffered from the alleged fraud to recover of the entire body of stockholders who have taken no part in it."

In *Winters v. Armstrong* (C. C.) 87 Fed. 508, a national bank had attempted to increase its capital stock without securing the consent of the Comptroller. The bank passed into the hands of a receiver, and he brought an action on certain stock notes given on account of such unauthorized issue. The defendants answered no consideration, to which the receiver replied by way of estoppel, to the effect that, after the attempted increase, the bank by means of circulars and statements upon the letter heads represented its capital stock at \$2,000,000, which was the amount to which it was proposed to increase the stock, and that said bank also advertised its capital stock at said amount in the newspapers of the city in which it was located, all of which was done with the knowledge of the defendants, and that with such knowledge they allowed their names to remain on the subscription list until the bank went into the hands of a receiver. Mr. Justice Jackson, delivering the opinion of the court, said: "National banking associations have no authority of law by their own action to increase their capital stock to any amount whatever. They can make no increase to any extent, without the approval of the Comptroller as the representative of the government. * * * In effecting an increase of its capital stock the association may, so far as relates to its own action, proceed in an irregular or informal manner, which a stockholder who has acquiesced therein may not, as against either the corporation or its creditors, take advantage of or insist upon as invalidating his subscription, or the stock issued to him thereunder. But in regard to the sovereign's consent to such increase, to be expressed in and by the approval of its comptroller of the currency, that is an essential prerequisite or condition precedent, like a special enabling act, in conferring the power and authority to make the proposed increase valid. Such approval involved the grant of power to complete and perfect the proceedings commenced by the association looking to an increase of its capital stock. It is something lying beyond the action or control of the association and its stockholders seeking to effect an organic and fundamental change in the constitution of the bank, and in respect to this essential thing, in no wise involved in the action or steps taken by the association, the question of irregularity or informality in its own mode of procedure, and the consequences thence resulting, do not apply. * * * The authorities brought to our attention do not support such an extension of the doctrine of estoppel, which is never invoked to confer corporate powers.

No estoppel can properly arise in any case where the party's direct and affirmative act could not have made the transaction valid. What the Fidelity Bank did in misrepresenting what did not lie within its power or that of its stockholders to do by their own action cannot, upon any sound principle, be taken and accepted as the equivalent of, or the substitute for, the power it did not possess. Parties deceived or misled to their damage by such misrepresentations must seek relief against those making or responsible for the false statement as individuals, but cannot look to them in the character of stockholders created under the operation of an estoppel, in the absence of power on their part or that of the association to establish that relation. This conclusion is sound in principle, and is, as we think, supported by the authorities."

It was held in *Clark v. Turner*, 73 Ga. 1, that an issue of stock which was wholly unauthorized by statute was ultra vires and void. Concerning a claim of estoppel the court said: "If this subscriber had induced insurance on the part of any person in the Grangers' Life & Health Insurance Company by his acts as trustee or agent, or on the faith of his subscription, then an action in his individual right for the tort against Turner would lie; but this assignee stands in the shoes of the corporation, and sues for the benefit of all creditors, and there is no pretense in this record that any particular creditor was induced or influenced by his action to insure in the company. *Scovill v. Thayer*, supra. So that neither the corporation nor its general assignee can recover in this suit on the facts which the record discloses." See, also, *Ross-Meehan, etc., Co. v. Southern, etc., Co.* (C. C.) 72 Fed. 957; *Tube Works v. Boston Machine Co.*, 139 Mass. 5, 29 N. E. 63; *Reed v. Boston, etc., Co.*, 141 Mass. 454, 5 N. E. 852; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768; *Schierenberg v. Stephens*, 32 Mo. App. 314; *Muncie Natural Gas Co. v. City of Muncie*, 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822.

There being no element of estoppel in the case as between the stockholders and the corporation, the further proposition, that the receiver cannot, at least irrespective of individual right, bring forward an estoppel on behalf of the whole body of creditors, is well illustrated by the late case of *Ellison v. Ganiard* (Ind.) 79 N. E. 450, in which there was the contention, made on behalf of the plaintiff, a trustee in bankruptcy, that the defendants, who were claimants under a declaration of trust, executed by the insolvent in connection with a deed made to him by a third person, were estopped to assert such right as against the creditors, because such claimants had neglected to record such declaration and had permitted the deed to the insolvent, which was absolute upon its face, to remain recorded and unquestioned, with a result that certain of the creditors had extended credit to him on the strength of his apparent owner-

ship. In disposing of this contention, we said: "It is contended that appellee is invested with the power to assert this estoppel against appellants for the benefit of all the creditors of the bankrupt. But the facts as established show that out of the 800 creditors but two, Shoup and Walters, can be said to have any basis whatever for asserting or invoking the principle of estoppel against appellants. Conceding arguendo, without deciding, that these two creditors, under the evidence, have the right to successfully assert an estoppel against appellants, certainly these facts alone would not, under the law, justify appellee, as trustee, to maintain this action, and thereby, as he has succeeded in doing under the judgment of the trial court, bring all of the property in controversy herein into the estate of the bankrupt to be disposed of for the benefit of all of the insolvent's creditors. This proposition is so manifestly true that, it appears to us, nothing can be said to the contrary. A case which very much supports the proposition we assert is *Audenried v. Betteley*, 87 Mass. 382, 81 Am. Dec. 755. In that appeal it was claimed that a contract between the plaintiffs and the insolvent was made in order to enable the latter to obtain a false credit in conducting his business in the purchase of merchandise and the borrowing of money upon the strength of the possession of property which apparently belonged to him. It was held therein by the court that an assignment under the insolvent laws of the state of Massachusetts did not vest in the assignee title to property which had been placed in the hands of the insolvent for the fraudulent purpose of giving him a false credit, although some of his creditors may have been defrauded thereby. The question of estoppel in that case, as in this, was advanced by the parties and considered by the court. Judge Hoar, in passing upon the question, said: 'An estoppel in pais on the ground of fraud is personal to the particular creditor defrauded, and does not pass the property so as to inure to the benefit of creditors generally. To constitute such an estoppel, a party must have designedly made an admission inconsistent with the defense or claim which he proposes to set up and another party have with his knowledge and consent, so acted on that admission that he will be injured by allowing the admission to be disproved; and this injury must be coextensive with the estoppel.' If the two creditors in question, or any other of the 800, have a right to successfully assert an estoppel against appellants, it is a matter personal to them, and they may avail themselves of such an estoppel in an action against appellants to subject the lands in question to the payment of their respective claims."

As the provision of the act of 1873 relative to an increase of the capital stock was unconstitutional, it could afford no basis for an irregular, or, as it might be termed, a de facto issue of stock, for an unconstitutional

enactment purporting to authorize an increase of capital stock is a nullity. *Clark v. American, etc., Co.*, 185 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217. The entire authority of the corporation to issue stock rested on the act of 1832, and that act, in legal effect, limited the capital to \$100,000. As was said in *Ross-Meehan, etc., Co. v. Southern, etc., Co.*, supra, in which the principle of estoppel was also sought to be invoked to enforce a subscription to an over issue of stock: "Where the power is wanting, it can make no difference in the effect whether this lack of power results from an express limitation or a limitation by implication." It is contended, however, that the increase of stock was only irregular, and not void, since there was in force between the years of 1853 and 1891 a general law relative to stock insurance companies which permitted an increase of stock to an amount not exceeding \$500,000. Section 4840, *Burns' Ann. St.* 1894. The authority thereby granted is, to quote the words of the statute, confined to any insurance company "organized under this act." Said enactment does not even give the *Citizens' Insurance Company* a standing as a de facto corporation, since it did not attempt to organize under said act. *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773; *In re Gibb's Estate*, 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276. The finding is that said corporation was organized under the act of 1832, as amended by the act of 1873. A corporation thus organized would differ essentially from a corporation organized under the law of 1853. Their rights and duties would be different, and in said circumstances it appears plain to us that a corporation which is organized under a special law cannot claim a de facto existence under a law which it does not recognize as its charter. It is equally plain that the issuance of the additional stock cannot be justified by section 3449, *Burns' Ann. St.* 1901, which is a part of an act, passed in 1883, authorizing the extension of the corporate life of corporations, chartered by special act before the Constitution took effect, for the period of 30 years. Assuming, without deciding, that said section may be disentangled from that portion of the act held unconstitutional, in *Re Bank of Commerce*, 153 Ind. 400, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489, it is enough to say that as to corporations enjoying special charters in perpetuity it was necessary for them to accept said act in order to enjoy its privileges, and that, by the terms of the act, would have operated to repeal the law under which the original charter was granted. The special finding speaks negatively when it finds that said corporation is organized under the act of 1832 as amended by the act of 1873.

We have already indicated that it appears to us that Hutchinson did not assume to pay the subscription of Bennett and Odell. The assumption of the notes by Bennett, if comprehended by the agreement, must be held

to be based on the correlative duty of the corporation to deliver the stock subscribed for, and, if the association was never in a position to do this, and can not now deliver even what would represent Bennett's interest in the charter, it would be making a new contract to charge him with the stock notes, waiving performance by the association. *Merrill v. Beaver*, 46 Iowa, 646; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

It is, however, insisted by counsel for appellant that the findings are not sufficiently full to exclude the idea that the stock obtained by Bennett and Odell was a part of the four-fifths of the original capital stock, which, under the original act, the board of directors was empowered to sell at such times as it might direct. This insistence may be granted, and it is true that we have no power, generally speaking, to add to a special finding. We may, however, give heed to a fact appearing in the evidence which does not admit of dispute, in order to uphold the judgment. *Dyke v. Spargur*, 143 N. Y. 651, 38 N. E. 269; *Sturgeon v. Hull*, 8 Ohio Cir. Ct. Rep. 269. Such a case, in our opinion, is one of a defect in form, or imperfection contained in the proceedings, which the statute provides shall be deemed amended in the Supreme Court. Section 670, *Burns' Ann. St.* 1901; 2 *Thornton's Civ. Code*, p. 1007.

Appellees put in evidence all of the entries in the stockbook of the Citizens' Insurance Company. This book shows stock certificates, of date August 1, 1890, aggregating approximately \$190,000. The stock certificates introduced by the receiver as issued to Bennett & Odell were dated, respectively, October 20, 1890, November 8, 1890, and March 6, 1894, and this corresponds with the stockbook entries of stock held by said firm. It may be inferred that these certificates in part stand for earlier subscriptions made by Bennett & Odell severally, but the earliest one made by Bennett was a part of the issue of August 1, 1890, and is preceded, in the order of entry upon the book, by certificates to the amount of more than \$113,000. It is charged in the complaint that the notes were given as and for the unpaid balance of the purchase price of stock of said corporation subscribed for on the 3d day of February, 1894, and the finding of the court is that on said day Bennett & Odell became indebted to said company in the amount represented by said notes for and on account of the issue to them of 240 shares of its stock. Upon this state of the record, there is no room for the inference that the shares in question were unsold stock of the old corporation. The stock was either part of an issue in excess of \$100,000, or else, if the corporation had not before issued stock to the full amount of its authorized capital, the new issue, which Bennett and Odell either severally or jointly subscribed for, brought the amount of outstanding stock up to a sum far in excess of the authority of the corpora-

tion to issue it, and, as there is no means of distinguishing the legal from the illegal, the whole must fail. *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768. And see *Gaslight, etc., Co. v. City*, 156 Ind. 406, 59 N. E. 176. Judgment affirmed.

(170 Ind. 674)

PITTSBURG, C. C. & ST. L. RY. CO. v. HARTFORD CITY. (No. 20,816.)¹

(Supreme Court of Indiana. Nov. 20, 1907.)

1. INJUNCTION — PUBLIC OFFICERS — POLICE POWER — SCOPE.

Though courts will arrest an unreasonable exercise of the police power, where there is an attempt thereby to lay a burden on a subject in the enjoyment of his property, the courts recognize that there is authority within the field of legislative discretion wherein the law-making power is absolute.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 27, Injunction, § 153.]

2. RAILROADS — MUNICIPAL REGULATION — ORDINANCES — VALIDITY — REASONABLENESS.

Where a municipal ordinance requiring a railway company to maintain electric lights where its tracks intersect streets does not fix the height of the lights, so that it will be a sufficient compliance if the lights are located at such a height that an engineer running a train over the streets will not be required to look directly toward them, the ordinance is not invalid on the ground that it impairs the efficiency of headlights on locomotives.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 41, Railroads, § 753.]

3. COMMERCE — INTERSTATE COMMERCE — LOCAL REGULATIONS — VALIDITY.

Where a railroad was built by the authority of the state, the company, whether an interstate carrier or otherwise, must, so long as Congress does not interfere, submit to reasonable local regulations in the use of its property, and a municipal ordinance requiring it to maintain electric lights where its tracks intersect streets is not invalid as an interference with interstate commerce.

4. MUNICIPAL CORPORATIONS — ORDINANCES — VALIDITY — JUDICIAL REVIEW.

Though the courts are open to one to challenge the validity of a municipal ordinance adopted as an attempted exercise of the police power, yet he is not entitled to a judicial hearing on the question whether the ordinance should have been passed.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 36, Municipal Corporations, § 155.]

5. EMINENT DOMAIN — TAKING OF PROPERTY WITHOUT JUST COMPENSATION — MUNICIPAL ORDINANCES.

A municipal ordinance requiring a railroad to maintain electric lights where its tracks intersect streets is not invalid as a taking of property without compensation, though it lays some expense and inconvenience on the company; the regulation being a just exercise of the police power.

6. RAILROADS — MUNICIPAL REGULATION — ORDINANCES — VALIDITY.

A municipal ordinance requiring a railroad company to maintain electric lights where its tracks intersect streets, adopted pursuant to *Burns' Ann. St.* 1901, § 5173, empowering councils to provide by ordinance that railroad companies shall maintain lights where the tracks cross streets and to provide what kind of lights the companies shall maintain, is not invalid on the ground that the municipality requires that the lighting shall be done by electricity, nor because it requires the lights to be

¹ Rehearing denied, 85 N. E. 362.

burning for five minutes before the arrival of trains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 753.]

7. STATUTES—GENERAL AND SPECIAL LAWS—CREATION OF CORPORATIONS.

Burns' Ann. St. 1901, § 5173, empowering the councils of cities not working under a special charter to adopt an ordinance requiring railroads to maintain lights at points where the tracks cross streets, does not create a difference in the extent of the lawmaking power granted to different municipalities, so as to come within Const. art. 11, § 13, prohibiting the creation of corporations by special act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 86.]

8. RAILROADS—MUNICIPAL REGULATION—ORDINANCES—VALIDITY—DEFINITENESS—LIGHTS AT CROSSINGS.

A municipal ordinance requiring a railroad company to maintain electric lights at points where its tracks cross streets of sufficient power to light the entire crossing, "but not to exceed the power of the electric lights used by the city," is not invalid because of the quoted phrase which merely keeps the ordinance from calling on the company to do more than Burns' Ann. St. 1901, § 5173, authorizing lights at street crossings, requires.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 753.]

9. SAME.

A municipal ordinance requiring a railroad company to maintain electric lights where its tracks cross streets of sufficient power to light the entire crossing, not to exceed the power of electric lights used by the city, and to keep the lights burning for five minutes before the arrival of each train, at all times at night when there is no moon, etc., is not so indefinite as to be invalid, but requires a light of sufficient power, not exceeding that used by the city, to enable a traveler, of good eyesight, in the nighttime, to perceive, before going upon the crossing, the tracks at the point of intersection and the character of the way across the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 753.]

10. SAME.

Under Burns' Ann. St. 1901, § 5173, authorizing cities to adopt an ordinance requiring railroads running through cities to maintain lights at the points where the tracks cross streets, and declaring that cities may "provide what kind of lights" shall be maintained, a municipality may adopt an ordinance requiring a railroad to maintain a light at a street intersection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 753.]

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company was convicted of violating an ordinance of the city of Hartford City, and appeals. Affirmed.

G. E. Ross, for appellant. L. F. Sprague, for appellee.

GILLET, J. Action by appellee against appellant for the violation of a city ordinance. The charge is that the defendant violated said ordinance "by then and there unlawfully falling, neglecting, and refusing, while operating said railway as aforesaid, to keep and maintain an electric light at a point where said tracks cross Walnut street, in said city, of sufficient power to light the

entire of said Walnut Street Crossing, but not to exceed the power of the electric lights in use in said city." The ordinance requires that the company shall keep and maintain electric lights at certain points, where its tracks intersect streets in said city, of sufficient power to light "the entire of said crossings," but not to exceed the power of the electric lights used in said city, and also to keep said lights supplied with a sufficient amount of electric current, and burning for five minutes before the arrival of each and every engine and train of cars at said crossing, and until after such engine and train of cars has departed, at all times in the nighttime when there is no moon, or the moon is obscured. Appellant answered in seven paragraphs. Demurrers were sustained to the last four of said paragraphs. The fourth paragraph challenged, in general terms, the reasonableness of said ordinance. The fifth paragraph alleged that defendant was a large taxpayer in said city, and further alleged that said lights would be of no benefit to it, but for the exclusive use and benefit of those using said streets. The paragraph concluded with a charge that the requirement of the ordinance amounted to a taking of defendant's property without just compensation and without due process of law, contrary to the Constitution of the United States. The sixth paragraph set up the fact that defendant is a railroad company, organized and existing under the laws of Illinois, Indiana, Ohio, Pennsylvania, and West Virginia, and as such is a common carrier of freight and passengers between the states, and is also engaged in transporting United States mails; that it is necessary that all of defendant's locomotives drawing trains in carrying on said business should be equipped with a headlight to enable the engineman and fireman properly to perform their duties, and that the existence of an electric light at said street crossing would impair the efficiency of said headlights, and obscure and diminish, and in effect destroy, the light therefrom, and prevent the engineman and fireman from performing their duties, thus endangering defendant's trains, and the passengers and freight carried thereon. It was further alleged that an electric light would prevent persons using said crossing from seeing the light upon approaching locomotives, and would hinder and prevent defendant's servants operating said trains from seeing persons and objects along its tracks, thus increasing the danger to those using said street and incapacitating defendant from the performance of its duties as a carrier of interstate commerce and United States mails. The seventh paragraph challenges the constitutional validity of said ordinance as a taking of property without just compensation and without due process of law; and it contains the averment of fact that said ordinance was passed without affording appellant an opportunity to be heard

tive thereto. The court found the facts fully, and filed conclusions of law there-which were adverse to appellant. A judgment against it followed, and from said judgment this appeal is prosecuted.

The constitutional objections which appellant's counsel urge to the ordinance are, for most part, indicated by the last four paragraphs of answer. It appears to us these questions are pretty well solved by consideration of whether the ordinance is far reasonable, as an attempted exercise of the police power, that the court should, or the grant of authority found in the act then in force (section 5173, Burns' Stat. 1901), defer to the determination of the local legislative authority as to the expediency to its requirement. It is true that the courts will arrest an arbitrary or only unreasonable exercise of the police power, where there has been an attempt merely to lay a burden upon a subject in the use or enjoyment of his property, yet, withstanding this, the courts recognize that, as respects the police power, there is no road authority within the field of legislative discretion, wherein, as respects what is good and expedient, the lawmaking power is absolutely the master of its own discretion. The ordinance in question does not fix the height of the electric light, and appellant would be within the requirements of the ordinance if the light were located at a height that the engineer would not be required to look directly toward it. This being so, we are of opinion, notwithstanding the broad allegations of the sixth paragraph of the answer, that the court knows enough of electric lighting to affirm that, at the most, there would only be presented a question of expediency, relative to what it would be wise to do in the premises, and the mere fact that it might be of opinion that the ordinance is in some measure unsuited to the attainment of its ostensible end would not justify us in striking it down. It must be assumed that the purpose of the requirement in question is to add to the security of the hand and limb, and the possibility of a traveler on the street passing unwittingly into danger at the crossing, particularly if in a hurry, without real opportunity to safeguard himself by looking and listening, is a great warrant to us in holding that the act may not be required, even if its effect is to compel the engineer to run slowly or cautiously in approaching it.

Granting that the ordinance in question is in some degree affect interstate commerce, we are nevertheless of opinion that, as a local regulation designed to protect travelers upon the street, it was competent to establish the same. The railroad was built by the authority of the state, and, whether an interstate carrier or otherwise, the company must, so long as Congress does not interfere, submit to reasonable local regulations in the use of its property. Any

other holding would substitute government by a board of directors for government by the representatives of the people. It was said in *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, that it is "within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns, with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and generally with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections and unquestionably valid." In *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166, the federal Supreme Court upheld, against an interstate railroad, a statute of the state of Georgia forbidding the running of freight trains on Sunday. In *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 283, 19 Sup. Ct. 465, 43 L. Ed. 702, that court upheld the right of the state to promote the convenience of local passengers by requiring all railroads to stop three trains a day (should so many be run) at all cities or towns in the state of more than 3,000 inhabitants. In that case the court said: "The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the state might from time to time establish that were not in violation of the supreme law of the land. In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the state to take into consideration all the circumstances affecting interstate travel within its limits, and, as far as possible, make such regulations as were just to all who might pass over the road in question. * * * Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interest of stockholders, and without taking into consideration the interests of the general public." It was further held in that case that the statute authorizing railroad companies to carry United States mails did not prohibit the enactment of reasonable police regulations by the state. See, also, *Village of St. Bernard v. Railway Company*, 4 Ohio S. & C. P. Dec. 371; note to *People v. Chicago, etc., R. Co.*, as reported in 7 Am. & Eng. Anno. Cases, 1. Of course, the courts are open to appellant to challenge the validity of the ordinance as an attempted exercise of the police power, but, as the act was one of a legislative character, and was not judicial, appellant

was not entitled to a hearing on the question whether the ordinance should be passed. The ordinance does not amount to a taking of property without just compensation. The regulation being a just exercise of the police power, appellant must submit to the requirement, even though it lays some expense or inconvenience upon it. There is too large a body of legislative regulations of this character which have received judicial sanction by the highest courts to make the proposition a debatable one. The mere fact that the General Assembly has seen fit to give the common council the power to prescribe the character of the light—with respect to its being electrical or otherwise—and that the latter body has required that the lighting shall be done by electricity, affords no sufficient ground for an overthrow of the ordinance. As was said in *Missouri, etc., R. Co. v. May*, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971: "Great constitutional principles must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that Legislatures are ultimate guardians of the liberties and welfare of the people in quite as large a degree as the courts." Nor does it appear to us that the common council exceeded its authority in requiring the light to be burning for five minutes before the arrival of a train. Such a provision as to the time that the light shall be burning is a very moderate one, and can well be defended on the ground that it is calculated to make it more certain that the duty will be performed.

The validity of the statute is questioned, in that it purports to be a grant of power to all cities not operating under a special charter. We may grant that this makes the statute special in its character, but from this it does not follow that it is invalid. As long as the legislation is not of a character sufficiently radical to amount to the creation of a municipal corporation, within the prohibition of section 13 of article 11 of the state Constitution, we know of no constitutional provision, federal or state, which is offended by a mere difference in the extent of lawmaking power which is granted to different cities or towns. As applied to the statute in question, it may be said that each street and railroad intersection presents its own considerations for the determination of the municipal Legislature, and it is no discrimination that such power is not given to every city, or that every such intersection in the state is not ordered lighted.

It is contended by appellant's counsel that the ordinance is within the condemnation of *Chicago, etc., R. Co. v. Town of Salem*, 166 Ind. 71, 76 N. E. 631, because of the provision that the power shall not exceed that of the lights used by the city. In that case there was no standard fixed, except the shifting standard of the lights which the city might from time to time use, and it was

held unreasonable to enforce by penalty a requirement that would compel the company to take notice of changes dehors the ordinance. Here the requirement is that the light shall be "of sufficient power to light the entire of said Walnut street crossing." And the limitation thereon is designed merely to keep the ordinance from calling on the company to do more than the statute authorizes. In other words, if such limitation were not found in the words of the ordinance, it would still be subject to the statute. We are of opinion that in this respect the case is ruled by *Chicago, etc., R. Co. v. City of Crawfordsville*, 164 Ind. 70, 72 N. E. 1025. The ordinance is not so indefinite in its requirement as to be invalid. Upon the hearing of such a case, it would be the duty of the court to construe the ordinance, and we are of opinion that its legal effect is to require a light of sufficient power (not exceeding that used by the city) to enable a traveler, of good eyesight, in the nighttime, to perceive, before going upon the crossing, the tracks at the point of intersection and the character of the way across the same. While it may be that a light of greater power than this might be required by the city, yet, as a matter of legal construction, any uncertainty must cut down the operation of the ordinance until it be brought within the limits of the clear requirements of the provision, and, when so construed, it must be said that the standard of duty is definite. See *Chicago, etc., R. Co. v. City of Crawfordsville*, *supra*.

We regard the complaint as sufficient. The statute specifically authorizes the city by ordinance or resolution to "provide what kind of lights the railroad company shall maintain," and, as a proper means to an authorized end, we are of opinion that it was proper for the common council to direct that a light be located at the street intersection. There is no available error in the record. Judgment affirmed.

(169 Ind. 354)

WILLIAMS et al. v. STATE. (No. 20,902.)
(Supreme Court of Indiana. Nov. 26, 1907.)

1. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

In a prosecution for conspiracy to commit grand larceny, defendants' plea in abatement that he had already been arrested for the same offense, and heard and discharged by a United States commissioner, was overruled. *Held*, that the ruling was not prejudicial, since, under Acts 1905, p. 627, c. 169, § 198, he might have offered proof of the former jeopardy under his plea of not guilty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3105.]

2. SAME—FORMER JEOPARDY—PRELIMINARY EXAMINATION—EFFECT OF DISCHARGE.

A discharge by a United States commissioner is not equivalent to an acquittal.

3. SAME—PLEA OF NOT GUILTY—EFFECT.

In a criminal prosecution, defendant's plea of not guilty waives the objection that since the preliminary hearing there have been a number

sions of the grand jury at which no indictment was returned, and that the grand jury in session when the affidavit was filed on the prosecution was based.

INDICTMENT AND INFORMATION—AUTHORITY FILE AFFIDAVIT.

Acts 1905, p. 611, c. 169, § 118, provides certain offenses may be presented by affidavit in term time, except when the grand jury is in session or a prosecution by indictment for the same offense is pending. Appellant was bound over on a preliminary affidavit. Thereafter the prosecutor filed an affidavit against him during an adjournment of the grand jury which subsequently reconvened. It was contended that there existed the right to prosecute by affidavit.

l. Note.—For cases in point, see Cent. Dig. 27, Indictment and Information, § 150.]

WITNESSES—COMPETENCY—CODEFENDANTS.

In a prosecution for conspiracy to commit grand larceny, one of the defendants was disallowed under the express provisions of Acts 1905, p. 637, c. 169, § 241, while the state was presenting its evidence in chief, in order that he might testify for the state, which he did. Held error, since the issue remained the same, notwithstanding the discharge, and it would be defeating the legislative purpose should an exception be inrafted upon the statute in favor of a co-conspirator.

d. Note.—For cases in point, see Cent. Dig. 50, Witnesses, § 487.]

CRIMINAL LAW—APPEAL—OBJECTIONS BEING—NECESSITY—ARGUMENT OF COUNSEL.

Where defendant failed to move to have the session set aside or the jury admonished not to regard improper statements in the prosecution's address to the jury, he cannot raise the question on appeal.

d. Note.—For cases in point, see Cent. Dig. 15, Criminal Law, § 2645.]

CONSPIRACY — CONSPIRACY TO COMMIT GRAND LARCENY—NATURE OF.

Where defendants agreed to attempt to procure animo furandi one's money by a trick or device, the underlying offense is a conspiracy to commit grand larceny, even though, as an incident of the consummation of the crime, defendants attempted to induce the owner of the money to meet them at a particular place in their state.

d. Note.—For cases in point, see Cent. Dig. 10, Conspiracy, § 40.]

Appeal from Circuit Court, Delaware County. Joseph G. Leffler, Judge.

William Williams and others were convicted of conspiracy to commit grand larceny, and they appeal. Affirmed.

A. Taughlinbaugh and George T. Whittier, for appellants. James Bingham and John D. Dowling & Cavins, for the State.

WILLET, J. Appellant appeals from a judgment under which he stands convicted of the crime of conspiracy to commit grand larceny. After entering a general plea of not guilty, appellant filed a plea in abatement, which issue was joined and a hearing had. It is contended that the court below erred in finding against appellant upon the issues tendered. In substance they are (1) that defendant had been arrested and had a hearing before a United States commissioner, a charge of attempting to sell counterfeit obligations and securities of the United States to one J. J. Scott, that upon such hear-

ing he was discharged, and that said charge related to the same transaction as was here involved; (2) that since the preliminary hearing of this cause there have been a number of sessions of the grand jury at which no indictment was returned against appellant, and that the grand jury was in session when the affidavit was filed in the circuit court. Appellant might have offered proof of a former jeopardy under his plea of not guilty (section 198, c. 169, p. 627, Acts 1905), so he was not injured by the ruling so far as the first ground was concerned. A discharge by a United States commissioner was not, however, equivalent to an acquittal. In re Grin (C. C.) 112 Fed. 790. The other matters set forth in the plea were waived by the prior pleading to the merits. *Cooper v. State*, 120 Ind. 377, 22 N. E. 320. Besides, the questions arising on the trial of the plea in abatement are not presented because of the failure to file a motion for a new trial as to such issues. So far as appears from the evidence, however, there was no charge pending against appellant in the circuit court when the prosecutor filed an affidavit against him, other than the preliminary affidavit on which the magistrate had bound appellant over. It also appears that, when the second affidavit was filed, the grand jury was not in session, but had formally adjourned, although it was subsequently reconvened. In these circumstances there was the right to prosecute by affidavit. See section 118, c. 169, p. 611, Acts 1905. And see, also, under the former statute, *Elder v. State*, 96 Ind. 162; *Lankford v. State*, 144 Ind. 428, 43 N. E. 444.

Appellant's principal ground of objection to the proceedings below, raised in a variety of ways, is based on the fact that his codefendant, one Joseph Studer, was discharged by the court after the two had entered upon their trial. It appears from the record that the court, while the state was upon its case in chief, pursuant to the motion of the prosecuting attorney to that effect, discharged Studer that he might testify in said cause on behalf of the state of Indiana. Section 241, c. 169, p. 637, Acts 1905, provides: "When two or more persons are included in one prosecution, the court may, at any time before a defendant has gone into his defense, direct him to be discharged, that he may be a witness for the state. A defendant may also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed, be discharged by the court for the purpose of giving testimony for a codefendant. The order of discharge shall be a bar to another prosecution for the same offense." While it may be possible that an irregular discharge of a codefendant in a conspiracy case during the trial may have the effect to entitle the remaining defendant to his discharge (a question we do not decide), yet we are of opinion that that result should not follow where the discharge is pursuant

to section 241, *supra*. The statute is not limited to any particular class of cases, and its most beneficial results are likely to be had where defendants have conspired with each other. The purpose of the discharge, as indicated by the statute, is that the defendant who receives the benefit of the order "may be a witness for the state." The issue remains the same notwithstanding the discharge, and we are of opinion that we would be thwarting the legislative purpose should we ingraft an exception upon the statute in favor of a co-conspirator. See *Bradshaw v. Territory*, 3 Wash. T. 265, 14 Pac. 594; *Weber v. Commonwealth (Ky.)* 72 S. W. 30. The codefendant testified for the state in this case, and the action of the court is not open to review.

Appellant's counsel contend that he was entitled to a new trial because of certain statements made by the prosecuting attorney in addressing the jury. It does not appear that appellant took any steps during the trial to have the court rectify the mischief by moving to have the submission set aside or to have the jury admonished. The case is therefore one in which appellant has taken the chance that the result would be favorable to him, while attempting to hold a point in reserve to undo the verdict if unfavorable. This he cannot do. *Coleman v. State*, 111 Ind. 563, 13 N. E. 100; *Coppenhaver v. State*, 160 Ind. 540, 67 N. E. 453; *Southern Indiana R. Co. v. Fine*, 163 Ind. 617, 72 N. E. 589.

Complaint is made of the refusal to give certain instructions. This was not made the ground for a new trial. Appellant's counsel assert that, while they do not contend "but what he (appellant) entered into an undertaking with Studer in Ohio to bunco some citizen out of his money," yet that the evidence does not show a conspiracy to commit grand larceny. The Attorney General asserts that there is nothing to show that it was any part of the plan of the conspirators to decoy their prospective victim to a particular place. Appellant's counsel have failed to point out any such evidence, and we have not discovered it in examining the bill of exceptions. If there was an agreement between the defendants that an attempt should be made by them to procure *animo furandi* the money by a trick or artifice, we are of opinion that the underlying offense was a conspiracy to commit grand larceny. See *Grunson v. State*, 89 Ind. 533, 46 Am. Rep. 178; *March v. State*, 117 Ind. 547, 20 N. E. 444; *Fleming v. State*, 136 Ind. 149, 36 N. E. 154; *Towns v. State (Ind. Sup.)* 78 N. E. 1012. And this would be true, although there was, as a mere subsequent incident of the consummation of the crime, an attempt upon the part of appellant to induce or persuade the owner of the money to meet him at a particular place. The evidence supported the verdict, and the conviction was just.

Judgment affirmed.

(169 Ind. 361)

STONE, County Superintendent, v. FRITTS.
(No. 20,962.)

(Supreme Court of Indiana. Nov. 26, 1907.)

1. SCHOOLS — ESTABLISHMENT — LEGISLATIVE AUTHORITY.

The establishment and regulation of public schools rests primarily with the legislative department.

2. LICENSES—NATURE OF RIGHT.

A license has none of the elements of a contract, and does not confer an absolute right, but only a personal privilege, to be exercised under existing restrictions, and such as may be subsequently reasonably imposed.

3. SCHOOLS—LICENSE TO TEACH—REVOCATION.

The statute authorizing the granting of a license to teach in the public schools may provide for the revocation thereof in certain contingencies, and the licensee, by accepting and acting under the license, assents to the conditions imposed, including such provisions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 288.]

4. CONSTITUTIONAL LAW—RIGHT TO REMEDIES FOR INJURY—DUE COURSE OF LAW.

Burns' Ann. St. 1901, § 5905f, authorizing the county superintendent to revoke licenses to teach in the public schools for the holder's incompetency, immorality, cruelty, or general neglect of the business of his school, etc., does not violate Const. art. 1, § 12, providing that every man for injury done to him shall have remedy by due course of law.

5. EMINENT DOMAIN—TAKING PRIVATE PROPERTY WITHOUT COMPENSATION—ACTS CONSTITUTING APPROPRIATION—POLICE POWER.

The enforcement of regulations enacted in the proper exercise of the police power of the state cannot be resisted as a taking of private property without compensation, in violation of Const. art. 1, § 21.

6. SAME.

Burns' Ann. St. 1901, § 5905f, authorizing the county superintendent of schools to revoke teachers' licenses for specified grounds, does not violate Const. art. 1, § 21, providing that property shall not be taken without just compensation.

7. CONSTITUTIONAL LAW—ENCROACHMENT OF EXECUTIVE ON JUDICIARY—EXERCISE OF JUDICIAL POWER IN REVOCATION OF LICENSES.

Statutes conferring on a ministerial officer power to issue and to revoke licenses are not invalid, and do not clothe such officer with judicial power, and in granting, refusing, or revoking any such license he does not exercise judicial power in violation of constitutional provisions.

8. SAME.

Burns' Ann. St. 1901, § 5905f, authorizing the county superintendent of schools to revoke teachers' licenses for specified causes, after a hearing, etc., is not invalid as conferring on a ministerial officer judicial power, in violation of Const. art. 3, dividing the powers of government into three departments, and declaring that a person charged with official duties in one department shall not exercise any of the functions of the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 145.]

9. LICENSES — REVOCATION — GROUNDS — STATUTES—CONSTRUCTION.

Where a statute authorizes a revocation of a license for causes specified, such license cannot, as a general rule, be revoked on any other ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Licenses, § 75.]

10. SCHOOLS—REVOCATION OF TEACHER'S LICENSE—PROCEDURE—JURISDICTION OF EQUITY.

Under Burns' Ann. St. 1901, § 5905f, authorizing the county superintendent of schools to revoke teachers' licenses for specified causes, the act of the superintendent in so revoking a license is not a judicial act in the technical sense of the word, but the superintendent may revoke the license only for a statutory cause, and, if he attempts to proceed on other grounds, his action is without jurisdiction, and on a sufficient showing equity may intervene; but, where he proceeds to hear a charge within the statute and on reasonable notice, the accused must follow the procedure provided in the school laws, and, if aggrieved, must prosecute an appeal to the state superintendent, as provided by such laws.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 288.]

11. SAME.

The utmost the holder of a teacher's license may ask, as to proceedings to revoke the license, is that they shall conform to the law authorizing revocation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 288.]

12. SAME.

In proceedings to revoke a teacher's license on the ground that he had refused without good reason to board in his school community, on account of which he was unable to reach his school so as to begin daily school sessions at a reasonable time, the teacher may object to the charge on the ground of its generality, and have the same amended or stricken out, on motion before the county superintendent, and, on his failure to take such steps, he is not entitled to relief by injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 288.]

13. SAME.

Burns' Ann. St. 1901, § 5905f, authorizes the county superintendent of schools to revoke teachers' licenses for incompetency and general neglect of the business of the school. Sections 6009 and 6010 require teachers to attend township and county institutes. A teacher, in proceedings to revoke his license, was charged with having refused to attend township and county institutes, and with having failed to make daily preparation necessary for successful teaching. *Held*, that the charges were sufficient under the statute to authorize the revocation of the license, on the same being established, and the courts would not interfere.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 288.]

14. SAME.

Where a county superintendent has jurisdiction of a proceeding to revoke a teacher's license, his bias and want of judicial capacity are not grounds for interference by the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Schools and School Districts, § 288.]

Appeal from Circuit Court, Owen County; Joseph W. Williams, Judge.

Action by Harry Fritts against William H. Stone, county superintendent. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Willis Hickam, for appellant. O. Matthews, for appellees.

MONTGOMERY, J. Appellee brought this action to enjoin appellant as county superintendent from revoking his license to teach school. It appears from the complaint:

That appellee is a school teacher of 20 years' experience, and that on October 16, 1905, while engaged in teaching in Owen county, appellant prepared and filed against him as such teacher the following charge and specifications, to wit: "(1) You have refused without good reason to board in your school community. On this account, you are unable to reach your school so as to begin daily school sessions at a reasonable time. (2) You have refused without reason to attend the preliminary township institute, and the monthly township institute. (3) You have refused without reason to give regular attendance at the teachers' county institute. (4) You do not make daily preparation necessary for successful teaching." That appellee appeared in response to notice, and such proceedings were had as resulted in the dismissal of such charge, and, on completion of his school term, appellant issued to him a success grade of 92 per cent. as a teacher. That afterwards appellee secured from the state superintendent a license to teach for 24 months from the 28th day of April, 1906, and on July 5th following appellant notified appellee to appear at his office and make answer to the above charge, and show cause, if any, why his license to teach should not be revoked, and in response thereto appellee appeared in person and by counsel, and caused the hearing to be postponed until July 10th. Appellee further avers that neither of said charges constitutes a cause for the revocation of such license; that appellant has no right or authority to hear and determine the same; that conceding the sufficiency of such charge appellant has no power to hear and determine the same over the objection of appellee; that section 9 of the act of March 3, 1899 (Acts 1899, p. 245, c. 143), is unconstitutional; that the charges are untrue and false, and appellant is not an impartial magistrate, and will upon such charge revoke appellee's license to his irreparable damage. The court below overruled appellant's demurrer to the complaint, and the assignment that this ruling was erroneous presents the disputed questions for our decision.

The statute upon which this proceeding was founded reads as follows: "That the county superintendent shall (have) the power to revoke licenses heretofore granted by himself or predecessors or hereafter granted by the state superintendent of public instruction, for incompetency, immorality, cruelty or general neglect, by the holder, of the business of his school. Due notice of such revocations shall be given in writing by the county superintendent, and an appeal therefrom shall lie to the state superintendent of public instruction, and if the same be taken within five days after notice is given it shall operate as a stay of proceedings until the state superintendent of public instruction shall have passed upon such appeal. The revocation of the license of any

teacher shall terminate his employment in the school in which he may have been employed to teach." Burns' Ann. St. 1901, § 5905f. It is contended on behalf of appellee that this section of the law contravenes section 12 of article 1 of the state Constitution, which provides "that the courts shall be open; and every man for injury done to him in person, property or reputation, shall have remedy by due course of law"; and also violates section 21 of article 1, which provides that "no man's particular services, nor his property shall be taken by law without just compensation"; and violates the provisions of article 3 of the Constitution by conferring judicial power upon a ministerial officer. This complaint can be held sufficient only upon the ground that the law in question is unconstitutional, or that the proceeding assailed was wholly void for want of jurisdiction over the subject-matter or the person of appellee.

The constitutional questions suggested are not of a serious character. It must be remembered that the establishment and regulation of public schools rests primarily with the legislative department, and the constitutional provisions invoked by appellee were not designed to trammel the state in the exercise of its general political powers, or to impose upon the courts the duty of interposing between the Legislature and the citizen in matters of pure governmental concern. The Legislature, in the proper exercise of its power, has provided a general system of licenses for those who desire to engage in teaching, and has authorized the revocation of any such license by county superintendents for certain prescribed causes. A license has none of the elements of a contract, and does not confer an absolute right, but only a personal privilege to be exercised under existing restrictions, and such as may thereafter be reasonably imposed. Statutes authorizing the issuance of such licenses are enacted to promote the good order and welfare of the state, and may ordinarily be repealed at the pleasure of the Legislature. *Calder v. Kurby*, 5 Gray (Mass.) 597; *Freleigh v. State*, 8 Mo. 606; *People v. New York Tax, etc., Com'rs*, 47 N. Y. 501; *State v. Burgoyne*, 75 Tenn. 173, 40 Am. Rep. 60.

In the case of *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 540, 24 L. Ed. 148, the Supreme Court of the United States, in speaking of licenses, said: "The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by the state is always revocable." The statute authorizing the granting of a license may provide for its revocation in certain contingencies, and, by accepting and acting under a license, the licensee consents to all conditions imposed thereby, including provisions for its revocation. 21 Am. & Eng. Ency. of Law, 826. In the case of *Commonwealth v. Kinsley*, 133 Mass. 578,

the Supreme Court of Massachusetts said: "A licensee takes his license subject to such conditions as the Legislature sees fit to impose, and one of the statutory conditions of this license was that it might be revoked by the selectmen at their pleasure. Such a license is not a contract, and a revocation of it does not deprive the defendant of any property, immunity, or privilege within the meaning of these words in the Declaration of Rights." The Supreme Court of Illinois, in discussing the proprietary interest of an individual in a license to retail intoxicating liquors, said: "He received the license on the condition that it might be revoked if he should sell liquor on Sunday, and he thereby assented to the terms and conditions." *Schwuchow v. City of Chicago*, 68 Ill. 444, 450.

It is our conclusion that the act in question does not assume to, and does not, deny appellee access to the courts for any injury done to him in his person, property, or reputation, within the meaning of section 12, art. 1, of the state Constitution. The enforcement of regulations enacted in the proper exercise of the police power of the state cannot be resisted as a taking of private property without compensation in violation of section 21, art. 1, of the state Constitution. *State v. Richcreek*, 167 Ind. 217, 77 N. E. 1085; *Levy v. State*, 161 Ind. 251, 68 N. E. 172; *City of Aurora v. West*, 9 Ind. 74. It is equally well settled that statutes conferring upon a ministerial officer or board power to issue and to revoke licenses are not invalid, and do not clothe such tribunals with judicial power, and in granting, refusing, or revoking any such license such tribunal does not exercise judicial power in violation of constitutional provisions. *Spurgeon v. Rhodes*, 167 Ind. 1, 78 N. E. 228; *State v. Webster*, 150 Ind. 621, 50 N. E. 750, 41 L. R. A. 212. We accordingly hold the statute above quoted valid and constitutional as against the attack of appellee.

The remaining question is whether, in his complaint, appellee has shown sufficient ground to invoke the aid of a court of equity. In a kindred case the Supreme Court of New Jersey denied a teacher's right to resort to a court of law, using the following language: "The plaintiff, having accepted an appointment as a teacher under the school law, is bound by all of its provisions, and has barred himself from having the propriety of his dismissal by the local school board reviewed in any tribunal except those specially created by the Legislature for the purpose." *Draper v. Com'rs of Public Instruction*, 66 N. J. Law, 54, 55, 48 Atl. 556. The rule of estoppel in this state cannot be said to be so strict as the New Jersey doctrine in view of the following provision: "Nothing in this act, however, shall be construed so as to change or abridge the jurisdiction of any court in cases arising under the school laws of this state; and the right of any person to

ring suit in any court in any case arising under the school laws, shall not be abridged by the provision of this act." Acts 1899, p. 42, c. 143, § 4; section 5903, Burns' Ann. St. 901. It is generally accepted doctrine that where a statute or ordinance authorizes the revocation of a license for causes enumerated, such license cannot be revoked upon any ground other than one of the causes specified. 1 Am. & Eng. Ency. of Law, 826. The Court of Appeals of Kentucky regards the act of a superintendent in revoking a license under the laws of that state as a judicial proceeding, and expressly holds that, if in any case he is proceeding without jurisdiction, the circuit court has power to restrain the proceeding. *Supt., etc., v. Taylor*, 105 Ky. 387, 390, 49 S. W. 38. We are not in accord with the Kentucky court in classing the action of a school superintendent in revoking a license as judicial in the technical meaning of that word, but we do hold that he may revoke only for some statutory cause, and, if attempting to proceed upon grounds wholly outside of the statute, his action would be without jurisdiction, and upon a sufficient showing, a court of equity might intervene to prevent the threatened revocation. If the superintendent is proceeding to hear a charge fairly within the statute, and upon reasonable notice, the accused must follow the procedure provided in the school laws, and, if aggrieved by the decision of the county superintendent, prosecute an appeal to the state superintendent. *Moreland v. Wynne* (Tex. Civ. App.) 62 S. W. 1093; *Harkness v. Hutcherson et al.*, 90 Tex. 383, 38 S. W. 1120; *Jackson v. Ind. School Dist.*, 110 Iowa, 313, 81 N. W. 596; *Kirkpatrick v. Independent School Dist.*, 53 Iowa, 585, 5 N. W. 750; *St. Joseph v. Levin*, 123 Mo. 588, 31 S. W. 101, 49 Am. St. Rep. 577; *Carver v. School Dist., etc.*, 113 Mich. 524, 71 N. W. 859; *People v. Board of Education*, 17 Barb. (N. Y.) 299; *McOrea v. Pine Twp. School Dist.*, 145 Pa. 550, 22 Atl. 1040; *Roth v. Marshall*, 158 Pa. 272, 27 Atl. 945.

Giving appellee's rights under his license the widest effect allowable, the utmost he could ask or exact of the state is that proceedings to revoke such license be made to conform to the law authorizing such revocation. Township and county institutes for teachers are required to be held, their attendance is commanded, and pay provided. Sections 6009, 6010, Burns' Ann. St. The statute quoted authorizes a teacher's license to be revoked for general neglect of the business of his school. It is manifestly upon this ground that the charge under consideration was predicated. The first specification was not skillfully or aptly phrased, and in itself might not justify the revocation; but the complaint intended, doubtless, was not, as seemingly charged, that appellee, without good reason, refused to board in the school community, but failed to open his school at a reasonable hour because he need-

lessly boarded at a place remote from the school. This feature of the general charge, so far as we are advised, might have been amended or stricken out upon motion before the county superintendent. A party to a pending proceeding is not entitled to relief by injunction for matter from which he might obtain relief by motion in that proceeding itself. 22 Cyc. 772. The second and third specifications, as well as the fourth, if true, show a lack of interest in his work, and a general neglect of his duty as a teacher and of the business to which his efforts should be directed, and bring the charge within the terms of the statute, and consequently give the appellant jurisdiction over the subject-matter. Jurisdiction over the person of appellee is admitted by the averments of the complaint. In these circumstances, the conditions under which he accepted his license compelled him to submit to the authority of the school officers, and, if aggrieved by the decision of the county superintendent, seek redress by an appeal to the state superintendent of public instruction. These officers are clothed with special powers and charged with the duty of holding these institutes, and of laboring in every practical way to elevate the standard of teaching, and to improve the condition of the schools. Judicial officers, howsoever wise, should not hastily usurp their prerogatives and functions, and seek to substitute their opinions for the opinions and judgments of men held accountable for results in educational affairs. Tribunals established by law may not infringe upon the jurisdiction of each other; and, as this court said in the case of *Board v. Markle*, 46 Ind. 96: "In the present imperfect state of human knowledge, a power to hear and determine necessarily carries with it a power which makes the determination obligatory, without reference to the question whether it was right or wrong. If this were not so, the judgment or determination of any court would be of no particular value. It might be attacked or avoided at pleasure, upon the ground that the court or judge had committed an error." If questions affecting the competency and general conduct of teachers may be indiscriminately taken from the determination of school tribunals and submitted to courts and juries, learned or unlearned, as they may be, no discipline or harmonious system can be preserved, but the fate of a teacher may be made to depend upon his pronouncement of such words as "Cuba" and "America," as exemplified in the case of *Carver v. School Dist.*, supra.

Jurisdiction of the county superintendent being shown, the allegations with respect to his bias and want of judicial capacity are without force. He must answer to the body responsible for his election for the manner in which he discharges his duties so long as he keeps within his legitimate sphere. The complaint is insufficient to invoke equitable

relief, and appellant's demurrer thereto for want of facts should have been sustained.

The judgment is reversed, with directions to sustain appellant's demurrer to the complaint.

(169 Ind. 393)

COLE v. STATE. (No. 21,011.)

(Supreme Court of Indiana. Nov. 26, 1907.)

1. INDICTMENT AND INFORMATION—PROSECUTION ON AFFIDAVIT—STATUTES.

Acts 1905, p. 611, c. 169, § 118, providing that public offenses may be prosecuted by affidavit, substitutes affidavit for the information authorized by the old Code, and the affidavit will alone perform all the functions of an affidavit and information under the old Code.

2. SAME—"FILED."

The word "filed" in Acts 1905, p. 611, c. 169, § 118, providing that public offenses may be prosecuted "by affidavit filed in term time," when considered in connection with section 119, providing that such affidavit shall be approved by the prosecuting attorney, etc., is intended for "made," and the clause should read "by affidavit made in term time."

[For other definitions, see Words and Phrases, vol. 3, pp. 2764-2770.]

3. SAME—INDORSEMENTS.

Acts 1905, p. 609, c. 169, § 110, providing that, when an indictment is found, it must be indorsed by the foreman of a grand jury as a true bill, re-enacts the provisions of the former Criminal Codes and the common-law rule, and imperatively requires, as at common law, that an indictment contain the indorsement by the foreman of the grand jury, or the same will be invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 138-143.]

4. SAME—AFFIDAVIT—INDORSEMENTS.

Under Acts 1905, p. 611, c. 169, §§ 118, 119, providing that public offenses may be prosecuted by affidavit, and requiring the prosecuting attorney to approve the affidavit by indorsement, using designated words and signed by him, an affidavit which does not contain the indorsement of the prosecuting attorney is bad, and a motion to quash it must be granted, though the court on discovering the failure of the prosecuting attorney to approve the affidavit may, before the beginning of the trial, permit him to approve it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 162.]

Appeal from Circuit Court, Washington County; Thomas B. Buskirk, Judge.

Johnnie Cole was convicted of trespass, and he appeals. Reversed and remanded.

Fippen & Fippen, for appellant. James Bingham, Atty. Gen., and White, Dowling & Cavins, for the State.

JORDAN, J. Appellant was prosecuted upon an affidavit for having violated the provisions of section 388, c. 169, p. 670, Acts 1905, by unlawfully trespassing on certain described lands situated in Washington county, Ind., and owned by one Frank A. Bundy. He unsuccessfully moved to quash the affidavit. Upon his plea of not guilty, he was tried by a jury and a verdict returned, finding him guilty as charged and assessing his punishment at a fine of \$5. He moved in arrest of

judgment and for a new trial. These motions the court overruled, and rendered judgment on the verdict. Appellant appeals, and the only error assigned is the overruling of the motion to quash the affidavit.

The argument advanced by counsel to show that the trial court erred in denying the motion to quash is that the affidavit does not contain the indorsement of the prosecuting attorney, "approved by me," as required by section 119 of the act concerning public offenses. Acts 1905, pp. 584, 611, c. 169; Burns' Ann. St. Supp. 1905, § 1700. An examination of the affidavit as it appears in the record verifies the contention of counsel for appellant in respect to the indorsement thereon, for there is an entire absence of the indorsement by the prosecuting attorney as required by section 119, supra. Section 118 of the statute in question provides that "all public offenses, except treason and murder, may be prosecuted in the circuit or criminal court by affidavit filed in term time," etc. Section 119 of the act reads as follows: "When any such affidavit has been made, as provided in the last section, the prosecuting attorney shall approve the same by indorsement, using the words 'approved by me' and sign the same as such prosecuting attorney and indorse thereon the names of all the material witnesses; after which such affidavit shall be filed with the clerk, who shall indorse thereon the date of such filing, and record the same as in the case of an indictment, as provided in section one hundred and thirteen of this act. Other witnesses may afterwards be subpoenaed by the state; but unless the names of such witnesses be indorsed on the affidavit at the time it is filed, no continuance shall be granted to the state on account of the absence of any witness whose name is not thus indorsed. And the record of such affidavit and the indorsement thereon, or a copy thereof certified to be a true copy by the clerk of the court, shall be sufficient evidence of the making and filing of such affidavit and the contents thereof; and the defendant may be tried upon such copy, all as provided in section one hundred and fifteen of this act in case of trial on copy of indictment." By the change made under section 118, supra, in our Criminal Code, the Legislature intended thereby that the method authorized under the old Code of prosecuting a criminal offense on affidavit and information should be eliminated, and that all public offenses, except treason and murder, may be prosecuted alone upon affidavit. It was intended that such affidavit should be substituted as a pleading upon the part of the state for the information authorized by the old Code, and that it alone should perform all of the functions of an affidavit and information. It will be noted that section 119, supra, expressly or positively requires that the prosecuting attorney shall approve the affidavit by indorsement, using

the words "approved by me," and subscribe or sign his name to such approval, after which the affidavit shall be filed with the clerk of the court, who shall indorse thereon the date of the filing and record the same as in case of an indictment, as provided by section 113. It is further provided that the record of such affidavit, and the indorsement thereon (that is, the record made by the clerk under section 113), or a copy thereof certified to be a true copy by the clerk, shall be sufficient evidence of the making and filing of the affidavit and the contents thereof. The Legislature appears to have made the approval of the affidavit by the state's representative a condition or requirement preceding its filing with the clerk of the court and the recording thereof by the latter officer, and it can have no standing or effect as a pleading or document in the case until authenticated by the approval of the prosecuting attorney as the law exacts.

The word "filed," as used in the clause, "by affidavit filed in term time," as the same appears in section 118, when read in the light of section 119, evidently was intended for "made," and such clause should be read "by affidavit made in term time," instead of "filed." The Legislature certainly did not intend that there should be a dual filing of the affidavit with the clerk. By section 110 of the same statute, it is provided that, when an indictment is found by a grand jury, it must be signed by the prosecuting attorney and indorsed by the foreman of the grand jury as "a true bill," to which indorsement he must subscribe his name. This is but a re-enactment of the same provision found in our former Criminal Codes, and certainly is no more mandatory than is the provision of section 119, requiring the prosecuting attorney to approve the affidavit as therein required. The language used in section 110 is: "It [the indictment] must be indorsed by the foreman, etc., as a true bill," and his name subscribed to such indorsement, while the language employed by section 119, supra, is: "The prosecuting attorney shall approve the same by indorsement, using the words 'approved by me' and sign the same," etc. As far back as 2 Blackford, in the appeal of *Townsend v. State*, 151, this court, in effect, held that the indorsement "a true bill" by the foreman of a grand jury was material. In fact, under the common law, it was held to be essential to the validity of the indictment. 22 Cyc. 254. In *Johnson v. State*, 23 Ind. 32, *Strange v. State*, 110 Ind. 354, 11 N. E. 357, *State v. Buntin*, 123 Ind. 124, 23 N. E. 1140, and *Denton v. State*, 155 Ind. 307, 58 N. E. 74, and many other cases, this court has held that, in the absence of the indorsement imperatively required by the statute, an indictment must be held bad on a motion to quash. These decisions are decisive of or at least influential upon the question presented in this case. There can be no question but what the lower court, upon discovering

that the prosecuting attorney had failed or neglected to approve the affidavit in dispute, might, before the beginning of the trial thereon, have permitted him to approve it as required by the statute. His neglect or failure to discharge a plain and important official duty certainly renders him deserving of unfavorable criticism. In the absence of the required approval of the affidavit in controversy by the prosecuting attorney, it is clearly bad and appellant's motion to quash should have been sustained. The lower court, therefore, erred in overruling the motion.

Judgment reversed, and cause remanded.

(42 Ind. App. 645)

CITY OF GREENFIELD v. BLACK. (No. 5,945.)¹

(Appellate Court of Indiana, Division No. 1, Nov. 28, 1907.)

1. MUNICIPAL CORPORATIONS — CONTRACTS — INDIVIDUAL INTEREST OF OFFICER.

The secretary of a city board of health is an officer within the act for the incorporation of cities, approved March 14, 1867 (Laws 1867, p. 53, c. 15, § 52; 2 Burns' Ann. St. 1901, § 3539), declaring that no city officer shall be in any manner interested in any contract with the city, and a contract made in violation thereof to be void, and hence a contract, between a city and the secretary of the board, whereby the secretary is to care for smallpox patients, is void unless such an emergency exists that it would be manifestly unjust to delay action in order to comply with the strict requirements of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 657-664.]

2. SAME.

Evidence in an action to recover for services rendered a city in caring for smallpox patients by one who at the time of the contract was secretary of the city board of health held not to establish such emergency as to create an exception, in favor of the secretary of the board, to the act for incorporation of cities approved March 14, 1867 (Laws 1867, p. 53, c. 15, § 52; 2 Burns' Ann. St. 1901, § 3539), forbidding contracts between a city and an officer thereof.

Appeal from Circuit Court, Henry County; John M. Morris, Judge.

Action by John P. Black against the city of Greenfield. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

W. C. Welborn and E. H. Bundy, for appellants. M. E. Forkner and W. W. Cook, for appellees.

WATSON, J. Appellee, a resident of the city of Greenfield, and secretary of the board of health thereof, sued said city for compensation for services alleged to have been rendered by virtue of a contract with said city during an epidemic of smallpox in the year 1902. The complaint was in three paragraphs. The first alleged, in substance, that appellee is and was at the time a legally licensed physician; that an epidemic of smallpox broke out during the year 1902 in said city; that the common council, being duly authorized, contracted with appellee to treat and prescribe for all persons affected

¹ Rehearing denied. Transfer to Supreme Court denied.

with or exposed to said disease, at the rate of \$20 per day; that appellee performed such services for a period of 71 days, for which he demands judgment in the sum of \$1,420. The second paragraph avers, in substance, the same facts, also alleging that appellee's services were reasonably worth \$20 per day, instead of averring that the agreed compensation was \$20 per day. The third paragraph avers that said epidemic broke out in said city on October 20, 1902; that there was no hospital or other place where persons affected could be treated; that for the protection of the citizens of the city, and for the preservation of the lives and health of those affected, it was as very urgent that persons so affected should have proper medical treatment; that the ordinary physicians of said city would not undertake such treatment, and that persons affected were wholly without medical aid unless the city authorities provided it; that appellee was secretary of the board of health of said city, but not required to take upon himself the treatment of such persons; that the mayor and common council requested appellee to attend on such persons; that, by reason of the request, he did so treat such persons for a period of 71 days; that his services were worth \$20 per day; that no part of said sum has been paid and the persons treated are unable to pay the same. Judgment was asked in the sum of \$2,000.

Appellant answered (1) general denial; (2) that at the time of rendering such services appellee was the regularly elected and acting secretary of the city board of health, therefore the alleged contract was void; (3) payment. There was a trial by jury and a verdict for appellee in the sum of \$850. Motion for a new trial was made, overruled, and judgment on the verdict rendered. The only error assigned is the overruling of the motion for a new trial. One of the reasons assigned for a new trial is that the verdict is contrary to law. It is shown by the answer, and by the proof as well, that appellee was at and during all the time the services were rendered for which this action is brought the health officer of the city of Greenfield, Ind. By section 52 of the act for the incorporation of cities, approved March 14, 1867 (2 Burns' Ann. St. 1901, § 3539), it is provided that "no member of the common council or other officer of such city shall, either directly or indirectly, be a party to or in any manner interested in any contract or agreement with such city for any matter, cause or thing by which any liability or indebtedness is in any way or manner created against such city, and if any contract should be made in contravention of the foregoing provisions, the same shall be null and void." There can be no doubt that the appellee is an officer of the city within the meaning of the statute above quoted. *Ft. Wayne v. Rosenthal*, 75 Ind. 156, 161, 39 Am. Rep. 127. The statute not only prohibits the making of contracts such

as that in issue, but it provides that, if made, the same shall be void. It applies to all contracts, both express and implied. *Brazil v. McBride*, 69 Ind. 244, 250; *Ft. Wayne v. Rosenthal*, 75 Ind. 156, 39 Am. Rep. 127; *McGregor v. Logansport*, 79 Ind. 166; *Case v. Johnson*, 91 Ind. 477; *Waymire v. Powell*, 105 Ind. 328, 331, 332, 4 N. E. 890; *Sloan v. City of Peoria*, 106 Ill. App. 151.

But appellee contends that there was such an emergency in this case that it created an exception to the statutory prohibition. In the case of *Eastman v. State*, 109 Ind. 278, 283, 10 N. E. 97, 99, 58 Am. Rep. 425, the court lays down the test for determining when such an emergency exists. It is said: "There are, perhaps, extreme cases where exceptions may be created by the courts, but these cases are very rare, and the authority to create exceptions is one to be exercised with great delicacy. It can never be exercised where the words of the statute are free from ambiguity and its purpose plain. It is only when the necessity is imperious, and where absurd or manifestly unjust consequences would otherwise certainly result, that the courts can create exceptions." This case is on "all fours" with the case of *City of Ft. Wayne v. Rosenthal*, supra, and in passing on the question of emergency in that case Judge Wood said: "The emergency, if it existed at all, was such as called for immediate and authoritative decision upon the case of each applicant. * * * The antagonism between the appellee's private interest and his public duty it is manifest was very great, and calculated to cast suspicion upon his discharge of duty, no matter how faithfully and conscientiously it was done. Let it be understood that such personal advantage may result to a member of the board, and suspicion not only attaches to his selection of those who may be served at public expense, but it extends to and taints the original decision and declaration of the board that an emergency existed which required the work to be done." Whenever a duty devolves upon the authorities to supply medical treatment and attention, as in the cases where the public welfare must be protected or indigent patients are unable to procure such treatment or attention, the authorities are empowered to employ such medical assistance. But, in order to justify the employment of a physician, who is within the positive inhibition of a statute, there must exist such an actual emergency that it would be manifestly unjust to delay action in order to comply with the strict requirements of such statute. And the right of recovery, under such circumstances, is not to be extended beyond the necessities of the actual emergency. *Board, etc., of Warren Co. v. Osburn*, 4 Ind. App. 590, 31 N. E. 541; *Board, etc., of Perry Co. v. Lomax*, 5 Ind. App. 567, 32 N. E. 800; *Board, etc., of Adams Co. v. Cole*, 9 Ind. App. 474; *Board, etc., of Morgan Co.*

¹ 36 N. E. 912.

v. Seaton, 90 Ind. 158; Washburn v. Board, etc., of Shelby Co., 104 Ind. 321, 3 N. E. 757, 54 Am. Rep. 332. If the duties of appellee, as such health officer, required him only to examine into and determine as to whether or not patients were suffering from an epidemic, and, if so, to put them and those about them under quarantine for the protection of the public, and the treating by him of such patients was not within the scope of his employment, then it would be the duty of the city authorities, if circumstances warranted it, to employ some one to care for and treat said patients, provided they be indigents. The evidence shows that a number of other physicians lived in said city, some of whom, doubtless, could have been employed to take charge of these patients, and who were not connected officially with the city administration. It also shows that at least in one instance appellee voluntarily took charge of the patients when they were under the care of the family physician. It is also shown to have been the third time during the year 1902 that this epidemic had broken out in said city; that appellee went to the council chamber, and notified them of the outbreak. He was then and there employed to look after and care for these patients, with little or no effort having been made to employ some one not an officer of the city to care for them. Taking the evidence as a whole, it fails to establish such a state of facts as to the existence of an emergency for the employment of the appellee, which, tested by the above cases, meets the requirements, to justify a recovery.

The judgment of the trial court is therefore reversed, with directions to sustain appellant's motion for a new trial.

(40 Ind. App. 592)

FIRST NAT. BANK OF REDLANDS v. GOLDSMITH. (No. 6,220.)

(Appellate Court of Indiana, Division No. 2. Nov. 26, 1907.)

1. JUDGMENT—CONCLUSIVENESS—DEMURRER.

A judgment sustaining a demurrer is as conclusive against a complaint in a subsequent action alleging the same facts as is a judgment upon issues joined and tried, but a judgment for defendant on a demurrer to the complaint because of an omission of an essential allegation therein will not bar a subsequent suit upon a complaint in which the omitted allegation is supplied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1167.]

2. MONEY PAID—CONTRACT FOR REIMBURSEMENT.

Where defendant agreed with a bank to pay, when presented, all drafts with bills of lading attached, drawn on defendant by a firm for all fruit defendant might authorize the firm to buy for cash for defendant's account, the firm being authorized by defendant to inspect, buy, and ship at his risk all spot cash orders, and defendant authorized the firm to buy a car of lemons for cash, which the firm did, delivering it to a railway company for shipment to defendant, and taking a bill of lading, naming the firm as both consignor and consignee, but

directing that defendant be notified of the car's arrival, and the firm indorsed the bill to defendant, attaching it to a draft in favor of the bank upon defendant, and the bank paid the draft, the firm using the proceeds to pay cash for the lemons, the bank may enforce reimbursement from defendant, as for money paid to his use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Money Paid, § 17.]

Appeal from Circuit Court, Sullivan County; O. B. Harris, Judge.

Action by the First National Bank of Redlands against Charles H. Goldsmith. From a judgment for defendant, plaintiff appeals. Reversed, with instructions.

Higgins & Cavins, John T. & Will H. Hays, and Eugene C. Campbell, for appellant. L. D. Levegne and Douthitt & Haddon, for appellee.

COMSTOCK, J. The amended cross-complaint is in five paragraphs. The first and second on the common count for \$970 each. The first for money loaned and advanced by appellant to appellee July 30, 1901, alleging demand for repayment August 9, 1901. The second for money laid out and expended for the use of the appellee on July 30, 1901, for which payment was demanded August 9, 1901. The third, fourth and fifth paragraphs each set out the facts leading up to the issuing of a draft upon which each is based. A demurrer for want of facts to each of the five paragraphs was overruled. The fourth paragraph embraces practically the averments of the third and fifth, and is substantially as follows: After alleging the corporate character of appellant, it states its business as banking, and that appellee is a fruit merchant, residing and doing business in Terre Haute, sets up the writing (Exhibit A) as a special promise by appellee to appellant "to pay, when presented, all drafts with bills of lading attached, drawn on the appellee by H. K. Pratt & Sons, for all cars of fruit appellee might authorize H. K. Pratt & Sons to purchase for spot cash for appellee's account, and to pay all such drafts covering such purchases without recourse or delay," and alleges that on July 22, 1901, appellee by telegraph did authorize H. K. Pratt & Sons to purchase for appellee, for spot cash, a car load of lemons, and pursuant to such authority H. K. Pratt & Sons did on July 23, 1901, purchase for appellee for \$970.50 spot cash a car load of lemons, and on July 26, 1901, delivered it to the Southern California Railway Company, to be transported to appellee at Terre Haute, Ind., and took from the railway company a bill of lading, naming themselves as both consignor and consignee, but containing directions to notify appellee of the arrival of the car, and acting under the special promise in writing, on July 29, 1901, indorsed the bill to appellee and drew in favor of appellant upon appellee for the \$970.50, attached the indorsed bill to the draft, and on the 30th of July, 1901, presented the draft with bill attached (Exhibit B) to

appellant for payment, and the appellant, relying on the special promise in writing, paid to H. K. Pratt & Sons the said sum, which was the full amount of the draft, and with this cash H. K. Pratt & Sons paid spot cash for the lemons; that afterwards, on August 9, 1901, and after the arrival of the lemons, appellant by course of banking presented the draft and bill to appellee and demanded payment, which was refused, and is still refused. Appellee answered in three paragraphs, each addressed to each of appellant's five paragraphs of amended complaint. The first and second were withdrawn. The third paragraph of answer is a plea of *res adjudicata* by reason of a former action begun and determined in the superior court of Vigo county prior to the commencement of the present suit. In this plea the various steps taken in the former action are specifically set forth, showing the filing of complaint by appellant, demurrer by appellee to same, sustaining thereof, filing amended complaint, demurrer thereto, overruling thereof, motion by appellee to require appellant to make the amended complaint more specific, the ruling of the court sustaining such motion, the filing by appellant of a second amended complaint, appellee's demurrer thereto for want of facts, the sustaining of the same, appellant's refusal to amend its complaint or plead further and election to abide said demurrer, and the rendition of judgment for appellee by the court that appellant take nothing, and that appellee recover his costs. The various complaints and amended complaints are set out in full.

The following is a copy of Exhibit A, filed with the third, fourth, and fifth paragraphs of the present action, and with the amended complaint in the former action: "Terre Haute, Ind. 12-28-1900. First National Bank, Redlands, Cal.—Gentlemen: I guarantee to pay when presented, all drafts, bill lading attached, drawn on us by H. K. Pratt & Sons for all cars of fruit we may authorize them to purchase for spot cash for our account. We authorize them to inspect, buy and ship at our risk, all spot cash orders and drafts covering such purchases will be paid without recourse or delay. We well understand that any benefits derived from these terms come to us and our money pays for the same. Yours truly, Chas. H. Goldsmith." Where a matter in a judicial proceeding is finally determined by a competent tribunal, it is considered at rest. A demurrer sustained to a complaint in a former action alleging the same facts as are set out in a complaint in a subsequent action, a judgment therein is binding upon the parties the same as a judgment rendered upon issues joined and tried by the court or jury. *Nickless v. Pearson*, 126 Ind. 486, 26 N. E. 478. But a judgment for the defendant on a demurrer to the complaint by reason of the omission of an essential allegation therein will not bar a subsequent suit upon a complaint in which the omitted allegation is supplied. *Terre Haute, etc., Ry. Co.*

v. State ex rel., 159 Ind. 470, 65 N. E. 401, and cases cited.

It is agreed by both parties to this appeal that the amended complaint in the first action was insufficient for want of facts, and that the demurrer thereto was properly sustained. This conclusion is reached, however, upon different grounds. Appellee insists that it was bad because it appeared that the goods bought were bought by H. K. Pratt & Sons on their own account, and were consigned by them to themselves, and not to appellee; that the bill of lading was never delivered to appellee, and the goods never became the property of the appellee, and for this reason the amended complaint in the former, as well as that in this action at bar, is bad. Appellant insists that the said amended complaint was bad because it contained no averment to show that any spot cash purchase had been authorized or made; that the authority given Pratt & Sons authorized draft on purchase for spot cash only. We are not advised upon what particular ground the demurrer was sustained by the trial court, but in our opinion the complaint in that cause was defective, in that it did not show that appellant acted within the scope of the written authority contained in Exhibit A. That defect is supplied in the complaint now under consideration. It was held by the trial court that in the present action facts are set out sufficient to bind the appellee and to constitute a cause of action against him. The holding is correct. In the former action it was alleged that appellee ordered Pratt & Sons to buy for him a car load of lemons. In the present case it is alleged that the order was to buy for spot cash. Appellee insists that this modification of the complaint is not material. A spot cash sale is for money immediately paid. It is alleged in the complaint that said agents of appellee could obtain for him lower prices upon purchases by them for him for spot cash paid immediately by his agents, upon inspection, than if purchased with the privilege to appellee of personal inspection of the fruit upon its arrival in Terre Haute with payment therefor afterward. Appellee's special promise in writing was for the purpose of securing the fruit at prices most favorable to him, and the additional averment in the complaint before us was material as showing that an important stipulation in Exhibit A had been observed. It clearly appears that, whatever H. K. Pratt & Sons did in the premises, they did as the agents of appellee acting by his express authority. The bill of lading shows that appellee was to be notified of the arrival of the goods at Terre Haute. It was indorsed by H. K. Pratt & Sons to be delivered to appellee on payment of draft attached. Exhibit A did not stipulate in whose name as consignee the bill was to be executed, but did provide that it should be attached to the draft. Appellant knew the authority by which the purchase had been made, that it was by the

agents of appellee for appellee. The bill was in effect to the appellee, when the draft was drawn and the money paid upon conditions which literally complied with the terms of Exhibit A. Appellee's agents were authorized "to inspect, buy, and ship at the risk of appellee all spot cash orders and drafts covering such orders were to be paid without recourse or delay." It was the duty only of appellant before honoring the draft to see that H. K. Pratt & Sons were authorized to make the purchase for appellee, whether such purchase had been made of the character specified and whether the goods were ready for forwarding. Of these facts appellant was informed.

In behalf of appellee a number of cases are cited relating to bills of lading as evidence of title to property in consignors, consignees, or transferees. The law as held in those cases is not questioned. They are not applicable to the question before us. This action is brought for money paid at the request and for the benefit and under the authority of the principal. Appellant was placed in a position to suffer pecuniary loss by appellee's directions to his agents and his written promise to appellant upon which the money was expended. It is proper to add that the first and second paragraphs of complaint upon the common counts are not barred by the former action. They were not within the issues.

Judgment reversed, with instructions to sustain the appellant's demurrer to the third paragraph of appellee's answer.

(42 Ind. App. 282)

STATE ex rel. VOYLES, Pros. Atty., v.
FRENCH LICK SPRINGS HOTEL CO.
SAME v. WEST BADEN SPRINGS CO.

(Nos. 6,399, 6,400.)¹

(Appellate Court of Indiana, Division No. 1
Nov. 26, 1907.)

1. CORPORATIONS — TERMINATION — MALFEASANCE.

That a corporation organized under Act March 9, 1901 (Acts 1901, p. 289, c. 127; Burns' Ann. St. 1901, § 4583), providing for the organization of voluntary associations, to operate a hotel and health resort, has successfully carried on that business, does not defeat a suit to terminate the charter for violations of the anti-gambling law in a casino to which men, women, and children had access.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 2395.]

2. SAME — SUIT TO TERMINATE CORPORATE CHARTER — PROPER RELATOR.

Act March 9, 1901 (Acts 1901, p. 289, c. 127; Burns' Ann. St. 1901, § 4583), provides for the organization of voluntary associations. Burns' Ann. St. 1901, §§ 1145, 1146 (Rev. St. 1881, §§ 1131, 1132), provides that an information may be filed against a corporation where it does acts amounting to a surrender of its corporate privileges or where it exercises powers not conferred by law, and that the information may be filed by the prosecuting attorney of the proper county upon his own relation, whenever he shall deem it his duty to do so or shall be directed by the court, or other competent authority. Act March 9, 1901 (Acts 1901, p. 294,

c. 127, § 29; Burns' Ann. St. 1901, § 4583p), provides that the State Auditor may examine corporations and when he finds them doing an unauthorized business, notify them to cease such business, and, upon their failure to so cease, to notify the Attorney General, who may institute proceedings, etc. Held, that a prosecuting attorney is a proper relator in a suit to terminate the charter of a corporation organized to operate a hotel and summer resort for violations of the anti-gambling law, such section 29 not affording an exclusive remedy.

Appeal from Circuit Court, Orange County; Bayless Harvey, Special Judge.

Actions by state of Indiana, on the relation of Willard H. Voyles, prosecuting attorney, against the French Lick Springs Company and West Baden Springs Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed and remanded.

C. W. Miller, Atty. Gen., W. H. Voyles, Pros. Atty., C. C. Hadley, James Bingham, Atty. Gen., and Dowling, White & Cavins, for appellant. A. G. Smith, Bernard Korbly, John W. Kern, M. B. Hottel, Perry McCart, and W. C. Mitchell, for appellees.

ROBY, C. J. This action was brought by the state, on relation of the prosecuting attorney of the Forty-Second circuit. The appellee is a corporation organized under the act of March 9, 1901, concerning the organization of voluntary associations. Acts 1901, p. 289, c. 127; section 4583, Burns' Ann. St. 1901. The purpose of its organization was to own and operate a hotel and health resort. The theory upon which the complaint proceeds is that it has abused its corporate privilege and franchise, and that because thereof its existence should be terminated. The procedure followed is authorized by the act of April 7, 1881 (Acts 1881, p. 880, c. 88; section 1145, Burns' Ann. St. 1901). The trial court sustained a demurrer to the complaint, and the correctness of its action therein is duly presented and is the sole question for determination.

The averments of the pleading show that as a part of its enterprise appellee constructed or acquired a large building called a "casino," to which men, women, and children had free access, and in which gambling in many forms was systematically conducted. It is averred, both generally and specifically, that the criminal law was habitually and persistently violated, that the resort has been widely advertised throughout the United States as a place where gamblers may be lavishly entertained and engage in their unlawful practices without fear of molestation, and that the local authorities are unable to enforce the law. The argument against the sufficiency of the facts stated in the complaint is confined to the proposition that the corporation is affirmatively shown to have successfully carried on the business for the doing of which it was chartered. This argument does not take into account the fact

that the corporation is not charged with nonfeasance, but with malfeasance. To have successfully conducted a hotel is no answer to a charge of contributing to the delinquency of children. It may also be observed that the form of any agreement as to the division of spoils between persons engaged in the commission of crime is likewise immaterial. The demurrer, in so far as it raised the question of insufficient facts, should have been overruled.

The further proposition argued is that the prosecuting attorney is not a proper relator, that the action to terminate the existence of a corporation organized under the act of 1901, concerning the incorporation of voluntary associations, can only be brought on the relation of the Attorney General, and that the provisions of said act as to such forfeiture render the act under which this proceeding is brought inapplicable. The general statute is, in part, as follows: "An information may be filed against any person or corporation in the following cases: * * * Fourth: or where any corporations do or omit acts, which amount to a surrender or a forfeiture of their rights and privileges as a corporation or where they exercise powers not conferred by law. * * * The information may be filed by the prosecuting attorney in the circuit court of the proper county upon his own relation, whenever he shall deem it his duty to do so or shall be directed by the court or other competent authority. * * * Sections 1131, 1132, Rev. St. 1881; sections 1145, 1146, Burns' Ann. St. 1901. Section 29 of the act of 1901 is as follows: "That such association at the time of filing its said articles with the Secretary of State, shall likewise file a copy thereof in the office of the Auditor of state, from time to time, written or printed copies of its Constitution and all by-laws thereafter adopted; and said Auditor of state shall have power to examine any such association at any time, and if upon any such examination said Auditor of state shall find that any such association is doing a business not authorized by law, he shall notify such association to cease doing such unauthorized business; and if such association shall fail, or refuse to cease doing such unauthorized business, or shall be insolvent, then in either such event the Auditor of state shall notify the Attorney General of the result of such examination and condition, and the Attorney General shall thereupon be authorized to institute proceedings for injunction, for a receiver or for a judgment of ouster by proceedings in quo warranto, or for sequestration of property, or for such other legal proceedings as may be necessary or proper in the premises." Acts 1901, p. 294, c. 127; section 4595p; Burns' Ann. St. 1901. The rules by which acts of the Legislature inconsistent with one another are construed and considered are elaborately stated in the briefs of respective counsel. They are not regarded as material to this

controversy, for the reason that the act of 1901 is not inconsistent with the discharge of his duty by the prosecuting attorney. Under section 29, supra, the Auditor of state was given authority to examine corporations, and, when he finds them doing a business not authorized by law, to notify them to cease doing such unauthorized business, and upon its failure to so cease or upon insolvency to notify the Attorney General who shall thereupon be authorized to institute proceedings, etc. The state does not charter corporations to commit crime. "Every private corporation in accepting its charter impliedly undertakes and agrees, upon condition of forfeiture, that it will exercise the rights and privileges conferred upon it in furtherance of the objects and purposes of its creation, and not otherwise, and that it will so conduct its affairs that it shall not become dangerous to the safety or well being of the state or community in and with which it transacts business." 2 Waterman on Corporations, p. 726, § 381; 2 Clark & Marshall's Priv. Corp. p. 877. The institution of a proceeding on the relation of the prosecuting attorney puts it within the power of the state to enforce the duty owing to it by its creature and to forfeit franchises for acts which in many instances are not punishable by indictment. The power of examination conferred upon the Auditor was not intended as a protection to corporations conducting gambling houses. The power conferred upon the Auditor may or may not be exercised. If it is, the Attorney General thereby acquires authority to institute proceedings, but there is nothing in the act indicating a purpose to confer upon the Auditor of state those powers which belong to the courts and their officers.

The prosecuting attorney was a proper relator, and the judgment is therefore reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint and for further proceedings not inconsistent herewith. All concur, except HADLEY, J., absent.

(40 Ind. App. 575)

BERG v. NEAL. (No. 6,151.)

(Appellate Court of Indiana, Division No. 1.
Nov. 26, 1907.)

1. EASEMENTS—RIGHT OF WAY—OBSTRUCTION—INJUNCTION—COMPLAINT.

A complaint to enjoin the removal of a gate, at a point where a private right of way entered a highway, alleged that plaintiff was the owner in fee simple of certain land and was in possession thereof, subject to an easement of a private right of way for wagons and other vehicles over and along the south side thereof, which easement was owned by defendant; that plaintiff had erected a farm gate of usual style and make, and sufficient width for the easy passage of wagons, other vehicles, etc.; that it was properly constructed, hung on hinges, and might be readily and easily opened and closed, and did not interfere with the free use and enjoyment of the right of way; and there were averments showing irreparable damage and threats of removal by de-

endant. *Held*, that the averments as to the easement might be treated as surplusage, but, at any event, the complaint was sufficient to maintain the action without an allegation of a right to close the right of way, since the admission of a right of way did not imply that it was an open way, and, if the grant gave defendant an open way, that was a matter of defense, which plaintiff was not required to anticipate or negative.

SAME — ACTIONS — PLEADING — AVERMENTS OF EASEMENT.

An averment that a certain easement was a private right of way for wagons and other vehicles is an averment that it is a private right of way for passage only, since nothing passes as an incident to the grant of an easement but what is requisite to the fair enjoyment of the privilege.

SAME—PLEADING AND PROOF—DEED CONTAINING MISDESCRIPTION—PAROL EXPLANATION.

In an action by the owner of a servient estate to restrain the removal of a gate at one end of a right of way where plaintiff, upon the record of a deed showing a right of way across different land, stated that he would show that the right of way claimed by defendant was taken in possession of, laid out, and used under the deed, and that the misdescription resulted from a mistake of the parties, admission of the deed and testimony showing the mistake were not error, even though the misdescription had not been pleaded nor reformation asked.

SAME—RIGHT OF SERVIENT OWNER—GATES.

The owner of a servient estate may maintain gates in a reasonable way at the termini of an easement for right of way passing over the estate; and an ordinary gate 10 feet wide is not an obstruction of a 16½ foot right of way for wagons and other vehicles.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Easements, §§ 124, 125.]

Appeal from Circuit Court, Hamilton County; Sam. R. Artman, Judge.

Action by John F. Neal against Andrew Berg to enjoin the removal of a gate at the end of a private right of way. From a judgment for plaintiff, defendant appeals. Affirmed.

Kane & Kane and Roberts & Vestal, for appellant. Gavin & Davis, for appellee.

HADLEY, P. J. This was an action brought by appellee to enjoin appellant from removing a gate erected by appellee upon his land at a point where a certain easement for the passage of wagons and vehicles entered upon a highway running along said land. The complaint avers that appellee is the owner in fee simple of the land, describing it. It then avers that there is a private right of way for wagons and other vehicles over and along the south side of said land, which easement, one rod in width, is owned by the appellant. The complaint further avers that appellee is the owner and in possession of said land and in the possession of the lands over which said easement passes, which land is subject only to the easement and use thereof as such private right of way for wagons and other vehicles by appellant. The complaint also avers that appellee has erected a iron gate of the usual style and make of sufficient width for easy passage for wagons and other vehicles, is properly constructed,

and is such as is in common and ordinary use for such purposes, hung on hinges attached to a post, may be readily and easily opened and closed, and does not in any manner interfere with the free use and enjoyment of said right of way. There are other proper averments showing irreparable damage and threats of appellant to remove said gate, and other matters not necessary here to set out. To this complaint appellant demurred, which demurrer was overruled, to which ruling appellant excepted. Appellant then filed a general denial, trial by the court, and a finding for appellee.

It is urged that the court erred in overruling the demurrer to the complaint for the reason that the same does not aver that the right of way mentioned therein was one that the appellee had a right to close. We do not think this contention can be sustained. The complaint avers that appellee is the owner and in possession of the land at the point where said gate is maintained. This, together with the other averments of the complaint exclusive of the averments in regard to the right of way, would be sufficient to maintain this action. The averments with reference to the right of way are in the nature of admissions and are for the benefit of the appellant, and may be treated as surplusage, but, considered in connection with the complaint, the admission that appellant had a right of way does not carry with it the necessary implication that it is an open right of way; it being well settled by the authorities that the general rule is that the owner of a servient estate may maintain gates in a reasonable way at the termini of an easement or right of way passing over said estate. *Goddard's Law of Easements* (Bennett's Ed.) 330; *Phillips v. Dressler*, 122 Ind. 414, 24 N. E. 223, 17 Am. St. Rep. 375; *Boyd v. Bloom*, 152 Ind. 152, 52 N. E. 751; *Whaley v. Jarrett*, 69 Wis. 613, 34 N. W. 727, 2 Am. St. Rep. 764; *Short v. Devine*, 146 Mass. 119, 15 N. E. 148; *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538; *Washburn's Easements & Servitudes*, p. 255; *Connery v. Brooke*, 73 Pa. 80; *Hartman v. Fick*, 167 Pa. 18, 31 Atl. 342, 46 Am. St. Rep. 658. The rule and the reasons therefor are well stated in *Goddard's Easements* on page 330, where the learned author says: "Questions often arise whether the owner of a private way through another's land has a right to an entirely free and open way the whole distance, or whether the landowner may lawfully erect gates or bars at the termini of the way, either where it enters the highway or at the opposite end. Obviously the burden on the owner of the servient estate is much greater if he must either leave the way entirely open for the roads of others' beasts, and the escape of his own, or else fence both sides of the way for its entire length. On the other hand, the use of the way to the owner thereof is not so convenient, if he must delay to open and close gates,

or remove and replace bars. When ways are created by express grant, this matter is frequently provided for by the grant itself. But in cases of a general grant, express or implied, or of necessity, the rule seems to be that gates or bars may be lawfully erected at the termini of such ways without any liability for obstructing the way, and the wayowner would be liable in trespass for wrongfully removing the same. The great preponderance of convenience to the landowner over the slight inconvenience to the wayowner seems to make it 'reasonable' in the eye of the law that such should be the rule. And, if the landowner may rightfully erect and continue such quasi obstruction without any liability, it seems to follow that the wayowner must duly replace the same after he has passed; and, if damage ensue from his neglect of his duty, he would be liable to the landowner therefor." This language is frequently referred to and quoted in subsequent authorities, and seems to be fully upheld by all of them. The averment that said easement is a private right of way for wagons and other vehicles is an averment that it is a private right of way for passage only, since nothing passes as incident to the grant of an easement, but what is requisite to the fair enjoyment of the privilege. 3 Kent, Com. 419-420; Lyman v. Arnold, 5 Mason (U. S.) 195, Fed. Cas. No. 8,626. And since it is well settled by the authorities above cited that the maintenance of a gate is not an unreasonable restriction upon the right of passage in appellant by the terms of his grant or use had through claim of right, if such grant or use gave him greater rights, such as the right of an open way, it was a matter of defense which appellee was not required to anticipate or negative.

On the trial appellee introduced in evidence a deed executed by George Ingermann and wife, grantors of appellee, to Jacob Heinzmann, grantor of appellant, which deed conveyed a right of way $16\frac{1}{2}$ feet in width, "over and along the south end of the west half of the northwest quarter of section eighteen (18), township nineteen (19) north range five (5) east." The right of way in question was situated along the south side of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section, township, and range above given. As will be seen, the right of way described in the deed is located 40 rods south of the right of way described in the complaint. Appellant objected to the admissibility of this deed. Appellee stated upon the proffer that he would show that the right of way claimed by appellant was taken possession of, laid out, and used under said deed, and that said deed contained the misdescription on account of mistake of all the parties. The record discloses that the claim of appellee was fully sustained, all of the witnesses testifying on this point agreeing that Jacob Heinzmann named in the deed took possession of the right of way described in the complaint, opened it

and used it, and that appellant as his successor continued the use and asserted his rights and claims under the said deed of Ingermann and Heinzmann. In fact, it is clearly shown that all of the rights that appellant has to said right of way have accrued to him under said deed. There was no error in admitting this testimony. It is contended by appellant that, since it was claimed by appellee that there was a mistake in the description of the deed, he could not introduce the same, and then introduce testimony to correct without first having plead such mistake and prayed for reformation of the same. This contention cannot be sustained. The deed had no place in the complaint. It formed no part of the action. In fact, we do not see how it was any part of appellee's cause more than an admission on his part of the rights of appellant. It would be a strange proceeding, indeed, if a plaintiff desiring to introduce a written instrument as evidence in which he knew there was some clerical or other mutual mistake of the parties, that before he should be permitted to introduce the same in evidence he should ask the court for a reformation of the instrument. It is also asserted by appellant that since the grant in the Ingermann deed was for a right of way $16\frac{1}{2}$ feet wide, and the gate constructed by appellee was only 10 feet wide, it was an obstruction of the free use of the whole width of such right of way. The cases cited by appellant in support of this proposition state no new or different rules from those above laid down. The case of Herman v. Roberts, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 800, is in full accord therewith. In that case the court say: "It is difficult, if not impossible, to lay down a clear and definite line of use which shall enable the parties always to determine what may be considered a proper and reasonable use as distinguished from an unreasonable and improper one, and such questions must, of necessity, be usually left to the determination of the jury, or the trial court, as a question of fact." Bakeman v. Talbot, 31 N. Y. 366, 88 Am. Dec. 275; Huson v. Young, 4 Lana. (N. Y.) 64; Prentice v. Gelger, 74 N. Y. 342. It is not supposed that it was the intention of the court below to wholly preclude the defendant from the use of the roadway by passing over or across it in such manner as should not materially obstruct passage, or injure the roadbed; but it was only intended to prevent an unreasonable use thereof which should sensibly impair its condition, or render its use offensive and impracticable to the plaintiff and others having lawful occasion to pass over it." Since the authorities cited clearly affirm that an ordinary gate erected across a way is not an unreasonable obstruction and is not an interference with a free passage, the above quoted rule is not antagonistic therewith. We find no reversible error in the second.

Judgment affirmed.

40 Ind. App. 581)

SCHMOLL, Treasurer, v. SCHENCK. (No. 5,941.)

Appellate Court of Indiana, Division No. 1.
Nov. 26, 1907.)

1. PLEADING—OBJECTION ON APPEAL—TAXATION—ACTION TO ENJOIN COLLECTION—SUFFICIENCY OF COMPLAINT.

A complaint to enjoin collection of certain taxes, alleging that plaintiff prior to 1892 was and since then had been a bona fide resident of the city of V., S. county; that as a resident of V. she was assessed from 1893 to 1903, inclusive, on personal property; that defendant was treasurer of the city of P., in M. county, and was claiming that plaintiff was the owner of personal property omitted from assessment for such years and on which she was liable to be assessed in P.; that she was not during those years a resident of P., and that the threatened assessment was wrongful—was sufficient where attacked for the first time in the Appellate Court, under the rule that a complaint, after judgment, will be held sufficient if it exhibits acts enough to bar another action for the same cause.

2. TAXATION—PLACE OF TAXATION—PERSONAL PROPERTY—"INHABITANT."

Under Burns' Ann. St. 1901, § 240, providing that the word "inhabitant" may be construed to mean a resident in any place, an "inhabitant" of a township, town, or city within section 8421, providing that personal property shall be assessed to the owner in the township, town, or city of which he is an inhabitant, is one whose place of abode is there, and who has no present intention of moving therefrom.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 419-423.]

For other definitions, see Words and Phrases vol. 4, pp. 3594-3604; vol. 8, p. 7687.]

3. DOMICILE—PRESUMPTION OF CONTINUANCE.

A domicile, once established, continues until both residence in a new locality and intent to make it a home concur.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Domicile, § 9.]

4. SAME—INTENT.

Intent to acquire a domicile may be determined by general acts and conduct and expressions of intention, but such expressions alone will not control where inconsistent with the acts and conduct of the person making them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Domicile, § 39.]

5. TAXATION—PLACE OF TAXATION—PERSONAL PROPERTY.

Plaintiff, at the death of her husband, was domiciled at V., where she had long lived with him. After his death, she spent about nine months of her time in P., the remainder in V., and other places, returning to V. on an average of about once a year, and remaining from two weeks to two months. She owned in V. residence properties and lots unimproved, together with other property and farms in the county wherein it was situated, but sold the house in which she lived at her husband's death. Each year she gave to the township assessor of the township wherein V. was located a list of all moneys, etc., and taxes were assessed on the property so returned. She denied her intention to adopt the city of P. as her home, and at all times claimed to be a resident of V. She purchased a lot in P. and built a house thereon, at the same was planned and constructed with reference to the wishes and conveniences of her son-in-law and his wife, and no special room was reserved therein for herself. Her mother lived at P., was a widow, old and in ill health, requiring constant attention, which largely devolved on plaintiff, and plaintiff also cared for her daughter's child during the daughter's illness. Held, in an action to enjoin the collection

of taxes on moneys, etc., by the treasurer of P., that plaintiff was an inhabitant of V. within Burns' Ann. St. 1901, § 8421, providing that personal property shall be assessed to the owner in the township, town, or city of which he is an inhabitant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 419-423.]

6. APPEAL—REVIEW—QUESTIONS OF FACT—WEIGHT OF EVIDENCE.

Evidence partly oral and partly documentary cannot be reviewed by the Appellate Court to determine its weight.

Appeal from Circuit Court, Miami County; Joseph N. Tillett, Judge.

Action by Flora H. Schenck against Andrew Schmoll, treasurer. Judgment for plaintiff and defendant appeals. Affirmed.

Cox & Andrews and H. M. Haag, for appellant. Antrim & McClintic, for appellee.

MYERS, J. On March 9, 1904, appellee commenced this action in the court below to enjoin the treasurer of the city of Peru, Ind., from collecting certain taxes threatened to be assessed against her. A complaint in one paragraph, answered by a general denial, formed the issue. Trial by the court. Special findings of fact made and conclusions of law stated thereon in favor of appellee, and, over appellant's motion for a new trial, judgment was rendered perpetually restraining and enjoining appellant from listing or assessing for taxation against appellee in favor of the city of Peru any moneys, moneys loaned, or credits for the years 1893 to 1903, inclusive, or in any manner attempting to collect taxes thereon, and in favor of appellee for costs. For the reversal of this judgment appellant contends that appellee's complaint does not state facts sufficient to constitute a cause of action; that the trial court erred in each of its four conclusions of law, and that the court erred in overruling appellant's motion for a new trial.

1. Among the facts shown by the complaint, it appears that appellee was the owner of a certain tract of real estate in the city of Peru; that for years prior to 1892 she was and continuously since that date has been a bona fide resident of the city of Vevay, Switzerland county, Ind.; that, as a resident of said city of Vevay, she was there regularly assessed for taxes for all and each of the years from 1893 to and including the year 1903 on personal property, consisting of moneys, notes, mortgages, etc., and which were assessed and valued at various amounts during said years; that appellant is treasurer of the city of Peru in Miami county, Ind., and as such treasurer is claiming that appellee was the owner of personal property, consisting of moneys, moneys loaned, and credits omitted from assessment for taxation for said years, and on which she was liable to be assessed and taxed in said city of Peru for said years, specifically stating the amount for each year, aggregating \$287,345; that she was not during either of said years a resident of said city of Peru; that she did not give

a list to the assessor of Miami county, Ind., nor was she assessed by any assessor of any township or city in said Miami county in either of said years from 1893 to 1903, inclusive, on any moneys, money loaned, notes, or mortgages for taxation; "that such threatened listing and assessing of said taxes against her are wrongful and unlawful and that she is in no wise liable for the payment thereof." The gist of this action is that appellee was a bona fide resident of the city of Vevay, Ind., during all of the years mentioned in the complaint, and that the property sought to be assessed and taxed in the city of Peru was not property subject to taxation by said last named municipality. Appellant for the first time, by an assignment of error in this court, questions the complaint for want of facts. The rule is that a complaint, after judgment, will be held sufficient if it exhibits facts enough to bar another action for the same cause. *Scott v. Collier*, 166 Ind. 644, 78 N. E. 184; *Over v. Dehne*, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883; *Smith v. Smith*, 35 Ind. App. 610, 74 N. E. 1008. Under this rule the complaint is sufficient.

2. The special findings of fact, in substance, show: The date and place of appellee's birth and place of residence before marriage, her marriage on May 29, 1872, to Ulysis P. Schenck, Jr., a resident of the city of Vevay, Switzerland county, Ind., and from that time she continued to there reside with him as his wife until his death and burial at Vevay in 1892. During the winter of 1889-90 appellee was an invalid and went to the city of Peru, Miami county, Ind., to receive treatment from certain physicians, residents of that city. That for about two years from May, 1890, appellee, her husband, and child, and solely for the benefit of the health of appellee and her husband, lived in Colorado and California, during which time their home in Vevay remained closed. That immediately after the death of her husband appellee and daughter went to Peru, and remained with relatives and friends until July, and then to Vevay, where they remained until October, 1892, then to Canton, Ohio, for one month, then to Peru to assist in the care of appellee's mother, who at that time was a widow, old, blind, and in ill health, requiring constant attention and physical assistance, and which care and attention devolved largely upon appellee. The mother died in July, 1903. In the spring of 1894, in anticipation of her daughter's marriage, a furnished residence in the city of Peru was leased for a term of 18 months. The marriage occurred in June, 1894. Thereafter when in the city of Peru appellee occupied said dwelling with her daughter and son-in-law. In September, 1895, her son-in-law went to New York for a course in the Bellview Medical College, his wife and appellee following in December, all returning to Peru the last of June, 1896, and in July appellee went to Petoskey, Mich., where she

remained a month, then returned to Peru, and immediately with her daughter went to Vevay, until the latter part of October, when they returned to Peru. Appellee's son-in-law, a physician, after considering various cities, decided to locate permanently in the city of Peru, and on June 26, 1897, appellee purchased a lot in the city of Peru, took the title in her own name, erected thereon a dwelling house, which was completed in July, 1898, and is the only real estate owned by appellee in said Miami county. The dwelling was planned and constructed with reference to the wishes and conveniences of the son-in-law and his wife. Two rooms for use as a physician's office, one room for the special use of appellee's mother, and occupied by her when appellee was in Peru. When appellee was away, she was taken to the home of her son. No special room was reserved for appellee. Appellee never remarried, and after the marriage of her daughter had no one depending upon her for support. In 1899 a son was born to appellee's daughter, and for several months after the birth of the child the mother was feeble in health and unable to care for it, and the child was cared for by appellee. Appellee since the death of her husband has not kept house, and prior to July, 1898, while in Peru, she occupied furnished rooms and took her meals at the hotel, restaurants, and in boarding houses. Subsequent to her daughter's marriage, when convenient, they roomed at the same house, and took meals together. At other times they roomed and boarded at separate houses. Immediately prior to the death of appellee's husband, he was negotiating the sale of the home they occupied in Vevay. The sale was not consummated by him. Soon after her husband's death appellee stored her household goods in a portion of the house, and rented the remainder until 1893, when she sold said residence and her household goods, except certain articles which had come to her through the relatives of her husband, and which, owing to the memories associated with them, she retained for her daughter, which she shipped and stored in Peru until the completion of her house in 1898. Appellee since the death of her husband has returned to Vevay on an average of about once a year, remaining on such occasions from two weeks to two months. Her stay on different occasions was shortened by calls from her relatives on account of sickness in their families, or on account of the condition of her own health. She has spent about nine-tenths of her time in Peru, the remainder in Vevay and other places. When appellee went to Peru after the death of her husband, she had no definite time fixed during which she would remain. Appellee was a member of the Baptist Church. She took a letter from that church at Vevay, and deposited it in the Baptist Church at Peru. When she went to Colorado and California in 1890, she took with her a church letter. On December 5,

1895, appellee intended to visit Europe for an indefinite time. To enable her brother to attend to her business pending her absence, she executed to him a power of attorney, in which the scrivener who drew said instrument, without her knowledge, described her residence therein as Miami county, Ind., and she executed the same without observing that her place of residence was so stated, and knew no different until after the instrument was recorded. That she at no time knowingly executed an instrument nor accepted a conveyance to herself in which her residence was described as Miami county, Ind. After the sale of her homestead in Vevay, the purchaser placed at her disposal a certain room therein, and which she occupied at times, and at other times, from choice, occupied another room, and at other times roomed with relatives of her deceased husband. She took meals at the hotel, and at times boarded with her friends. Of all the times appellee was in Vevay after the death of her husband on but two occasions did she go on matters of business. Since the death of her husband she has continuously owned, in the city of Vevay, six residence properties and other lots unimproved, two business rooms, two livery stables, one paint shop, and an interest in a furniture factory. In the county of Switzerland she owns four farms, one of 30 acres, two of 100 acres each, and one of over 200 acres. She owns notes secured by mortgages on real estate in Miami county of the value of \$10,000. Since the sale of her homestead in Vevay, appellee has owned but a small amount of tangible personal property, consisting principally of a horse and buggy, which, with her daughter's household goods, she listed for taxation in the city of Vevay until the year 1898, inclusive, in good faith, claiming and believing that to be her residence and the proper place to list said property, although said property was in Miami county, Ind. For the years 1899 to 1903, inclusive, acting on the advice that tangible personal property should be listed for taxation and assessed in the township, town, or city where the same is situate, irrespective of the owner's place of residence, the last above named property was listed for taxation in said city of Peru, she at the time of each listing claiming Vevay as her residence. In each and every year from 1893 to 1903 appellee, claiming Vevay as her home, returned to the township assessor of the township in Switzerland county, in which the city of Vevay is located, a full, true, and complete list of all moneys, moneys loaned, and credits owned by her on the 1st day of April of each of said years, respectively, which were duly listed for taxation in said county and city, averaging for the 11 years \$21,602, and the taxes were duly assessed on the property so returned and listed, both in said county and city and paid by appellee. That appellant is threatening to place certain property on the tax duplicates for the years from 1893 to

1903, inclusive, consisting of moneys, moneys loaned, and credits, ranging in amounts from \$16,240 in 1893 to \$22,896 in 1903. That during said years the average rate of taxation in the city of Peru was \$1.42 and in Vevay 60½ cents on the hundred dollars. That she had an agent in the city of Vevay who attended to the listing of her property, and she did not know the rate of taxation in either Peru or Vevay for either of said years. During her married life, she formed sincere and lasting friendships in the city of Vevay, and a warm attachment for the city and its residents, which she still retains, and never at any time intended to abandon her home in Vevay and to fix her home in any other place, and to maintain that city as her home and be buried there.

In this case there is no question of fraud or bad faith nor claim that the property claimed as exempt from taxation in the city of Peru was under the control of a trustee or agent, nor within any of the exceptions mentioned in section 8421, Burns' Ann. St. 1901. By this section "all personal property shall be assessed to the owner in the township, town or city of which he is an inhabitant on the first day of April of the year for which the assessment is made." The question now under consideration depends largely upon the construction given to the word "inhabitant" as used in the statute. The statutory rules of construction (section 240, Burns' Ann. St. 1901) provides that "the word 'inhabitant' may be construed to mean a resident in any place." It is almost impossible from the decided cases to give an exact definition of the word "inhabitant" as applicable to all cases. It has been construed to mean an occupant of land; a resident; a permanent resident; one having a domicile; a citizen; a qualified voter; a settler. Its construction is made to depend upon the connection in which the word is used. "Inhabitant implies a more fixed and permanent abode than 'resident'; frequently imports many privileges and duties to which a mere resident could not lay claim or be subject. One domiciled; one who has a fixed residence in a place—in opposition to a mere 'sojourner.'" Anderson's Law Dictionary. "Domicile: A place where a person lives, or has his home; that is, where one has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning. The habitation fixed in any place without any present intention of removing therefrom." Anderson's Law Dictionary. "*A resident of a place* (our italics) is one whose place of abode is there, and one who has no present intention of moving therefrom." Am. Eng. 694. Our lawmakers selected the word "inhabitant," a word, as we have seen, embracing locality of domicile or fixed permanent home, and which excludes the idea of a temporary residence, as particularizing the character of the residence intended where property of the class described in

the complaint shall be taxed. Considering the force given the word "resident" when used in the phrase "a resident of a place," and our right by statute to construe "inhabitant" to mean "a resident in any place," we have the definition of the word "inhabitant," and phrase "resident in any place," as meaning a true, fixed place, from which one has no present intention of moving. *Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700; *Astley v. Capron*, 89 Ind. 167; *McCormick v. Board*, 68 Ind. 214. Not, if absent, that he will return to a particular building, but, when applied to our taxing statutes, that he will return to the township, town, or city of which his domicile or place of residence is shown to be. As said by this court in *Green v. Simon*, 17 Ind. App. 360, 367, 46 N. E. 693, 695: "The general rule is that a man can have but one place of residence, and that to lose his residence in one place he must acquire residence in another place. Personal presence alone at another place does not determine the matter. He must remove without the intention of returning to his home as such. He must remove to another place with the intent to make it his home." The New Jersey act for the assessment of personal property, approved April 11, 1866, is practically in the same language as the act we are now considering, when read with our permissive construction of the word "inhabitant." The New Jersey court in the consideration of the New Jersey act (*State v. Casper*, 36 N. J. Law, 367) say: "The character of the residence here intended is fixed by the word 'inhabitant.' The meaning of this word, as used in the act, does not differ materially, if at all, from its ordinary and popular signification. One who has an actual, but merely temporary, residence in a place, is not, in any proper sense, an inhabitant of that place. An inhabitant of a township or ward is one who has his domicile there, his fixed habitation and home, from which he has no present intention of removing." The well-considered case of *Borland v. City of Boston*, 132 Mass. 89, 42 Am. Rep. 424, is very instructive on the question now being considered. One of the questions in that case rested on a determination of who were inhabitants within the meaning of the statutes of that state, making "liable to taxation in a particular municipality, those who are inhabitants of that municipality on the first day of May of the year." On that question the court ruled: "We cannot construe the statute to mean anything less than 'being domiciled in.' A man need not be a resident anywhere. He must have a domicile. He cannot abandon, surrender, or lose his domicile, until another is acquired. * * * Upon the whole, therefore, we can have no doubt that the word 'inhabitant' as used in our statutes when referring to liability to taxation, by an overwhelming preponderance of authority, means 'one domiciled.' While there must be inherent difficulties in the decisiveness of proofs

of domicile, the test itself is a certain one; and, inasmuch as every person by universal accord must have a domicile, either of birth or acquired, and can have but one, in the present state of society it would seem that not only would less wrong be done, but less inconvenience would be experienced, by making domicile the test of liability to taxation than by the attempt to pick some other necessary, more doubtful criterion."

In the case at bar it is admitted that appellee in 1893 was an inhabitant of the city of Vevay, Ind. With this fact admitted, the rule is well settled, both in this country and in England, that such habitancy or domicile will continue until both residence in a new locality and intent to make it her home concur. *Green v. Simon*, supra; *McCollem v. White*, 23 Ind. 43; *Brittenham v. Robinson*, 18 Ind. App. 502, 48 N. E. 616; *Borland v. Boston*, supra; *In re Moir's Estate*, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205; *Price v. Price*, 156 Pa. 617, 27 Atl. 291; *Plant v. Harrison*, 36 Misc. Rep. 649, 74 N. Y. Supp. 411; *Viles v. Waltham*, 157 Mass. 542, 32 N. E. 901, 34 Am. St. Rep. 311; *Mitchell v. U. S.*, 88 U. S. 350, 22 L. Ed. 584; *Desmare v. U. S.*, 93 U. S. 605, 23 L. Ed. 959; *Wicker v. Hume*, 7 H. L. Cas. 124; *Udny v. Udny*, L. R., 1 H. L. Cas. § 441; *Dacey*, Conflict of Laws, p. 104. Intention in cases of this character may be determined by the general acts and conduct and expressions of intention, but such expressions alone will not control the ultimate fact in issue if they are inconsistent with the acts and general conduct of the person making them. *Jacob's Domicile*, § 455. In the case at bar the special findings show the presence of appellee in the city of Peru the greater part of the time between 1893 and 1903, inclusive, that she purchased a lot and the building of a residence thereon, and that she has money loaned in that county. But, when these facts are considered in connection with the denial of an intention to adopt the city of Peru as the place of her habitancy or domicile, the magnitude of her interests in the city of Vevay and Switzerland county, her acts and conduct in listing the property in controversy for taxation in the city of Vevay, her long admitted residence there, her explanation of the cause of her stay in the city of Peru covering practically the entire time for which she is proposed to be taxed by the latter city, the explanation and inferences to be drawn from the facts found relative to the purchase of the lot, and the building of the residence, coupled with the fact that by the will of her late husband she became the owner of all the property with which he died seised, and that she, during all of said time, was unmarried, together with all of the other facts found, in our judgment clearly sustain the conclusions of law of the trial court, to the effect that during all of said time she was an inhabitant of the city of Vevay, and not an inhabitant of the city of Peru, Ind., and

at the class of property mentioned in the complaint was during all of the time mentioned properly and rightfully listed and taxed in the city of Vevay.

3. We have carefully considered the evidence relative to appellant's contention, that is not sufficient to support the findings presented by his assignment of error on the action of the court in overruling his motion for new trial. Without here taking the space and time necessary to set out the evidence tending to support the findings so challenged, we deem it sufficient to say that on all material facts, there is evidence in the record justifying the inferences drawn by the trial court. Any other conclusion of fact could only be drawn by weighing the evidence, orally and partly documentary, and this we cannot do. *Karges Furn. Co. v. Amalgated, etc.*, Union No. 131, 165 Ind. 421, 75 E. 877, 2 L. R. A. (N. S.) 788; *Parkinson Thompson*, 164 Ind. 609, 73 N. E. 109; *Edelson v. Hudelson*, 164 Ind. 694, 74 N. E. 109; *Over v. Dehne*, supra; *Maitland v. Edelson*, 37 Ind. App. 469, 77 N. E. 290; *Smith v. Smith*, supra.

Judgment affirmed.

Ind. App. 598)

HASELY v. ENSLEY. (No. 6,556.)
Appellate Court of Indiana, Division No. 2.
Nov. 26, 1907.)

TAXATION—NATURE OF PROPERTY—SHARES IN STOCK.

Shares of stock in a corporation are the property of the holder thereof, separate and distinct from the property of the corporation itself, and, in the absence of any more specific provision by the Legislature, would be held to be subject to taxation as personal property.

1. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 221.]

SAME—STATUTORY PROVISIONS.

Burns' Ann. St. 1901, § 8410, providing that all property not expressly exempt shall be subject to taxation, covers shares of the capital stock of both foreign and domestic corporations, and renders them liable to taxation unless exempted by some other statute.

1. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 221.]

STATUTES—CONSTRUCTION—INTENT OF LEGISLATURE—ENTIRE SUBJECT.

The purpose of the Legislature is the object to be attained in the construction of statutes, and it is to be determined, not from the declaration of a single sentence or section of law, but from a view of the entire legislation on the subject.

1. Note.—For cases in point, see Cent. Dig. vol. 45, Statutes, § 282.]

SAME—CHANGE OF WORDING.

A change of legislative purpose is to be presumed from a material change in the wording of the statute.

TAXATION—PROPERTY LIABLE—STATUTORY PROVISIONS—DOUBLE TAXATION.

The object of the provision, "all goods, chattels and effects belonging to inhabitants of this state, situated without this state, except the property actually and permanently invested in business in another state shall not be included," Burns' Ann. St. 1901, § 8411, defining what term "personal property" shall include for the purpose of taxation, was not to avoid

double taxation, since the purpose of that section was not to exempt any property from taxation, but to define the term "personal property" as used in the taxing law.

6. SAME—CORPORATE STOCK—FOREIGN CORPORATIONS.

Burns' Ann. St. 1901, § 8410, provides that all property within the jurisdiction of the state, not expressly exempt, shall be subject to taxation. Section 8411 provides that, for the purpose of taxation, personal property shall include all shares in foreign corporations, except national banks, owned by inhabitants of this state, and that shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholders. Section 8422 provides that all corporate property, including capital stock and franchises, shall be assessed to the corporation. Section 8460 requires that the schedule of property made out by the taxpayer shall set forth "all shares in foreign corporations other than banks, and their value." Section 8463 provides the form of schedule which includes "(8) all shares of stock in any corporation formed outside of this state." Section 8523 requires the township assessor to deliver to the auditor a list of the persons and the value of the property and taxables required to be listed. Section 8528 requires him to deliver to the auditor with his returns the statements of the property received from persons required to list it. Section 8561 requires the county auditor to make out a duplicate list and to enter under one column separately "all corporate stock," etc. Section 8566 requires him to deliver the duplicate to the treasurer, and subsequent sections require the treasurer to collect the taxes appearing on the duplicate. *Held*, that the Legislature intended that all shares of stock in foreign corporations owned by inhabitants of the state should be assessed for taxation, regardless of whether the property of the corporation was taxable in a foreign state or not, and even if it resulted in double taxation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 292.]

7. SAME—MATTERS INCLUDED IN TAXPAYER'S SCHEDULE.

The provisions of Burns' Ann. St. 1901, §§ 8460, 8463, were not inserted for statistical purposes, or to put the assessor on inquiry.

8. SAME.

The provision of Burns' Ann. St. 1901, § 8411, to the effect that shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholders, was intended to apply to the corporations which could be assessed under the law then in effect. The Legislature was then engaged in enacting, and was a complement of the prior provisions of the same section, to the effect that personal property should include all shares in corporations organized under the laws of the state when the property of such corporations is not exempt or taxable to the corporation itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 221.]

Appeal from Probate Court, Marion County; Henry C. Allen, Judge.

Action by Oliver P. Ensley, treasurer, etc., against Charles R. Hasely, administrator, etc., for certain taxes. From a judgment for plaintiff, defendant appeals. Affirmed.

Smith, Duncan, Hornbrook & Smith, for appellant. D. J. Hefron, Merrill Moores, and M. S. Hawkins, for appellee.

RABB, J. Appellant's testator, an inhabitant of the state of Indiana, was the owner of certain shares in the capital stock of the

Youngstown Rolling Mill Company, a foreign corporation, all of whose property was assessed for taxation to the corporation in the state where the company was organized and carried on its business, and the sole question presented by the record in this case is whether or not the shares of stock so owned by appellant's testator are subject to taxation in this state.

The solution of this question depends upon the proper construction to be given to the statute in force at the time the taxes are claimed to have accrued governing the assessment of property for taxation. This is the act of March 6, 1891 (Laws 1891, p. 199, c. 99), and is found under the proper subject in volume 3 of the Revised Statutes of 1901. Section 8410 of Burns' Annotated Statutes of 1901 provides that "all property within the jurisdiction of this state, not expressly exempt, shall be subject to taxation." Section 8411 provides: "For the purpose of taxation, personal property shall include * * * all goods, chattels and effects belonging to inhabitants of this state, situated without this state, except the property actually and permanently invested in business in another state shall not be included. * * * All shares in corporations organized under the laws of this state, when the property of such corporation is not exempt, or is not taxable to the corporation itself. * * * All shares in foreign corporations, except national banks, owned by inhabitants of this state. * * * Shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholders." Section 8422 provides that "all corporate property, including capital stock, and franchises, * * * shall be assessed to the corporation, as to a natural person, in the name of the corporation." Sections 8458, 8459, and 8460 provide for the listing of personal property for taxation by the owner. Section 8460 provides, among other things, that the schedule of property so made out by the taxpayer shall set forth: "Chattels. (1) All shares in banks organized in this state, * * * and their full market value. (2) All shares in foreign corporations other than banks, and their value. (3) All shares in other corporations organized under the laws of this state, where the property of the corporation is not exempted by some law, or is not taxable to the corporation itself, and the cash value of such shares." Section 8463 provides for the form of the schedule. Item 8, and under the head of "Description of Property," is as follows: "Personal Property—Credits—Chattels. (8) All shares of stock in any corporation formed outside of this state,—value by party,—value by assessor." Section 8523 requires the township assessor, on or before the first Monday in June of each year, to make out and deliver to the auditor of his county, in tabular form, in alphabetical order, a list of the names of the several persons in whose name any personal property, moneys, or credits or

other taxables shall have been listed, on which list he shall enter separately, in appropriate columns, opposite each name, the aggregate value of the several species of personal property and taxables required, to be listed, as attested by the person required to list the same. Section 8528 requires the assessor at the time he makes such return to the county auditor to deliver to him all the statements of property which he shall have received from persons required to list the same. Section 8561 requires the county auditor, between the first Monday in July and the last day of December of each year, to make out a duplicate list of the taxes assessed in the county, and to enter the same in separate columns. In one column separately all corporate stock, and its value. Section 8566 requires the auditor to deliver a copy of the tax duplicate so made out to the county treasurer on or before the last day of December of each year, and subsequent sections of the statute require the county treasurer to collect the taxes appearing upon the duplicate. Shares of stock in a corporation are property separate and distinct from the property of the corporation itself. They are the property of the holder of the shares, over which he has entire dominion. They may be made subject to taxation, of barter and sale, of the crime of larceny, and may be replevied, as other personal property may be, and, in the absence of any more specific definition by the Legislature, would be held to be personal property, liable to taxation within the meaning of section 8410 of the tax law, unless expressly exempted by some other provision of the law. Section 8410, which declares that "all property not expressly exempt, shall be subject to taxation," would cover shares of the capital stock of both foreign and domestic corporations, and, unless the appellant can point to some statute that exempts the shares of stock owned by the decedent from assessment for taxation, the same are clearly liable to be taxed. Appellant does not contend that it was not within the power of the Legislature to tax shares of stock in a foreign corporation, but earnestly insists that the provisions contained in section 8411, above quoted, exempt this stock from taxation, for the reason that all of the property of the corporation was taxed in another state; that the sentence, "shares of stock in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder," is an express exemption of these shares of stock in this foreign company, the condition appearing as above stated; and that it applies to all corporations, foreign or domestic. In the construction of statutes the object to be attained is the purpose of the Legislature, and this is to be drawn, not from the consideration of a single sentence, or a single section of the law, but from a view of the whole, and every part, of the legislation on the subject. This well-known rule of construction is recognized by both contending

parties, and appealed to as sustaining their respective contentions.

It is urged by appellant that, while technically shares of stock in a corporation are property distinct from the property owned by the corporation, yet practically they are the same, and that, while it is competent for the Legislature to impose the burden of taxation on both the shares of stock and on the property of the corporation, that this is in reality double taxation, and that a fair consideration of all the provisions of the law on the subject of taxation show clearly that it is the policy of our law to avoid double taxation. It is pointed out in support of this view that section 8411, in defining what the term "personal property" shall include for the purpose of taxation, declares, "All goods, chattels and effects belonging to inhabitants of this state situated without this state, except property actually and permanently invested in business in another state, shall not be included," and that this provision was inserted in the law of 1891 for the purpose of avoiding double taxation on property so situated. While it is clear that it was not the legislative purpose to include such property thus permanently invested out of the state in the tax list, it is not so manifest that this purpose was influenced by an inclination on the part of the Legislature to avoid double taxation. It will be observed that the exclusion of this absent property from the tax list is not made to depend upon whether it is taxed in a foreign state or not. If actually and permanently invested there, whether taxed or not, it is not personal property within the meaning of the tax law; and, on the other hand, personal property belonging to an inhabitant of this state, situated in another state, but not permanently invested there, is subject to taxation here, regardless of the fact that it may have been taxed in the foreign state for its full value, so that these provisions of the law are not very convincing proofs of a policy on the part of the Legislature to avoid the taxation here of property that might also be subject to taxation in a foreign state.

It is further urged by appellant that the law as it existed prior to the enactment of the statute in question was different upon this subject, and that this sentence quoted from section 8411, and relied upon by appellant as exempting the property in question from taxation, first appeared in the tax law of 1891; that prior laws upon the subject all in express terms related to the capital stock of domestic corporations, and by no construction could be held to apply to the shares of stock in foreign corporations; that this change in the language of the law is a material one, and that from the change in the wording of the statute a change of legislative purpose is to be presumed. We recognize the rule of construction invoked by appellant, but do not conceive that it should be accorded controlling influence in the construction of the statute under considera-

tion. The evident purpose of section 8411, referred to, is not the exemption of property from taxation. Its purpose is to define what property is included in the term "personal property," as used in the taxing law. Its language does not expressly exempt any property from taxation, neither that of corporations, foreign or domestic, or of natural persons. It does not declare that stock in a domestic corporation shall be exempt from taxation. It does not declare that shares of stock in a foreign corporation shall, under any circumstances, be exempt from taxation. It simply declares that shares in corporations, all the property of which is taxable to the corporation itself, shall not be assessed to the shareholder, and, construing this section with section 8422, providing that "all corporate property, including capital stock and franchises, shall be assessed to the corporation," a purpose is clearly evinced that all the stock in corporations shall be subjected to taxation, either to the individual owner of the shares or to the corporation itself. Had it been the legislative purpose not to include for taxation the shares of stock in a foreign corporation, where the property of the corporation was assessed in another state, it is difficult to escape the conclusion that this purpose would have been manifested by a proper exception in immediate connection with the legislative declaration that all shares of stock in foreign corporations, except banks, should be within the meaning of the words, "personal property," subject to taxation. Banks were excepted; and why would not all of the exceptions that the Legislature intended should attach to this class of property be included in the same sentence? If it was intended that shares in the capital stock of a foreign corporation should stand in that respect upon the same footing with shares in a domestic corporation, why was not the same language used by the Legislature in expressing that purpose that was used with reference to domestic corporations? In arriving at the purpose and intention of the Legislature from a consideration of the provisions of section 8411, standing alone, these considerations raise doubt as to the legislative purpose to exclude from taxation shares in the capital stock of a foreign corporation owned by inhabitants of this state, where all the property of the corporation was taxed in a foreign state, and a consideration of the subsequent provisions of the statute on the subject leave no room for reasonable doubt that such was not the legislative purpose. Those sections of the taxing law that regulate the listing and return of property for taxation, that provide for the placing of the property upon the tax duplicate, and the collection of the taxes give a more correct and reliable view of the legislative purpose in this respect than are afforded by the provisions of section 8411, whose purpose it was to define the meaning of the term "personal

property." *Wasson v. First Nat. Bank*, 107 Ind. 212, 8 N. E. 97. It is these provisions of the law that place the property upon the tax duplicate, and that duplicate as a warrant in the hands of the treasurer, imposing upon him the duty of enforcing the payment of the taxes assessed. It is not to be presumed that the Legislature would require the placing of property on the tax duplicate, and require the officer to proceed to collect the taxes assessed against it, if it did not intend that such property should be subject to taxation. The provisions of section 8460, requiring the taxpayer to make a list and schedule of his property for taxation, and in that schedule to set forth "all shares in foreign corporations other than banks," and to place a value upon such shares, connected as it is with the provisions requiring the taxpayer to set forth all shares in other corporations organized under the laws of this state, when the property of such corporation is not exempt by some law, or is not taxable to the corporation itself, and the cash value of such shares, manifests a clear intent and purpose upon the part of the Legislature to distinguish between shares of stock in a foreign corporation and shares of stock in a domestic corporation, and to subject all shares of stock in foreign corporations, except stock in banks, to taxation in this state. This purpose is emphasized by the requirements of section 8463, which provides the blank form of tax lists, one of the items, No. 8 in the list, reading as follows: "All shares of stock in any corporation formed outside of this state, and also all shares of stock in any corporation formed in this state, and conducting its business outside of this state." It is from these tax lists, thus made out, that the assessor is required to make his return to the county auditor, and from this source alone are the taxes charged upon the tax duplicate of the county upon personal property drawn.

It is suggested by appellant that the several sections of the statute under consideration can be harmonized by holding that the provisions of sections 8460 and 8463, above alluded to, were inserted in the act either for statistical purposes, or for the purpose of putting the assessor upon inquiry, and furnishing information to him by which he might ascertain whether or not the shares of stock in foreign corporations owned by inhabitants of this state were or were not subject to taxation. This theory is wholly untenable. There is an express provision of the statute governing the gathering of statistics, in which it is made the duty of the state statistician to furnish the auditor with a form for blanks for the collection of such information as may be necessary for the bureau of statistics. It is the duty of the county auditor to provide such blanks and deliver the same to the assessor at the same time he delivers to him the blank assessments for taxation. The blanks required by

law for statistical purposes are entirely distinct, and have no relation whatever to the assessment of property for taxation. These lists are required to be furnished for the purposes of taxation, and for no other purpose. There is no law making it the duty of the township assessor, or of any other public officer, to investigate the laws of foreign states to ascertain whether or not property in this state is subject to taxation in such foreign state. It is utterly unreasonable to suppose that the taxpayer is required to list all his shares of stock in foreign corporations, not for the purpose of taxation, but for the purpose of enabling the assessor to ascertain whether or not they were subject to taxation. The assessor is required to take the list as he finds it, and to make up the assessment from that list, and return it to the auditor as property subject to taxation; and, in view of these provisions and the purpose of these sections of the laws in reference to the listing and assessment of personal property, we cannot escape the conclusion that it was the intention of the Legislature that all shares of stock in foreign corporations, owned by inhabitants of this state, should be assessed for taxation, regardless of whether the property of the corporation was taxed in a foreign state or not. The provision of section 8411, referred to and relied upon by appellant as exempting the shares of stock involved in this case from taxation, to the effect that, where all the property belonging to the corporation was assessed to the corporation, the shares of stock shall not be assessed to the holder, was evidently intended to apply to those corporations which could be assessed under the law the Legislature was then engaged in enacting. It is simply a complement of the previous provision found in the same section, to the effect that the term "personal property" should include all shares in corporations organized under the laws of this state, when the property of such corporation is not exempt, or is not taxable to the corporation itself.

Numerous authorities are cited to establish the proposition that taxation of the shares in the capital stock of a corporation, and taxation of the property of the corporation, is double taxation, and that double taxation is not to be presumed, and that the tax laws are not to be construed so as to impose double taxation, unless the Legislature has unmistakably so enacted. We recognize the correctness of appellant's position upon this question, and the force of the authorities cited; but, conceding it to be the law, we still conclude that these provisions of the law to which we have referred show an unmistakable legislative purpose to assess shares of stock in nonresident corporations for taxation, although it may result in double taxation. Numerous authorities are cited from the various states, particularly New York, New Hampshire, and Vermont, to sus-

tain appellant's contention that under our statute this stock is exempt from taxation here. All of these decisions were based upon statutes entirely different in effect and manifest purpose from the law in this state, and we cannot regard them as in point.

Judgment affirmed.

(230 Ill. 610.)

PEARSON v. HANSON et al.

(Supreme Court of Illinois. Oct. 23, 1907.

Rehearing Denied Dec. 10, 1907.)

1. WILLS—CONSTRUCTION—VESTED ESTATE.

Under a will giving property in trust to invest and manage, and during the first 10 years after testator's death to pay annually one half the net income to the four children of testator's deceased brother, share and share alike, the remaining half of the income to be added to the principal, and at the end of 10 years to so pay to them one half the principal, and at the end of 20 years the remainder of the property, with provision that, if any of the four legatees should die before the time for any such payments, the share of the deceased should be paid to his or her heirs, the estates of the four beneficiaries vested on the death of the testator, so that one of them, though dying before the time for distribution, could bequeath his share; there being nothing to show that the controlling purpose of testator in fixing on a future time for the beneficiaries coming into enjoyment of their estate was personal to them, rather than for the convenience of the property, though one of the four beneficiaries was a distracted person, and another was deaf and dumb from birth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1481.]

2. WILLS—SPENDTHRIFT TRUSTS—CREATION.

A spendthrift trust is not created by a will giving property to a trustee to invest and manage, and during the first 10 years after testator's death to pay half the income to the four children of testator's deceased brother, adding the other half of the income to the principal, and at the end of 10 years to pay half the principal to said children, and at the end of 20 years the remainder of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1585.]

Appeal from Circuit Court, Cook County;

G. A. Carpenter, Judge.

Suit between Anna Maria Pearson and Christian H. Hanson and others. From an adverse decree, said Pearson appeals. Reversed and remanded.

This is a bill filed to obtain a construction of the last will of Andrew Peterson. Only legal questions are involved. The will disposed of both real estate and personal property; hence the appeal is to this court. The testator died January 19, 1899, and his will, which was dated August 4, 1898, was admitted to probate February 23, 1899. The testator left neither widow nor lineal descendants. His nearest relatives and principal beneficiaries under his will were two nephews, Harold P. Pearson and James A. Peterson, and two nieces, Nina M. Pearson and Josephine Kaywood (Née Peterson). The only clauses of the will which are necessary to be considered in determining the questions involved are the following:

"Paragraph 1. I give, devise and bequeath

the death membership arising from my membership of the Chicago Stock Exchange, also all the remainder of my estate, real, personal and mixed, of which I may die seized or possessed, to the State Bank of Chicago, to have, possess and hold the same, to it, its successor or successors, as hereinafter provided, from the date of my decease until the final distribution thereof as hereinafter provided, in trust, nevertheless, for the uses and purposes and upon the trusts and subject to the provisions hereinafter expressed and declared, that is to say:

"(1) To pay all my just debts and funeral expenses; and in this connection it is my desire that my remains be buried in my lot in Oakwood cemetery, next to those of my deceased beloved wife, Josephine E. Peterson; that a headstone similar to the one upon my wife's grave be erected upon my grave and that my name be inscribed upon the monument on the said lot; that my said trustee expend the necessary money for keeping in good order the graves of my said wife and of myself and also my said cemetery lot.

"(2) To have, hold, manage, possess, collect, invest and re-invest, upon the advice and under the direction and control of my executors, their survivor or survivors, successor or successors, all of my said estate, real, personal or mixed; to collect the issues and profits thereof; to keep the real estate insured and in repairs.

"(3) To pay out of said trust estate, as soon as my executors, their survivor or survivors, successor or successors, find that there is sufficient cash on hand in the said trust estate for such purpose the special bequests shall be paid in their alphabetical order.

"(4) During the first ten (10) years after my death to pay once a year, and upon the date of the anniversary of my death unless it should fall on Sunday, and in that event on the Monday succeeding, one-half ($\frac{1}{2}$) of the net amount of all annual issues and profits of the said trust estate to the four children of my deceased brother, Nils P. Pearson, namely, Harold P. Pearson, Nina M. Pearson, James A. Peterson and Mrs. Josephine Kaywood, (née Peterson,) share and share alike. If any of the said four legatees should die during the said ten (10) years, then the share of the deceased of the annual issues and profits hereinbefore provided shall be paid to the heir or heirs-at-law of such deceased legatee. I direct that the remaining one-half ($\frac{1}{2}$) of the net amount of the said annual issues and profits shall, during the said ten (10) years, be added to the principal of the said trust fund for re-investment, in the manner as directed in 2 of this first paragraph of this my last will and testament, in accumulation of said trust fund. * * *

"Paragraph 2. I direct that at the expiration of ten (10) years from my death one-half ($\frac{1}{2}$) of the trust fund created by the first paragraph of this my last will and testament shall be distributed and paid to the

four children of my deceased brother, Nils P. Pearson, namely, Harold P. Pearson, Nina M. Pearson, James A. Peterson and Mrs. Josephine Kaywood, (née Peterson,) share and share alike; but if any of the said four legatees be then dead, then and in that event the share of the deceased in this distribution shall be paid to his or her heirs-at-law.

"Paragraph 3. I direct that the remaining one-half ($\frac{1}{2}$) of the trust fund created by the first paragraph of this my last will and testament, left after the distribution of the one-half ($\frac{1}{2}$) as provided by the second paragraph hereof has taken place, shall continue to remain with and be held by my said trustee, the State Bank of Chicago, in trust, nevertheless, for the uses and purposes and upon the trusts and subject to the provisions hereinafter expressed and declared, that is to say:

"(1) To have, hold, manage, possess, collect, invest and re-invest, upon the advice and upon the direction and control of my executors, their survivor or survivors, successor or successors, all of the said trust fund created by this third paragraph of this my last will and testament.

"(2) To collect, invest and re-invest all the issues and profits upon the trust fund created by this third paragraph, such issues and profits to be added to this trust fund for its accumulation.

"(3) At the expiration of ten (10) years from the distribution, as provided by paragraph 2 of this will, which will be equal to twenty (20) years after my death, I direct that the trust created by this third paragraph of my will shall be dissolved, and that the remainder of my estate shall be distributed as provided by paragraph 4 of this my last will and testament.

"Paragraph 4. At the dissolution provided by 3 of paragraph 3 hereof of the trust created by said paragraph 3, I direct that the remainder of my estate shall be divided, distributed and paid to the four children of my deceased brother, Nils P. Pearson, namely, Harold P. Pearson, Nina M. Pearson, James A. Peterson and Mrs. Josephine Kaywood, (née Peterson,) share and share alike, but if any of my said four legatees die before such final distribution, then the share of the deceased shall be paid to his or her heirs-at-law. All distributions provided for by the second and fourth paragraphs of this my last will and testament shall be per stirpes, not per capita."

On April 23, 1906, Harold P. Pearson, one of the beneficiaries, died, leaving a will, dated July 28, 1898, devising all his property, real and personal, to his mother, with a devise over to his sister Nina Pearson in case his mother did not survive him. Harold P. Pearson having died before the first period of distribution under paragraph 2 of the will of Andrew Peterson, a question has arisen whether the share of Harold P. Pearson in the annual distribution of accumulations under clause 4 of paragraph 1, and his one-

fourth part of the one-half of the corpus distributable at the end of 10 years under paragraph 2, and his one-fourth interest in the final distribution at the end of 20 years to be distributed under clauses 3 and 4 of paragraph 3, shall be paid to Anna Maria Pearson as sole legatee under the will of Harold P. Pearson, or paid to the legal heirs of said Harold P. Pearson. Anna Maria Pearson contends that under the will of Andrew Peterson her son Harold P. Pearson took a vested and a devisable interest, which passed under his will to her, while the heirs of Harold contend that no interest vested in the devisees under Peterson's will until the expiration of ten years, when one-half vested and the remainder of the estate did not vest until the expiration of 20 years from Peterson's death. The circuit court construed the will in accordance with appellees' contention, and ordered the trustee to pay Harold's share, both in the income and the principal, to the legal heirs of Harold P. Pearson. Anna Maria Pearson appeals to this court, and assigns error upon the construction given to the will of Andrew Peterson.

Wolseley & Barker (Henry W. Wolseley, of counsel), for appellant. James A. Peterson, for appellees.

VICKERS, J. (after stating the facts as above). The court below held that the interest of the devisees under the will of Andrew Peterson was contingent on the devisees being alive at the periods of distribution, and that, Harold having died before either of such periods was reached had no devisable interest, hence his mother took nothing under his will. Cases of a present vesting of title where the enjoyment in possession is postponed are often difficult to distinguish from cases where the title is only to vest on some future contingency which may or may not happen. In determining this question, the legally expressed intention of the testator as found within the four corners of the will must be the chart and guide of the court. That this great, fundamental rule may prevail and the property of the testator take the posthumous course intended by the owner other rules are made and unmade. One test given for the decision of the question is to consider the object of the testator in fixing upon a future period for the devisee to come into the enjoyment of the estate. If it appears that the controlling purpose was personal to the devisee, then the estate will not vest until the time appointed, and is contingent upon the devisee being alive when the time designated is reached. The leading case in England on this subject is *Leake v. Robinson*, 2 Mer. 363, which is extensively quoted by this court in *Howe v. Hodge*, 152 Ill. 252, 275, 38 N. E. 1083. Many other cases may be found applying this test. The other branch of the rule is that, if the payment was postponed for the convenience of the

property or fund, then there is an immediate vesting of the title and the postponement merely respects the time of enjoyment, even though there be no other gift than the general direction to pay or distribute at the appointed time. The distinction which we have above sought to point out will be made clear by a quotation from *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351. On page 373 of 120 Ill., page 353 of 11 N. E., this court said: But, even though there be no other gift than the direction to pay or distribute in futuro, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, as where the future gift is postponed to let in some other interest, for instance, if there is a prior gift for life or a bequest to trustees to pay debts, * * * the gift in remainder vests at once and will not be deferred until the period in question. But, here the payment is deferred for reasons personal to the legatee, the gift will not vest until the appointed time. 2 Jarman on Wills (R. & T.'s Ed.) 458; Theobald's Law of Wills, 412. Thus a gift to a person if or when he shall attain a certain age will not vest until the age is attained. *Id.* In other words, if the reason for the postponement is the position of the fund, the bequest in remainder vests at once; but, if it is the position of the legatee, the remainder is contingent. In *re Bennett's Trusts*, 3 Kay & J. 30."

The case at bar was heard on the bill, answer and a stipulation. The stipulation recites that "Josephine Kaywood is a distracted person, and that Nina M. Pearson is married, and is deaf and dumb from birth." The unfortunate condition of two of the devisees under the will is introduced for the purpose of supplying a basis for the claim that the testator, in postponing the period of enjoyment, did so out of considerations personal to the unfortunate devisees. These facts being in the record by agreement, no question is made as to the admissibility of circumstances outside the will itself to discover the intention of the testator. Considering the right of the parties to have these extrinsic circumstances considered, we fail to see any force in them. There is no reason to suppose that the testator hoped, believed, or anticipated that the condition of these devisees would be any different at the end of ten or 20 years than at the date of his death. Their incapacity to manage the estate, if it existed, was of a permanent character, and can afford no rational explanation why the testator fixed a future date for the enjoyment of the devise. Again, the testator limits the time of enjoyment of the other two devisees, as to whom this argument does not apply, to the same time and manner as to the two unfortunate ones. If any argument can be drawn from these extrinsic facts, it seems to us quite as reasonable to conclude that the unfortunate condition of these two devisees, and their inability to ac-

cumulate property and provide for themselves and their heirs may have had some influence on the testator in leading him to vest in them a portion of his estate absolutely. But we do not regard this matter as having any controlling weight either way. The law favors the vesting of estates, and in cases of doubt the construction will be adopted which leads to that result. An estate is vested when there is an immediate right of present enjoyment or a present fixed right of future enjoyment. It carries with it the seisin in law or in equity, according to the character of the estate, and takes effect in interest and right immediately on the death of the testator, although it may not take effect in possession and enjoyment until the death of a life tenant or the termination of another particular estate. *Scofield v. Olcott*, supra. In the case at bar there is nothing dubious or uncertain about the devise. The testator has with unusual clearness expressed the purpose to give the residue of his estate to the four persons named, and it is specially provided in each clause referring to the distribution that the share of any of the devisees who may die before the time appointed for the several distributions shall be paid to the legal heirs of such deceased devisee. The expressions used in the different clauses are not identical, but there is no indication that the testator meant to convey a different meaning by the slight changes to be found in the different clauses. In our opinion the testator intended to vest the title in fee in each of the devisees to an equal share of the residue of his estate, and the several clauses providing for the legal heirs to take in case any devisee should die is only a further manifestation that the interest intended to pass was the absolute title and right, complete and perfect in all respects, except the enjoyment in possession was postponed for a limited but certain and fixed time.

It is said by the appellees that the devise here should be held to be a spendthrift trust. There is nothing in the will that has any resemblance to a spendthrift trust, and, if there were, we know of no decision that has gone to the extent of holding that a testator can do more than to exempt the devise from the rights of creditors of the devisee. That a devise can be made under the rule that will exempt the estate from the creditors of the devisee has been established in this state ever since the case of *Steib v. Whitehead*, 111 Ill. 247, was decided; but to hold that a testator can devise an estate and at the same time exempt such estate from the law of devise and alienation is to say that a testator can give and not give, in the same breath. *Steib v. Whitehead*, supra; *Johnson v. Preston*, 226 Ill. 447, 80 N. E. 1001.

Our conclusion is that the estate vested in the devisee upon the death of the testator and that the estate was a devisable interest; hence under the will appellant succeeded to all the rights, title, and interest of her de-

ceased son, both as to the corpus and the income thereof.

The decree of the circuit court is reversed and the cause remanded, with directions to enter a decree in conformity with the views herein expressed.

Reversed and remanded.

(230 Ill. 519)

BRENOCK et al. v. BRENOCK.

(Supreme Court of Illinois. Oct. 23, 1907.

Rehearing Denied Dec. 10, 1907.)

WILLS—CONSTRUCTION—ESTATE DEVISED—BASE FEE.

Testatrix devised her residuary estate to two sons named, to be equally divided between them, and, in case of the death of one of the sons without issue, then his share should revert to the other, and his heirs and assigns, forever, subject to the dower interest of the deceased son's widow, should she survive. *Held*, that the death of the son should not be construed as limited to a death during the lifetime of testatrix, but a death at any time without issue, and that he therefore took a base fee in the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1851-1854, 1514-1518.]

Appeal from Superior Court, Cook County; W. M. McEwen, Judge.

Bill by John Brenock against Margaret Brenock and others for partition. From a decree in favor of complainant, defendants Margaret and Martin Brenock appeal. Reversed and remanded.

Bowersock & Stilwell, for appellants. Darrow, Masters & Wilson, for appellee.

PER CURIAM. Patrick Brenock died in March, 1897, leaving a will, which was admitted to probate, the second paragraph of which is as follows: "Second. After the payment of such funeral expenses and debts, I give, devise and bequeath unto my beloved sons, Martin Brenock and John Brenock, all of the property, real and personal, and effects of every name, kind and nature which I now have, may die possessed of or may be entitled to, to be equally divided between them, share and share alike; but in case of the death of the said John Brenock, my beloved son, without issue, then it is my will that his share of the estate left by me shall revert to the said Martin Brenock, my beloved son, and his heirs and assigns forever, subject to the dower interest of his, the said John Brenock's, wife, should she survive." Martin Brenock afterward conveyed his undivided interest to a third person, who conveyed it to Margaret Brenock, Martin's wife. Subsequently John Brenock, who has never had any issue, filed a bill for the partition of the real estate devised by the second clause of the will, claiming to be a tenant in common with Margaret Brenock thereof in fee simple. Margaret Brenock and her husband insist that the estate devised to John is a qualified fee, terminable upon his death without issue. From a decree finding that the complainant was the owner of one-

half the premises in fee simple, Margaret Brenock and Martin Brenock have appealed to this court.

The only question presented is whether the words of the will in regard to the death of John Brenock without issue refer to his death in the lifetime of the testator or at any time. The same question arose in the cases of *Fifer v. Allen*, 81 N. E. 1105, *Crockner v. Van Vliissingen*, 82 N. E. 614, and *Carpenter v. Sangamon Loan & Trust Co.*, 82 N. E. 418. The language of the wills in controversy in all those cases was substantially identical, in the particular mentioned, with that of this will, and it was held that the devise over took effect upon the death, under the circumstances mentioned, of the first taker at any time, whether before or after the death of the testator. That conclusion is decisive of this case, and the decree of the superior court of Cook county will therefore be reversed, and the cause remanded to that court.

Reversed and remanded.

(230 Ill. 342)

KASPAR v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

1. GUARDIAN AND WARD—BONDS—DISCHARGE OF SURETIES—STATUTES—CONSTRUCTION.

Act March 13, 1874, entitled an act to revise the law in relation to official bonds, as amended in 1879 (Hurd's Rev. St. 1905, c. 103), does not, so far as it provides for the release of sureties on official bonds, apply to guardians' bonds.

2. SAME—NEW BOND—EFFECT.

A new bond given by a guardian under Act July 1, 1872, § 35 (Hurd's Rev. St. 1905, c. 64), authorizing the county court to require a guardian to give additional security, does not discharge the sureties on a prior bond.

3. SAME—ADDITIONAL SECURITY.

At common law, the surety of a trustee cannot require the trustee to give additional security or counter security, and on failure to give such security have the trustee removed, and a guardian sustains the relation of trustee to his ward.

4. SAME—RELEASE OF SURETY.

The power of the probate court to release the surety on a guardian's bond is statutory, and under Act May 11, 1877 (Hurd's Rev. St. 1905, c. 103), providing that when a surety on a guardian's bond desires to be released he shall petition for release, and on notice to the guardian the court shall compel him to settle his accounts and file a new bond, etc., the giving of a new bond does not release the surety on a prior bond, unless the surety petitions for his discharge and the guardian on notice settles his account and a new bond is approved and the surety on the prior bond is discharged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 612.]

5. SAME.

Any contract between a retiring guardian and his successor with reference to assets in the hands of the retiring guardian does not effect a release of the sureties of the retiring guardian.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 607.]

6. SAME.

A retiring guardian and his successor contracted as to assets in the hands of the retiring

guardian. The ward, on coming of age, received in part settlement the amount realized from the property received from the retiring guardian. The probate court approved the action of the successor in receiving from the retiring guardian the property in question. *Held*, that the sureties of the retiring guardian were not thereby discharged.

7. SAME.

The sureties of a guardian are bound by lawful orders of the probate court, but they cannot rely on an unlawful order to effect their release on the guardian's bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 617.]

8. JUDGMENT—RES JUDICATA.

One cannot try, in an action at law, issues determined adversely to him in a suit in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 996.]

9. GUARDIAN AND WARD—BONDS.

A new guardian's bond, running to the people, and conditioned on the guardian performing the duties of his office, is additional security, and is not a counter security, though the guardian and ward act does not give the form of a bond to be taken under section 35 thereof (Hurd's Rev. St. 1905, c. 64), authorizing the court to require a guardian to give additional security.

10. SAME—ACTIONS—PARTIES.

A surety in a guardian's bond may be sued without joining the guardian and co-surety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, §§ 640-643.]

11. DISMISSAL AND NONSUIT.

Under Practice Act, § 24 (Hurd's Rev. St. 1905, c. 110); providing that amendments may be made discontinuing as to any joint defendants, plaintiff, in an action on a guardian's bond, may dismiss as to the guardian and his surety and recover judgment against the co-surety, though the judgment is rendered on a question of law.

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Lockwood Honoré, Judge.

Action by the people against William Kaspar and others. From a judgment of the Appellate Court affirming a judgment for plaintiff against defendant William Kaspar, he appeals. Affirmed.

Kraus, Alschuler & Holden, for appellant. John F. Holland and William Sanders Elliott, for the People.

HAND, C. J. This was an action of debt commenced in the circuit court of Cook county by the appellee, against the appellant and Josef Lurie and Joseph Babka, upon a new guardian's bond, bearing date March 29, 1895. The case was tried upon an amended declaration consisting of two counts.

The first count was in the following form: "The people of the state of Illinois, which sues in this behalf for the use of Joseph Sabath, as guardian of the estate of Gottlieb Lurie, minor, by John F. Holland, his attorney, complains of Josef Lurie, William Kaspar, and Joseph Babka, defendants, of a plea that they render to the plaintiff, for the use aforesaid, the sum of \$50,000, which they owe to and unjustly detain from the plaintiff. For that whereas, at the April term, 1892, of the probate court of the county

aforesaid, to wit, April 25th, one Albert Lurie, then a minor above the age of 14 years, the brother of said Gottlieb Lurie and Bertha Lurie, minors under the age of 14 years, personally appeared before said court and petitioned said court to appoint the said Josef Lurie as guardian of said Albert Lurie, Gottlieb Lurie and Bertha Lurie, and thereupon the said Josef Lurie was approved and appointed as guardian of the persons and estate of the said Albert Lurie, Gottlieb Lurie, and Bertha Lurie, and the same court then and there took and approved a bond of the said Josef Lurie, with Simon Pick and Frank Zajicek as two sufficient sureties in double the amount of the personal estate of the said Albert Lurie, Gottlieb Lurie, and Bertha Lurie, and six times the amount of the gross annual income of their real estate, and on that occasion the said Josef Lurie, Simon Pick, and Frank Zajicek, then and there, by their writing obligatory bearing date the 21st day of April, 1892, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the sum of \$50,000 above demanded to be paid to the plaintiff, which said writing obligatory was and is subject to a certain condition thereunder written, to the effect that if the said Joseph Lurie should faithfully discharge the office and trust of said guardian of the said Albert Lurie, Gottlieb Lurie, and Bertha Lurie according to law, and should make a true inventory of all the real and personal estate of the said Albert Lurie, Gottlieb Lurie, and Bertha Lurie that should come to the possession or knowledge of the said Josef Lurie and return the same unto the said probate court at the time required by law, and should manage and dispose of all such estate according to law and for the best interest of said Albert Lurie, Gottlieb Lurie, and Bertha Lurie, and should faithfully discharge his, the said Joseph Lurie's, trust in relation thereto, and should render an account, on oath, of the property in the hands of him, the said Josef Lurie, and of the management and disposition of said estate, within one year after his appointment and at such other times as he should be required by law or directed by the court, and upon removal from office or at the expiration of such trust settle his account in said court or with the wards or their legal representatives, and pay over and deliver all the estate, title, papers, and effects remaining in his hands and due from him on such settlement, to the person or persons lawfully entitled thereto, then the writing obligatory should be void and otherwise should remain in full force and virtue, as by the said writing obligatory and the conditions thereof remaining affixed in the said probate court will appear; and thereupon the said Josef Lurie then and there took upon himself the said office and trust of guardian of the estate of said Albert Lurie, Gottlieb Lurie, and Bertha Lurie, and thenceforth was such guardian until the 14th day of March,

1895, and on said last-mentioned date the said Josef Lurie, being such duly appointed and qualified guardian, was directed by said probate court of Cook county, by an order duly entered by said court, to file his new bond as such guardian, and the said Josef Lurie afterwards, on, to wit, the 29th day of March, 1895, in compliance with the said order of said probate court, and while being said duly appointed and qualified as well as acting guardian of the persons and estates of said Albert Lurie, Gottlieb Lurie, and Bertha Lurie, filed his guardian's new bond, and the said court then and there took and approved a guardian's new bond of the said Josef Lurie, with the said William Kaspar and Joseph Babka as two sufficient sureties in double the amount of the personal estate of the said Albert Lurie, Gottlieb Lurie, and Bertha Lurie, and six times the amount of the gross annual income of their real estate, according to the form of the statute, etc., and on that occasion they, the said Josef Lurie, William Kaspar, and Joseph Babka, defendants, then and there, by their writing obligatory bearing date said 29th day of March, 1895, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the sum of \$50,000 above demanded to be paid to the plaintiff, which said writing obligatory was and is subject to a certain condition thereunder written, to the effect that, whereas, the said Josef Lurie, as guardian of the persons and estates of Albert Lurie, Gottlieb Lurie, and Bertha Lurie, minors, had theretofore executed a bond, payable to the people of the state of Illinois, for the use of Albert Lurie, Gottlieb Lurie, and Bertha Lurie, and for the discharge of his duties as guardian, as recited in said bond, meaning the said bond which bears date the 21st day of April, A. D. 1892, and is the bond hereinbefore recited, therefore if the said guardian, Josef Lurie, shall well and truly have kept and performed, and shall well and truly keep and perform, the conditions of the bond first given, as aforesaid, meaning the bond hereinbefore recited, in all respects according to law, and shall in all respects have performed and shall continue to perform the duties of his office, as aforesaid, then the said writing obligatory should be void and otherwise should remain in full force and virtue, as by the said writing will appear; and thereupon the said Josef Lurie continued the said office of guardian of the said Albert Lurie, Gottlieb Lurie, and Bertha Lurie, and thenceforth was such guardian until the 23d day of November, A. D. 1898, when the said Josef Lurie resigned his said office and trust, and the said Joseph Sabath was duly appointed and qualified, and thenceforth has been, and still is, guardian of the estate of said Gottlieb Lurie, who is a minor and not yet of lawful age. And the plaintiff in fact says that the said Josef Lurie did not faithfully discharge the said office

and trust of guardian of the said Gottlieb Lurie according to law, but neglected and refused so to do, to the injury of the said Joseph Sabath, as guardian of the estate of said Gottlieb Lurie. And for assigning a breach of the said condition of the writing obligatory dated March 29, 1895, the plaintiff says that after the said appointment of the said Josef Lurie as such guardian, and after the making of the said guardian's new bond March 29, 1895, as aforesaid, and before the resignation of said Josef Lurie as such guardian and the appointment of the said Joseph Sabath, a large sum of money, to wit, the sum of \$9,000, the money of the said Gottlieb Lurie, came into the hands of the said Josef Lurie, as guardian of the estate of said Gottlieb Lurie, yet the said Josef Lurie, not regarding his duty as such guardian, during that time there converted and disposed of the said money to his own use, and has neglected and refused, and still neglects and refuses, to pay over to the said Joseph Sabath, guardian of said Gottlieb Lurie, the said sum of money or any part thereof, although he, the said Joseph Sabath, as guardian, on the date aforesaid, was there lawfully entitled thereto, and the said Josef Lurie was then and there requested to pay over the same to him, Joseph Sabath, as guardian aforesaid, by reason of which premises the said writing obligatory of March 29, 1895, became forfeited, and thereby an action has accrued to the plaintiff to demand of the defendants, for the use aforesaid, the said sum of \$50,000 above demanded, yet the defendants," etc.

And the second count was the same as the first, except as to the breach assigned, which was as follows: "And for assigning a breach of said condition of said writing obligatory dated March 29, 1895, the said plaintiff says that after the said appointment of the said Josef Lurie as such guardian, and after the making and after the filing and approving in said probate court of the said writing obligatory aforesaid, which bears date the 21st day of April, 1892, and is recited in said writing obligatory of March 29, 1895, and before the said 23d day of November, 1898, divers sums of money belonging to the said Gottlieb Lurie, amounting to a large sum, to wit, the sum of \$9,000, belonging to the said Gottlieb Lurie, came into the hands of the said Josef Lurie, as such guardian, and that in the probate court of said Cook county, in the May term, 1902, to wit, on the 23d day of May, 1902, the said Josef Lurie, guardian as aforesaid, settled his accounts as such guardian, and that on such settlement, on the date last aforesaid, by the consideration and order of said probate court, there was found due from said Josef Lurie, as such guardian, as aforesaid, to the said Gottlieb Lurie, the sum of \$6,774.81 on account of moneys that had come into the hands of the said Josef Lurie, as such guardian of Gottlieb Lurie;

and thereupon the said probate court, on said 10th day of May, 1902, ordered said Josef Lurie, as such guardian, to pay said sum of \$6,774.81 to said Joseph Sabath, as guardian of said Gottlieb Lurie, forthwith, which said order of said probate court still remains in full force, unreversed, and no appeal was ever taken therefrom, yet the said Josef Lurie, guardian as aforesaid, has not paid the said sum, or any part thereof, to the said Joseph Sabath, guardian as aforesaid, or to any person entitled to the same, but has hitherto neglected and refused so to pay the same, although often requested so to do, by reason of which premises the said writing obligatory of March 29, 1895, became forfeited, and thereby an action has accrued to the plaintiff to demand of the defendants, for the use aforesaid, the said sum of \$50,000 above demanded, yet the defendants," etc.

The appellant filed 24 pleas to the declaration, many of which were amended a second time. Numerous demurrers, replications, rejoinders, surrejoinders, and rebutters were also filed, and, all questions of law finally having been determined by the court in favor of the appellee, the suit was dismissed by the appellee as to Josef Lurie and Joseph Babka, and judgment was rendered against the appellant for the sum of \$50,000 debt, the penalty of the bond, and \$7,988.57 damages, which judgment has been affirmed by the Branch Appellate Court for the First District, and the record, which contains no bill of exceptions, but which contains nearly 50 pages, consisting of the pleadings and orders entered by the court in disposing of demurrers filed by the respective parties, has been brought to this court for further review, and 70 errors have been assigned, although the appellant has elaborated, in a brief of 87 pages and a reply brief of 45 pages, only the following propositions: (1) The dismissal as to Josef Lurie and Joseph Babka worked a discontinuance of the case; (2) the sureties upon the guardian's bond sued on were released by the giving by said guardian of two subsequent bonds; (3) the sureties upon the bond sued on were released by reason of the action of the successor of Josef Lurie (which action was approved by the probate court of Cook county) in receiving from Josef Lurie, as Lurie's successor, certain personal property at the time Lurie resigned as guardian; and (4) the bond sued on was given as counter security.

The filing of the numerous pleadings subsequent to the declaration was preposterous, and it would be a waste of time for this court, in an opinion, to take up and consider seriatim the action of the trial court in disposing of the 48 demurrers which appear in this record. The principal assignments of error relied upon in the brief of appellant are those assignments which question the action of the court in sustaining demurrers to those pleas which averred the appellant had been released upon the bond sued

upon, by the action of the probate court of Cook county in requiring Josef Lurie to give, and in approving, two guardian's bonds given by Josef Lurie in the year 1897.

The first contention of the appellant is that he was discharged by the action of the court in approving said bonds under and by virtue of the provisions of "An act to revise the law in relation to official bonds," approved March 13, 1874, in force July 1, 1874, as amended in 1879. Hurd's Rev. St. 1905, p. 1417, c. 103. From a careful consideration of said act we do not think its provisions, in so far as they provide for the release of sureties upon official bonds, apply to guardians' bonds, and are therefore of the opinion that the pleas which set up a release under that act were clearly bad and interposed no defense to the cause of action set up in the declaration, and that the demurrers interposed to certain of said pleas were properly sustained, and the demurrers interposed to the replications filed to other of said pleas were properly carried back to the pleas and sustained.

The further contention is made that if the appellant was not discharged upon the bond sued upon by virtue of the act of 1874, as amended in 1879, he was discharged by virtue of the provisions of an act entitled "An act to provide for releasing sureties on the bonds of guardians, conservators of idiots or insane persons, or trustees of any fund or property appointed by any court," approved May 11, 1877, in force July 1, 1877. Hurd's Rev. St. 1905, p. 1419, c. 103. From an examination of the pleas filed by the appellant setting up a discharge under the act of 1877, we think the pleas are all defective in failing to allege one or more of the conditions precedent which are necessary to be alleged in order to show a valid order of discharge of the surety upon the guardian's bond under said act, and that for that reason said pleas were defective, and that if said pleas were not defective in that regard they were fully answered by the replications filed thereto, which were by the court held good upon demurrer, and to which the appellant failed to rejoin. The only provision found in any statute of this state other than the act of 1877, which provides for the giving of a new guardian's bond, is section 35 of "An act in regard to guardians and wards," approved April 10, 1872, in force July 1, 1872 (Hurd's Rev. St. 1905, p. 1129, c. 64), which reads as follows: "It shall be the duty of the county court, at each accounting of the guardian, to inquire into the sufficiency of his sureties. And if, at any time, it has cause to believe that the sureties of a guardian are insufficient or in failing circumstances, it shall, after summoning the guardian, if he be not before the court, require him to give additional security." And as the act of 1874, as amended in 1879, does not apply, and the appellant has not brought himself within the provisions of the act of

1877, the bonds relied upon by the appellant to effect his discharge must have been taken under section 35 of chapter 64 of Hurd's Revised Statutes of 1905, and as a new bond taken under the provisions of said section 35 does not have the effect to release the sureties upon the former bond, but said bond is additional security, and both bonds remain in force for the protection of the minor, the appellant was not discharged upon the bond upon which suit was brought, by the giving of the bonds relied upon as a discharge.

At the common law the surety of a trustee—and a guardian sustains the relation of trustee to his ward—could not require his principal to give other and additional security to secure the cestui que trust, or counter security, and on a failure to give such security have his principal removed (*Ridgeway v. Potter*, 114 Ill. 457, 3 N. E. 91, 55 Am. Rep. 875); and the power of the probate court of Cook county to release the surety upon a guardian's bond is purely statutory (*Clark v. American Surety Co.*, 171 Ill. 235, 49 N. E. 481). There was therefore no method whereby a surety, upon his own application, could be released from a guardian's bond until the passage of the act of 1877, which act provides that when a surety upon a guardian's bond desires to be released he shall petition the court in which the bond was filed for such release, and that, upon notice to the guardian in such manner as the court may direct, the court shall compel the guardian, within a reasonable time to be fixed by the court, to appear and settle his accounts and file in such court a new bond, which being done, the surety may be discharged from all liability on such bond. We think therefore, before the giving of a new bond could have the effect to release the appellant from the guardian's bond sued upon as surety, five things must be shown: (1) A petition by the surety that he be discharged; (2) notice to the guardian; (3) a settlement of the guardian's account; (4) the filing and approval of a new bond; and (5) an order of the probate court discharging the surety from all liability on the old bond. In the *Clark Case* a surety upon an administrator's bond was discharged by the court without complying with the provisions of section 35 of the administration of estates act, which provisions are substantially the same as the provisions of the act of 1877, except that the one applies to administrators and executors, and the other to guardians, and the court held that that section was the only one under which a surety upon an administrator's or executor's bond could be discharged upon the application of the surety (although if appellant's contention is correct such surety could have been discharged under the act of 1874, as amended in 1879), and that the provisions of said section, to effect a discharge, must be fully complied with by filing a petition, etc., in accordance with the provisions of said section 35 of the administration of estates

act. And in *People v. Curry*, 59 Ill. 35, under a statute similar to section 35 of the guardian and ward act, it was held the surety of an administrator could not be discharged from his bond. The court say (page 37): "In the absence of the express enactment of the Legislature to that effect, so to hold would be unwise and odious judicial legislation." We are of the opinion the appellant was not discharged from the bond sued upon by the giving of the two subsequent bonds by the principal in said bond.

It is next assigned as error that the court erred in sustaining demurrers to the pleas and in carrying back demurrers to the pleas filed to replications which purported to answer said pleas, which pleas set up that at the time Josef Lurie resigned as guardian of Gottlieb Lurie the said Josef Lurie turned over to his successor, Joseph Sabath, a large amount of real and personal property; also a trust arrangement, which, it was alleged, existed between said Josef Lurie and said Joseph Sabath with reference to said property so turned over to such guardian, and that said guardian realized from said property an amount equal to the amount due his ward by Joseph Lurie, and that the proceeds of said property were paid to said ward and retained by him after he reached his majority, and that by reason thereof the appellant was discharged upon said bond. The matters averred in the replication to which demurrers were interposed and carried back to the said pleas were that the property referred to in said pleas was the same property involved in the case of *Lurie v. Sabath*, 208 Ill. 401, 70 N. E. 323, which was a chancery suit, and which, it was averred, was commenced in the name of Josef Lurie by appellant and prosecuted to final decree in his name and for the benefit of the appellant, and that the decree in that case was res judicata of the questions raised by said pleas, and that the successor of Josef Lurie accounted to said ward for all he received from said property, and that the suit upon said bond was for the balance due said ward. We think the law clear that no contract which could be made between Josef Lurie and his successor, Joseph Sabath, with reference to assets in the hands of Josef Lurie at the time he resigned and Sabath was appointed, could effect a release of the bondsmen of Lurie. If such contract could be made, then all that would be necessary in order to discharge the bondsmen of an insolvent guardian would be for such guardian to resign and have a successor appointed, and for such guardian to turn over to his successor a mass of worthless or incumbered property in settlement of the claims of his ward, or for the successor to give the former guardian time, as it was alleged was done in this case, in which to pay the amount due his ward, by taking the guardian's note or otherwise. This, it would seem to be too plain for argument, would not be such a change in the obligation assumed by the bondsmen of a

ardian as would release them upon a ardian's bond. The minor was not a party the contract between Lurie and Sabath, atever it was, and if he had been it would ike no difference. Neither does the fact at when he became of age his then guard- turned over to him the amount realized on the property received from Lurie to ply in part settlement of the amount due m by his guardian, and the fact that the obate court approved the action of Sabath receiving from Lurie the property in ques- on would not discharge appellant, as it ust be the law that the bondsmen of a ardian are bound by all orders of the pro- te court which are lawfully made with ref- ence to the estate of the ward, and, if not wfully made, clearly the bondsmen could t rely upon such unlawful order to effect eir release upon the guardian's bond. As e understand the matter from a study of is record, the filing of the pleas upon this anch of the case is merely an attempt to try er, in an action at law, the issues determin- adversely to the appellant in the case of urie v. Sabath, supra, which clearly cannot e done. We think the trial court ruled cor- rectly upon this branch of the case.

It is further assigned as error that the urt erred in refusing to sustain appellant's venteenth and eighteenth pleas, and to hold at the bond of March 29, 1895, was given counter security. The guardian and ward t does not give the form of the bond to be ken under section 35 of that act, and the ond bearing date March 29, 1895, is substan- ally in the form prescribed by section 34 the administration of estates act, and runs e people, and is conditioned that if the ardian shall well and truly have kept and rformed, and shall well and truly keep and rform, the conditions of the bond first given he bond of April 21, 1892), in all respects cording to law, and shall in all respects ave performed, and shall continue to per- m, the duties of his office according to law, en the said writing obligatory shall be void, c. This bond clearly was not given as ounter security to the bondsmen upon the ond bearing date April 21, 1892, but was ven as further and additional security for e protection of the ward of Josef Lurie. he bond, in case one is given as counter se- rity, does not run to the people, as the ond sued on does (People v. Lott, 27 Ill. 215; ark v. American Surety Co., supra), but to e sureties upon the former bond, and is onditioned to indemnify and keep harmless e sureties upon the guardian's former bond. e are clear the bond of March 29, 1895, was ot given as counter security, but that it was ven as further and additional security, and ink the court did not err in holding appel- ant's seventeenth and eighteenth pleas bad.

It is finally contended that the dismissal f the suit as to Josef Lurie and Joseph Bab- a worked a discontinuance of the suit. We o not agree with this contention. By section

24 of the practice act (Hurd's Rev. St. 1905, p. 1534, c. 110) it is provided that amend- ments may be made discontinuing as to any joint defendants and changing the form of action at any time before final judgment. The appellant could have been sued alone upon said bond had the appellee seen fit to have thus sued him. McIntyre v. People, 103 Ill. 142; Cassady v. Trustees of Schools, 105 Ill. 560. If the appellant could have been sued alone in the first instance upon said bond, then the guardian, Josef Lurie, and the appellant's co-obligor, Joseph Babka, were not necessary parties, and under the section of the practice act, above referred to, a joint suit having been brought against Josef Lurie, Joseph Babka, and the appellant, the appel- lee had the right to dismiss as to Josef Lurie and Joseph Babka at any time prior to final judgment and to take judgment against ap- pellant alone, and the fact that judgment was rendered upon questions of law we think does not make a case different from one where final judgment is rendered upon a ver- dict. In Mayer v. Brensinger, 180 Ill. 110, on page 119, 54 N. E. 159, on page 162 (72 Am. St. Rep. 196), it was held the rule that in a joint action ex contractu a dismissal as to one defendant effects a discontinuance of the entire action, so as to render a judgment against the remaining defendants erroneous, does not apply where a defense is interposed which is personal to the defendant who makes it, such as infancy, coverture, lunacy, bankruptcy, and the like, or where one is joined as a defendant in the action who is an unnecessary or improper defendant.

We have given this record a patient and painstaking examination, and are of the opin- ion that no substantial defense to the bond sued on was set up in any of the pleas filed by the appellant, and that the trial court, upon the pleadings, disposed of the case cor- rectly.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(230 Ill. 530)

CHICAGO & J. ELECTRIC RY. CO. v. WANIC.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 10, 1907.)

1. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.

The question of contributory negligence is ordinarily one for the jury, and only becomes one of law where the undisputed evidence es- tablishes that the injury resulted from the in- jured person's negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 277-286.]

2. APPEAL—REVIEW—SCOPE.

Controverted questions of fact are settled by the Appellate Court when it approves a ver- dict, and on further appeal to the Supreme Court that court may only decide whether there is any evidence fairly tending to support plain- tiff's cause of action.

3. STREET RAILROADS — SPEED — COMPANY'S DUTY.

That electric railway tracks are far beyond any municipal limits and there is no law relating to speed does not affect the company's duty toward persons crossing its tracks to use ordinary care to avoid injuring them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 172-176.]

4. SAME—DUTY TO LOOK AND LISTEN.

The failure of one crossing electric railway tracks to look and listen is not negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 208, 249, 256.]

5. SAME—DUTY OF COMPANY.

An electric railway company must exercise greater care in running its cars along a public highway in a thickly settled locality, where the view of approaching cars is obstructed, than in a highway in the country, where the view is unobstructed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 172-182.]

6. SAME—QUESTION FOR JURY.

In an action against an electric railway company for injuring one crossing its track, whether defendant was negligent and plaintiff guilty of contributory negligence *held*, under the evidence, questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251-257.]

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Will County; Frank L. Hooper, Judge.

Personal injury action by Joseph Wanic against the Chicago & Joliet Electric Railway Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of trespass on the case, brought by appellee against appellant in the circuit court of Will county. On the trial in that court a judgment for \$1,500 was recovered, which, on appeal to the Appellate Court, was sustained. The cause has been brought here on appeal for review. The declaration contained three counts, and charged general negligence by appellant's servants in improperly handling and controlling one of its cars, that the car was run at a high and dangerous rate of speed on a public highway without giving any warning to plaintiff, and that the car was run at a very high rate of speed without ringing a bell or blowing a whistle.

E. Meers, for appellant. S. P. Douthart (F. D. Jordan, of counsel), for appellee.

CARTER, J. (after stating the facts as above). The sole contention of appellant on this appeal is that the plaintiff, at the time of the accident, was not exercising due care and caution, or, in other words, that he was guilty of contributory negligence. It is most strenuously insisted that the evidence does not justify the verdict. The surrounding facts and circumstances as shown by the record we think are set forth with substantial accuracy in the opinion of the Appellate Court, as follows: "Appellant has an electric car line from Joliet to Chicago, which be-

tween Lemont and Romeo, in Will county, runs on the east side of the public highway, the track being 4 or 5 feet from the property line, and its cars are 9 feet wide, and project over about half the space between the track and the fence. Near quarry No. 6, in Will county, it runs through a small Polish hamlet of 27 families. Appellee lived on the east side of this highway, in a house 25 feet from appellant's track. On the line of the highway between the appellant's track and the lot there is a stone wall about 4 feet high. A picket fence stands on the north side of the house and runs to the stone fence. On the south side of the picket fence, and between Wanic's house and the highway, a summer kitchen from 6 to 8 feet high stood close to the stone wall, and a smokehouse and a coal shed stood about 5 feet from the house. Some willow trees also stood between the house and the highway. The path from the house to the highway was on the north side of the picket fence, through a gate opening on the north side of where the picket fence joined the stone wall. There was a ditch 3 feet wide between the stone wall and the track; the crossing over this ditch being made by two planks a foot wide. Other houses stood in the immediate neighborhood at different distances from the highway."

Counsel for appellant in his brief has not found fault directly with the statement of facts in the Appellate Court's opinion, although his contentions as to the facts would not support the above statement, especially as to some of the distances, and the location of the track, fence, trees, and houses. Distances and measurements about which there is a dispute and a conflict in the evidence could have been settled by accurate measurements on the ground. This was not done, and, while some of the evidence of appellant tends to show different distances from the above-quoted statement, we think the weight of the evidence supports it. The appellee was struck by a car which came from the south. There is proof tending to show that the car could be seen by a person going from Wanic's house to the highway but a short distance, if at all, before it arrived at a point opposite him. The accident happened on a clear Sunday morning, shortly after 9 o'clock. Appellee testified that he did not see the car that struck him. Apparently he had just crossed the plank bridge over the ditch and was stepping onto the track when he was struck, and was so badly injured that he did not regain consciousness until the next day. His leg was broken, and he was in the hospital for five months, and unable to work for about a year. Some testimony tends to show his brain was affected.

The evidence as to the speed of the car at the time of the accident, and as to whether there was any signal or warning of danger before appellee was struck, is very conflicting. Appellee's witnesses testify that it was

running from 30 to 35 miles an hour, while appellant's witnesses state that it was running from 15 to 20 miles an hour. Some of the testimony is to the effect that it ran 300 feet after appellee was struck before it stopped, while the testimony for appellant is that it did not run over 150 feet. Witnesses for appellee state that no whistle was blown before the accident, while appellant's testimony is to the effect that the whistle was sounded and every effort made to stop the car from the time the motorman saw appellee until he was struck, but that the distance was too short to allow him to do so. There is no claim that any whistle or other warning signal was sounded before the appellee was seen close to the track. The car itself apparently made little noise in running. The testimony of appellant is to the effect that the distance from the gate to the track was about 15 feet. There was testimony in the record that places it much nearer. The testimony is not clear as to how much the obstructions prevented a view of the approaching car, or just how far down the track appellee, had he looked before he was actually at or on the track, could have seen a car coming, or whether he could have heard the car had he stopped and listened. Appellant's testimony is that appellee did not look towards the car at all before he was struck, and there is nothing to contradict this.

The question of contributory negligence is ordinarily one of fact for the jury, and only becomes one of law where the undisputed evidence establishes that the injury resulted from the negligence of the injured party. If there may be a difference of opinion on the question, so that reasonable minds will arrive at different conclusions, then it is a question of fact for the jury. *Chicago City Railway Co. v. Nelson*, 215 Ill. 436, 74 N. E. 458. By the terms of the statute controverted questions of fact are settled by the judgment of the Appellate Court when it approves the verdict of the jury. This court can only decide whether there is any evidence in the record, with all its reasonable inferences, fairly tending to support plaintiff's cause of action. The weight of the testimony is never involved. *Chicago & Eastern Illinois Railroad Co. v. Snedaker*, 223 Ill. 395, 79 N. E. 169; *Chicago City Railway Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017.

Appellant insists that as the track in question was along the highway, far beyond any municipal limits, there was no law or ordinance requiring it to run its cars at any particular rate of speed, and that therefore it owed appellee no duty other than not to wantonly and recklessly injure him; citing in support of this contention *Bartlett v. Wabash Railroad Co.*, 220 Ill. 163, 77 N. E. 96, and *Illinois Central Railroad Co. v. Eicher*, 202 Ill. 556, 67 N. E. 376. In both of those cases the person was injured on the right of way of the railroad company, and not on a public highway occupied by the tracks of the

railroad, as in this instance. This court held in *Elgin, Joliet & Eastern Railway Co. v. Raymond*, 148 Ill. 241, 35 N. E. 729, that it could not be laid down as a legal principle that a person, in attempting to go over a railroad track where it crosses a street or highway, is bound, at his peril, to pursue a course at right angles to the track, but held that his right is, in using a street or highway, to walk in any direction he pleases, and his duty is to exercise reasonable and ordinary care, in crossing a railway track, to avoid injury. We held in *Chicago City Railway Co. v. Fennimore*, 199 Ill. 9, 64 N. E. 985, that although no ordinance limiting the speed at which street cars were allowed to run had been introduced, yet in every case it must be a question for the jury to decide whether or not, under the facts and circumstances of that particular case, the rate of speed was or was not dangerous or unreasonable; that a railroad company, in the running of its trains, is always required to use ordinary care and prudence to guard against injury to the persons or property of those who are rightfully traveling upon public streets; that this is true, whether there is any statutory regulation on the subject or not. See, also, *Chicago, Burlington & Quincy Railroad Co. v. Perkins*, 125 Ill. 127, 17 N. E. 1. If this be the rule as to street cars and steam railways occupying streets or highways, it must necessarily be as to electric lines.

Appellant further insists that under the proof in this case the negligence of appellee in failing to look and listen is a question of law; citing *Thompson on Negligence*, and other authorities. This court, in *Chicago & Northwestern Railroad Co. v. Hansen*, 166 Ill. 623, 46 N. E. 1071, stated that, while it had been formerly held in this state that this was a matter of law, "It has since been repeatedly held that it cannot be said, as a matter of law, that a traveler is bound to look or listen, because there may be various modifying circumstances excusing him from doing so. * * * The traveler may not be in fault in failing to look or listen, if misled without his fault, or the view may be obstructed by objects or by darkness, and other and louder noises may interfere with his hearing. It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise, and the question what a reasonably prudent person would do for his own safety under like circumstances must be left to the jury as one of fact." The following decisions support the rule laid down in this last case: *Chicago & Alton Railroad Co. v. Pearson*, 184 Ill. 386, 56 N. E. 633; *Chicago & Alton Railroad Co. v. Lewandowski*, 190 Ill. 301, 60 N. E. 497; *Chicago Junction Railway Co. v. McGrath*, 203 Ill. 511, 68 N. E. 69; *Chicago Union Traction Co. v. Jacobson*, 217 Ill. 404, 75 N. E. 508; *Illinois Southern Railway Co. v. Hamill*, 226 Ill. 88, 80 N. E. 745. In *Chicago, Burling-*

ton & Quincy Railroad Co. v. Pollock, 195 Ill. 156, 163, 62 N. E. 831, 834, we said: "Negligence does not become a question of law alone, unless the acts constituting it are of such a character that all reasonable men would concur in pronouncing them so. Human conduct must be judged by human standards."

A greater degree of care must necessarily be required of appellant in running its cars along a public highway in a thickly settled locality, with houses as close to it as the evidence shows they were in this case, and little or no opportunity for any one coming from the house on the side of the highway next to the track to see the approaching car, than would be required in a highway in an open country, away from all houses, where any one approaching the track would have an unobstructed view before reaching it. What would be reasonable speed in one case might be very reckless or dangerous speed in the other. Whether or not ordinary care required the blowing of the whistle or a warning signal would depend entirely upon the surrounding facts and circumstances of each particular case. We cannot say that the evidence in this record necessarily leads to but one conclusion. Chicago Union Traction Co. v. Jacobson, *supra*. Whether the appellee used reasonable judgment in view of all the circumstances, or appellant used reasonable care at the time of the accident, was properly left to the jury.

The judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

(230 Ill. 327)

DAVIS et al. v. UPSON.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 10, 1907.)

1. WILLS — PROBATE OF FOREIGN WILLS — STATUTES—RIGHT TO PROBATE.

Statute of Wills (Hurd's Rev. St. 1905, c. 148) § 10, provides that all wills executed and published out of the state may be admitted to probate in any county in the state in which the testatrix was seised of real estate at the time of her death. Section 11 provides that, if testatrix had a mansion house or known place of residence, her will shall be proved in the county where the mansion house or place of residence was; but if she had no place of residence, and no lands are devised in the will, it may be proved either in the county where she died or where her estate or the greater part thereof lies. *Held*, that section 11 applies only to domestic wills, and the probate court has no jurisdiction to admit to probate the will of a testatrix who was a citizen of New York and had no real estate in the state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 573.]

2. SAME—SITUS OF PROPERTY—BONDS.

Under Statute of Wills (Hurd's Rev. St. 1905, c. 148) § 11, providing that a will may be probated where the estate of the testatrix or the greater part thereof lies, no lands being devised by the will, the fact that testatrix, domiciled in another state at the time of her death, owned bonds of a street railway in this state, such

bonds being in the hands of an agent here, did not entitle her will to probate in Illinois, even if such section is applicable to foreign wills, since the property in the bonds followed testatrix's person, and was in contemplation of law at the time of her death situated at her domicile.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 572.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Motion by Lydia Farlin Upson, administratrix of the estate of Cynthia M. Cameron, deceased, to set aside the order of the probate court admitting to probate an instrument claimed to be the last will of Cynthia M. Cameron. From a judgment of the Appellate Court, affirming a judgment of the Circuit Court allowing the motion and setting aside the order of the probate court denying the motion, Lewis H. Davis, executor of, and Harriet W. Davis, residuary legatee under, said alleged will of Cynthia M. Cameron, appeal. Affirmed.

D. J. Schuyler, James C. Hutchins, Max Baird, and L. M. Greeley, for appellants. Alden, Latham & Young, for appellee.

HAND, C. J. This was a motion made in the probate court of Cook county by the appellee, Lydia Farlin Upson, administratrix by appointment of the surrogate's court of Warren county, N. Y., of the estate of Cynthia M. Cameron, who died February 2, 1898, in Warren county, N. Y., where she was domiciled at the time of her death, and where she had lived for many years prior to her death, against the appellants, Lewis H. Davis, executor by appointment of the probate court of Cook county, Ill., of the last will and testament of said Cynthia M. Cameron, deceased (which last will and testament, and a codicil thereto, were admitted to probate by the probate court of Cook county on May 4, 1898), and Harriet W. Davis, the sole residuary legatee under said will and codicil, to set aside the probate thereof in the probate court of Cook county, on the ground that Cynthia M. Cameron was a resident of Warren county, N. Y., at the time of her death and left no real estate in the state of Illinois at the time of her death, and that the probate court of Cook county was without jurisdiction to admit said will and codicil to probate. The probate court denied the motion, whereupon Lydia Farlin Upson perfected an appeal to the circuit court of Cook county, where the motion was allowed, and the order of the probate court of Cook county, admitting said will and codicil to probate and appointing said Lewis H. Davis executor of the last will and testament of said Cynthia M. Cameron, deceased, was vacated and set aside, which judgment of the circuit court has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

It appears from this record that after a

certain instrument in writing purporting to be the last will and testament of Cynthia M. Cameron, deceased, and a codicil thereto, had been admitted to probate by the probate court of Cook county, the heirs at law of said Cynthia M. Cameron filed a bill in the superior court of Cook county to contest said will and codicil upon various grounds, among which was that the said Cynthia M. Cameron was domiciled in the state of New York at the time of her death and left no real estate in Illinois at the time of her death, and that the probate court of Cook county was without jurisdiction to admit said will and codicil to probate. The superior court of Cook county sustained the will and codicil, which decree of the superior court was reversed by the Appellate Court for the First District (Upson v. Davis, 110 Ill. App. 375), on the ground that the probate court of Cook county was without jurisdiction to admit said will to probate. The decree of the superior court and the judgment of the Appellate Court were reversed by this court, on the ground that the question of the jurisdiction of the probate court of Cook county to admit said will to probate was not involved in said chancery proceeding to contest said will (Davis v. Upson, 209 Ill. 206, 70 N. E. 602), and it was held that said question of want of jurisdiction should have been raised by motion in the probate court to vacate and set aside the order admitting said will and codicil to probate, whereupon this motion was made in the probate court. It also appears that the heirs at law of Cynthia M. Cameron, deceased, petitioned the surrogate's court of Warren county, N. Y., where Cynthia M. Cameron was domiciled at the time of her death, to appoint said Lydia Farlin Upson administratrix of the estate of said Cynthia M. Cameron, deceased, alleging that she died intestate. The appellants in this case were not made parties to that proceeding. They, however, employed a firm of lawyers in the state of New York to appear in the surrogate's court of Warren county for certain minors who were named as beneficiaries in said will and who were parties to said proceeding, who set up in their names that said Cynthia M. Cameron died testate, and copies of the instrument purporting to be the last will and testament of Cynthia M. Cameron, deceased, and the codicil thereto, and the order of the probate court of Cook county admitting the same to probate, were introduced in evidence in said surrogate's court. Upon the hearing of said application for the appointment of said Lydia Farlin Upson as administratrix of the estate of said Cynthia M. Cameron, deceased, the said surrogate's court held that said will and codicil were not properly executed under the laws of the state of New York, and that said Cynthia M. Cameron, deceased, died intestate, and appointed said Lydia Farlin Upson administratrix of the estate of Cynthia M. Cameron, deceased, which judgment of the sur-

rogate's court of Warren county was affirmed by the Appellate Division of the Supreme Court and the Court of Appeals of the state of New York. In re Estate of Cameron, 47 App. Div. 120, 62 N. Y. Supp. 187; In re Estate of Cameron, 166 N. Y. 610, 59 N. E. 1120. It further appears that several years prior to the death of Cynthia M. Cameron she sent a large portion of her estate, which consisted of money, to a relative in Chicago for investment in Illinois; that thereafter, upon her order, the portion of her estate in Illinois was turned over to appellant Lewis H. Davis for investment by him in this state; that subsequently Cynthia M. Cameron executed a will, and thereafter a codicil thereto, which she also sent to Lewis H. Davis; that Lewis H. Davis was named as executor therein, and his wife, Harriet W. Davis, was named as residuary legatee therein; that, at the time of the death of said Cynthia M. Cameron, said will and codicil, and about \$12,000 of said fund, which was invested in Chicago City Railway bonds, were in the possession of Lewis H. Davis in the city of Chicago, and something like \$2,500 in cash, the balance of the estate of Cynthia M. Cameron, deceased, was on deposit in a bank in the state of New York or due to her from persons residing in New York; that said Cynthia M. Cameron did not live in Illinois, and had no real estate in Illinois at the time of her death, but was at the time of her death, and had been for many years, domiciled in the state of New York.

In the opinion filed in Davis v. Upson, 209 Ill. 206, 210, 70 N. E. 602, 603, it was said: "The Appellate Court found from the pleading and the proof that said Cynthia M. Cameron was not a resident of the state of Illinois and did not own any real estate in the state, and on these facts held that the probate court of Cook county, Ill., was wanting in jurisdiction to grant the probate of the will, and for that reason reversed the decree of the superior court. * * * If the probate court was lacking in jurisdiction of the subject-matter, as found by the Appellate Court, the judgment admitting it to probate could be vacated by motion, entered either at the term at which the judgment was made or at any subsequent term. If jurisdiction was lacking, the proceeding resulting in the admission of the will and codicil to probate is void, and may be set aside at any time by motion in that court." It is therefore settled that the question whether the probate court of Cook county had jurisdiction to admit to probate the instrument purporting to be the last will and testament of Cynthia M. Cameron, deceased, and the codicil thereto, was properly raised by motion in the probate court, and the only question which needs now be considered is: Did the probate court of said Cook county have jurisdiction to admit said will to probate? We think that question involves only a consideration of sections 10 and 11 of our statute of wills (Hurd's Rev.

St. 1905, c. 148). From a consideration of those sections, we think section 10 applies to foreign wills and section 11 to domestic wills. Those sections read as follows:

"Sec. 10. All wills, testaments and codicils, which heretofore have been, or shall hereafter be made, executed and published out of this state, may be admitted to probate in any county in this state in which the testator may have been seized of lands, or other real estate, at the time of his death, in the same manner, and upon like proof as if the same had been made, executed and published in this state, whether such will, testament or codicil has first been probated in the state, territory or country in which it was made and declared or not. And all original wills, or copies thereof, duly certified according to law, or exemplifications from the records in pursuance of the law of Congress in relation to records in foreign states, may be recorded as aforesaid, and shall be good and available in law, the same as wills proved in such county court.

"Sec. 11. If any testator or testatrix shall have a mansion house or known place of residence, his or her will shall be proved in the court of the county wherein such mansion house or place of residence shall be. If he or she has no place of residence, and lands be devised in his or her will, it shall be proved in the court of the county wherein the lands lie, or in one of them, where there shall be land in several different counties; and if he or she have no such known place of residence, and there be no lands devised in such will, the same may be proved either in the county where the testator or testatrix shall have died, or that wherein his or her estate, or the greater part thereof, shall lie."

It is clear from the language of section 10 that a foreign will can be admitted to probate in this state only in case the testator died seized of "lands or other real estate" situated in this state. Cynthia M. Cameron did not reside in this state or die seized of lands or other real estate situated in this state; hence her will could not be properly admitted to probate in this state, and, the probate court not having jurisdiction of the subject-matter, its order admitting said will and codicil to probate was void, and was properly set aside.

It is urged, however, that the last clause of section 11, which provides, "If he or she have no such known place of residence, and there be no lands devised in such will, the same may be proved either in the county where the testator or testatrix shall have died, or that wherein his or her estate, or the greater part thereof, shall lie," conferred jurisdiction upon the probate court of Cook county to admit said will and codicil to probate. As we have said, section 11 applies only to domestic wills. The language is, "If he or she have no such known place of resi-

dence,"—that is, "a mansion house or known place of residence." Here the testatrix did have a known place of residence. And again: "If he or she have no such known place of residence and there be no lands devised," then the will shall be proved "either in the county where the testator or testatrix shall have died"—clearly the foregoing language applies to residents of this state—"or that wherein his or her estate, or the greater part thereof, shall lie," which language, we think it equally clear, applies to a resident of this state.

By section 42 of chapter 3 of the Revised Statutes of this state (Hurd's Rev. St. 1905), foreign executors and administrators are given the right to sue in any court in this state upon filing authenticated copies of their letters testamentary or of administration. There is no reason, therefore, why the probate court of Cook county should be given power to admit to probate the wills of non-residents who die without leaving real estate situated in this state. Especially is this true in view of the results that would follow. In this case the courts of the domicile of Cynthia M. Cameron found she died intestate. If the decision of the court of the domicile of a deceased person does not control in the matter of whether the deceased died testate or intestate, there must necessarily result a multitude of decisions upon that question, and if a devisee may carry a will from state to state, and present it for probate in each state where the decedent had a debt due him at the time of his death, until he can find a state under the laws of which it can be admitted to probate, great confusion in the settlement of estates would follow. In no event did Cynthia M. Cameron fall within the provisions of section 11 of the wills act, as she left no property in this state. The property belonging to her at the time of her death in the hands of her agent in Illinois, whose agency was revoked by her death, was nothing more than a debt due her from the Chicago City Railway Company. The property in such bonds followed her person, and in contemplation of law was at the time of her death situated at her domicile. The situs of said property was, therefore, in New York, and not in Illinois. *Cooper v. Beers*, 143 Ill. 25, 33 N. E. 61; *Consolidated Tank Line Co. v. Collier*, 148 Ill. 259, 35 N. E. 756, 39 Am. St. Rep. 181; *Holbrook v. Ford*, 153 Ill. 633, 39 N. E. 1091, 27 L. R. A. 324, 46 Am. St. Rep. 917.

From a careful consideration of this record we are of the opinion that the probate court of Cook county was without jurisdiction to admit the instrument purporting to be the last will and testament of Cynthia M. Cameron, deceased, and the codicil thereto, to probate.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(230 Ill. 641)

GLOS et al. v. CASS.

(Supreme Court of Illinois. Oct. 23, 1907.

Rehearing Denied Dec. 10, 1907.)

1. TAXATION—TAX DEEDS—ACTIONS TO SET ASIDE—PERSONS ENTITLED TO MAINTAIN.

One who has executed a contract to sell lots, stating that the property "is hereby bargained and sold," and permitting vendee to take immediate possession, may still sue to set aside a tax deed as a cloud on his title; the legal title remaining in him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1585.]

2. SAME—JUDGMENT.

In an action to set aside a tax deed, a provision in the decree for a deposit to be paid to defendants as their respective rights might thereafter be determined was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1612-1616.]

3. SAME.

It was not error that the decree only set aside the tax deed, and did not bar any interest that defendants had in the premises, other than that derived from the tax deed.

4. SAME—SALE—VALIDITY.

Where the county clerk's certificate to the delinquent tax list was dated as of a day other than the day advertised for sale, the sale and deed based thereon were void.

Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Bill by Joseph K. Cass against Emma J. Glos and others. Decree for complainant, and defendants appeal. Affirmed.

John R. O'Connor, for appellants. Charles T. Mason and William P. Elliott, for appellee.

CARTER, J. Appellee filed a bill in the superior court of Cook county September 29, 1905, alleging that he was then the owner and in possession of certain described lots in Chicago; that October 18, 1899, the lots were sold for delinquent taxes to Jacob Glos and a certificate of sale issued; that, no redemption having been made, a tax deed was issued to Glos; that said tax deed was void. Emma J. Glos was made a defendant as the wife of Jacob Glos, and August A. Timke, trustee, by reason of a trust deed being executed to him by Jacob Glos to secure a certain indebtedness. The appellee prayed that the tax deed be set aside as a cloud on his title. Appellants answered, denying the material allegations, and demanding strict proof. Evidence having been heard by the chancellor, decree was entered finding the material allegations of the bill true and setting aside the tax deed.

It appeared from the evidence that on June 20, 1905, the appellee entered into a contract with the Chicago & Illinois Western Railroad Company to sell the lots here in question for \$700; that \$100 was paid down, and the balance was to be paid on the delivery of a good and sufficient warranty deed within 30 days after the title should be found good. The contract also provided that the tax deed here in question should be re-

moved by appellee, either by legal decree or quitclaim deed, and that the railroad company might take immediate possession of the lots. The appellants contend that, because this contract stated that this property "is hereby bargained and sold to the said" railroad company, the railroad was the owner of said lots when the bill was filed. In *Langlois v. Stewart*, 156 Ill. 609, 41 N. E. 177, this court had this identical question before it, and held that a bond for a deed was only an agreement to make a title in the future, and the fact the seller had executed such a bond to a third party, who was in possession, did not prevent the seller from maintaining his bill to set aside a cloud upon the title, so he might fulfill the conditions of his bond and make good title to their property. This decision has been approved in *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314, and *National Fire Ins. Co. v. Lumber Co.*, 217 Ill. 115, 75 N. E. 450, 108 Am. St. Rep. 239. Under these decisions, notwithstanding this contract of sale, the legal title still remained in appellee.

Appellants also contend that the decree does not declare the rights of the parties as to the amount of money to be paid to the various defendants. It found that appellee had offered \$3 to each of the three defendants for their respective appearance fees in this suit and that they had refused to accept it, and that thereupon it was ordered that these sums be deposited with the clerk for the respective use of said defendants. It also provided that the appellee should deposit with the clerk of the court, "for the use of the defendants to this suit, or any or either of them, or their grantees or assigns, as their respective rights may hereafter by this court be determined and decreed," \$116.04, and that this amount was deposited. Under the decisions of this court in *Glos v. Hanford*, 212 Ill. 261, 72 N. E. 439, and *Glos v. Ault*, 221 Ill. 562, 77 N. E. 939, this provision of the decree was proper.

The decree did not set aside the trust deed as to August A. Timke, trustee, as claimed by appellants, but only the tax deed of Jacob Glos, enjoining the defendants from claiming or asserting any title by reason of any tax deed. Any interest that the defendants had in these premises, other than that derived from the tax deed, is not foreclosed by this decree. There was no error in this regard. *Glos v. Ault*, supra.

The tax sale and deed to Glos were null and void. The county clerk's certificate to the delinquent tax list upon which this deed was based was dated July 12, 1899. It should have been dated August 7, 1899, the date advertised for the sale. The judgment of sale was therefore void. *Glos v. Gleason*, 209 Ill. 517, 70 N. E. 1045; *Glos v. Hanford*, supra; *Glos v. Ault*, supra.

The decree of the superior court will be affirmed.

Decree affirmed.

(230 Ill. 436.)

DALY v. KOHN et al. (two cases).(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 10, 1907.)**1. COURTS—APPELLATE JURISDICTION—FREEHOLD.**

Where a trustee in bankruptcy, under U. S. Comp. St. 1901, p. 3451, which provides that the trustee shall be vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt, sues to have set aside a fraudulent transfer of real estate from the bankrupts to their mother and to have the premises conveyed to him as trustee, a freehold is involved, and an appeal must be taken directly to the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 557-560.]

2. APPEAL AND ERROR—DISMISSAL—DEFECTS IN PROCEEDINGS FOR REVIEW.

Where appellant, as soon as the appeal was dismissed by the Appellate Court, prosecuted a further appeal to the Supreme Court, and thereupon sued out a writ of error from the Supreme Court to the trial court, the writ of error was improvidently sued out and must be dismissed, since such a writ cannot be sued out while an appeal in the case is pending in the Appellate or Supreme Courts, even though it may ultimately be held by the Supreme Court that the appeal to the Appellate Court was improperly taken.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 47.]

3. SAME—EFFECT OF TAKING APPEAL.

An appeal is a continuation of the same case, and, when the case is transferred to an appellate tribunal by appeal, there is no case pending in the trial court upon which a writ of error will operate at the suit of the party prosecuting the appeal until the case gets back into the trial court in some regular way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2181.]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; *W. M. McEwen*, Judge.

Actions by Charles L. Daly, trustee in bankruptcy, against Katie Kohn and others to set aside a fraudulent conveyance of real estate. From a judgment of the Appellate Court dismissing plaintiff's appeal, plaintiff appeals. Affirmed. Writ of error sued out from Supreme Court to trial court after dismissal of appeal in Appellate Court dismissed.

Alden, Latham & Young (Charles Martin, of counsel), for appellant. David J. Lyon and Henry M. Sellgman, for appellees.

HAND, C. J. This was a bill in chancery filed in the superior court of Cook county by Charles L. Daly, trustee in bankruptcy of the estate of Sidney Kohn and Edward A. Kohn, against said Sidney Kohn and Edward A. Kohn and one Katie Kohn, to set aside as fraudulent a certain deed from said Sidney and Edward A. Kohn to their mother, Katie Kohn, whereby Sidney and Edward A. Kohn had conveyed to Katie Kohn certain real estate described in the deed, situated in the city of Chicago. Answers and replications were filed, and upon a trial the bill was dismissed for want of equity, whereupon an appeal was prayed by the trustee to the Appellate Court for the First District, where the

appeal, upon motion of the appellees, was dismissed for want of jurisdiction in the Appellate Court to hear and determine the same, on the ground a freehold was involved, and a further appeal has been prosecuted by the trustee to this court. After the appeal was dismissed by the Appellate Court the trustee sued out a writ of error from this court to the superior court to bring in review before this court the decree of said superior court entered in said cause, and at the June term, 1907, of this court the appeal and writ of error were both pending in this court and the cases were consolidated and taken as one case. It was averred in the bill that the deed from Sidney and Edward A. Kohn to Katie Kohn, which bore date September 24, 1901, was not filed for record until September 21, 1902, and that said deed was without consideration and was a mere sham, and was made with the intention of defrauding and delaying the creditors of said Sidney and Edward A. Kohn, and it was prayed that said deed be set aside and vacated and declared null and void, that said Katie Kohn be ordered to convey the premises therein described to said trustee, and that, in default thereof, the master in chancery of said court be directed to convey said premises to said trustee.

The bankruptcy act provides: "The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested, by operation of law, with the title of the bankrupt as of the date he was adjudged a bankrupt." 1 Fed. St. Ann. § 70, p. 697 [U. S. Comp. St. 1901, p. 3451]. We are of the opinion, therefore, the question of title to real estate was involved in this suit, and not the question of the enforcement of a lien, as is the case in foreclosure suits and upon creditors' bills, and that the Appellate Court properly held that a freehold was involved. In *Dean v. Plane*, 195 Ill. 495, 501, 63 N. E. 274, 276, this court said: "The provision of the bankruptcy act for vesting the title of real estate in the trustee does not relate to the establishment of a lien, but involves the freehold and transfers title." The necessary result of the decree in this case was to sustain the title of Katie Kohn or to divest her of her title and transfer it to the trustee. A freehold was therefore involved. *Hursen v. Hursen*, 209 Ill. 466, 70 N. E. 904.

The trustee states in his suggestions in support of his motion to consolidate the appeal with the writ of error that to secure as "speedy a decision as possible" of this case, so soon as the appeal was dismissed by the Appellate Court he prosecuted a further appeal to this court, and thereupon sued out a writ of error from this court to the superior court. The writ of error, under the practice in this state, was improvidently sued out, and must therefore be dismissed. A writ of error cannot be sued out from this court by the appellant to review a judgment or decree of a

trial court while he has an appeal pending in the Appellate or Supreme Court from said judgment or decree; and this is true although it may ultimately be held by this court that the appeal to the Appellate Court was improperly taken. In *Smith v. Chytraus*, 152 Ill. 664, 38 N. E. 911, it was held that the trial court acts judicially in granting an appeal to the Appellate Court and within the jurisdiction committed to the court, and, although the appeal may be erroneously granted to the Appellate Court and the Appellate Court be without jurisdiction to hear and determine the appeal, the order granting the appeal is not void, but the case is transferred to the Appellate Court and remains in that court, or in the Supreme Court if a further appeal be prosecuted, until the appeal is dismissed. An appeal is a continuation of the same case, and, when the case is transferred to an appellate tribunal by appeal, there is no case pending in the trial court upon which a writ of error will operate at the suit of the party prosecuting the appeal until the case gets back into the trial court in some regular way. A second appeal cannot be taken when the first appeal has not been dismissed, but is a valid subsisting appeal, and when an appeal is pending the case cannot be brought up by writ of error, by certiorari or by bill of exceptions. 2 Cyc. p. 523, and cited cases.

In the cases of *Harding v. Larkin*, 41 Ill. 413, and *Page v. People*, 99 Ill. 418, the appeal was prosecuted by the appellee or the writ of error was sued out by the defendant in error, and it was held the right to prosecute an appeal or sue out a writ of error was not barred or affected by the appeal or writ of error of the adversary of the party prosecuting the second appeal or second writ of error. The basis of those decisions is, that both parties may prosecute an appeal or sue out a writ of error from a judgment, and those cases in no way conflict with the holding in this case. In the cases of *Hibernian Banking Ass'n v. Commercial Nat. Bank*, 157 Ill. 524, 41 N. E. 919, and *Id.*, 157 Ill. 576, 41 N. E. 918, the question here disposed of was not raised or considered.

The judgment of the Appellate Court will be affirmed in case No. 5508 and the writ of error will be dismissed in case No. 5473, without prejudice.

Judgment affirmed; writ of error dismissed.

(230 Ill. 356)

MANTERNACH et al. v. STUDT et al.
(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

1. APPEAL—RIGHT OF REVIEW—EFFECT OF DISMISSAL AS TO PARTIES.

Where a person, in answering a bill for partition, merely asserts that she is the owner of a certain interest in the premises, and denies the allegations of the bill that she is not entitled to any interest, she has no right of appeal

from a decree dismissing the bill, since her rights are not determined thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 923.]

2. EQUITY—DECREE—RECITAL OF SERVICE OF PROCESS—CONCLUSIVENESS.

Where a decree in a chancery proceeding is entered at a term subsequent to the return term, and recites due service of process upon defendants, but the return on the summons is insufficient, the finding in the decree will be supported by the presumption that a second summons was issued and served for the term at which the decree is entered; but no such presumption exists where the decree was entered at the return term of the summons, and the recitals in the decree cannot prevail if the summons and return show the court was without jurisdiction.

3. ADMINISTRATORS—SALE OF LAND UNDER ORDER OF COURT—PROCESS—SERVICE ON MINORS.

Service of summons in a proceeding in the probate court against minor heirs to sell real estate of an intestate to pay debts, by delivering a copy of the summons for the minors to their mother, who is also their guardian, and is the creditor for whose benefit the proceeding is instituted, does not give the court jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1402.]

4. SAME—APPOINTMENT OF GUARDIAN AD LITEM.

Where there has been no service of summons on a minor defendant, the appointment of a guardian ad litem does not give the court jurisdiction of his person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, § 1402.]

5. SAME—TITLE AND RIGHTS OF PURCHASER—FAILURE TO SUMMON INTERESTED MINOR.

Where land belonging to an estate is sold to pay debts, but a minor heir is not legally summoned, a subsequent warranty deed from the widow, who was the purchaser, is not binding upon the minor, even though she is his mother, and he not estopped to claim his interest in the land.

6. ADVERSE POSSESSION—ACTUAL POSSESSION OF LAND—PAYMENT OF TAXES.

Where the color of title to land in possession of a man and wife for over seven years was in the husband part of the time and for the rest of the time in the wife, and the evidence does not clearly show that the husband after the conveyance to the wife paid the taxes for her as her agent or at her request, the possession is not sufficient to give title under section 6 of the statute of limitations (Hurd's Rev. St. 1905, c. 83, § 6), providing that a person, who shall for seven successive years continue in actual possession of land under color of title obtained in good faith and pay the taxes, shall be the owner to the extent of his paper title.

7. SAME—ACTUAL RESIDENCE.

In order to gain title to land under section 4 of the statute of limitations (Hurd's Rev. St. 1905, c. 83, § 4), providing that actions to recover lands actually resided upon by one having a record title must be brought within seven years after possession taken, there must be actual residence thereon; actual possession not being sufficient.

Appeal from Superior Court, Cook County; Theodore Brentano, Judge.

Bill by John Manternach and others against August Studt and others. From a decree for defendants, complainants appeal. Reversed and remanded.

John Manternach, one of appellants, began this suit by filing a bill in the superior court of Cook county for the partition of a cer-

tain lot described in the bill. The bill alleged that the complainant owned the undivided one-fourth of said lot; that he acquired title thereto by inheritance from his father, Peter Manternach, who died January 31, 1886, leaving Emma M. Manternach, his widow, and Lizzie, Annie, Mary, and complainant as his children and only heirs at law. The bill averred Peter Manternach died intestate; that his widow was appointed administratrix of his estate February 15, 1886; that in March, 1887, she filed her account in the probate court, showing receipts of \$895.95 and disbursements of \$1,294.65, leaving a balance due her of \$398.70; that January 30, 1889, she resigned her office of administratrix, and caused Alexander S. Maltman to apply for letters and be appointed administrator de bonis non February 6, 1889; that February 7, 1889, said Maltman filed his report and account of the personal estate of the intestate in the probate court, from which it appeared that the indebtedness of the estate, including the widow's award, amounted to \$2,525.50 and the personal property to \$1,770.65, leaving a deficit of \$754.85; that February 8, 1889, said administrator de bonis non filed a petition in the probate court asking for an order and decree to sell the lot described in the bill for the payment of said deficit, and on that day a summons was issued on said petition, returnable on the third Monday of February, which was the first day of the next term of court succeeding the filing of the petition and the issuing of the writ. The return of the sheriff on the summons is dated the day of its issue, and recites that the writ was served on the complainant and Lizzie Manternach (now Sperk) "by leaving a copy thereof for each of them at the usual place of abode of said defendant with Emma M. Manternach, a member of their family of the age of 10 years and upwards, and informing said Emma M. Manternach of the contents thereof." No question is involved as to the service on the other defendants. On the 28th of February, 1889, a decree was entered by the probate court for the sale by the administrator de bonis non of the lot in controversy, and on May 1, 1889, said administrator, in pursuance of the decree, sold said lot to the widow, Emma M. Manternach, for \$1,800, which sale was afterwards approved by the probate court. Mrs. Manternach, who had previously been appointed guardian for her children, receipted the administrator for the amount due her and for \$168.80 as guardian for her four minor children, which appears to have been the surplus from the proceeds of this sale after paying the indebtedness, costs, and expenses. There is no proof in the record that Mrs. Manternach, as guardian, ever accounted to complainant for his share of the money, or that he received any benefit from it except support and maintenance by his mother. April 22, 1893, Mrs. Manternach sold the lot

to August T. Studt, who conveyed it to his wife March 17, 1898, and on March 17, 1906, Mrs. Studt and her husband conveyed the lot to John and Mary Nagl. The bill avers, on information and belief, that Lizzie Sperk's right to assert title to an interest in said premises is barred by the statute of limitations; that complainant is the owner of the undivided one-fourth of said premises and John and Mary Nagl of the undivided three-fourths thereof; and that complainant is entitled to an account for the rents and profits of the premises accruing after the purchase by Studt from Mrs. Manternach, and prays that an account therefor may be taken and for partition of the premises. August Studt, Sophia Studt, John Nagl, and Mary Nagl filed their joint and several answers. The defenses set up by their said answers, as summarized by counsel for appellees in their brief and argument, are: First, the proceedings for the sale of the real estate were regular on their face, and this proceeding is a collateral attack, and the recitals in the decree are binding upon John Manternach; second, he is bound by the warranty in the deed given by Emma Manternach, his mother, to August T. Studt; third, he is barred by section 9 of the statute of limitations (Hurd's Rev. St. 1905, c. 83, § 9); fourth, he is barred by sections 6, 7, and 8 of the statute of limitations (Hurd's Rev. St. 1905, c. 83, §§ 6, 7, 8); fifth, he is estopped by having received benefits from the sale. Lizzie Sperk answered, admitting all the allegations of the bill except that she was barred by the statute of limitations from claiming and asserting a right to an interest in the real estate, and averred that she was the owner of the undivided one-fourth of said premises, and asked that the same be ascertained and set off to her, as well as a share of the rents and profits if the account be taken. Upon a hearing in open court a decree was entered dismissing complainant's bill for want of equity, and from that decree John Manternach and Lizzie Sperk have prosecuted this appeal.

Mason & Wyman, for appellants. Bulkley, Gray & More, for appellees.

FARMER, J. (after stating the facts as above). In our opinion Lizzie Sperk was not authorized to prosecute an appeal from the decree. The dismissal of the bill was not an adjudication of her rights in the premises. By her answer she merely asserted that she was the owner of the undivided one-fourth of the land sought to be partitioned and denied the allegations of the bill that she was not entitled to any interest therein. In the absence of a cross-bill, finding that the complainant had no interest in the premises and no right to a partition thereof would require that the bill be dismissed, and the decree to that effect was an adjudication, only, that the complainant had

no interest in the premises, but was not a determination of the right of Lizzie Sperk, and there was nothing therefore for her to appeal from. This appeal therefore brings before us for consideration nothing except the correctness of the decree of the superior court in adjudging that John Manternach (hereafter called appellant) had no interest in the real estate sought to be partitioned and dismissing his bill for want of equity.

The proof tends to show appellant had no knowledge that his father ever owned the lot in controversy until February, 1906, and the suit was instituted by him June 29, 1906. There is some controversy as to the age of appellant, but in our view of the case his exact age is immaterial. The proof shows him to have been either seven or eight years old at the time of the issuing and service of summons in the proceeding by the administrator de bonis non for the sale of real estate to pay debts. Service of summons issued in a chancery proceeding against minor defendants by delivering a copy of the summons for the minor defendants to the complainant in the bill and informing such complainant of its contents does not give the court jurisdiction of the minors so served, and a decree rendered upon such service is void as to them. Cases so holding will be found collected in *Heppe v. Szczepanski*, 209 Ill. 88, 70 N. E. 737, 101 Am. St. Rep. 221. The same rule applies to proceedings in the probate court for the sale of real estate to pay debts. It is true, Mrs. Manternach, mother of appellant, with whom copy of summons was left, was not complainant in the petition to sell the real estate, but the evidence shows she was the creditor for whose benefit it was sold, and that she resigned her office of administratrix and had an administrator de bonis non appointed so that she might become the purchaser at the sale, and while she was not the nominal complainant in the petition she was the real party interested and the one for whose benefit the proceeding was instituted.

The *Heppe* Case, supra, is in its essential features very similar to the case at bar. In that case the widow of Frank Szczepanski was a creditor of his estate, and for the purpose of paying said indebtedness, and upon her request the executor of her husband's estate procured a decree of the probate court to sell real estate. Rosalia and Marianna Szczepanski, only surviving children of said Frank Szczepanski and his widow, were minors, and the summons as to them was served by leaving a copy with their mother, who at that time was married to a man named Witt Obecny, and informing her of the contents thereof. A guardian ad litem was appointed for and answered the petition for the minors. At the sale, which occurred November 12, 1897, a brother of Mrs. Obecny was the highest bidder for the land, and it was struck off to and reported sold to him by the executor. Upon the approval of the

report of sale the executor executed a deed under date of November 18, 1897, to the purchaser, and on the same day the purchaser conveyed the premises to his sister, Mrs. Obecny. In June, 1899, Rosalia Szczepanski and Marianna Szczepanski filed their bill for partition, and upon the question as to whether service was had upon Rosalia and Marianna the court said (page 105 of 209 Ill., page 744 of 70 N. E. [101 Am. St. Rep. 221]): "In the case at bar, Katharina Obecny, acting in the name of the executor, Kucharski, was the real complainant in this petition for the sale of this property. * * * There was no service upon her minor children except by leaving a copy of the summons with her, the real, though not nominal, complainant in the petition, and stating the contents of it to her. We do not regard this service, under the decisions referred to, and upon principle, as sufficient. Her interest lay in the direction of keeping a knowledge of the filing of the petition from the very children for whom she accepted service. We are therefore of the opinion that the court acquired no jurisdiction over these appellees to enter the order of sale against their property."

But one summons appears to have been issued in the present case, and it was served in the manner above set out. That summons was made returnable to the February term of court, and at that term the decree for the sale was entered. In *Hemmer v. Wolfer*, 124 Ill. 435, 16 N. E. 652, it was held that where a decree in a chancery proceeding is entered at a term subsequent to the return term and recites due service of process upon the defendants, but the return on the summons is insufficient, the finding in the decree will be supported by the presumption that a second summons was issued and served for the term at which the decree is entered. But no such presumption can be indulged where the decree was entered at the return term of the summons, and in such case the recitals in the decree cannot prevail if the summons and return show the court was without jurisdiction. In *Forrest v. Fey*, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740, 109 Am. St. Rep. 249, it was said (page 170 of 218 Ill., page 791 of 75 N. E. [1 L. R. A. N. S. 740, 109 Am. St. Rep. 249]): "Where the record itself shows that notice was not given as required by law the jurisdiction does not attach, and where it shows that the finding of jurisdiction upon which the court acted was insufficient, the finding of the court as to its jurisdiction is not conclusive, and the recital of proper service on the face of the decree makes no difference." Service of summons upon Mrs. Manternach, as guardian of complainant, did not give the court jurisdiction to enter a decree to sell his land. To have authorized a decree to that effect it was necessary that process be served legally upon complainant. *Greenman v. Harvey*, 53 Ill. 386; *Bonnell v. Holt*, 89 Ill. 71. Neither

did the appointment of a guardian ad litem for the appellant give the court jurisdiction of his person. *Campbell v. Campbell*, 63 Ill. 462; *Chambers v. Jones*, 72 Ill. 275. It is very clear that the court did not have jurisdiction of the person of appellant and had no authority to decree a sale of his interest in the land.

It is contended by appellees that, even if the court had no jurisdiction of the person of appellant in the proceeding to sell real estate to pay debts, his mother having made appellee August Studt a warranty deed for the premises, her warranty is binding upon her heirs "and an estoppel to their recovery." This contention is unsound, for the reason that appellant does not claim title as heir of his mother, but his claim is that he derived title by descent from his father. In such case he would be no more bound by the covenants of warranty in a deed made by his mother than he would by the covenants of warranty in a deed made by any other stranger to the title.

Appellees also relied upon the seven-years statute of limitations as one of their defenses, but the proof was insufficient to establish such defense. At the time of the sale of the premises by the administrator they were occupied by a barn, but the barn was burned down some time (just when the evidence does not show) before Mrs. Manternach sold the lot to Studt, in April, 1893. Studt began the erection of a building on the lot in March, 1897, and completed it about the 1st of July following. He testified he rented the premises, and they had been occupied from the time of the completion of the building until the sale to the Nagls, in March, 1906. This covered a period of more than seven years prior to the filing of the bill, June 29, 1906. But the premises were not owned by Studt during all that time, for he conveyed them to his wife in March, 1898. Studt was absent from Chicago from January 1, 1898, to August 23, 1899. He testified that while he was at home he paid the taxes, and while he was absent his wife paid them. All he knew about his wife paying the taxes during his absence, he said, was from what she told him and from the receipts. He testified he had turned over the tax receipts to Nagl, and none were introduced in evidence. Studt's testimony was all the evidence that was introduced on the subject of the payment of taxes. To make the period of seven years' payment of taxes under color of title obtained in good faith a bar under either section 6 or 7 of the statute of limitations, the taxes must be paid by the person holding the title or in some way interested in or connected therewith. *Hurlbut v. Bradford*, 109 Ill. 397; *Timmons v. Kidwell*, 149 Ill. 507, 36 N. E. 974; *McCauley v. Mahon*, 174 Ill. 384, 51 N. E. 829. The testimony of Studt is vague and uncertain as to how many of the years during which the premises were occupied after he received the conveyance from Mrs. Man-

ternach he paid the taxes and how many of those years his wife paid them after he made the conveyance to her. If he paid the taxes at any time after making conveyance to his wife, he does not testify that he paid them for her as her agent or at her request. In *Timmons v. Kidwell*, supra, it was held that payment of taxes by the husband where color of title was in the wife, in the absence of proof that he paid them for his wife, was insufficient. In *Hurlbut v. Bradford*, supra, and *McCauley v. Mahon*, supra, it was held that proof that the taxes were paid for the whole period of seven years by or for the person holding or interested in the color of title must be clear and convincing. There was no proof that the premises were vacant and unoccupied for any period of seven successive years. We hold therefore that the evidence was insufficient to sustain the defense under either section 6 or 7 of the statute of limitations.

Section 4 of the statute of limitations (*Hurd's Rev. St. 1905*, p. 1331, c. 83) is also relied upon by appellees. That section reads as follows: "Actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deductible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken, as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title." This section was enacted in 1835 and has been the subject of discussion in numerous cases in this court. Sections 6 and 7 of the limitation act were enacted subsequent to section 4, to meet a class of cases to which that section was not applicable. Section 4 requires that a person claiming under it must have been "possessed by actual residence thereon for seven successive years." Mere possession under section 6 is sufficient, but section 4 requires the possession to be by actual residence, and this has been the construction given this section of the statute in *Stoltz v. Doering*, 112 Ill. 234, *Heacock v. Lubuke*, 107 Ill. 396, *Elston v. Kennicott*, 46 Ill. 187, *Woodward v. Blanchard*, 16 Ill. 424, and *Collins v. Smith*, 18 Ill. 160. There is no proof whatever that the premises had been possessed by any one "by actual residence thereon for seven successive years" or any other period, and we are of opinion therefore appellees failed to establish title under section 4 of the statute of limitations.

It is also urged that the appellant received benefits from the proceeds of the sale of the

real estate and is therefore estopped from attacking appellees' title and asserting title in himself. The proof shows that his mother, as his guardian, received \$42.50 for him out of the proceeds of the sale. We do not agree to the correctness of this proposition; but, as appellant has by an amendment to his bill tendered the money back to whomever the court should decide was entitled to it, we deem it unnecessary to discuss this question.

We are of opinion the court erred in dismissing the appellant's bill, and the decree is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

(230 Ill. 454)

ALEXANDER et al. v. LOEB et al.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

1. JUDGMENT—RES JUDICATA.

Judgment for damages was rendered in favor of a landlord on an appeal bond in an action of forcible entry and detainer. Four days after bringing the action on the bond, the landlord sued for double damages for holding over. *Held*, that the suit on the appeal bond and payment of the judgment recovered thereon did not merge the suit for double damages, nor bar recovery therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1107.]

2. LANDLORD AND TENANT—HOLDING OVER—PENALTY—WILLFULNESS OF ACT.

In order to render a tenant liable under the statute for double damages for holding over, the act must be willful.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1250.]

3. APPEAL—REVIEW—FINDINGS OF COURT.

On controverted questions of fact, the judgment of the Appellate Court, approving the judgment of the trial court, is conclusive, and the only question is whether there is any evidence tending to support plaintiff's cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4322, 4324.]

4. SAME—AMOUNT OF RECOVERY.

The Supreme Court ordinarily has nothing to do with the amount of judgment when it has been approved by the Appellate Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4324.]

5. SAME—OBJECTIONS WAIVED.

A point not raised in the motion for new trial or in the assignment of errors cannot be raised on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1650, 1753-1755.]

6. LANDLORD AND TENANT—ACTIONS FOR HOLDING OVER—DEFENSES.

In an action against a tenant for double damages for holding over, the fact that defendant held over into a period for which a new tenant had leased the premises will not bar plaintiff's right to recover, where by agreement plaintiff was not to deliver possession to the new tenant while prevented by acts of third persons, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 1211.]

7. SAME—LEASE AND CONTEMPORANEOUS AGREEMENT.

A lease and a written agreement waiving delivery of possession under certain conditions,

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when made at the same time, must be considered together.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 104.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; O. E. Heard, Judge.

Action by Solomon Loeb and others against Sigmund Alexander and others. From a judgment of the Appellate Court affirming the judgment of the circuit court, defendants appeal. Affirmed.

This is an appeal from a judgment of the Appellate Court affirming that of the circuit court of Cook county in an action of debt brought by appellees against appellants. The declaration contained a count based on section 2 of chapter 80, p. 1290, Hurd's Rev. St. 1905, which gives double rent against a party willfully holding over after the expiration of the term and the service of a written demand for possession. Two additional counts were based upon a covenant of the lease providing for the payment of \$20 for each day the tenants should hold over after the lease expired.

In December, 1898, appellees leased the store floors and basement of the premises known as 561 and 563 Blue Island avenue, Chicago, to appellants, to commence January 1, 1900. A controversy arose over the period when the lease terminated, which was settled by a decree in chancery entered January 20, 1902, finding that the term expired December 31, 1900. The lease was executed in duplicate, and the only difference between the two copies was that appellees' provided that the term should end in 1900, while appellants' copy made it 1901. In the body of both copies it was provided that there should be paid "as rent for said demised premises \$3,300, payable in monthly installments of \$125, in advance, on the 1st day of January, 1899, and the same amount on the 1st day of each and every month of said year 1900," etc. Some talk appears to have taken place between appellants and appellees during the summer of 1900 with reference to leasing the premises in question, along with adjoining premises; but before any bargain of this kind was consummated the appellees leased the entire building, which included the two numbers already mentioned and also No. 559 Blue Island avenue, to one William Kolacek. Along with the lease a contemporaneous agreement was executed, which referred, in terms, to the lease, providing, among other things: "The said first party agrees to deliver possession of said premises, with the herein above and before described repairs and alterations done, unless said party is prevented from so doing by riot, strikes, inevitable accident, act of God, rebellion, injunction proceedings, or other act or acts of third parties, or of the second party himself, that said first party has no control over, on the 1st day of April, A. D. 1901. If said first party is prevented from so delivering pos-

session on said 1st of April, 1901, by any of the aforesaid causes except the act of said second party, then the rent to be paid by said second party shall abate in proportion to delay and to that part of the premises of which possession is not delivered." January 24, 1901, the appellees commenced an action of forcible entry and detainer against appellants and recovered judgment thereon before a justice, from which judgment Albert Lurie appealed to the circuit court, filing a bond of \$2,500 with William Loeffler as surety January 28, 1901. The condition of the bond was as follows: That he "shall prosecute his appeal with effect and pay all rent now due and that may become due before the final determination of the suit, and all damages and loss which the said plaintiffs may sustain by reason of the withholding of the premises in controversy and by reason of any injury done thereto during such withholding, together with all costs, until the restitution of the possession thereof to the plaintiff, in case the judgment from which the appeal is taken is affirmed or appeal dismissed." Two jury trials were had in the circuit court of Cook county on this appeal, the first resulting in favor of appellants, and on this being set aside the second resulted in favor of appellees, and a judgment was entered against appellants for possession on April 2, 1902, possession being yielded up April 8th or 9th of that year. May 24, 1902, appellees began an action of debt in the circuit court against William Loeffler and Albert Lurie, respectively, on the appeal bond in said forcible entry and detainer suit, and, after a trial by jury and verdict, judgment was entered February 11, 1905, in the appellees' favor for \$2,500, damages, interest, and costs. This judgment was paid and fully satisfied February 23, 1905. Appellants paid no rent for the premises after December 31, 1900, except that which was recovered by the suit on the appeal bond. May 28, 1902, appellees began this proceeding in the circuit court; jury being waived, and trial had before the judge, who entered the judgment now in question of \$3,380 in favor of appellees October 10, 1905.

James E. Cross (I. T. Greenacre, of counsel), for appellants. Edward H. Morris, for appellees.

CARTER, J. (after stating the facts as above). From the propositions of law held by the trial judge it is apparent that he made the finding under the count of the declaration claiming double the rental value for willfully holding over, and not under those counts based on the covenants of the lease for the payment of \$20 per day for holding over. Appellants contend that a recovery on any of the grounds charged in the declaration is barred and waived by the election to sue on the appeal bond given in the forcible entry and detainer suit and the recovery and satisfaction of the judgment

therein. This precise question has never been decided by this court, and, while many authorities from other jurisdictions have been cited, none of them are on "all fours" with the question here involved. In *Doe ex dem. Cheney v. Batten*, 1 Cowper, 243, it was held that the acceptance of rent after notice to quit did not imply a consent that the tenancy should continue, but the court stated incidentally that such acceptance was a waiver of the landlord's right to double rent under the statute. The point covered by this last statement was not in the case. In *Wright v. Smith*, 5 Esp. 203, it was held that when a tenant held over after the expiration of his term, and the landlord recovered possession by ejectment, he could not thereafter maintain an action of debt under the statute. Some three years thereafter, in reviewing this last case, the court, in *Soulsby v. Nering*, 9 East, 310, practically overruled the former decision, and held that after the landlord had recovered in an action of ejectment he could still maintain an action of debt under the statute and recover for double the yearly value of the premises during the time the tenant held over after notice to quit. In *Ryal v. Rich*, 10 East, 7, the landlord had declared in debt, first, for the double value of the rent, and, second, for the use and occupation. The tenant tendered single rent before the action was brought and paid into court the money, which plaintiff took out before the trial and still proceeded. It was held that this was no cause of nonsuit as being a waiver of plaintiff's right to proceed for the double value; that the cause should have gone to the jury, and the plaintiff's going on with the action after taking the single rent was not evidence to show that he meant to waive his claim for double value, but that he merely accepted it pro tanto. This decision was quoted with approval in *Higgins v. Halligan*, 46 Ill. 173, where this court stated that "the doctrine is well established that accepting a sum tendered, if not accepted in full of all demands, does not preclude the party from proceeding for more." *Freeman on Judgments* (4th Ed.) § 259, says that the best and most invariable test as to whether a former judgment is a bar is to inquire whether the same evidence would sustain both the present and the former action.

The parties to this suit are not the same as to the suit on the appeal bond. There, only one of the appellants and his bondsman, Loeffler, were parties defendant. Under the conditions of the appeal bond, appellees could not have recovered in that case for double rent or for \$20 per day liquidated damages. In *Wilson v. Hoffman*, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485, it was held that the judgment for rents and profits in ejectment was not a bar to an action in trover for the cutting and removing of standing timber from the premises by the defendant while in possession. In *Lehan v. Good*, 62 Mass. (8 Cush.) 303, the court held that a judgment

and satisfaction in an action on a bond given to dissolve an attachment constituted no defense to an action on a bond given, on appeal, to obtain a review of the action on which the attachment was made. In *Ackley v. Westervelt*, 86 N. Y. 448, it was argued that, because the plaintiff sued on an appeal bond given in a forcible entry and detainer suit and recovered a judgment which had been paid, no further suit could be brought for rent not covered by the appeal bond but which had accrued during the withholding. The court held to the contrary, stating that the bond did not supersede the original lease between the parties or alter the terms upon which the defendants were holding the premises; that it operated as collateral security as far as it went; that the amount recovered on the suit on the appeal bond would go in diminution of what would otherwise be recovered in an action for rent, and to that extent should be applied pro tanto. The action on the appeal bond in the forcible entry and detainer suit herein was commenced May 24, 1902, and this action was commenced four days later. It is manifest that in accepting the payment of damages in the suit on the appeal bond appellees did not intend to waive their claim for the double value of the rent or the \$20 per day damages declared for in this proceeding. Under the authorities cited, and upon principle, the suit on the appeal bond, and the payment of the judgment therein, cannot be held to have merged this suit in that judgment or to act as a bar to recovery herein. The following additional authorities tend to support these conclusions: *People v. Allen*, 80 Ill. 166; *Chicago Opera House Co. v. Paquin*, 70 Ill. App. 596; *Reilly v. Sicilian Asphalt Co.*, 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636; *Ex parte Bate*, 3 Deacon, 358; *Holmes v. Bell*, 3 M. & G. 118; *People v. Sylvester*, 22 Ch. Div. 98; *Glasple v. Keator*, 56 Fed. 203, 5 C. C. A. 474.

Appellants also contend that they are not liable for the penalty of double rent, as they held over under a claim of right, and therefore not willfully. The plain meaning of the statute seems to require that the holding over must be willful, and the trial court so held. The authorities sustain this finding. *Stuart v. Hamilton*, 66 Ill. 253; *Prickett v. Ritter*, 10 Ill. 96; *Chapman v. Wright*, 20 Ill. 120; 2 *Taylor on Landlord and Tenant* (9th Ed.) § 622. The trial court, however, found that the holding over was willful. Appellants contend that the evidence does not support this finding. This was a controverted question of fact, and on such questions the judgment of the Appellate Court, when it approves the judgment of the trial court, is conclusive on this court. The only question that can be reviewed here is whether there is any evidence in the record fairly tending to support plaintiff's cause of action. The weight of the testimony is not involved. *Chicago & Eastern Illinois Railroad Co. v.*

Snedaker, 223 Ill. 395, 79 N. E. 169; *Chicago City Railway Co. v. Martensen*, 198 Ill. 511, 64 N. E. 1017; *Blakeslee's Express Co. v. Ford*, 215 Ill. 230, 74 N. E. 135; *Poppers v. Meagher*, 148 Ill. 192, 35 N. E. 805.

It is also contended that the tenants are not liable for the double rental unless there was a written demand for possession by the landlord, and that the manifest weight of the evidence is that there was no service of such written demand. Here, again, the finding of the Appellate Court affirming that of the trial court as to the service of such notice is conclusive.

The further contention is made that the judgment is excessive. Ordinarily, this court has nothing to do with the amount of the judgment when it has been approved by the Appellate Court. *City of LaSalle v. Kostka*, 190 Ill. 130, 60 N. E. 72; *Chicago, Rock Island & Peoria Railway Co. v. Steckman*, 224 Ill. 500, 79 N. E. 602. The basis upon which the trial court figured out the amount of this judgment has not been preserved. Counsel for appellants state that, if there is evidence to show that the property was worth \$176.85 a month rent, then the amount of this judgment can be sustained. There is evidence tending to show that it was worth more than this amount. It is true, this question is controverted; but here, as in the other questions noted above, this court cannot interfere on this point in the present state of the record. In this connection it is also contended that interest cannot be included in the finding. This point was not raised on the motion for new trial or in the assignment of errors and cannot now be raised on appeal. *Bank of Commerce v. Miller*, 202 Ill. 410, 66 N. E. 1039; *Lasher v. Colton*, 225 Ill. 234, 80 N. E. 122; *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798.

Appellants also contend that even if they are liable, on the facts in this record, for the double rent, appellees cannot recover, as the premises were leased to Kolacek, and that, if any rental is due, Kolacek is the one entitled to it. With this contention we do not agree. It will be noted that under the lease to Kolacek his term did not begin until April 1, 1901, three months after the expiration of the appellants' lease. The contemporaneous agreement with Kolacek, heretofore referred to, provided specifically that the possession should not pass to Kolacek during the time appellees were prevented from delivering the possession of the premises by the action of appellants. The lease and agreement must be considered together, as they were executed at the same time. *Wilson v. Roots*, 119 Ill. 379, 10 N. E. 204; *Gardt v. Brown*, 113 Ill. 475, 55 Am. Rep. 434. This conclusion does not conflict with that in *Gazzolo v. Chambers*, 73 Ill. 75, cited by appellants; the facts in the two cases being entirely different.

As the evidence justifies the finding of the trial court holding appellants liable for double rent, it is unnecessary for us to dis-

cuss the question whether the \$20 a day provided in the lease should be considered as a penalty or as liquidated damages.

We find no reversible error in the record, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(230 Ill. 492)

KRETSCHMAR et al. v. RUPRECHT et al.
(Supreme Court of Illinois, Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

1. JUDGMENT—VACATING—NEGLIGENCE OF PARTY.

Plaintiffs obtained a judgment in ejectment, entitling them to the possession of certain premises of which defendants were tenants. The attorney for one of the plaintiffs assured defendants that the proceedings would not affect them and that their rights would be protected. Later a suggestion of claim for mesne profits was filed, and defendants, having been duly served with summons, made default. A writ of inquiry was issued. Defendants were duly notified of its execution, and upon the return of the writ, with the inquisition taken thereon, a judgment was rendered against them. *Held*, that they had ample opportunity to present their defense to the claim, and, having failed to do so, they are not entitled to enjoin the collection of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 817.]

2. SAME—FRAUD—PERJURY OR OTHER MISCONDUCT.

Giving false testimony, or making false assertions as to liability, or presenting a claim without disclosing a defense which may exist to it, or insisting upon an unfounded or overstated claim, are not grounds for setting aside a judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 836, 840.]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Bill by Howard Kretschmar and others against Frank H. Ruprecht and others to enjoin the collection of a judgment. From a judgment of the Branch Appellate Court, affirming the decree of the superior court dismissing the bill, complainants appeal. Affirmed.

This was a bill to enjoin the collection of a judgment for \$650, recovered in the superior court of Cook county by appellees against appellants. The decree of the superior court, dismissing the bill for want of equity, was affirmed by the Branch Appellate Court for the First District, and appellants, having procured a certificate of importance from that court, prosecute this further appeal. In 1897 Catherine Bredow, having previously executed five separate trust deeds upon a certain apartment building in Chicago owned by her, mortgaged the same to John Ruprecht to secure the sum of \$4,000. John Ruprecht afterward died, leaving a widow and two sons, the appellees, and leaving a will bequeathing all his personal estate to his widow. On April 22, 1903, the widow and sons brought suit in the superior

court to foreclose the mortgage, and at the same time the appellees began an ejectment suit for the premises. Appellants, being tenants of parts of said premises, were made defendants to both suits. At the June term judgment was rendered in the ejectment suit in favor of appellees for the possession of the premises, and, a writ of possession having been issued, appellants acknowledged in writing appellees' right to the possession of the premises and agreed to hold under and make payment to them. A new trial was afterwards granted under the statute, and on September 28, 1903, another judgment was rendered in favor of appellees. A suggestion of claim for mesne profits was filed, and, appellants having been duly served with summons and made default, a writ of inquiry was issued, and defendants were duly notified of its execution. Upon the return of such writ, with the inquisition taken thereon, a judgment for \$650 was rendered against appellants, which is the judgment sought to be enjoined.

W. P. Black, for appellants. Mason & Wyman, for appellees.

DUNN, J. (after stating the facts as above). Appellants should have presented the questions argued here on the trial of the claim for mesne profits, where, if at all, they would have been availing. The judgment, if they had any valid defense to the claim, was the result of their own negligence. It is immaterial to the decision of this case whether they had a valid defense or not. They had ample opportunity to present it, if they had one; but without any reasonable excuse they neglected to do so. Equity will not relieve against a judgment at law, except in cases of fraud, accident, or mistake, and then only where the party applying for relief is free from all negligence. "It is not enough that the judgment is unjust. It must have been obtained without negligence on the part of the appellant to entitle to relief." *Walker v. Shreve*, 87 Ill. 474; *Tallman v. Becker*, 85 Ill. 183; *Harding v. Hawkins*, 141 Ill. 572, 31 N. E. 307, 33 Am. St. Rep. 347; *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745; *Hahn v. Gates*, 169 Ill. 299, 48 N. E. 398; *Lucas v. Spencer*, 27 Ill. 15.

Even though appellees had had no right to judgment in the ejectment suit and no cause of action against appellants, either jointly or severally, for mesne profits, and had taken judgment for a greater amount than was due, yet appellants could not willingly or negligently permit such judgment to be taken and then be relieved from it in equity. False testimony given at the trial or false assertions as to liability are not grounds for setting aside a judgment. *Galena & Southern Wisconsin Railroad Co. v. Ennor*, 116 Ill. 55, 4 N. E. 762. Nor is presenting a claim without disclosing a defense which may exist to it. *Ward v. Durham*, 134 Ill. 195, 25 N. E. 745. Nor is in-

isting upon an unfounded or overstated claim. *Dickson v. Hitt*, 98 Ill. 300. It is not the policy of the law to permit a party to slumber upon his rights, when he has the opportunity and is required to assert them in a court of justice, and then seek them in another forum.

Upon the commencement of the ejectment suit Mrs. Bredow's attorney assured appellants that the proceedings would not affect them, and that their rights would be protected by the action such attorney would take on behalf of Mrs. Bredow. They, however, did not retain him or any other attorney. After that time, and after the attorney's death, a summons, and later a notice of the execution of the writ of inquiry, were served on them personally, and were ignored. Their reliance upon Mrs. Bredow's attorney to protect their rights does not relieve them of the consequences of their own negligence. *Bardonski v. Bardonski*, 144 Ill. 294, 33 N. E. 39; *Hahn v. Gates*, 169 Ill. 299, 48 N. E. 398; *Kern v. Strausberger*, 71 Ill. 413.

The judgment of the Branch Appellate Court will be affirmed.

Judgment affirmed.

230 Ill. 324)

PATTERSON v. NORTHERN TRUST CO.
et al.

Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 11, 1907.)

RECEIVERS—ELIGIBILITY FOR APPOINTMENT.

A trustee may be appointed receiver for the trust estate in the sound discretion of the court, if it appear that the appointment will be for the best interest of the estate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 73.]

LANDLORD AND TENANT—FORFEITURE FOR NONPAYMENT OF RENT.

A strict and technical forfeiture under a lease for nonpayment of rent is not favored in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 333.]

APPEAL—RECORD—EVIDENCE.

A party obtaining a decree granting affirmative relief, to maintain it, must preserve the evidence by a certificate of evidence, or the decree must find specific facts that were proved on the hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2433, 2434, 2438.]

SAME—PRESUMPTIONS.

It will be presumed, in the absence of a certificate preserving all the evidence, that there was sufficient evidence to sustain the finding of the specific facts in the decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3673, 3675.]

MORTGAGES—PAYMENT AFTER DEFAULT.

A mortgagor whose property has been placed in the hands of a receiver pending foreclosure may, at any time, pay the debt and have the property restored to his possession.

LANDLORD AND TENANT—LIEN—FORECLOSURE—ACCOUNTING.

A bill to foreclose a landlord's lien having been filed, and a receiver appointed of an office and store building erected on the premises by

lessee, a decree was entered providing that unless the amount due be paid within a specified time the leasehold interest should be sold, but that if redemption should be made that an accounting should be had for all rents and other moneys received while the receiver was in possession. Before sale thereunder certain holders of bonds made by lessee and secured by a trust deed on the leasehold estate and building paid the decree, and the court ordered the receiver to receive the money and turn over the property to the lessee. *Held*, that an owner of a life estate in an undivided interest in the premises, who was a party complainant in the foreclosure suit, having been paid in full, had no interest in the accounting.

7. APPEAL—REVIEW—HARMLESS ERROR—IRREGULARITIES IN PROCEDURE.

Where a decree in a suit to foreclose a landlord's lien for rent, provided that the leasehold interest should be sold, and before the sale certain holders of bonds made by lessee and secured by a trust deed paid the amount of the decree, and the court ordered the receiver, appointed in the suit, to receive the money and turn over the property to lessee, and thereafter a complainant in the foreclosure suit moved to set aside such order as that he had not been served with notice thereof, but did not support his motion by any proof that he had not received notice, nor show that he was injured by the failure to give notice, or that he would be benefited if the order were set aside, such order will not be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4037.]

8. RECEIVERS—ACCOUNTING—APPROVAL.

Where an order as finally entered provided that "the final report and account of the receiver are approved without prejudice to the rights of" a certain party to the suit, the rights of such party were protected as fully as if the same provision had been inserted in other parts of the order, as requested by him.

9. CORPORATIONS—ESTOPPEL TO DENY CORPORATE POWERS.

Where one having a life estate in an undivided interest in certain premises joined in consenting to an assignment of a lease of the premises to a corporation, and thereafter, in a bill to foreclose a landlord's lien for rent against such corporation, he was estopped some seven years thereafter to first raise the question that the corporation was not permitted by law to hold real estate, and that all its acts were void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1563-1567.]

Appeal from Appellate Court, First District, on Writ of Error to Circuit Court, Cook County; M. F. Tuley, Judge.

Bill by the Northern Trust Company, trustee, John C. Patterson and others, against the Merrimac Building Company and others, to foreclose a landlord's lien for rent, in which proceeding the Northern Trust Company was also appointed receiver. From a judgment of the Appellate Court, affirming a decree of foreclosure and certain orders of the circuit court, John C. Patterson appeals. Affirmed.

On December 20, 1897, Hannah M. Williams, Helen W. S. Johnson, Fannie V. M. Johnson, Stewart Patterson, and John C. Patterson executed to the Northern Trust Company, as trustee, a deed of trust to the premises at the northwest corner of Washington and State streets, Chicago, subject to a lease originally made to H. H. Kohlisaat for 102

years, which lease had been previously, with the lessor's consent, assigned to the Merrimac Building Company. Each of the first four of said persons joining in the deed of trust was the owner of an undivided one-fourth interest in said premises; the interest of Stewart Patterson being subject to a life interest in favor of his father, John C. Patterson, in one-third of said quarter interest. Upon said premises said Merrimac Building Company has erected a modern 12-story office and store building, at a cost of some \$600,000, known as the Stewart Building. In July, 1896, the Merrimac Building Company executed a deed of trust of the leasehold estate and building to the Illinois Trust & Savings Bank to secure an issue of bonds amounting to \$300,000.

On August 7, 1900, said Northern Trust Company, trustee, together with the five cestui que trustent above named, including appellant, Patterson, joined in a bill in the circuit Court of Cook county, against said Merrimac Building Company and others, to foreclose a landlord's lien for rent claimed to be due and unpaid to the amount of over \$140,000. Shortly after the filing of the bill to foreclose, C. W. Hubbard, an employé of the Northern Trust Company, was appointed receiver of the Stewart Building and premises covered by the lease, by agreement with the defendant's attorneys, and took possession. On June 24, 1902, the day before the decree of foreclosure was entered, on stipulation of the various attorneys for the parties in interest, Hubbard's resignation was accepted, and the Northern Trust Company itself was appointed receiver. Said trust company proceeded to take charge of the building and rent the same, attending to the heating, lighting, janitor service, collecting of rents, etc. It filed its quarterly reports in the court, to several of which appellant, Patterson, filed objections, urging, among other things, that the receiver had charged for its services as such when it should not do so, being also trustee; that the expense for operating the building, and for electric light, coal, etc., was 50 per cent. too high, etc.

On June 25, 1902, a decree was entered confirming the report of the master to whom the case had been referred, and finding that there was due to the Northern Trust Company, as trustee, from the Merrimac Building Company, \$199,359 for ground rent, solicitors' fees, stenographers' bills, etc. The decree further provided that unless said amount should be paid by March 15, 1904, the leasehold interest should be sold to satisfy the same; that any of the complainants might bid at the sale; that the receivership continue until a sale should be had and until confirmed or until the property should be redeemed; that out of the rents the receiver should pay the ground rent provided in the lease, running expenses, etc., and file quarterly reports; that the sale should not be made before March 15, 1904. No further steps were taken towards making a sale under the

decree, so far as is shown by this record, and on February 21, 1905, E. A. Shedd and Albert M. Johnson filed a petition in the case, alleging that they owned \$294,500 of the bonds issued by the Merrimac Building Company, and asking, as such bondholders, to be allowed to pay the amount found due by the decree. An order was entered on February 21st in accordance with the petition, and the amount was paid to the Northern Trust Company in open court. On February 25, 1905, appellant, John C. Patterson, moved to set aside said order on the ground that he had not been served with notice that it would be asked for. Appellant's motion to set aside the order was refused. On May 2, 1905, an order was entered vacating the order of reference as to two of the receiver's quarterly accounts, overruling objections to said accounts and approving the same, but adding in said order a provision that such approval would be without prejudice to the rights of appellant, Patterson, in any case then pending or thereafter filed against said Northern Trust Company, as trustee under the trust deed. On the hearing of the motion as to the entry of the above order, appellant asked to have the provision as to its being entered without prejudice to his rights inserted in several other places in the order, which insertion the court held was unnecessary and refused to make. Said Patterson thereupon took the case by writ of error to the Appellate Court, assigning as error the entering of the order appointing the Northern Trust Company as receiver; of the decree of June 25, 1902; of the order of February 21, 1905, and refusal to vacate the same; and the entering of the order of May 2, 1905. The Appellate Court having affirmed the findings of the trial court, the case is appealed to this court.

John C. Patterson, pro se. Judah, Willard, Wolf & Reichman, Oliver & Mecartney, and Herrick, Allen, Boyesen & Martin, for appellees.

CARTER, J. (after stating the facts as above). Appellant, who files the brief in his own behalf, contends that the court erred in entering the order of June 24, 1902, appointing the Northern Trust Company receiver, because said trust company at that time was acting as trustee under the deed of trust of December 20, 1897. While it is true that a trustee will not ordinarily be appointed receiver of the trust estate, yet if it appears that such appointment would be for the best interests of the estate the rule may be departed from. 23 Am. & Eng. Ency. of Law (2d Ed.) p. 1035, and cases there cited. The general rule is that the appointment of a receiver and the proper person to be appointed is not an arbitrary matter, but rests in the sound discretion of the court. *Taylor v. Life Ass'n* (C. C.) 3 Fed. 465. This appointment was made with the consent and concurrence of appellant herein, and so far as the record

discloses he found no fault with it until some three years thereafter, nor did he apply to have the receiver removed. The discussion of the duty of the trustee not to mingle the trust fund with his own, as found in the brief, and that he shall not make secret profits is, generally speaking, in accord with the law, but finds no support from the facts in the record. Appellant has not pointed out how he has been injured in any way by said company acting as receiver. It is true, he seems to contend that said receiver should have insisted upon strict and technical forfeiture under the lease on account of the nonpayment of rent, thus causing the Merrimac Building Company and the bondholders under the trust deed to the Illinois Trust & Savings Bank to forfeit all their interests in said leasehold and the \$600,000 building thereon. Such forfeitures are not favored in equity. In *Douglas v. Union Mutual Life Ins. Co.*, 127 Ill. 101, 116, 20 N. E. 51, 55, this court said: "No rule is better settled than that a court of equity will not lend its aid to enforce a forfeiture because of a breach of a condition subsequent in a deed."

It is urged that the decree of June 25, 1902, confirming the report of the master and finding the amount due under the trust deed, providing that if such amount was not paid within a certain date the leasehold interests should be sold to satisfy the same, was erroneous, and that there is nothing in the record to justify its entry. In chancery cases the rule is settled that the party in whose favor a decree granting affirmative relief is entered, to maintain it, must preserve the evidence by a certificate of evidence, or otherwise the decree must find specific facts that were proved on the hearing. *First Nat. Bank v. Baker*, 161 Ill. 281, 43 N. E. 1074; *Village of Harlem v. Suburban Railroad Co.*, 202 Ill. 301, 66 N. E. 1050; *Berg v. Berg*, 223 Ill. 209, 79 N. E. 13. This decree did find specific facts upon which it is based. It will be noted that the transcript of the record in this case was prepared upon a praecipe filed by appellant and does not purport to be a transcript of the complete record. Apparently, only a small portion of the evidence appears to have been incorporated therein. In the absence of a certificate preserving all the evidence, it will be presumed that there was sufficient evidence to sustain the finding of the specific facts in the decree. *Brown v. Miner*, 128 Ill. 148, 21 N. E. 223; *King v. King*, 215 Ill. 100, 74 N. E. 89.

The further objection is made that the court erred in entering the order of February 21, 1905, wherein it permitted the bondholders to file a petition and granted their request to pay the amount in full found due by said decree of June 25, 1902. In 2 *Jones on Mortgages* (5th Ed.) § 1537, the author states: "It is the right of the mortgagor whose property has been placed in the hands of a receiver pending a suit for foreclosure to pay the debt at any time and have the prop-

erty restored to his possession. This right does not depend upon the discretion of the court, but is one which he can claim and the court cannot withhold. Payment destroys the plaintiff's cause of action." Complaint is not made that the full amount of the decree was not paid into court as provided by the order of February 21, 1905, although it is argued that the balance of the money in the hands of the receiver should not have been turned over to the Merrimac Building Company. It is especially provided by said decree of June 25, 1902, that if redemption be made, an accounting be had by the receiver and the Merrimac Building Company for all rents and other moneys received while in possession, and that the court should retain jurisdiction for that purpose. As appellant was paid in full for all his interests, he has no interest in the accounting. The only parties who have a right to complain are apparently satisfied with the decree of the trial court. When a lien created by a mortgage has been fully satisfied, the property is no longer subject to its provisions. *Davis v. Dale*, 150 Ill. 239, 37 N. E. 215.

Appellant further complains that his motion to vacate and set aside said order of February 21, 1905, should have been allowed by the court. The only point made in support of this motion was that appellant had not received notice of the entering of said order of February 21, 1905, as provided by the rules of the trial court. He did not support his motion by any proof, not even to the extent of swearing that he did not receive notice. He simply made that statement in open court and said that was the only point he made and relied on. He did not show or claim at that time, nor does he now, that he was injured in any way by the entry of this order without notice or that he would be benefited if it were set aside. In *Foster v. Mansfield, Coldwater & Lake Michigan Railroad Co.*, 146 U. S. 88, 101, 13 Sup. Ct. 28, 33, 36 L. Ed. 899, that court said: "A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice or to compel the defendants to buy their peace." See, also, *Stearns v. Cope*, 109 Ill. 340. Appellant was a party complainant in the foreclosure proceedings, and before the sale under the decree certain holders of bonds made by the Merrimac Building Company and secured by a trust deed to the Illinois Trust & Savings Bank came into court and paid the entire amount of the decree, and the court ordered the receiver to receive the money and turn over the property to said Merrimac Building Company. If appellant had been present in court upon due notice nothing less could have been done.

In entering the order on May 2, 1905, as to certain receiver's reports, objection was made that the order did not provide, in various places where appellant desired to have it do so, that it was entered without prejudice. As the order was finally entered it contains this

clause: "And the final report and account of the receiver are approved without prejudice to the rights of the said John C. Patterson" in any suit he may file against the Northern Trust Company, as trustee, etc. We think this wording protected all the rights of appellant as fully as if it had been inserted a score of times in the decree.

Appellant devotes a portion of his brief to the point that the Merrimac Building Company was not permitted, by law, to hold real estate, and that all its acts in the premises were absolutely null and void. It is hardly proper for appellant at this late day to raise this question. If valid, it should have been taken into consideration by him some seven years ago, when he joined in the bill to foreclose the trust deed, or even at an earlier date, when appellant (who is himself an attorney at law) joined in consenting to an assignment of the lease to the corporation which he now says is acting in violation of law in holding it. *Leigh v. National Hollow Brake-Beam Co.*, 224 Ill. 76, 79 N. E. 318.

Appellant has an equitable life interest in one-twelfth of the property conveyed by the trust deed. Appellees, who represent three-fourths of the entire beneficial interest under said trust deed, insist here, as they did in the Appellate and circuit courts, that if the contention of appellant were sustained the results would be injurious to the trust estate. The owner of the other one-fourth beneficial interest (in one-third of which appellant has an equitable life estate) makes no complaint here. He is the son of appellant, an adult, and under no legal disability. These facts, while not conclusive, tend strongly to show that no injustice has been done appellant by the proceedings of which he complains.

Finding no error in the record, the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(231 Ill. 22)

PATTERSON v. NORTHERN TRUST CO.
et al.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 11, 1907.)

1. EQUITY — CROSS-BILL — SUFFICIENCY — GERMANE TO ORIGINAL BILL.

Where a bill by a trustee for instructions as to bidding at a future foreclosure sale has no bearing upon the merits of the original decree of foreclosure, a cross-bill seeking to vacate the foreclosure decree is bad on demurrer because not confined to the subject-matter of the original bill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 469.]

2. SAME—CROSS-BILL SHOWING NO EQUITY.

A cross-bill asking that a decree be vacated, which does not allege any injury from the decree, is bad on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 469.]

3. LANDLORD AND TENANT—LEASE—FORFEITURE—WAIVER—FORECLOSURE.

Where a person has signed an agreement waiving a strict forfeiture of a lease and au-

thorized a bill of foreclosure, it amounted to a waiver of notice to forfeit, and he cannot, years after, insist on a strict forfeiture of the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 343-349.]

Appeal from Appellate Court, First District, on Writ of Error to Circuit Court, Cook County; M. F. Tuley, Judge.

Bill by the Northern Trust Company and others against John C. Patterson and others. From a judgment of the Appellate Court for the First District, affirming a decree for complainants, defendant John C. Patterson appeals. Affirmed.

In the opinion in *Patterson v. Northern Trust Co.*, 82 N. E. 837, between the same parties as are in this cause, will be found a statement of the facts as to certain litigation resulting in a decree of the circuit court of Cook county on June 25, 1902, establishing a lien in favor of the Northern Trust Company, trustee, as lessor, against the Merrimac Building Company as lessee, of certain premises in Chicago, on which, after the lease was made, the structure known as the Stewart Building was erected. For a more complete statement of facts in the original proceedings we refer to that case.

The decree of June 25, 1902, found, among other things, that the amount due from the Merrimac Building Company to the trust company was \$199,359, and ordered the leasehold estate and building sold unless the amount so found due was paid on or before March 15, 1904. The bill in this case, filed May 20, 1904, in the circuit court of Cook county, sets forth that while the other beneficiaries under the trust deed had directed and requested the Northern Trust Company, trustee therein, to bid for the property to be sold the full aggregate sum due and payable under the decree, agreeing to credit any sum so paid and for which said Northern Trust Company, as trustee, might buy the property on account of the decree, and that while all of the other beneficiaries under said decree desired this to be done, appellant, the said John C. Patterson, had refused to join in such request, direction, or agreement, and threatened to object to any action said trust company might take in regard to the leasehold and the building above described, and also threatened that he would seek to impose a personal liability on whatever action said trust company might take in that regard, and therefore said trust company asked for directions as to its rights and duties as said trustee. All the other beneficiaries under said deed of trust answered admitting the allegations of the bill, except appellant (the beneficial owner of a life estate in one-twelfth interest in the property), who filed his answer June 9, 1904, alleging, among other things, that on March 1, 1898, said trust company, as trustee, served upon the Merrimac Building Company, under the terms of said lease, notice of default and of its election to terminate the lease, and that

thereby said lease and leasehold was terminated; further alleging that thereafter, on March 15, 1898, said trustee, under a mistake of law and fact, and without understanding its duties or rights in the premises or its powers under said deed of trust, entered into an agreement in writing with the Merrimac Building Company, whereby it was agreed that no further steps should be taken to enforce the forfeiture of said leasehold estate and building until July 1, 1900, provided certain covenants and agreements made by the Merrimac Building Company should be kept and performed, and providing further that nothing should be deemed a waiver by said trustee or beneficiary as to the right to forfeit, but only that they would forbear its enforcement for the time upon the conditions stated. Defendant represents that said agreement was *ultra vires* and beyond the power of the trustee to make under the terms of the trust, and that the assent of the beneficiaries who also signed said agreement was also *ultra vires* and therefore void. The further allegation is made that the terms of said agreement were not carried out, and that said pretended agreement could not revive said lease. The answer further alleges that the trustee had been in possession of the premises, but had improperly yielded the possession to the receiver in a suit brought by certain bondholders under a mortgage given by said Merrimac Building Company; that said suit brought to foreclose the lessor's lien, in which appellant was one of the parties complainant, in which said decree of June 25, 1902, was entered, was brought under a mistake of law and fact, and that the decree entered therein ought to be set aside and should not be enforced, the leasehold being, as a matter of fact, already terminated, and the building already the property of the trustee.

Appellant, on January 24, 1905, filed a cross-bill, in which he made substantially the same allegations about the litigation between the Northern Trust Company and its beneficiaries that he had made in his answer, asserting that the beneficiaries joined in the agreement of March 15, 1898, and in the bill for foreclosure, at the request of the Northern Trust Company, not having any "independent or competent legal advice." The cross-bill further alleged that said bill of August 10, 1900, was in the interest solely of the Northern Trust Company and its attorneys, to enable them to obtain a private profit at the expense of the trust funds. The cross-bill asked that the decree of June 25, 1902, might be set aside and declared to be void and of no effect, and that it might be decreed that no further proceedings should be had thereon. To this cross-bill all the other beneficiaries under said deed of trust and the Illinois Trust & Savings Bank filed general demurrers, and the Merrimac Building Company filed a general and special demurrer setting forth that the cross-complain-

ant had been guilty of laches, which should bar him from relief; that there was no denial in the cross-bill that the cross-complainant had received rents and profits collected by the trustee and receiver under the decree he sought to set aside; and that he had not set up facts sufficient to release him from the binding force of his consent to the agreement of March 15, 1898, and the proceedings of June 25, 1902. March 20, 1905, the court entered an order that the demurrers to the cross-bill be sustained on the ground that the matters set forth were not germane to the original bill, and that the cross-bill be dismissed out of court for want of equity, without prejudice to the cross-complainant's right to file a bill of review therein, or a bill in the nature of a bill to review, as to the matters set forth in said cross-bill, and further ordered that the original bill be dismissed on the motion of complainant, at its costs. On a writ of error the proceedings of the circuit court were reviewed by the Appellate Court and the decree of that court affirmed. Appellant, by appeal, has brought the proceedings to this court for review.

John C. Patterson, pro se. Judah, Willard, Wolf & Reichman, Oliver & McCartney, and Herrick, Allen, Boyesen & Marlin, for appellees.

PER CURIAM. The main contention of appellant is that the court erred in sustaining the demurrers to the cross-bill and dismissing it for want of equity. The original bill in this proceeding was filed by the Northern Trust Company solely for the purpose of obtaining an instruction of the court as to its power and duty, as trustee, in bidding at a sale that might be made under a decree of foreclosure theretofore entered, and had no bearing upon the merits of the original decree of foreclosure. The relief sought by the answer of appellant and by his cross-bill was to vacate and set aside this decree of foreclosure. The cross-bill was therefore in the nature of a bill of review, and the sole ground urged to sustain it is fraud. A cross-bill must be confined to the subject-matter of the original bill, and cannot introduce new and distinct matters not embraced in the original bill. 3 Daniel's Ch. Pl. & Pr. (Perkins' Ed.) p. 1743. Matters in the cross-bill must be germane to the matter involved in the original bill. The new facts which it is proper for the defendant to introduce thereby are such, and such only, as are necessary for the court to have before it in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it in respect to the cause of action on which the complainant rests his right to aid or relief. 5 Ency. of Pl. & Pr. 640. We are inclined to the opinion that on the facts presented in this record the cross-bill of appellant was not germane, and that on this ground the demurrer was properly sustained (*Ballance v. Under-*

hill, 3 Scam. 453; Pestel v. Primm, 109 Ill. 353; Gage v. Mayer, 117 Ill. 632, 7 N. E. 97); but, without giving our reasons at length as to that ground for dismissal, we are convinced that the demurrer to the cross-bill was properly sustained on the other ground stated in the chancellor's order—that it showed no equity on its face. "A demurrer in chancery is always to the merits and in bar of the relief sought, and proceeds upon the ground that, admitting the facts to be true as stated in the bill, still the complainant is not entitled to the relief he seeks." Harris v. Cornell, 80 Ill. 54. It appears that appellant is an attorney in actual practice, and while he insists that he was not properly advised as to his rights in the matter when he signed said agreement on March 15, 1898, or joined as complainant in the foreclosure proceedings of August 10, 1900, still the cross-bill does not allege that his joinder as plaintiff was unauthorized, but, on the contrary, states that he gave his consent, and it nowhere appears from this record that such consent was ever afterwards withdrawn or attempted to be withdrawn.

It is apparent from the facts presented on the two records that the decision in Patterson v. Northern Trust Co., 82 N. E. 837, heretofore referred to, is conclusive as to the merits of the cross-bill in this case. In that case it is shown that appellant has been paid in full all that he is entitled to under said deed of trust, and he did not claim in that case, and has not alleged or claimed in this case, that he is in any way injured by the ruling of the court in the original proceedings. It is true that in this case, as in the other, he charges, in his brief, secret agreements between the Northern Trust Company and the Merrimac Building Company, and claims that the original bill to foreclose was brought solely for the benefit of said trust company and its attorneys, but he has not shown in that proceeding, or in this, how he has been injured thereby. The jurisdiction of a court of equity to give the relief asked for in the original proceedings in the other case or on this cross-bill, even if it appeared (which it does not) that there had been collusion between the parties, as alleged, could only be invoked by appellant if it was shown "that the collusive acts have done an injury" to him. First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 461; Central Trust Co. v. Peoria, Decatur & Evansville Railway Co., 104 Fed. 420, 43 C. C. A. 616.

As we understand this record, appellant's only basis of claim for injury by the issuing of said order of June 25, 1902, is that the Northern Trust Company should have insisted on strict forfeiture of the lease. Appellant does not deny that he signed an agreement waiving this forfeiture, and that he authorized in the bill of foreclosure in the original proceedings, which amounted to a waiver of notice to forfeit. Wood on Landlord and Tenant, § 46; 18 Am. & Eng. Ency.

of Law (2d Ed.) 382-384, and cases there cited. He complains that certain agreements of his attorneys in filing the bill for foreclosure in the original proceedings and in entering the decree therein were not authorized by him. He does not deny that they were authorized to act as his attorneys, and he does not here or in the original proceedings show wherein they misled him or in any way acted without authority. He signed the agreement of March 15, 1898, substantially waiving any right which he may have had to a strict forfeiture, and never raised any question in this regard until he filed, years after, his answer and cross-bill herein. To insist upon a strict forfeiture of this lease under these circumstances would be most harsh and unjust. On the facts presented by this record we think this delay amounts to such laches as to preclude him from now raising this question.

The appellant is barred by his own acts from raising the question as to the right of the Merrimac Building Company to take as assignee under said lease (Coquard v. National Linseed Oil Co., 171 Ill. 490, 49 N. E. 563), as he is also barred from questioning the authority of the Northern Trust Company to act as trustee under said deed of trust.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(231 Ill. 33)

HANBERG, County Treasurer, v. WESTERN COLD STORAGE CO.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

TAXATION — COLLECTION — INJUNCTION RESTRAINING WRONGFUL ENFORCEMENT.

Equity will restrain the collection of a tax levied on property as real estate, where the tax thereon has already been paid as a personal tax, under the power to enjoin taxes levied without authority of law in excess of the uniform legal rate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 1232.]

Appeal from Circuit Court, Cook County; Lockwood Honoré, Judge.

Bill by the Western Cold Storage Company against John J. Hanberg, as county treasurer, to restrain the collection of a tax. From a decree for complainant, defendant appeals. Affirmed.

Iles & Martin, for appellant. Runnells & Burry, for appellee.

VICKERS, J. The Western Cold Storage Company, appellee herein, a corporation, leased a portion of the Illinois Central Railroad Company's right of way; said ground being described as the north 200 feet of Illinois Central pier No. 2, in that portion of Cook county known as the town of South Chicago. The company erected on said property buildings, five in number, and plac-

ed machinery and appliances therein, at a total cost of more than \$400,000, which buildings and appliances were used for general and cold storage purposes. The same company had its general office in Chicago, and also owned warehouses and properties in what is known as North Chicago. The leasehold was for a period of 10 years, extending from June 1, 1898, to June 1, 1908, and by the terms of the lease appellee had the right to remove the buildings and machinery at the expiration of the lease. Taxes in the two towns of North Chicago and South Chicago were assessed and collected separately. The general credits, indebtedness, bank accounts, etc., of appellee, related to and were assessed at its general office in the north town. Only its tangible property located in the south town was assessed and taxed therein. The case at bar is a suit in chancery, filed June 19, 1906, in the circuit court of Cook county, to restrain the collection of certain general taxes assessed on the leasehold estate and improvements above mentioned for 1904 and 1905; said taxes being extended against said property as real estate taxes. It appears that appellee filed no schedule of its personal property for either of the years 1904 or 1905, but was assessed upon its personal property in said years upon an estimate made by the board of assessors and the board of review, and that it paid the personal property tax so assessed, but did not pay the tax assessed and levied against the real estate.

The bill sets out the fact of appellee's corporate existence, and alleges that appellant is county treasurer and ex officio county collector of Cook county, Ill.; that said Cook county, for more than 10 years last past, has had more than 125,000 inhabitants, and has a board of assessors and a board of review duly elected according to law; and that the persons constituting said board of assessors and board of review have qualified as members thereof and have assumed the duties and obligations of their respective offices. It then sets up the ownership of the leasehold and improvements hereinbefore mentioned, and alleges that the buildings and appliances were erected and furnished at appellee's own expense. The bill alleges ownership of the fee to be in the Illinois Central Railroad Company, and sets up the fact that by the terms of the charter of said railroad company its property is exempt from general taxation. The bill further alleges that the lessee has endeavored to obtain an extension of said lease, but has been unable to obtain any further lease; that all of said buildings and improvements are built principally of brick and tile, with mortar, and are of little or no value for removal; that the insulating and refrigerating appliances and fixtures are composed largely of iron piping, which has been in use about 8 years, and, if removed, would be valuable for sale only as scrap iron; that the other machinery,

etc., would be of little value for purposes of removal. The bill also sets up the lease, which shows that without the renewal of the said lease at the expiration of 10 years the buildings and machinery must be removed from the premises within 60 days, or in default thereof the same would become the property of the Illinois Central Railroad Company. The bill further alleges that on the 1st of April, 1904, appellee was possessed of the leasehold property herein described, and also a small amount of personal property, of the value of about \$200, and that the foregoing was and is all the property then or now owned by appellee in said town of South Chicago; that at its meeting in 1904 the board of assessors estimated the total full value of appellee's personal property in said south town at \$150,000; that said valuation was a fair valuation, including said improvements and buildings on said pier No. 2; that said estimate included all the property belonging to appellee in said south town. The bill further alleges that the board of review afterwards placed an assessed valuation of \$30,000 on all of appellee's property in said south town, and a tax was levied thereon amounting to \$1,917.30; that on February 16, 1905, appellee paid to appellant, in his official capacity as county collector, the said sum of \$1,917.30 in full payment of all taxes levied upon the property belonging to the appellee in the south town, and received his receipt therefor. The bill further alleges that the board of assessors, and the board of review also, for the purposes of taxation for the year 1904, valued said buildings and improvements upon the north 200 feet of said pier No. 2 as real estate, at the sum of \$480,745, and put an assessed valuation thereon of \$96,149; that there was thereupon extended against appellee and against the said buildings and improvements, as real estate, by the taxing authorities of said Cook county, a tax amounting to \$6,144.91 for the year of 1904. The bill further alleges that the appellee had no notice and did not know of said assessment made upon said buildings and improvements on real estate, or of the tax of \$6,144.91, until September 14, 1905, when said buildings and improvements were offered for sale by appellant for nonpayment of said real estate taxes; that a warrant for the collection of said taxes was duly issued to appellant as county collector, and because said tax was not paid to him appellant caused publication to be made against said property for delinquent taxes, as provided by law, and subsequently, without actual notice to the appellee, a judgment and order of sale were entered against the said property for said taxes, penalties, etc. The bill further alleges that on April 1, 1905, appellee was still possessed of the same property situated in said south town of Chicago on pier No. 2 aforesaid, and also a small amount of other personal property of the value of about \$200,

and that the foregoing was all the property owned by appellee in said south town; that the board of assessors, at its meeting in 1905 to value and assess property for taxation that year, estimated the total fair value of appellee's personal property in said south town at \$250,000; that said valuation was a high valuation therefor, including said improvements and buildings on said pier No. 2; that said estimate included all the property belonging to appellee in said south town; that the board of assessors and the board of review afterwards placed an assessed valuation upon all of appellee's personal property in said south town of \$50,000, and a tax was levied and extended thereon amounting to \$3,907.71; that on March 15, 1906, appellee paid to the collector said sum of \$3,907.71 in full payment of such tax and received his receipt therefor; that said assessors and board of review, for purposes of taxation for 1905, valued said buildings and improvements upon said pier No. 2, and put an assessed valuation thereon of \$96,149 as real estate; that there was thereupon levied and extended against the appellee, and against said buildings and improvements, by the taxing authorities of Cook county, a tax amounting to \$6,534.33 for the year 1905, which tax is based only and solely on said property by the board of assessors and the board of review as real estate. The bill further alleges the issue of a warrant for collection, and a judgment subsequently, and order of sale, without notice to appellee, as in case of the taxes for 1904. It is then alleged that the taxes levied on said buildings and improvements situated on pier No. 2 as aforesaid, as real estate, constituted a double taxation; that the same is a cloud upon appellee's title, and a lien, at law, against appellee's property. The bill prays that the said taxes as levied against the said property as real estate for the years 1904 and 1905 be declared null and void, that the lien thereof be discharged and removed from the said property of appellee, and that appellant be restrained by order of the court from collecting the same. On October 19, 1906, appellant filed his answer, denying the double taxation. Replication was filed and the cause was heard in the circuit court of Cook county at the April term, 1907, and a decree entered in accordance with the prayer of the bill. Appellant brings the record to this court for review.

The evidence satisfactorily shows that the taxes sought to be enjoined were levied upon the same property upon which appellee had paid the taxes as personal property. The doctrine is established in this state that a court of equity will enjoin a tax that is void or levied without authority of law, or where the property is exempt from taxation, or where there has been a fraudulent assessment at too high a rate. *Munson v. Miller*, 66 Ill. 380; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Moore v. Wayman*, 107 Ill. 192;

New Haven Clock Co. v. Kochersperger, 175 Ill. 383, 51 N. E. 629; *Slegfried v. Raymond*, 190 Ill. 424, 60 N. E. 868. Where a tax is levied, without authority of law, in excess of the proper and uniform legal rate of taxation, the collection of such excess may properly be enjoined. 1 High on Injunctions, § 503; *Porter v. Rockford, Rock Island & St. Louis Railroad Co.*, 76 Ill. 561. Cooley, in his work on Taxation (volume 1, p. 394), speaking of double or duplicate taxation, says: "There is a sense, however, in which duplicate taxation may be understood, and which we think is the proper sense, which would render it wholly inadmissible under any constitution requiring equality and uniformity in taxation. By duplicate taxation, in this sense, is understood the requirement that one person, or any one subject of taxation, shall directly contribute twice to the same burden while other subjects of taxation belonging to the same class are required to contribute but once." In the case at bar the double assessment was not caused through the voluntary act or by reason of any neglect or default on the part of appellee, and in this respect the case is distinguishable from *Chicago, Burlington & Quincy Railroad Co. v. People*, 136 Ill. 660, 27 N. E. 200.

The decree enjoining the collection of this tax was a proper one under the facts shown, and is accordingly affirmed.

Decree affirmed.

(230 Ill. 476)

TEEL et al. v. DUNNIHOO et al.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

1. APPEAL—SUBSEQUENT APPEALS—MATTERS IN ISSUE.

On the first appeal of a suit concerning the title to land, the question involved was: Did a decree in a former suit to correct a deed to the land by striking therefrom the words "her bodily heirs," inserted after the name of the grantee, finding that the deed should be so corrected and the master's deed made pursuant to that decree, to correct the former deed, divest the plaintiffs, T. and S., bodily heirs of the original grantee, of the fee-simple title thereof? And it was held that the decree was inoperative, and that the master's deed did not divest these plaintiffs of the fee-simple title, but that it still remained in them. On a second appeal the question presented was: Did the court properly decree upon the cross-bills filed after the case was reinstated, on the evidence submitted to it, that the deed should be corrected, and in correcting it and decreeing the fee-simple title to the land to be in defendants, the remote grantees of the original grantee? Held, that the decision of the court on the first appeal is not conclusive against the rights of the defendants on the second appeal, since the question presented for determination is not the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4370-4379.]

2. JUDGMENT—CONCLUSIVENESS—MATTERS CONCLUDED.

Where some controlling fact or question material to the determination of both causes of action has been determined in a former suit, and the same fact or question is again an issue

between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1251.]

3. SAME — EFFECT OF DECREE AS AGAINST BONA FIDE PURCHASERS.

Where the circuit court, in a chancery suit to correct a deed by striking out the words "her bodily heirs," after the name of the grantee, to which suit T. was a party, and S. a privy, found that the words were erroneously inserted, T. and S. were bound by the finding, and estopped in a suit instituted to have the fee-simple title to the land declared in them as against defendants, the remote bona fide grantees of the original grantee, even though the guardian ad litem of T. may not have performed his full duty in the chancery suit, and though T. and S. have introduced evidence in the pending suit tending to contradict witnesses upon whose testimony the former decree was based.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1181-1189.]

4. EQUITY—DECREE AND ENFORCEMENT—BILL TO ENFORCE DECREE—CROSS-BILL.

The rule that on an original bill to carry a former decree into execution the court will look into the original case and see if the former decree is equitable and just, and, if it is not, it will refuse its enforcement, applies where a former decree is sought to be carried into execution by a cross-bill.

5. REFORMATION OF INSTRUMENTS—PROCEEDINGS—EVIDENCE—SUFFICIENCY.

A decree in a suit correcting a deed by striking out the words "her bodily heirs," inserted after the name of the grantee, is sustained by the findings in a decree in a former suit brought to reform the same deed, that these words were inserted by mistake, and that it should be corrected by striking them out.

6. SAME—RIGHT TO REFORMATION.

Where the words "her bodily heirs" were inserted by mistake in a deed after the name of the grantee, thereby vesting in the grantee only a life estate in the land, which was not the intention of the parties, the grantee could sue to have the deed corrected by striking out these words.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reformation of Instruments, §§ 68-78.]

7. EQUITY—DECREE—OPENING OR VACATING.

Where a court had jurisdiction of the parties and subject-matter of a suit to reform a deed by striking out the words "her bodily heirs" after the name of the grantee, and found in its decree that the words were inserted by mistake and should be struck out, and that innocent parties had relied upon these findings in purchasing the land from the grantee, the decree cannot be impeached by a party or privy to the first suit in a subsequent suit to have the deed so corrected, by parol evidence and by showing irregularities in the first proceeding, where many years have elapsed since the testimony in the case was taken and the decree entered, and the principal witnesses on whose testimony the findings were based are dead.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1034-1041.]

Appeal from Circuit Court, Williamson County; A. W. Lewis, Judge.

Suit by Harry C. Teel and others against Wilmoth Dunnihoo and others. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

This was a bill in chancery filed by appellants, Harry C. Teel and Nona Teel (former-

ly Nona Stocks) and Elmo Stocks, by his guardian, John Stocks, against the appellees, to partition certain farm lands situated in Williamson county between Nona Teel and Elmo Stocks, who were alleged to be the owners in fee simple thereof, and to impeach and set aside as a cloud upon the title of said Nona Teel and Elmo Stocks a certain decree entered by the circuit court of Williamson county on April 17, 1891, in a suit in chancery then pending in said circuit court, wherein Mary E. A. Stocks and John Stocks, the father and mother of Nona Teel, and Elmo Stocks, were complainants, and wherein William L. Henderson and Harriet Henderson (the father and mother of Mary E. A. Stocks) and Nona Stocks were defendants, for fraud and for errors of law appearing upon the face of the record in said chancery suit, and to set aside and cancel as clouds upon the title of Nona Teel and Elmo Stocks a master's deed made to Mary E. A. Stocks in pursuance of the terms of said decree; also, to set aside and cancel certain deeds made by Mary E. A. Stocks and her grantees to said lands, through which the parties now in possession of said lands claim title. The court sustained a demurrer to said bill and dismissed the same for want of equity, and an appeal was prosecuted to this court, where the decree of the circuit court was reversed, and the cause was remanded to the circuit court, with directions to overrule the demurrer. *Teel v. Dunnihoo*, 221 Ill. 471, 77 N. E. 906, 112 Am. St. Rep. 192.

It appears from the averments of the bill filed in this case: That Mary E. A. Stocks was a daughter of William L. and Harriet Henderson; that on the 17th day of August, 1886, William L. and Harriet Henderson conveyed to Mary E. A. Stocks and "her bodily heirs" the land in question for \$1,000; that Mary E. A. Stocks and her husband, John Stocks, immediately moved upon the lands and improved the same and made their home thereon for a number of years; that on February 18, 1891, Mary E. A. Stocks and her husband, and after the birth of their child Nona, and when she was of the age of three years, filed a bill in chancery in the circuit court of Williamson county against Nona Stocks, William L. Henderson, and Harriet Henderson for the purpose of having corrected said deed by striking out therefrom the words "her bodily heirs"; that upon the hearing upon said bill the court found that William L. and Harriet Henderson by deed conveyed to said Mary E. A. Stocks and "her bodily heirs," on the 17th day of August, 1886, the lands described in the bill, and that the words "her bodily heirs" were improperly inserted in said deed, and that Mary E. A. Stocks was entitled to have said deed corrected by eliminating therefrom the words "her bodily heirs," and decreed that William L. Henderson, and Harriet, his wife, execute a good and sufficient warranty deed conveying to Mary E. A. Stocks said lands in fee

simple, without any qualification or restriction whatever, within 60 days, and that in default of the execution and delivery of said deed the master in chancery of said court execute a deed of conveyance conveying to Mary E. A. Stocks in fee simple said lands; that William L. and Harriet Henderson having failed to make a deed as provided by said decree, the master in chancery executed a deed to Mary E. A. Stocks in accordance with the terms of said decree; that Mary E. A. Stocks subsequently sold and conveyed said lands by absolute deed, and the lands have been transferred, from time to time, by her grantee and his grantees, and are now owned and in the possession of persons who were not parties to said chancery suit commenced by Mary E. A. Stocks and husband against Nona Stocks and William L. and Harriet Henderson; that Mary E. A. Stocks died on October 21, 1902, leaving her surviving her husband, John Stocks, and Nona Teel, born March 21, 1887, and Elmo Stocks, born August 22, 1891, as her children and sole heirs at law; and that said Nona was about 18 years of age and Elmo about 14 years of age at the time this bill was filed.

The contentions made on the former appeal were. First, that in the case of Stocks et al. v. Stocks et al. the court did not have jurisdiction of the persons of Nona Teel and William L. Henderson and Harriet Henderson; second, that the guardian ad litem appointed for Nona Teel neglected and failed to properly represent and protect the rights of Nona Teel; third, that the testimony of John Stocks, Mary E. A. Stocks, and William L. Henderson, upon which the findings in the decree were based, that the words "her bodily heirs," found in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks, were improperly inserted in said deed, was false; and, fourth, that the deed from William L. and Harriet Henderson to Mary E. A. Stocks conveyed to Mary E. A. Stocks a life estate in said lands only, and that the fee-simple estate therein vested in Nona Teel and Elmo Stocks, and that the decree entered by the court in said chancery case, and the deed of the master in chancery based thereon, did not have the effect to divest said Nona Teel and Elmo Stocks, at the time of filing the bill herein, of their title in and to said lands, and that the title to said lands was in Nona Teel and Elmo Stocks at the time of filing the bill herein in fee simple. And it was held in the opinion then filed that the court, in the suit of Stocks et al. v. Stocks et al., had jurisdiction of the parties and of the subject-matter of that suit, and that the fact that error may have afterwards intervened on the hearing or in the entry of the decree would not have the effect to defeat the title of parties who dealt in good faith with the property, relying upon said decree; but, as it appeared that the title to said premises passed out of William L. Henderson and Harriet Henderson and vested in said Mary

E. A. Stocks for life and in Nona Teel and Elmo Stocks in fee, there was no title remaining in William L. and Harriet Henderson which they could convey, and that by a conveyance voluntarily made, or by one made under the direction of the court, they could not divest Nona Teel and Elmo Stocks of their fee-simple title in and to said premises and invest the same in Mary E. A. Stocks, and that the master's deed had no greater effect than would a deed from William L. and Harriet Henderson, and that the fee-simple title to said premises was in Nona Teel and Elmo Stocks.

Upon the case being reinstated in the circuit court the demurrer was overruled, whereupon the appellees answered said bill and filed cross-bills, in which they prayed, as was prayed in the bill filed by Mary E. A. Stocks and husband, that the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks be reformed and corrected by striking out the words "her bodily heirs." The cross-bills were answered, and, replications having been filed, a trial was had in open court, and a decree was again entered dismissing the original bill for want of equity, and the prayers of the cross-bills of the respective cross-complainants were granted, and the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks was corrected by striking out the words "her bodily heirs," and a second appeal has been prosecuted to this court.

F. W. Raymond and Arthur W. Underwood, for appellants. James A. Martin, William W. Clemens, and William H. Warder, for appellees.

HAND, C. J. (after stating the facts as above). It is first contended that the opinion filed by the court on the former appeal is conclusive against the right of the appellees to recover in this case. The question presented to this court when the case was here before was: Did the decree entered in the case of Stocks et al. v. Stocks et al. by the circuit court of Williamson county, and the master's deed made in pursuance of said decree, divest the fee-simple title of Nona Teel and Elmo Stocks in the real estate in controversy and invest Mary E. A. Stocks with the fee-simple title to said premises? And it was held, for the reasons there stated, said decree was inoperative in that regard, and that the decree and master's deed did not divest said Nona Teel and Elmo Stocks of the fee-simple title to said premises, and that in determining the question of where the fee-simple title to said premises then rested said decree and master's deed should be disregarded, which left the fee-simple title in said Nona Teel and Elmo Stocks. While the question presented for determination on this appeal is: Did the circuit court, on the last trial, properly decree, upon the cross-bills filed after the case was reinstated in the circuit court, on the evidence submitted to it,

that the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks should be reformed and corrected by striking out from said deed the words "her bodily heirs," and did the court err in reforming and correcting said deed by striking out said words and decreeing that the appellees be invested with the full fee-simple title to said premises, as the remote grantees of said Mary E. A. Stocks? It clearly appears therefore that the question now presented for decision is a different question from the one determined when the case was here before.

In *Davis v. Kennedy*, 105 Ill. 300, John R. Kennedy had made a conveyance of an 80-acre tract of land to his three daughters, but in describing the land there was an error in the deed; the land being described as located in a township other than the one in which it was located. Kennedy thereafter became a bankrupt, and the land was sold by his assignee to Davis. The daughters filed a petition and made a motion in the United States District Court, where the bankruptcy proceeding was pending, to set aside the sale, which that court declined to do, whereupon they filed a bill in equity in the state court to correct the mistake in the deed, and it was contended they were foreclosed from such relief by reason of the action of the United States District Court in overruling their motion to set aside said sale; but it was held otherwise. This court, on page 307, said: "That proceeding falls far short of an adjudication of the question being litigated in this case. There is therefore, no just claim that the questions here litigated were there determined. There, the object and direct purpose was to have the sale disapproved and set aside; here, the purpose is to have this deed reformed and the mistake corrected, and the assertion of title under the assignee's deed enjoined. So it falls of an estoppel because the questions decided, and necessary to be decided, are not the same. That court, on that petition and motion, could not have declared that defendants in error were not entitled to the relief they seek in this case, because no such question was presented or before that court. We are not warranted in presuming that court did what it was not authorized to do, on the record as it then stood, nor was it asked, nor do we suppose it intended so to do. We must therefore hold that this proceeding is not barred by a former adjudication of the same questions now litigated." We think that case, and many others which might be cited, conclusive of the proposition that the appellees were not barred by any questions determined when the case was here before, from filing their cross-bills to correct the mistake in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks.

It is next contended the court erred in admitting in evidence against Nona Teel and Elmo Stocks the decree in the case of *Stocks et al. v. Stocks et al.*, as it is said that de-

cree is not binding upon Nona Teel and Elmo Stocks by reason of the fact that the guardian ad litem appointed for Nona Teel neglected and failed to properly protect and guard her interests, and that the testimony of John Stocks, Mary E. A. Stocks, and William L. Henderson, upon which the findings in the decree were based, that the words "her bodily heirs," found in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks, were improperly inserted in the deed, was false, and that the testimony of John Stocks, Mary E. A. Stocks, and William L. Henderson was taken in the form of affidavits—that is, in narrative form—before the master in chancery, and not upon questions propounded to them by the master in chancery. On the former appeal similar contentions were made, and this court, on page 476 of 221 Ill., page 908 of 77 N. E. (112 Am. St. Rep. 192), said: "The bill filed in that case was sufficient to give the court jurisdiction of the subject-matter of the suit, and the court having found it had jurisdiction of the parties, which was a matter upon which it was authorized to adjudicate, the fact that errors may have afterwards intervened on the hearing or in the entering of the decree would not have the effect to defeat the title of the defendants, who dealt in good faith with the property, relying upon such decree, if the effect of the decree was to divest the title of the complainants." The court found, however, the decree did not have the effect to divest the title of Nona Teel and Elmo Stocks, and for that reason the court was of the opinion the fee to said premises still remained in Nona Teel and Elmo Stocks. It was also held in that opinion that while an original bill might be filed on behalf of a minor during his minority, or within the period allowed after majority for the prosecution of a writ of error to impeach a decree for fraud or for errors of law appearing upon the face of the record, if it appeared the court entering the decree had jurisdiction of the parties and the subject-matter of the suit, and parties who were not parties to the suit and who had dealt with the subject-matter of the suit in good faith, relying upon the decree, had acquired interests in the subject-matter of the suit, the court would not set aside the decree and thereby divest and destroy their interests in the subject-matter of the suit, and the cases of *Hedges v. Mace*, 72 Ill. 472, *Lloyd v. Kirkwood*, 112 Ill. 329, and *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352, were cited as sustaining that position.

In the *Hedges Case*, which was a bill to impeach a decree in partition for want of jurisdiction over the persons of the defendants in the partition suit, none of the complainants appear to have been minors; but the court, after disposing of the question of jurisdiction adversely to the contention of the complainants, announced the general doctrine upon the subject now under consideration in the following words (page 475 of 72

Ill.): "Various other objections are made to the proceedings, but it is not necessary to consider them. If the questions raised are at all tenable, they are but errors, and cannot be urged in this collateral manner against the title of the defendants who purchased at the sale under the decree. The law is well settled that, where the court has jurisdiction of the subject-matter and obtains jurisdiction of the person by service of process, then, although errors may intervene, the title of a purchaser under the decree, who is not a party to the proceeding, will be protected. *Stow v. Kimball*, 28 Ill. 93; *Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303; *Wight v. Wallbaum*, 39 Ill. 554; *Mulford v. Stalzenback*, 46 Ill. 303." In the *Lloyd* Case the question arose upon the cross-bill filed on behalf of a minor to impeach a decree which was relied upon in the original bill as a basis for partition, and the court there said (page 337 of 112 Ill.): "In many of the states, * * * including our own, a decree against an infant, like that against an adult, is absolute in the first instance, subject to the right to attack it by original bill, for either fraud or error, merely; but until so attacked, and set aside or reversed on error or appeal, it is binding to the same extent as any other decree or judgment. This right to attack a decree by original bill may be exercised at any time before the infant attains his majority, or at any time afterwards within the period in which he may, under the statute, prosecute a writ of error for the reversal of such decree. * * * The rule thus established is, of course, subject to the qualification that the decree of a court having jurisdiction of the subject-matter of the suit and the person of the infant against whom it is rendered, will not be thus set aside as against third parties who have in good faith acquired rights under it; but as against original parties to the suit, and their legal representatives, the rule as above stated will be enforced." In view of the foregoing authorities, if the mandatory part of the decree sought to be impeached had corrected the *Henderson* deed by eliminating the words therefrom which vested the fee in *Nona Teel* and *Elmo Stocks*, the appellees would have been protected in their title against the claims of *Nona Teel* and *Elmo Stocks*. The question then arises: Of what force and effect, as evidence in this case, is that portion of said decree against *Nona Teel* and *Elmo Stocks* which finds that the words "her bodily heirs," in the deed from *William L. Henderson* and *Harriet Henderson* to *Mary E. A. Stocks*, were improperly incorporated therein, and that *Mary E. A. Stocks* was entitled to have the deed corrected by eliminating from the deed said words?

It has been frequently held by this court that where some controlling fact or question material to the determination of both causes of action has been determined in a former

suit, and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit, irrespective of whether the cause of action is the same in both suits or not. *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 606; *Tilley v. Bridges*, 105 Ill. 336; *Wright v. Griffey*, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; *Reynolds v. Mandel*, 175 Ill. 615, 51 N. E. 649; *Brack v. Boyd*, 211 Ill. 290, 71 N. E. 995, 103 Am. St. Rep. 200. In the *Brack* Case, in a partition suit between the parties, it was held that one *Mary J. Singleton* was the legally adopted child of *Allen L. and Sallie Ralls*, and in a subsequent partition suit between the same parties, although in regard to different lands, it was held that the parties defendant in the second suit were bound by the findings of the court in the first suit upon the subject of the adoption of *Mary J. Singleton*, which finding in the first suit amounted to an estoppel upon them by verdict. In the *Hanna* Case, *Ezra B. Read*, owning real estate in Indiana and in this state, made two deeds; one conveying the Indiana land directly to his wife, and the other conveying the Illinois land to her through a third party. A bill was filed in the circuit court of *Vigo county, Ind.*, to set aside the conveyance in that state on the alleged ground that *Ezra B. Read* was, at the time of its execution, of unsound mind and incapable of making the deed, and that he was unduly influenced to execute the same. The answer of the defendant denied both allegations, and upon the hearing a decree was entered sustaining the bill and finding that the grantor was of unsound mind and incapable of making said instrument. Afterwards, in a suit between the same parties in this state to set aside the conveyance of the Illinois lands, the decree entered in the Indiana court was set up by the complainants as *res judicata*; but the circuit court refused to admit the transcript of the record of the circuit court of *Vigo county* as evidence to sustain the bill. In reversing that ruling it was said (page 602 of 102 Ill.): "Where the former adjudication is relied on as an answer and bar to the whole cause of action, or, in other words, where it is claimed to be an answer to all the questions involved in the subsequent action, then it must appear * * * that the cause of action and thing sought to be recovered are the same in both suits. The former adjudication in cases of this class is technically known as an estoppel by judgment, * * * but where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue in a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied on, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same

n both suits or not. This species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense."

We therefore think it clear that, the circuit court of Williamson county having found in the case of Stocks et al. v. Stocks et al. that there was a mistake in the deed from William L. Henderson and Harriet Henderson to Mary E. A. Stocks, to which litigation Nona Teel was a party and Elmo Stocks a privy, appellants are bound by such finding and estopped in this proceeding to deny the facts there found as against the appellees, who are subsequent bona fide purchasers of said real estate, even though the guardian and item of Nona Teel may not have performed his full duty in said chancery suit, and even though the appellants have introduced into this record some evidence which tends to contradict the evidence of the witnesses who testified in the case of Stocks et al. v. Stocks et al., upon whose testimony said decree was based, which objections and irregularities only amounted to error in the original case, and which did not render the decree in that case void, but which would have been available in this suit against the original parties to that suit (Lloyd v. Kirkwood, supra; Crane v. Stafford, 217 Ill. 21, 75 N. E. 424), but which are not available against third parties who have in good faith acquired rights relying upon said decree. Lloyd v. Kirkwood, supra.

It is finally contended that the court erred in entering the decree in this case, as it is said appellees failed to show, by proper proofs, that said former decree was equitable and just, and it is urged on an original bill to carry a former decree into execution the court will look into the original case and see if the former decree is equitable and just, and if it is not it will refuse its enforcement. The doctrine contended for by the appellants has been recognized by this court in *Wadhams v. Gay*, 73 Ill. 415, and subsequent cases, and it is a well-established equitable doctrine where an original bill has been filed to carry a former decree into execution, and we think applies with equal force where a former decree is sought to be carried into execution by a cross-bill. The prayers of the cross-bills filed in this case, however, are in the alternative that of *Wilmouth Dunnihoo*, the *Carterville & Herrin Coal Company*, *John Waggoner*, *Ellen Augusta Waggoner*, *Finis W. Varnier*, *Henry Kelper*, *Raymond Lisby*, *Clayton Wright*, *John Alexander*, *W. C. Alexander*, *Joseph Moore*, *Wilford Beson*, *Wesley Walker*, and *Mary Walker* being in the following form: "Forasmuch, therefore, as your orators are without remedy except in a court of equity, and to the end that the said *Harry C. Teel*, *Nona Teel*, *John Stocks*, *Chicago & Carbondale Railroad Company*, *Illinois Central Railroad Company*,

and *Elmo Stocks*, who are made parties defendant to this bill, may be required to make full and direct answer to the same, but not under oath, answer under oath being hereby waived, and that upon a hearing hereon the court may order and decree that the relief granted by the above recited decree be made effectual, the said deed from William L. Henderson and wife to Mary E. A. Stocks hereinabove set forth be canceled and set aside, and that the master's deed hereinabove referred to and set forth be declared effectual to convey the fee-simple title of the lands therein described to said Mary E. A. Stocks at the time of its delivery, or that said deed so made by William L. Henderson and wife to Mary E. A. Stocks be reformed and corrected to accord with the intention of the parties as found and declared by the court in said decree hereinabove set forth, by striking therefrom, and from the record thereof, the words 'her bodily heirs,' and that your orators have such other and further relief as equity may require and as to your honors may seem meet." And we think the decree of the circuit court could properly be sustained on the ground that the findings of fact in the decree in the case of Stocks et al. v. Stocks et al. established the fact that there was a mistake in the deed from the Hendersons to Mary E. A. Stocks, and it should be corrected, and such seems to have been the view of the trial court, as its decree was as follows: "It is therefore ordered, adjudged, and decreed that the complainants' original bill herein be dismissed for want of equity, and that complainants in their cross-bills herein be granted the relief prayed for in said cross-bills, and that said deed made by William L. Henderson and wife to Mary E. A. Stocks, dated August 17, 1886, conveying to her the following described real estate: The west half of the southwest quarter of section 22 and the northeast quarter of the northeast quarter of section 28, town 22 south, range 2 east of the third principal meridian, in Williamson county, Illinois—be and the same is hereby reformed and corrected by striking therefrom the words 'her bodily heirs' where the same appear therein after the words 'Mary E. A. Stocks,' and that the record thereof in the recorder's office of Williamson county, at page 171 of Deed Records 27, be corrected by the master in chancery of this court by striking out the said words 'her bodily heirs' after the words 'Mary E. A. Stocks,' thus vesting in her the fee-simple title as of the date of August 17, 1886."

If, however, it be conceded that it was necessary that the appellees show that the decree entered in that case was equitable and just, we think the evidence found in this entire record, when taken in connection with the decree in Stocks et al. v. Stocks et al., clearly shows that equity and good conscience required the correction of said deed as between Mary E. A. Stocks and Nona Teel and Elmo Stocks, who were "her bodily heirs."

From the recitals in said decree it appears that the land in question belonged to William L. Henderson; that on August 17, 1886, he sold the same to Mary E. A. Stocks for the sum of \$1,000 and executed to said Mary E. A. Stocks a deed of conveyance of said lands, intending to convey thereby said lands to said Mary E. A. Stocks in fee simple, and in consideration of said deed of conveyance said Mary E. A. Stocks paid to said William L. Henderson the sum of \$1,000; that by some mistake or error of the scrivener who wrote said deed, or from some other error or mistake at the time unknown to both the grantors and the grantee in said deed, the deed was so written as to convey said lands to said Mary E. A. Stocks and to "her bodily heirs," thereby vesting in said Mary E. A. Stocks a life estate only in said lands, which was not the intention of the grantors or the grantee, each of whom intended and agreed that said deed of conveyance should pass to said Mary E. A. Stocks the said lands in fee simple absolute. It further appears that Mary E. A. Stocks sold and conveyed said premises to her grantee, and he to his grantees, for a full and valuable consideration, and that her remote grantees are now in possession of said lands. In *Dinwiddie v. Self*, 145 Ill. 290, 33 N. E. 892, and *Kyner v. Boll*, 182 Ill. 171, 54 N. E. 925, this court held that it was not inequitable and unjust to correct a deed under similar circumstances to those disclosed in this record, by striking out from a deed words of similar import to the words found in the deed from the Hendersons to Mrs. Stocks. This case, and the cases above referred to, differ materially from the case of *Atherton v. Roche*, 192 Ill. 252, 61 N. E. 357, 55 L. R. A. 591; the distinction between the cases being pointed out in the *Atherton Case*, on page 261 of 192 Ill., 61 N. E. 357, 55 L. R. A. 591. Mistakes of law cannot be corrected by a court of equity. Where, however, real estate is bought for its full value, and the grantors understand they are selling, and the grantees understand they are purchasing, a fee title, and by mistake some words creep into the deed which defeat such intention, it clearly is not inequitable or unjust that the error should be corrected.

The appellants have sought in this case to impeach the findings of the decree entered in the case of *Stocks et al. v. Stocks et al.* by parol evidence and by showing irregularities took place upon the trial. Many years have elapsed since the testimony in that case was taken and the decree entered. Mary E. A. Stocks and William L. Henderson are both dead, and the interest of John Stocks, through his children, is adverse to the decree. This case demonstrates the wisdom of the rule that where a court has jurisdiction of the parties and subject-matter of a suit and makes certain findings of fact in its decree upon which innocent parties rely, the facts thus found, when again called in

question by a party or privy to said suit in a subsequent suit, are held to be established by the findings of fact in the first decree. Were not this the rule, no title in which a minor is a party to a suit would ever be secure until after the time for the suing out of a writ of error or for filing a bill to impeach the decree had elapsed.

Finding no reversible error in this record, the decree of the circuit court will be affirmed.

Decree affirmed.

VICKERS, J., took no part in the decision of this case.

(230 Ill. 386.)

LYON v. LYON.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 10, 1907.)

1. MARRIAGE — ANNULMENT — GROUNDS — FRAUD.

The fraudulent representations for which a marriage may be annulled must be of something making impossible the performance of the duties and obligations of that relation, or rendering its assumption and continuance dangerous to health or life; and hence a false representation that defendant had not had an attack of epilepsy for eight years is not sufficient to warrant annulling her marriage to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, §§ 115-117.]

2. SAME—WHAT LAW GOVERNS.

Whether alleged facts constitute fraud sufficient to warrant annulment of a marriage must be determined by the law of the state in which the suit to annul is brought.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 3.]

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; W. M. McEwen, Judge.

Action by James A. Lyon against Susanne B. Lyon for the annulment of a marriage. From a decree of the Appellate Court, affirming an order of the superior court sustaining a demurrer to the bill and dismissing it for want of equity, plaintiff appeals. Affirmed.

Appellant filed his bill in the superior court of Cook county for the annulment of his marriage with appellee, alleging that on September 18, 1903, at Richford, Tioga county, N. Y., he agreed to marry her on June 15, 1904; that he had known her for 16 years prior to their engagement of marriage, and about 15 years before had learned that she was subject to attacks of epilepsy; that at the time of their engagement, with the intention of causing him to enter into it and to marry her, she falsely and fraudulently represented to him that she had been entirely cured of her epilepsy, and had had no attacks thereof for more than 8 years; that, relying upon said representations and believing them to be true, by reason thereof he entered into said engagement, and on June 15, 1904, still relying upon the truth of said representations, he married her at Richford,

Tloga county, N. Y.; that they immediately came to Chicago to live, and lived together as husband and wife until March 28, 1905; that on April 7, 1905, he learned for the first time that the representations made to him were false, and that she had been an epileptic, subject to fits occurring at irregular, though frequent, intervals, for more than 10 years immediately prior to their marriage, and from that time he has not cohabited with her as her husband; that about 6 weeks after their arrival in Chicago she had an attack of epilepsy, and has since suffered from several similar attacks, and that, still believing in the truth of her representation, he caused her to receive medical treatment, but she became worse, and on March 30, 1905, suffered from three attacks of epilepsy, and is incurable; that, having learned of the falsity of her representations, he ceased to live with her, and on April 9, 1905, took her to the home of her parents, in Richford, N. Y., where she now is; that, had he known her true condition, he would not have entered into said engagement or married her; that the statutes of New York in force at the time of the engagement and marriage, and now, provide that in case the consent of one of the parties to a marriage was obtained by fraud such marriage may be annulled, and an action for that purpose may be maintained at any time by the party whose consent was so obtained, unless the parties to said marriage have cohabited with full knowledge of such fraud upon the part of the innocent party to the contract; that appellant's consent to said marriage was obtained by the appellee's fraud in making said representations and in concealing from him the knowledge of her epileptic condition; and that by reason thereof said marriage is voidable. The prayer was that the marriage be decreed to be null and void from the beginning. Upon demurrer the bill was dismissed for want of equity. The decree was affirmed by the Appellate Court, and an appeal is now prosecuted to reverse the judgment of affirmance.

Clark & Clark, for appellant. James P. Harrold (Theodore R. Tuthill, of counsel), for appellee.

DUNN, J. (after stating the facts as above). Appellant's claim is that the rights of the parties are to be determined by the law of New York, where the marriage was contracted, and that by such law this marriage was subject to be annulled for fraud. Fraud in the state of New York is not different, we presume, from fraud elsewhere. If the bill does not charge conduct which we would hold fraudulent, we cannot assume that the courts of another state would do so. The bill alleges that the statutes of New York provide that the marriage may be annulled if appellant's consent was obtained by fraud. Our inquiry is, therefore, whether the bill shows that appellant's consent was obtained

by fraud, and the allegation will be construed according to the law of Illinois. It is not alleged that any different definition of fraud has been established by statute or prevails in New York, or that the statute declares that a marriage may be annulled for a misrepresentation in regard to the health of one of the parties. The fraud charged is that the appellee falsely represented that she was entirely cured of her epilepsy and had no attack of it in eight years. So far as her being entirely cured was concerned, that was essentially a matter of judgment and opinion. The false representation of fact was that she had had no attack of the disease for eight years. "As to fraud, in order to vitiate a marriage, it should go to the very essence of the contract. * * * Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament cannot, therefore, vitiate the contract. Caveat emptor is the harsh, but necessary, maxim of the law." Schouler on Domestic Relations, par. 23. "In that contract of marriage which forms the gateway to the status of marriage, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or, indeed, generally, from fraudulent practices in respect to the character, fortune, health, does not render void what is done. To this conclusion the authorities all conduct us, but different modes of stating the reason for it have been adopted. Thus, the qualities just mentioned are said to be accidental, not going to the essentials of the relation; and Lord Stowell, after remarking that error about the family or fortune of an individual, though produced by disingenuous representations, does not affect the validity of the marriage, adds: 'A man who means to act upon such representations should verify them by his own inquiry. The law presumes that he used due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for relief of a blind credulity, however it may have been produced.'" 1 Bishop on Marriage and Divorce, par. 167. "It is well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as to his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." 2 Kent's Commentaries, 77. "The degree of fraud sufficient to vitiate an ordinary contract will not afford sufficient ground for the annulment of a marriage. It is not sufficient that the party relied upon the false representations and was deceived, or that important and essential facts were concealed with intent to deceive. The marriage relation is a status controlled and regulated by considerations of public policy, which are

paramount to the rights of the parties. * * * The fortune, character, and social standing of one of the parties are not essential elements of marriage, and it is contrary to public policy to annul marriages for fraud or misrepresentation as to such personal qualities." 19 Am. & Eng. Ency. of Law (2d Ed.) 1184.

Concealment of the fact that the woman had previously been insane has been held insufficient to justify a decree of nullity of marriage. *Cumington v. Belchertown*, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131. So has concealment of kleptomania. *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559. Also concealment by a woman of unchastity prior to marriage. *Leavitt v. Leavitt*, 13 Mich. 452; *Allen's Appeal*, 99 Pa. 196, 44 Am. Rep. 101; *Varney v. Varney*, 52 Wis. 120, 8 N. W. 739, 38 Am. Rep. 726. Also concealment of a prior marriage. *Donnelly v. Strong*, 175 Mass. 157, 55 N. E. 892; *Fisk v. Fisk*, 6 App. Div. 432, 39 N. Y. Supp. 537. Also concealment of the birth of an illegitimate child prior to marriage. *Farr v. Farr*, 2 MacArth. (D. C.) 35; *Smith v. Smith*, 8 Or. 100. The fraudulent representations for which a marriage may be annulled must be of something essential to the marriage relation—of something making impossible the performance of the duties and obligations of that relation, or rendering its assumption and continuance dangerous to health or life. *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440; *Ryder v. Ryder*, 66 Vt. 158, 28 Atl. 1029, 44 Am. St. Rep. 833; *Cumington v. Belchertown*, supra. The case of *Gould v. Gould*, 78 Conn. 242, 61 Atl. 604, 2 L. R. A. (N. S.) 531, is not inconsistent with these rules, though it was there held that concealment of epilepsy was such a fraud as would justify a decree of divorce under the statute of that state forbidding marriage or sexual intercourse by or with an epileptic under penalty of imprisonment. The court said that a fraud was accomplished "whenever a person enters into that [marriage] contract knowing that he is incapable of sexual intercourse, and yet, in order to induce that marriage, designedly and deceitfully concealing that fact from the other party, who is ignorant of it and has no reason to suppose it to exist. Whether such incapacity proceeds from a physical or a merely legal cause is immaterial. The prohibition of

the act of 1895 fastened upon the defendant an incapacity which, if unknown to the plaintiff and by him fraudulently concealed from her with the purpose thereby to induce a marriage, made his contract of marriage, in the eye of the law, fraudulent. * * * The superior court has power to pass a decree of divorce from the bonds of matrimony in favor of a party to a marriage not an epileptic, who has been tricked into it by the other party, who was an epileptic, through his fraud in inducing a belief that he was legally and physically competent to enter into the marital relation and fulfill all its duties, when he knew that he was not." The Supreme Court of New York, in *Di Lorenzo v. Di Lorenzo*, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. Rep. 609, held that the representation by a woman to a man that she had given birth to a child of which he was the father and which she purported to exhibit to him, when in fact she had not given birth to a child, was such fraud as to justify the annulling of a marriage brought about thereby. This representation is similar in kind to that of a pregnant woman, who induces a man with whom she has had illicit intercourse to marry her by the false representation that he is the father of her child. But such representation, under such circumstances, does not constitute fraud for which the marriage will be annulled, and we regard the decision in the *Di Lorenzo* Case as opposed to the weight of authority. *Franke v. Franke* (Cal.) 31 Pac. 571, 18 L. R. A. 375; *Foss v. Foss*, 12 Allen (Mass.) 26; *Crehore v. Crehore*, 97 Mass. 330, 93 Am. Dec. 98.

The statute of New York mentioned in the bill merely declares the law as it exists in Illinois—that a marriage procured by fraud may be annulled. The kind and degree of evidence required for such purpose must be determined by the court in which the suit is brought, according to the law of the forum. The bill proceeds on the theory that the appellant's consent to the marriage was obtained by fraud, and sets out the facts constituting the fraud. Whether those facts constitute fraud must be determined by the law of the forum, and the superior court did not err in sustaining the demurrer to the bill. Its decree, and the judgment of the Appellate Court in affirmance thereof, will be affirmed.

Judgment affirmed.

(230 Ill. 505)

PEOPLE ex rel. McCULLOUGH, Auditor, v.
MILWAUKEE AVENUE STATE
BANK et al.

(Supreme Court of Illinois. Oct. 23, 1907. Re-
hearing Denied Dec. 11, 1907.)

**BANKS AND BANKING — RECEIVERS IN PRO-
CEEDINGS FOR DISSOLUTION—SUFFICIENCY OF
BILL.**

Under Hurd's Rev. St. 1905, c. 16a, § 11, which provides that the Auditor of State shall give 30 days' notice to the president of a bank to have the impairment of its capital stock made good by the stockholders, or a reduction of the stock, and that, should neither be done, the Auditor shall sue the stockholders, or, if the conditions so warrant, have a receiver appointed to wind up the affairs of the bank, a bill by the Auditor for the appointment of a receiver is insufficient if it does not allege that the Auditor gave the proper 30 days' notice, since the giving of the notice is a condition precedent to both the suit against the stockholders and the bill for a receiver.

Hand, C. J., and Vickers, J., dissenting.

Appeal from Circuit Court, Cook County;
Thomas G. Windes, Judge.

Action for the appointment of a receiver by the people, on the relation of James S. McCullough, Auditor of State, against the Milwaukee Avenue State Bank and others. From a decree dismissing the bill, complainant appeals. Affirmed.

On September 12, 1906, the people of the state of Illinois, on the relation of James S. McCullough, Auditor of Public Accounts of the state of Illinois, filed a bill in the circuit court of Cook county against the Milwaukee Avenue State Bank and others for the appointment of a receiver, for the purpose of the dissolution of said bank and the winding up of its affairs, and for injunction. The bill, which is verified, alleges, among other things, that the Milwaukee Avenue State Bank is a corporation organized under an act of the General Assembly of the state of Illinois entitled "An act concerning corporations with banking powers," passed and adopted in the year 1887 (Hurd's Rev. St. 1905, c. 16a); that said bank was organized with a capital stock of \$250,000 about the year 1893 for the purpose of doing a general banking business, and that it has been engaged in said business in the city of Chicago for more than ten years last past; that said bank, on August 6, 1906, was legally indebted to its various depositors in about the sum of \$4,000,000, and that it was the owner and in possession of a large amount of property, both real and personal; that on the date last mentioned Paul O. Stensland was the president of said bank, and had acted in that capacity for many years, and that while in the management and control of said bank he fraudulently and unlawfully appropriated, from time to time, large sums of money and other valuable property belonging to said bank to his own personal use; that said Stensland made or caused to be made false

entries on the books of said bank, and turned over to said bank many forged and worthless notes and obligations for large amounts, aggregating \$500,000; that Henry W. Hering was cashier of said bank, and knew of such illegal practices, and that while acting as cashier of said bank he willfully made to the Auditor of Public Accounts of the state of Illinois, and caused to be published, false and fraudulent statements as to the resources and liabilities of said bank; that the directors of said bank, if not actually cognizant of the misdoings and defalcations of said Stensland, were grossly and culpably negligent in the performance of their duties, and by reason thereof are liable to the depositors and creditors of said bank for all losses sustained; that said bank is absolutely insolvent; that on the date last mentioned the actual value of all the assets of said bank was less than \$3,788,000, and that the total liabilities of said bank to its depositors and creditors is \$4,240,465.87, and that by reason of the said misappropriations the capital, surplus amounting to \$250,000, and a large amount of undivided profits have been wholly lost, and in addition thereto the assets of said bank have been encroached upon to the extent of about \$450,000; that on August 6, 1906, the assets of said bank included loans then outstanding, made to various individuals, firms, and corporations, largely in excess of 10 per cent. of the amount of its capital stock, in violation of the provisions of section 10 of the act heretofore mentioned, and that 13 of such loans so carried aggregate the sum of \$763,888.25; that certain persons (naming them) are the stockholders in said bank, setting out the number of shares owned by each, and the par value of the same. The bill further alleges that on said 6th day of August the said Auditor, by virtue of section 8 of the act aforesaid, began an examination of the affairs of said bank and caused the doors thereof to be closed, posting a notice thereon stating, in substance, that the bank was in the hands of the Auditor of Public Accounts for the purpose of examination, and alleges that as a result of such examination it appears that the capital stock of said bank has become impaired, that said bank is absolutely insolvent, and that, although a considerable time has elapsed since the result of such examination has become a matter of public knowledge, the officers and stockholders of said bank have made no effective effort to supply the necessary funds to meet its obligations. The bill further alleges that on August 7, 1906, while said bank was in charge of said Auditor for the purpose of examination, and before it had in fact ceased doing business, and before it was definitely ascertained that said bank was insolvent, a bill was filed in the superior court of Cook county by Moll Jakubowitz and Rosie Siegelman against the said bank, which alleges, among other things, that they brought the suit on be-

half of themselves and all the other creditors who might choose to join in and contribute to the expense of the same; that said bank is a banking corporation organized under the laws of the state of Illinois, and that defendant conducted a bank upon Milwaukee avenue, in the city of Chicago, Cook county, Ill.; that Rosie Siegelman is a creditor and depositor in said bank in the sum of \$160, and that Mollie Jakubowitz is a creditor and depositor in said bank in the sum of \$132.80, and that said bank is indebted to them in the respective sums aforesaid; that on August 6, 1906, said bank became financially embarrassed and ceased to do business; that its doors are now closed to the public, and complainants are informed that its officers have left the city of Chicago for parts unknown, and have ceased to take any charge of the said business of said bank, or have any connection therewith; that said bank is hopelessly insolvent, and is indebted to persons in a sum largely in excess of its assets; that the creditors of said bank number more than 20,000 persons, and are largely persons of small means; and that, unless a competent person is appointed receiver to take charge of and conserve the assets of said bank, they and other creditors of said bank will suffer irreparable injury. The bill makes the said bank defendant and prays for the appointment of a receiver, with power to collect and distribute the said assets under the direction of the court. In support of the bill is the affidavit of Mollie Jakubowitz stating that the same is true in substance and in fact, except as to the matters therein stated upon information and belief, and as to those matters she believes them to be true, and that, unless a receiver is appointed without notice, affiant and other complainants and creditors of said bank will sustain irreparable injury.

The bill herein further alleges that the verification of said bill was wholly insufficient, and that the said superior court, without other evidence of the truth of the allegations of said bill, and without jurisdiction to grant the relief prayed for therein, on the filing of the said bill, ordered that one John C. Fetzer be appointed as such receiver, upon the complainants entering into a bond to defendant in the sum of \$10,000, and upon the said receiver giving bond in the sum of \$1,000,000 for the faithful performance of his duties; that it was further ordered that defendant deliver to said receiver all books of account, securities, and evidences of indebtedness and effects belonging to it, and that said Fetzer from time to time make report to the court of his acts and doings as such receiver; that afterward, on August 8, 1906, the said bill in said superior court was amended by inserting therein a prayer for the dissolution and closing up of the affairs of said bank, and that said receiver should have authority to do all things necessary to the closing up of its affairs, and on the same day said su-

perior court entered an order authorizing the said receiver to employ such help as he deemed necessary, and to do all the necessary and proper acts to conserve, protect, and collect the assets of said corporation; that on the 10th day of August, 1906, the superior court entered an order referring the said cause to the master in chancery of said court for the examination of such persons as may be produced concerning the assets of said corporation; that afterwards, on August 15, 1906, the bill in said superior court was again amended by setting out the insolvent condition of said bank, naming the stockholders, with the number of shares owned by each, alleging that the liabilities of said bank were from \$3,000,000 to \$5,000,000, and that said stockholders were individually liable to said creditors for said amount, and made said stockholders parties defendant; that afterwards, on August 17, 1906, the said court entered an order directing said John C. Fetzer to pay a dividend of 20 per cent. on the amount of the verified claims filed with him, out of the assets in his hands, and ordering him to notify all persons claiming to be creditors of said bank to file their claims with him, duly verified, within 30 days from the date aforesaid; that on the date aforesaid a bill was filed in the said superior court by the Polish National Alliance of the United States of America against the said Milwaukee Avenue State Bank, claimed to be filed in support of the bill of Mollie Jakubowitz and Rosie Siegelman against said bank, which alleged, among other things, that the said Polish National Alliance was a fraternal beneficiary society organized under the laws of Illinois; that it had collected from its members assessments amounting to \$48,427.60 for the payment of death claims, and that said fund had been deposited in the Milwaukee Avenue State Bank to the credit of said Polish National Alliance, and was on deposit in said bank on August 6, 1906; that payments of death benefits are made to beneficiaries by means of checks, and that since the appointment of said receiver in said superior court certain checks drawn by said Polish National Alliance upon said fund in said bank, not having been paid, have been protested, and certain other checks have been tendered back to said Polish National Alliance by the holders thereof, who were unable to obtain payment thereon at said bank; that it has brought suit in said superior court against said bank to recover the said sum so deposited and due it from said bank; that said funds collected and held for the purpose above set forth are trust funds and wholly exempt from the claims of the creditors of said bank—and prays, among other things, that the receiver appointed be decreed to pay to said Polish National Alliance the amount due it from said bank as a preferred claim. On the same day the said superior court entered an order consolidating the said

cause with the case of Jakubowitz and Siegelman against said bank, and thereafter, on August 23, 1906, entered an order authorizing the said receiver to permit certain debtors of the said bank to offset the amount of their deposits in said bank against said claims, and authorizing said receiver to accept the balance due said bank and surrender and cancel the notes and evidences of indebtedness held against them.

The bill further alleges that said Fetzer, upon the entry of the order of said court appointing him receiver, gave the bond required of him, and thereupon, claiming to be receiver of said bank, proceeded to take possession of said property and assets of said bank and oust said Auditor, although he was in possession for the purpose of ascertaining the condition of said bank, that he might be enabled to take such action as was necessary for him to take under the provisions of said act hereinbefore referred to; that said Fetzer proceeded to, and is now proceeding to, collect the assets of said bank and to convert certain other assets into money and pay out the moneys of said bank and to generally assume charge of said property; that he has employed a large number of persons to assist him in the performance of his duties, and has incurred, and is now incurring, a large expense, and that, acting under the orders of said superior court, he is settling and compounding claims held by said bank and assuming all powers of a receiver legally appointed; that he claims to be a receiver of said bank by virtue of the orders entered on the filing of the original bill in said superior court and of the said bill of the Polish National Alliance; and the bill herein alleges that said bills are wholly without equity, and that said superior court acted without jurisdiction in entertaining the bills aforesaid, in the appointment of said receiver, and in entering the subsequent orders. The bill further alleges that there is great danger that the various creditors of said bank will institute attachment and other legal proceedings, to the irreparable injury of the remaining creditors, unless a receiver is appointed forthwith, and that to prevent further losses, waste, and depreciation it is imperative that said receiver be appointed; that said Fetzer is well qualified to perform the duties that devolve upon the receiver of said bank, and complainant believes that his appointment will be for the benefit of the depositors and creditors of said bank. The Milwaukee Avenue State Bank and its stockholders, the complainants in the bills filed in the superior court, John C. Fetzer, and others are made defendants. The bill prays for the appointment of a receiver for the purpose of dissolving said bank and the winding up of its affairs, and for an injunction restraining said Fetzer from further proceeding to administer upon said estate, and that he be ordered to surrender possession of said bank and turn over all the assets in his possession to the receiver

appointed by the circuit court. The bill was later amended from time to time, making additional persons parties defendant.

On October 23, 1906, the court entered an order denying the motion of complainant for the appointment of a receiver, and at the same time denied the motion of the Polish National Alliance to dismiss the bill for want of jurisdiction, and also its motion to transfer the said cause to the superior court. Practically all of the defendants interposed general demurrers to the bill, and on April 17, 1907, upon a hearing, the court entered an order sustaining each of them and dismissing the bill for want of equity. From the decree complainant appeals to this court, and contends that the court erred in sustaining the demurrers and in dismissing the bill.

W. H. Stead, Atty. Gen., and Thomas E. Dempcy (W. H. Boys, of counsel), for appellant. Archibald Cattell and David F. Matchett for appellee Milwaukee Avenue State Bank. Joseph Weissenbach and Hiram T. Gilbert, for appellee John C. Fetzer. Weissenbach & Melvan, for appellees Jakubowitz and others. Henry S. Wilcox (Jesse Wilcox, of counsel), for appellee Frank R. Crane. Arthur W. Underwood and Goodrich, Vincent & Bradley, for appellees Peabody, Cooper, and Pringle.

SCOTT, J. (after stating the facts as above). The Auditor of Public Accounts contends that he was empowered to file the bill herein by section 11 of chapter 16a, Hurd's Rev. St. 1905, which, so far as material, is as follows: "Should the capital stock of any bank organized under this act become impaired the Auditor shall give notice to the president to have the impairment made good by assessment of the stockholders or a reduction of the capital stock of such bank, if the reduction should not bring the capital below the provision of this section; and if the capital stock of said bank shall remain impaired for thirty days after notice by the Auditor, he shall have power, and it is hereby made his duty to enter suit against each stockholder in the name of the people of the state of Illinois, for the use of said bank; for his or her pro rata proportion of such impairment, and when collected shall pay over the amount thereof to said bank, and the judgment in such case shall be for the amount claimed, with all costs and reasonable attorney's fees, which fees shall be fixed by the court, or he may, in his discretion, file a bill in the circuit court of the county in which said bank is located, in the name of the people of the state of Illinois, against said bank and its stockholders, for the appointment of a receiver for the winding up of the affairs of said bank. And said court, upon the presentation of said bill, and upon being made satisfied that the capital of said bank has become impaired, shall immediately appoint a competent and disinterested per-

son as such receiver, and shall determine and fix his bonds, and shall prescribe his duties. And said cause shall proceed as other cases in equity."

The arguments of counsel have taken a wide range. We find it necessary to discuss but one of the questions presented. The bill does not aver that the Auditor gave notice to the president of the bank to have the impairment of the capital stock made good by the assessment of the stockholders or otherwise, and it is the view of the Attorney General that this notice is not necessary when the Auditor elects to proceed in equity and not at law; in other words, that the giving of the notice is not a condition precedent to filing a bill by the Auditor "for the appointment of a receiver for the winding up of the affairs of said bank." If this construction be correct, the Auditor would have the right to file the bill, and it would become the duty of the court to appoint a receiver, however trifling the impairment of the capital might be, without the stockholders having had an opportunity to make good the impairment. The discretion lodged in the Auditor as to the method by which he shall proceed is an arbitrary one, and, when the time for its exercise arrives, the manner of its exercise does not depend upon the existence or nonexistence of facts which lead him to believe that the financial condition of the bank and its stockholders is such that the impairment of the capital stock cannot be made good, or that the bank is insolvent, or that the bank is about to become insolvent, or that the bank is of doubtful solvency. We think the plain intent of the statute is that, if the Auditor finds the capital stock impaired, he shall give a 30-day notice to the president, or if, as here, it is not feasible to do that, then to the officer or officers upon whom devolves the performance of the duties of the president, and, in the event that the impairment of the capital stock is not made good during that period, then the Auditor may elect to proceed at law or in equity, as he sees fit. We think it was not the purpose of the Legislature to make it optional with him to give the 30-day notice and proceed at law after the expiration of that period, or to proceed in equity without giving any notice.

It is urged that this construction leaves the Auditor without power to secure the appointment of a receiver for a period of 30 days in cases (such as the present) where it was practically certain that the stockholders would not make good the impairment of the capital stock, and that this would expose the creditors and stockholders to the danger of greater loss than was made necessary by conditions existing when the Auditor first ascertained that the capital stock had been impaired. This argument, while persuasive, is, we think, one that should be addressed to the Legislature, rather than to the courts. The present General Assembly has passed an

act amending section 11, *supra*. *See*, Laws 1907, p. 52. This amendment, if ratified by a vote of the people, will eliminate the question we have been discussing in litigation arising after it takes effect. The amendment does not give to the Auditor the power to obtain the appointment of a receiver merely upon discovering an impairment of the capital stock, but provides that if it appears to the Auditor that the conditions are such that the impairment cannot be made good, or that the business of the bank is being conducted in an illegal, fraudulent, or unsafe manner, he may at once file a bill for a dissolution of the corporation and the appointment of a receiver. This amendment, which is remedial in character, is, we think, in itself an indication that the Legislature did not regard the present law as conferring the right which is claimed for the Auditor. It is perhaps true that the interests of stockholders and creditors would be better conserved if we could give to the statute now in force the construction for which the Attorney General contends; but that we cannot do without disregarding the plain provisions of the act.

We are of the opinion that the demurrers were properly sustained, for the reason that it did not appear from the bill that the notice required by section 11, *supra*, had been given. Accordingly the decree of the circuit court will be affirmed.

Decree affirmed.

HAND, C. J. and VICKERS, J. (dissenting). We do not concur in the opinion of the majority of the court in this case. The conclusion is reached by construing section 11, c. 16a, Hurd's Rev. St. 1905, as requiring the Auditor to give the president of any bank organized under the state banking act, the capital stock of which has become impaired, 30 days' notice before filing a bill in equity against such bank and its stockholders for the appointment of a receiver and for winding up the affairs of such bank. The section of the banking act under consideration is set out in full in the foregoing opinion and need not be here repeated. By reference to said section it will be seen that provision is made for an action at law against the stockholders and an action in equity against the bank and the stockholders. When the entire section is carefully analyzed, marked differences will appear in the two remedies, both in the means to be employed and the objects to be attained. In the action at law the suit is against each stockholder for his pro rata share of the impairment of the capital stock, and the judgment, which includes "all costs and reasonable attorney's fees" to be taxed by the court, is for "the use of said bank." In these suits against the stockholders, which apparently must be several, and not one joint action against all, the bank, as a corporate entity, is the real beneficial plain-

5. It is clear to our minds that in providing this legal remedy against the stockholders was intended that the Auditor should resort to it in all cases where the conditions are such that it would be efficacious. It is not applicable to a case of insolvency, where the only thing that can be done is to throw the institution into involuntary liquidation. For this purpose the equitable remedy is provided. The bill in equity is not a suit for the use of the bank; but its manifest purpose is to take the control of the bank out of the hands of its officers and place it under the direction of a court of equity, through its receiver, so that its assets may be collected and distributed to the creditors.

It is not to be presumed that the more drastic remedy in equity would be resorted to in any case where the remedy at law would be adequate. The Legislature has left the selection of the remedy to the discretion of the Auditor. It seems that the vesting of this power in the Auditor has excited the apprehension of the majority of this court lest his discretion might be abused and a bill be filed for a receiver when only a slight impairment of capital existed. In our opinion this argument is unsound. Experience has shown that discretion vested in executive officers of the government is not abused more frequently than when vested in judicial officers. Under section 5434 of the Revised statutes of the United States of 1878 [U. S. Comp. St. 1901, p. 3673], and the amendments thereto, the Comptroller of the Currency is given much greater power in respect to national banks than section 11 of our statute confers on the Auditor in regard to state banks. Under the federal law the Comptroller is authorized, when he becomes satisfied that a national bank is not complying with the law by paying its circulating notes, to appoint a receiver and proceed to wind up the affairs of the bank. The Comptroller is in such a case vested with power far greater than is conferred on the Auditor under the statute, yet we have to learn, in the more than 30 years that this power has resided in the Comptroller, of a single instance where it has been unwisely or capriciously exercised. If the Comptroller can thus be safely intrusted with such a power over national banks, is it reasonable that the Legislature of Illinois would be deterred by the possibility suggested in the majority opinion from conferring the limited and guarded power on the Auditor? We think not.

In our opinion the lawmaking department intended to pass a workable banking law for the government of state banks, and that in the system devised it was intended that the Auditor should exercise powers of the same general character over state banks that the Comptroller exercises over national banks. In a case such as the one presented here, where the president of the bank is a defaulter and is a refugee from criminal jus-

tice, it is idle to say the Auditor must give 30 days' notice before he can file a bill to have a receiver appointed. The facts recited in the bill in this case furnish a striking illustration of how the rights of creditors may be imperilled by so construing the statute as to compel the Auditor to stand idly by for 30 days after he knows the bank is insolvent, thus allowing time enough for the defaulting and dishonest bank officials to complete the work of devastation before any restraining action can be taken. Here the bill charges that the president of the bank, with the aid and connivance of the cashier, had misappropriated about \$1,000,000 of the bank's assets, and, when unable longer to conceal the shortage by false and fictitious bookkeeping, the president fled the country, and when last heard of was in hiding in Morocco, Africa. It seems to us that the Legislature must have had in contemplation such emergencies as exist here, and that to meet them it was intended that the Auditor should have power to proceed at once, and without notice, to file a bill and have a receiver appointed. If it be said that the creditors may proceed by bill on their own account and secure the same relief, we reply that this argument proves too much. If good, it affords a reason for dispensing with state supervision over state banks entirely. If creditors can take care of themselves, why give the Auditor any power to act in any case, either with or without notice? It is reasonable to suppose that the Legislature intended to safeguard the rights of depositors in state banks by conferring a substantial and beneficial power on the Auditor to do something on behalf of the creditors that they could not do for themselves. Creditors may file a bill, it is true; but before doing so they must obtain judgments and have execution returned nulla bona, and it was, no doubt, in part to obviate the delay incident to such a course that the power was conferred on the Auditor to proceed at once when, in his discretion, the safety of depositors indicated such course. The view of the majority virtually defeats this salutary purpose by tying the hands of the Auditor until action on his part will become, in many cases, wholly barren of results.

In the view we take of this statute the 30 days' notice has no application to the suit in equity but is limited to actions at law against the stockholders. This section of the statute is remedial, and was adopted by the people for the purpose of placing state banks under the control of the state, in order that they might merit and enjoy the confidence and patronage of the public to the same extent and for the same reasons that national banks do. The opinion of the majority, it seems to us, takes away all the safeguards that the Legislature intended to throw around these institutions, and results at once in a great injustice both to the banks and their

patrons. In construing a statute the intent of the Legislature is the controlling consideration. In presenting these dissenting views we have sought to point out briefly some of the reasons which seem to forbid our attributing to the Legislature an intent to do a thing so unreasonable and inconsistent as requiring 30 days' notice before filing a bill for a receiver. The language of the section does not imperatively demand such construction, and since, as we have sought to show, such construction tends to encourage the very evil intended to be remedied, the construction adopted by the majority should be rejected, and one adopted which will accomplish, and not defeat, the legislative intent.

(230 Ill. 525.)

FOSTER v. OBERREICH.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 5, 1907.)

1. FRAUD—DECEIT—CAUSE OF ACTION—ELEMENTS.

The elements of a cause of action for deceit are representation, falsity, scienter, deception, and injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 1-6.]

2. APPEAL—PLEADING—REVIEW.

Where no plea was filed to a declaration, it stands on the same footing on appeal as if it had been attacked by general demurrer.

3. FRAUD—PLEADING—COMPLAINT—SUFFICIENCY.

A count for deceit alleged that plaintiff bought a note and trust deed of defendant for a certain price, not stated, and that defendant represented that the trust deed, which purported to be signed by H., conveyed certain real estate described, as security for the note; that the note was in fact fraudulent and of no value; and that H. had no title to the land described in the deed by reason of which plaintiff was deceived and damaged in the sum of \$5,000. *Held*, that such complaint, though failing to state the consideration paid for the note and deed, sufficiently stated a cause of action as against attack for the first time after judgment by default under Starr & C. Ann. St. 1896, c. 7, § 6, providing that a judgment shall not be arrested or reversed for any insufficient pleading, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, §§ 37, 38.]

4. PLEADING—DEFECT—CURATIVE ACT.

Starr & C. Ann. St. 1896, c. 7, § 6, providing that no judgment shall be arrested, reversed, or impaired for defects in the pleadings, proceedings, or records, consisting of mispleading, insufficient pleading, etc., does not cure matters of substance, but only obviates defects in form.

Hand, C. J., and Cartwright and Dunn, JJ., dissenting.

Appeal from Appellate Court, First District, on Writ of Error to Circuit Court, Cook County; John Gibbons, Judge.

Action by Ida Oberreich against Frank Foster. From a judgment for plaintiff affirmed by the Appellate Court, defendant appeals. Affirmed.

Poynton & Poynton and Lyman M. Paine, for appellant. Cyrus Heren and N. A. Stern (A. C. Allen, of counsel), for appellee.

VICKERS, J. Ida Oberreich brought this action against Frank Foster in the circuit court of Cook county. Foster did not appear, and a default was entered against him, whereupon a jury was impaneled and assessed the damages at \$2,130. Foster removed the case to the Appellate Court for the First District, and the judgment was there affirmed. He has appealed to this court, and assigns as error that the declaration is wholly insufficient to support the judgment.

We are of the opinion that the first count of the declaration cannot be sustained. The second count, omitting the mere formal parts thereof, is as follows: "And whereas also, afterwards, on, to wit, December 17, 1902, at Chicago, in consideration that the plaintiff, at the like request of the defendant, had then and there bought of the defendant a certain promissory note and trust deed at and for a certain other price then and there agreed upon between the plaintiff and defendant, he, the defendant, undertook and then and there promised the plaintiff that the last-mentioned promissory note and trust deed, at the time of said sale and purchase thereof, was of great value and merchantable, yet the defendant, well knowing that said promissory note and trust deed was fraudulent and of no value, deceived the plaintiff in causing her to purchase the same, in this, to wit: That the said last-mentioned promissory note purported to be signed by Frank C. Huston and was made payable to the order of the defendant, Frank Foster, and that said last-mentioned trust deed purported to be given conveying lots 3, 4, 5, 6, and 7, in block 1, in the subdivision, etc., of section 1, etc., in Cook county, Ill., and which trust deed purported to be and was so represented to this plaintiff as security for the last-mentioned note, and was purported to be signed by the said Frank C. Huston. And, as plaintiff avers, the said Frank C. Huston had no title whatsoever in the premises above described, yet the defendant, well knowing that the said promissory note and trust deed was fraudulent and worthless and of no value, deceived the plaintiff in causing her to purchase the same, and that said Frank C. Huston had no title thereto, whereby the said promissory note and trust deed then and there were valueless and fraudulent, to the damage of the plaintiff of \$5,000, and therefore she brings this suit."

This count of the declaration contains, in substance, all of the essential elements of a cause of action in case for fraud and deceit. The elements of such cause of action are representation, falsity, scienter, deception, and injury. In Brackett v. Griswold, 112 N. Y. 454, 20 N. E. 376, speaking of the necessary

elements of an action for fraud and deceit, it was said: "There must have been a false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff and which came to his knowledge, and in reliance upon which he in good faith parted with his property or incurred the obligation which caused the injury of which he complains." When analyzed, the above count avers that appellee bought a promissory note and trust deed of appellant, and that appellant represented that the trust deed, which purported to be signed by Frank C. Huston, conveyed certain real estate described in the count as security for said promissory note, that the note was in fact fraudulent and of no value, that Frank C. Huston had no title to the real estate mentioned in the trust deed, and that appellee was deceived and damaged to the amount of \$5,000. It will be noted that in this count the want of value in the note grew out of the fact that Huston had no title to the real estate mentioned in the trust deed.

No plea having been filed, this declaration can only be questioned for matter of substance. While the pleading is inartificially drawn, we are of the opinion that it states the substance of a cause of action, and that there are no defects in the second count that are not cured by section 6 of chapter 7, Starr & C. Ann. St. 1898, p. 390. The above statute provides that "judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the court, or upon confession *nisi dicat* or *non sum informatus*, or upon any writ of inquiry of damages, be reversed, impaired, or in any way affected, by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records, namely: * * * Fifth—For any mispleading, insufficient pleading, lack of color, miscontinuance, discontinuance or misjoining of the issue, or want of a joinder of the issue." While this statute does not extend to and cure matters of substance, yet where a pleading is good in substance, but only defective in form, the above statute cures the defect after judgment by default.

It is urged that the second count does not specifically charge that appellee paid any fixed amount for the note. This is true, but we do not regard it as essential to the count that the price paid for the property should be stated. It does appear by this count that a valuable consideration was given for the note and trust deed, and this is sufficient to uphold the declaration when the same is questioned after judgment by default.

Our conclusion is that the Appellate Court committed no error in holding the second

count sufficient, and its judgment is affirmed.
Judgment affirmed.

HAND, C. J., and CARTWRIGHT and DUNN, JJ. (dissenting). We are of the opinion that the second count does not state a cause of action. It contains no allegation of any false and fraudulent representation made by the defendant, and no allegation that the note was not merchantable and worth its face. It alleges that the defendant, "well knowing that said promissory note and trust deed was fraudulent and of no value," and "well knowing that the said promissory note was fraudulent and worthless and of no value, deceived the plaintiff in causing her to purchase the same." It does not, however, allege that the note and trust deed were in fact fraudulent, worthless, and of no value. It is as necessary to allege the fact as to allege the defendant's knowledge of it. The deceit charged is "that the said last-mentioned promissory note purported to be signed by Frank C. Huston, and was made payable to the order of the defendant, Frank Foster, and that said last-mentioned trust deed purported to be given conveying lots 3, 4, 5, 6, and 7, in block 1, in the subdivision, etc., of section 1, etc., in Cook county, Ill., and which trust deed purported to be, and was so represented to this plaintiff as, security for the last-mentioned note and was purported to be signed by the said Frank C. Huston." This is alleged, not as a representation made by the defendant, but as a fact. It is not stated that the note was not signed by Frank C. Huston and payable to the order of the defendant, or that the trust deed was not given, conveying the property mentioned as security for the note, and signed by Frank C. Huston. It is averred that Frank C. Huston had no title to this property; but there is no allegation that the defendant knew this fact, or made any representation in regard to it. There is no allegation that Frank C. Huston was not worth the amount of the note and personally liable thereon, nor is it alleged that the plaintiff gave any consideration for the note or parted with any property or has sustained any injury. The judgment was by default. "A default admits only what is averred in the declaration, and, if the facts alleged do not give a right of recovery, final judgment should not be entered against the defendant." *Schueler v. Mueller*, 193 Ill. 402, 61 N. E. 1044. The defects of the declaration being matters of substance, were not cured by the statute of amendments and jeofails. *Id.* Nor were they cured by the verdict of the jury assessing damages. No issue was made upon the declaration, and nothing was required to be proved, except the amount of plaintiff's damages.

(230 ILL. 486)

CITY OF AURORA v. SCHOBERLEIN.

(Supreme Court of Illinois. Oct. 23, 1907.)

1. APPEAL—QUESTIONS REVIEWABLE.

From a judgment of the board of fire and police commissioners of a city dismissing defendant as fire marshal he appealed to the circuit court. The city moved to dismiss the appeal on the ground that the act under which the appeal was taken was unconstitutional, but no bill of exception was taken at the time, and there was no extension of time for tendering such bill. The appeal was subsequently called to trial before another judge, and the order of dismissal reversed. *Held*, on appeal by the city, that the ruling on the motion to dismiss the appeal was not preserved by motion for a new trial before such other judge.

2. SAME—BILL OF EXCEPTIONS—NECESSITY.

Where an assignment of error is based on matters apparent on the face of the record, no bill of exceptions is necessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2417.]

3. COURTS — JURISDICTION — AGREEMENT OF PARTIES.

Jurisdiction of the subject-matter cannot be conferred by agreement of parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 76, 77.]

4. SAME—WAIVER.

A want of jurisdiction cannot be waived by failing to object.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 147-151.]

5. APPEAL—JURISDICTION.

The question of jurisdiction of the subject-matter may be raised for the first time on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1166-1178, 1375.]

6. COURTS—JURISDICTION—APPELLATE JURISDICTION.

Where want of jurisdiction of the subject-matter results from the unconstitutionality of an act purporting to confer jurisdiction, an Appellate Court has no power to decide the question, and an appeal is properly brought direct to the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 553.]

7. OFFICERS — PUBLIC OFFICERS — TITLE OR PROPERTY IN OFFICE.

There is no such thing as title or property in a public office, and the removal of an officer is not the exercise of judicial power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, §§ 1, 8, 9.]

8. CONSTITUTIONAL LAW.

By Const. art. 3, the power of government is divided into three distinct departments, the legislative, executive, and judicial, and it is provided that no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as thereafter expressly directed or permitted. By article 6, § 1, the judicial powers are vested in certain courts. *Held*, that to authorize an appeal there must be a decision by a judicial body, and Laws 1903, pp. 99, 100, § 18, purporting to allow an appeal to the circuit court from any order of a board of fire and police commissioners created under the act is unconstitutional and void, since such board could not exercise judicial power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 144.]

Appeal from Circuit Court, Kane County;
Charles A. Bishop, Judge.

Proceeding by the city of Aurora against Adam Schoberlein, as fire marshal. From the judgment, the city appeals. Reversed.

C. F. Olyne, N. J. Aldrich, and B. P. Alschuler, for appellant. Raymond & Newhall and F. R. Reid, for appellee.

CARTWRIGHT, J. On July 10, 1905, written charges against appellee, fire marshal of the city of Aurora, were presented to the board of fire and police commissioners of said city in pursuance of section 12 of an act entitled "An act to provide for the appointment of a board of fire and police commissioners in all cities of this state having a population of not less than seven thousand nor more than one hundred thousand, and prescribing the powers and duties of such board," in force April 2, 1903. Laws 1903, p. 99. After an investigation, at which appellee was heard in his own defense, the board found him guilty as charged and made an order removing him from office. Within 10 days after the entry of the order appellee filed with the secretary of the board a bond for an appeal to the circuit court of Kane county, in which said city is located, and on November 21, 1905, the secretary transmitted to the court a transcript of the proceedings before the board, in compliance with section 18 (page 100) of said act, which purports to allow an appeal to the circuit court from any order of a board created under the act. The record recites that appellant filed its motion to dismiss the appeal on the ground that section 18 is unconstitutional and void, and the court denied the motion. No bill of exceptions was taken at the time, and there was no extension of time for tendering such a bill. The appeal was subsequently called for trial before another judge, and the court ordered a trial de novo, against the objection of appellant, and called a jury against like objection. The files of the proceeding consisted of the written charges, the evidence produced before the board, and the order of removal, and the jury were sworn to try the issues joined and a true verdict render according to the evidence. Both parties introduced testimony relating to the charges, and at the conclusion of the evidence the court, on motion of appellee, instructed the jury to find him not guilty. A verdict of not guilty was thereupon returned, and the court entered an order reversing the order of the board removing appellee from office, and ordered the board forthwith to reinstate and re-employ him as fire marshal, and to allow him to perform the duties and services connected with that office and collect the salary and compensation allowed therefor, and also rendered judgment against appellant for costs. From that judgment an appeal was prosecuted to this court, and among other assignments of error is one that the circuit court had no jurisdiction of the subject-matter, and that section 18 of said

act authorizing an appeal is unconstitutional and void.

Counsel for appellee contend that we cannot entertain the appeal, for the reason that the question of the validity of the statute which purports to authorize an appeal to the circuit court was not preserved for review. They are correct in saying that the ruling of the court on the motion to dismiss the appeal was not preserved by the motion for a new trial before another judge. *Guyer v. Davenport, Rock Island & Northwestern Railway Co.*, 196 Ill. 370, 63 N. E. 732; *Cella v. Chicago & Western Indiana Railroad Co.*, 217 Ill. 326, 75 N. E. 373. There was a motion in arrest of judgment, which was general in terms and sufficient to raise the question of the jurisdiction of the court; but if there had been neither motion to dismiss nor motion in arrest of judgment the question of jurisdiction could be raised by assignment of error in this court. The assignment of error is based on matters apparent on the face of the record and requires no bill of exceptions. Jurisdiction of the subject-matter cannot be conferred by agreement of parties, and a want of jurisdiction cannot be waived by failing to object. The question of jurisdiction of the subject-matter may be raised for the first time on appeal or error. *Chicago Portrait Co. v. Chicago Crayon Co.*, 217 Ill. 200, 75 N. E. 473; 2 Cyc. 680; 12 Ency. of Pl. & Pr. 186. If the want of jurisdiction of the subject-matter results from the unconstitutionality of an act purporting to confer jurisdiction, an Appellate Court has no power to decide the question, and an appeal is properly brought direct to this court.

The board of fire and police commissioners of the city of Aurora is a branch of the executive department of the city government, and all the acts and powers of the board are purely ministerial or executive. The Legislature could not confer upon the board any judicial power whatever. By article 3 of the Constitution the powers of the government are divided into three distinct departments, the legislative, executive, and judicial, and it is provided that no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as thereafter expressly directed or permitted. By section 1 of article 6 the judicial powers are vested in certain courts, and a board of fire and police commissioners cannot assume or exercise any part of the judicial power. *George v. People*, 167 Ill. 447, 47 N. E. 741. Neither does the act purport to give to such boards any judicial power. They are authorized by statute to remove an officer for cause, after a hearing and an opportunity to make a defense, and that authority implies the power to judge of the existence and sufficiency of the cause; but there is no such thing as title or property in a public office, and the removal of an officer is not the exercise of judicial power.

Donahue v. Will County, 100 Ill. 94; *Stern v. People*, 102 Ill. 540. No right of life, liberty, or property was involved or adjudicated before the board in this case. Although the exercise of the power of removal involved judgment and discretion, it was not a judicial act. It has been said that where an act is the result of judgment and discretion and a decision upon the facts it is of a judicial nature; but there is a clear distinction between such acts and the exercise of judicial power which adjudicates upon and protects the rights and interests of individuals and to that end construes and applies the law.

An appeal is a step in a judicial proceeding, and in legal contemplation there can be no appeal where there has been no decision by a judicial tribunal. Two things are essential to an appeal, in its proper sense: First, the decision of a judicial tribunal; and, second, a superior court invested with authority to review the decision of the inferior tribunal. *Elliott on Appellate Procedure*, § 15. There have been cases where the jurisdiction of courts has been sustained in what were called appeals from inferior bodies having non-judicial powers, such as the case of establishing a road by commissioners involving an appraisal of damages (*County of Peoria v. Harvey*, 18 Ill. 364), or an assessment of damages for a right of way (*Joliet & Chicago Railroad Co. v. Barrows*, 24 Ill. 562), or the trial of a right to property levied upon and claimed by a third party before a sheriff and jury (*Rowe v. Bowen*, 28 Ill. 116), or an assessment of property for taxation (*Bureau County v. Chicago, Burlington & Quincy Railroad Co.*, 44 Ill. 229). The nature of such proceedings was explained in the case of *Maxwell v. People*, 189 Ill. 546, 59 N. E. 1101, where it was held that there can be no such thing as an appeal, in a legal sense, from a nonjudicial body to a court. It was said that appellate jurisdiction is the attribute of a court created for reviewing the decisions of inferior courts and not of inferior bodies nonjudicial in character, citing *People v. Cook Circuit Court*, 169 Ill. 201, 48 N. E. 717, and it was held that this court takes jurisdiction of what is called an appeal in cases relating to the revenue, in the exercise of its original jurisdiction conferred by the Constitution. If a controversy belongs to a class of cases of which a court has original jurisdiction, and it is brought before the court in the method prescribed by the Legislature, the court may take jurisdiction by virtue of its general powers; but so far as the remedy is judicial it begins with a presentation of the case to the court. The cases in which appeals from nonjudicial bodies to courts have been recognized have involved individual or property rights of which the court had jurisdiction under some other form of procedure, and belonged to classes of cases in which the court, acting judicially, could afford a remedy. This proceeding is

not of that character. The section in question purports to authorize an appeal from any order of the board by any person interested or affected, and if it should be sustained it would result in the circuit courts assuming and exercising executive powers. They would practically control the appointment and removal of members of fire departments in the cities of this state to which the act applies, by the exercise of judgment and discretion as to fitness and qualifications of individuals for positions in such departments, and not by adjudicating rights or applying the rules of law. That would be the exercise of executive powers, which the separation of departments of the government precludes the court from exercising.

The fact that courts have jurisdiction to issue the common-law writ of certiorari to determine whether inferior bodies have acquired jurisdiction to act and have proceeded according to law can have no influence upon the question here involved. The courts do not, by virtue of that writ, review the decisions of the inferior bodies or determine the facts. It has been held competent for the Legislature to confer on persons holding judicial offices the power to appoint officers whose selection or appointment cannot be classed as belonging to either of the departments of government (*People v. Morgan*, 90 Ill. 558; *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793); but we do not think there can be any doubt that officers of a fire department belong to the executive branch of the government.

Section 18, which purports to authorize an appeal to the circuit court from any order of a board of fire and police commissioners, is unconstitutional and void, and the judgment of the circuit court is reversed.

Judgment reversed.

(230 Ill. 521)

DARST v. KIRK.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

COURTS — JURISDICTION—AGREEMENT—ESTOPPEL.

Though, where the subject-matter is such that under no circumstances could the court otherwise have jurisdiction of the suit, it cannot be given by stipulation, yet, where the subject-matter is such that it only requires some equitable element to bring the suit within the jurisdiction of a court of equity, defendant may by his action estop himself to question such jurisdiction; so, where the parties to an action on contract, the subject-matter growing out of a partnership matter, stipulate that it be transferred to the chancery side of the docket, and the pleadings be so amended by filing a bill for an accounting, and this is done, defendant is estopped to raise the question of jurisdiction, on the ground that there was adequate remedy at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 75-81, 147-151.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Charles M. Walker, Judge.

Suit by Thomas E. Kirk against William Darst. From a judgment of the Appellate Court, affirming a decree for complainant, defendant appeals. Affirmed.

Benjamin Levering, for appellant. Johan Wooge (W. E. Hughes, of counsel), for appellee.

HAND, C. J. The appellant and appellee, as partners under the firm name of the "Rex Manufacturing Company," were engaged in business in the city of Chicago. In the year 1899 they organized a corporation by the same name of Rex Manufacturing Company, with a capital stock of 2,000 shares, of the par value of \$100 each, 750 of which shares were issued to appellant, 750 to the appellee, and 500 to certain parties residing in Paducah, Ky., and the business formerly carried on by the partnership was turned over to the corporation. The shareholders in Kentucky thereafter becoming dissatisfied with the management of the corporation by the parties in charge thereof, the appellant and appellee, to adjust the matter, agreed with the Kentucky shareholders that the appellant should transfer to them all of the shares of capital stock of said corporation held by him, and the appellee 500 of the shares held by him; that appellant should retire from the company; and that said Kentucky shareholders would pay to him \$3,000 in cash, \$1,200 of which he agreed to pay to appellee. The transfer of the stock was made by appellant and appellee, and \$3,000 was paid to the appellant; and, he having refused to pay said sum of \$1,200 to appellee, the appellee brought an action of assumpsit against him in the circuit court of Cook county to recover said sum of \$1,200. The appellant, having been served with process, entered his appearance in writing, whereupon a stipulation was made between appellant and appellee that the cause should be transferred to the chancery side of the docket in said court, and that the pleadings theretofore filed in the assumpsit suit should be amended by filing a bill for an accounting and for relief instant, and that the appearance of the appellant in the assumpsit suit should stand as his appearance to said bill. An amended bill was filed, whereupon the appellant demurred to the bill on the ground that the appellee had an adequate remedy at law, and, the demurrer having been overruled, the appellant filed an answer thereto, whereby, among other things, he averred that the appellee had an adequate remedy at law. A replication was filed, and a trial was had in open court, and the court entered a decree against the appellant for the sum of \$1,200, which has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court; and the main ground urged in this court as a ground of reversal is that the appellee had an adequate remedy at law, and that for that reason a court of chancery was without

jurisdiction to hear and determine this case.

The law is well settled that parties to a suit cannot ordinarily confer jurisdiction upon a court over the subject-matter of a suit by stipulation or consent, where by law the jurisdiction of the subject-matter of the suit has been conferred upon another court. To illustrate: The parties to an action at law could not, by stipulation or consent, confer upon a court of chancery jurisdiction to try an action of trespass or slander, and in such case the decree of the court, if entered, would doubtless be a nullity, although the jurisdiction of the court passed unchallenged. There is, however, another class of cases, involving matters of contract and the like, which, while they do not come within the ordinary jurisdiction of a court of equity, yet only want some equitable element to bring them within such jurisdiction, and in such cases the defendant by his action may estop himself to afterward raise the question of jurisdiction in the trial or upon appeal. In both cases there is a want of jurisdiction. In the first there is a total want of power to hear and determine the case, and in the other the want of power is not absolute, but qualified. In the first class a stipulation or consent conferring jurisdiction would be void; while in the latter class it would be binding upon the parties. *Richards v. Lake Shore & Michigan Southern Railway Co.*, 124 Ill. 516, 16 N. E. 909. In this case a partnership had existed between the appellant and appellee, and, while they had transferred the partnership property and business to the corporation organized by them under the name of the "Rex Manufacturing Company," it does not appear that there had been a settlement of said partnership matters between them, and the stock for which the \$3,000 was received was stock of the corporation received in payment of the partnership business turned over to the corporation.

The settlement of partnership matters and the adjustment of partnership accounts are fruitful sources of litigation and fall within the jurisdiction of courts of equity. If the appellant had been brought into a court of chancery by the filing of a bill and the service of process to answer for nonpayment of said \$1,200 in the first instance, there might have been some force in the position that he should have been sued for said sum of \$1,200 in an action at law; but, he having been sued in an action at law and thereafter stipulated that the case should be transferred to the chancery side of the docket of the court where it was pending, and that the pleadings should be amended and the case should thereafter proceed as a chancery suit, in view of the fact that the subject-matter of the suit grew out of a partnership matter, we think the suit should be held to fall within the second class of cases above referred to, and that this is a case in which jurisdiction may be conferred upon a court of chancery by the stipulation or consent of the parties,

and that the appellant should be held to be estopped by said stipulation from raising the question of the want of jurisdiction in a court of chancery to hear and determine this cause. *City of Chicago v. Drexel*, 141 Ill. 80, 30 N. E. 774; *Mertens v. Roche*, 39 App. Div. (N. Y.) 398, 57 N. Y. Supp. 349.

The other questions raised on this record are without merit, and need not be discussed in this opinion.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(231 Ill. 9)

COOKE v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907.

Rehearing Denied Dec. 11, 1907.)

1. INDICTMENT—BILL OF PARTICULARS—ADDITIONAL BILL.

Where, under an indictment charging in general terms a conspiracy to defraud the county and obtain its money by false pretenses, a bill of particulars was filed specifying the charges on which the people would rely to sustain a conviction, it was not error to permit an additional bill of particulars to be filed, which was only a further specification of the charges relied on.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 316-320.]

2. CRIMINAL LAW—TRIAL—OPENING STATEMENT.

On a trial under an indictment charging in general terms a conspiracy to defraud the county and obtain its money by false pretenses, it was not error to permit the state's attorney to read in his opening statement the bill of particulars filed by him, specifying the charges on which the people would rely to sustain a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1659.]

3. SAME—DELIBERATIONS OF JURY—TAKING PAPERS TO JURY ROOM.

On a trial under an indictment charging in general terms a conspiracy to defraud the county and obtain its money by false pretenses, it was not reversible error to allow the jury to have with them while considering their verdict a bill of particulars filed by the state's attorney, specifying the charges on which the people would rely to sustain a conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2056.]

4. CONSPIRACY—EVIDENCE—ADMISSIBILITY.

On a trial for a conspiracy to defraud the county, in that defendant and others padded the pay rolls by placing thereon as employes the names of real and fictitious persons not actually employed, and received the warrants issued in the names of such persons and payment thereof, it appeared that the money so received was turned over to defendant, or at his direction deposited to his individual account in a certain bank. A co-conspirator testified that at the time he made the deposits he presented deposit slips showing that the funds then delivered to the bank were placed therein to be credited to the individual account of defendant. These deposit slips were produced by the cashier, and identified and received in evidence. The cashier then produced books of the bank, and traced the entries of the deposits until the same were credited to defendant's individual account. He testified that the books were made or kept in the usual

course of business, but stated that, while the books were under his control, the entries therein were made by different clerks, that the bank had ceased doing active business, and that the persons making the entries were not then in the employ of the bank, but were living in different places, many of them outside the state. *Held*, that the books of the bank, when taken in connection with the deposit slips and testimony of the co-conspirator and the cashier, were admissible against defendant to show that the money deposited was credited to his individual account.

5. INDICTMENT—ISSUES, PROOF, AND VARIANCE.

An indictment for conspiracy to defraud the county and obtain its money by false pretenses charged that defendant conspired with a person named and divers other persons whose names were to the grand jury unknown. On the trial it was shown that a third person was a co-conspirator with defendant, and that he appeared before the grand jury that found the indictment and informed them of his name; but there was no evidence in the record, on review, tending to show that the grand jury knew that such third person was a co-conspirator with defendant. *Held*, that it could not be said on the record that the grand jury knew that such third person was a co-conspirator at the time they found the indictment against defendant, and hence there was no variance between the indictment and the proofs.

6. CRIMINAL LAW—LIMITATION OF PROSECUTION—CONSPIRACY.

Where, on a trial for conspiracy to defraud the county, in that defendant and others padded the pay rolls by placing thereon as employes the names of real and fictitious persons not actually employed, and received the warrants issued in the names of such persons and payment thereof, it appeared that two pay rolls, dated within 18 months of the returning of the indictment, contained fictitious names on which warrants were issued, the proceeds of which were deposited in a bank to defendant's credit, the offense was not barred by the statute of limitations; the rule being that in prosecutions for conspiracy the statute does not run from the time the conspiracy was entered into, but runs from the commission of the last overt act in furtherance thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 275.]

7. CONSPIRACY—PERSONS LIABLE—ACTS OF CO-CONSPIRATORS.

Every person entering into a conspiracy already formed is deemed a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 74.]

8. CLERKS OF COURTS—COMPENSATION.

Under Hurd's Rev. St. 1905, c. 53, § 31, providing that the clerk of the circuit court of Cook county shall receive as compensation only the salary therein specified, to be paid out of the fees of his office, and that he shall keep an account of all the fees of his office and expenditures, and make a semi-annual report to the board of commissioners of all fees and expenses, and that the balance over the amount due him as compensation for services, stationery, clerk hire, etc., shall be paid to the county treasurer, the fees earned in the office of the circuit clerk are the property of the county, and not of the clerk, especially where such fees have been paid to the county treasurer under a custom for the circuit clerk to pay the county treasurer a sufficient amount to satisfy the salary account of his office, and for the county treasurer to pay the salary account on warrants drawn on him by the county comptroller.

9. CRIMINAL LAW—REVIEW—QUESTIONS OF FACT.

On a trial for conspiracy to defraud the county, in that defendant and others padded the

pay rolls by placing thereon as employes the names of real and fictitious persons not actually employed, and received the warrants issued in the names of such persons and payment thereof, the question whether the witnesses for the people, corroborated by the production of false pay rolls prepared by defendant, the warrants wrongfully obtained, and the books of the bank showing the deposit to defendant's individual account of the money received by him, were to be believed, was for the jury; and, the jury having found defendant guilty on sufficient evidence, the Supreme Court will not be disposed to consider further the question as to whether the evidence establishes his guilt beyond a reasonable doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

10. JURY—COMPETENCY—FORMATION OF OPINION.

Jurors, who stated on their voir dire that they knew nothing of the cause, other than what they read in the newspapers, from which they had formed opinions which they had not expressed, but that, regardless of what they had read, they believed they could give defendant a fair and impartial trial, were competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 461-479.]

Error to Branch Appellate Court, First District, on Error to Criminal Court, Cook County; Ben M. Smith, Judge.

John A. Cooke was convicted of conspiring to defraud a certain county and obtain its money by false pretenses. From a judgment of the Branch Appellate Court, First District, affirming a conviction in the criminal court, defendant brings error. *Affirmed*.

Daniel Donahue and James Hartnett, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (Hobart P. Young, of counsel), for the People.

HAND, C. J. The grand jury of Cook county, at the April term, 1906, returned in to the criminal court of said county an indictment charging the plaintiff in error with having formed a conspiracy with Charles H. Bradley, and with divers other persons whose names were to the grand jurors unknown, to cheat and defraud Cook county, and to obtain by means of false pretenses from said county a large sum of money. A motion to quash the indictment was overruled, whereupon a bill of particulars was filed by the state's attorney upon the motion of the plaintiff in error, and a plea of not guilty was entered, and a trial was had before the court and a jury, which resulted in the conviction of the plaintiff in error, and a judgment sentencing him to pay a fine of \$2,000 and to be imprisoned in the penitentiary for an indeterminate period, which judgment was affirmed by the Branch Appellate Court for the First District, and a writ of error has been sued out from this court to review the record made in said cause.

It appears from the undisputed evidence that the plaintiff in error was elected clerk of the circuit court of Cook county, Ill., on November 3, 1896, and on December 7th of that year he duly qualified as such clerk and entered upon the discharge of the duties of

said office, and continued to act as clerk of said court until December 5, 1904—a period of eight years, he having been re-elected in the year 1900; that Charles H. Bradley, who was named as a co-conspirator in the indictment, was appointed chief clerk of the circuit court of Cook county in the year 1884 by the then clerk of said court, and continued to act as chief clerk of said court up to the year 1896; that the plaintiff in error, upon his election to said office, appointed said Charles H. Bradley his chief clerk, which position Charles H. Bradley continued to hold until June 30, 1904, when he was succeeded as chief clerk of the circuit court by John E. Seinwerth, which position Seinwerth continued to occupy until the expiration of the term of office of the plaintiff in error as circuit clerk of said county; that the salary fixed by law for the circuit clerk of Cook county during the eight years that plaintiff in error held said position was the sum of \$5,000 per annum; that shortly after plaintiff in error was elected circuit clerk he stated to Charles H. Bradley the office ought to pay him, as he was informed, from \$10,000 to \$15,000 per annum; that in 1897 plaintiff in error and Charles H. Bradley, and so long as Bradley remained chief clerk, and afterwards Seinwerth while he acted as chief clerk, systematically padded the pay rolls in the circuit clerk's office in said county from month to month, by placing on said pay rolls the names of real or fictitious persons who were not employed in the circuit clerk's office of Cook county, and by means of such padded pay rolls, during the eight years the plaintiff in error was circuit clerk of Cook county, he fraudulently obtained from the county treasury of said county the sum of \$22,590.51; that the plaintiff in error and Bradley or Seinwerth would select from the city directory, or otherwise, a list of names, which, when the monthly pay roll of the circuit clerk's office was made up, would be placed thereon; that the pay roll of said office, with said fictitious names thereon, would then be filed in the comptroller's office of the county of Cook by Bradley or Seinwerth; that warrants would be issued to each individual whose name appeared upon the pay roll. Each employé in the office of the circuit clerk would receive, personally, his warrant from the comptroller, which, upon its being properly indorsed by him and presented, would be paid to him by the county treasurer. The warrants which were issued in the names of the fictitious persons would be received and receipted for by Bradley or Seinwerth. The payees' names would thereupon be indorsed upon said warrants by either Bradley or Seinwerth, and the warrants would be presented to the county treasurer and payment received thereon. When the money was collected upon said warrants, it would be turned over by Bradley or Seinwerth to the plaintiff in error, or at his di-

rection be deposited to his individual account in the Chicago National Bank of Chicago. In one instance the original warrants issued to 14 fictitious persons, for sums aggregating \$1,440, were received and receipted for by Bradley, and the payees' names indorsed thereon by him, and the warrants, thus indorsed, deposited by him to the credit of the private account of the plaintiff in error in said Chicago National Bank, and said warrants were collected by said bank of the county treasurer of Cook county, and plaintiff in error received credit for said amount in his private account in said bank. In another instance a slip with 10 fictitious names written thereon in the plaintiff in error's handwriting was introduced in evidence. These names went onto the monthly pay roll of the circuit clerk's office. Warrants were issued on such pay rolls by the comptroller in the names of said fictitious persons, and said warrants were receipted for by Bradley, and the payees' names indorsed thereon by him, and the amount thereof was collected by him from the county treasurer of Cook county, and deposited by him to the credit of the private account of the plaintiff in error in said Chicago National Bank. In many other instances the deposit slips filed by Bradley with the Chicago National Bank at the time he made deposits to the credit of the private account of the plaintiff in error in said bank showed that the plaintiff in error received credit in his private account in said bank for the precise amount received by Bradley upon warrants issued to fictitious persons named on the pay roll of the circuit clerk's office. After the cash received from the county treasurer was turned over by Bradley to the plaintiff in error, and after he had counted it, he would frequently add to it or retain a portion thereof, and then give the amount thus made up or thus remaining, with his private bank book, to Bradley, with directions to Bradley to deposit the amount thus paid to him to the private account of the plaintiff in error.

Numerous assignments of error, 42 in number, have been made upon this record, and numerous propositions have been elaborately discussed in the briefs filed by counsel for plaintiff in error in support of said assignments of error. The contentions thus made will be taken up in this opinion in their order and considered. It is first contended that the court erred (1) in declining to quash certain paragraphs of the original bill of particulars; (2) in permitting the state's attorney to file an additional bill of particulars; (3) in permitting the state's attorney to read the original bill of particulars and additional bill of particulars in his opening statement to the jury; and (4) in permitting the original bill of particulars and additional bill of particulars to be in the possession of the jury while they were considering their verdict.

The indictment contained two counts. The

first was based upon the statute, and the second upon the common law, and each charged, in general terms, a conspiracy to cheat and defraud the county of Cook and to obtain its money by false pretenses. No specific overt acts were charged, and the original bill of particulars filed by the state's attorney upon the order of the court, at the request of the plaintiff in error, was a specification of the specific charges upon which the people would rely to sustain a conviction. In *McDonald v. People*, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547, it was pointed out that the office of a bill of particulars is to give the accused, under a general conspiracy indictment like this, notice of the specific charge or charges he is required to meet on the trial, so that he might be prepared to make his defense. The original bill of particulars filed in this case pointed out to the defendant the specific charges which the people would seek to support by proof to show the guilt of the plaintiff in error upon the trial of said indictment, and the additional bill of particulars filed by the state's attorney by leave of court was only a further specification of the names of fictitious persons not stated in the original bill of particulars, which the people would seek to show the plaintiff in error and his co-conspirators had used as a means whereby to obtain the funds of Cook county. We think the original bill of particulars and the additional bill of particulars were in proper form, and that the court did not err in refusing to quash the original bill of particulars or any part thereof, or in permitting the additional bill of particulars to be filed.

We also think that the state's attorney had the same right to read in his opening statement said bills of particulars to the jury that he had to read to them the indictment, or to state to them the specific overt acts of the plaintiff in error and his co-conspirators which the people would rely upon to sustain a conviction, and that the court did not err in permitting the state's attorney to incorporate the substance of said bills of particulars in his opening statement by reading the same to the jury; also that the court did not commit reversible error in allowing the jury to have with them said bills of particulars in the jury room. In *Dunn v. People*, 172 Ill. 582, 50 N. E. 137, it was held that whether a writing should be delivered to the jury upon their retirement to consider their verdict rested largely in the sound discretion and judgment of the trial court, and that this court would not reverse a trial court for permitting the jury to take with them to the jury room a written instrument which was properly before them, unless it clearly appeared that the action of the trial court was prejudicial to the accused and ought not to have been pursued.

It is next contended that the trial court erred in admitting in evidence the books

of account of the Chicago National Bank, showing that the funds deposited by Charles H. Bradley and John E. Seinwerth in said bank to the private account of the plaintiff in error had passed to the private account of the plaintiff in error upon the books of the said bank. It appeared, from the testimony of Bradley, at the time he made said deposits he presented, to the officer of the bank receiving such deposits, deposit slips showing that the funds then delivered to the bank by him were placed in said bank to be credited to the private account of the plaintiff in error. These deposit slips were produced by the cashier of said bank and fully identified, and received in evidence. The cashier then produced numerous books of the bank, and traced the entries of said deposits upon the several books thus produced until such deposits were credited to the individual account of the plaintiff in error in the books of said bank. He testified that the books produced by him were books kept by said bank, and that the entries thereon were made in the usual and due course of business in said bank. He stated, however, that, while said books were under his control and general supervision as cashier of the bank, the entries made therein were not made by him personally, but were made by different clerks and bookkeepers in the employ of the bank; that the bank had ceased doing active business; and that said clerks and bookkeepers were not, at the time of the trial, in the employ of the bank, but were living in different places, many of them being in foreign states. We think the books of the bank, when taken in connection with the deposit slips and the testimony of Bradley and the cashier, were admissible in evidence, as against the plaintiff in error, for the purpose of showing that the money deposited by Bradley and Seinwerth in said bank was credited to the individual account of the plaintiff in error. *Chisholm v. Beaman Machine Co.*, 160 Ill. 101, 43 N. E. 796; *Continental Nat. Bank v. First Nat. Bank*, 108 Tenn. 374, 68 S. W. 497; *Nelson v. Bank*, 69 Fed. 805, 16 C. C. A. 425.

It is further contended that there is a fatal variance between the averments of the indictment and the proofs offered in support thereof. The indictment averred that the plaintiff in error conspired "with one Charles H. Bradley and with divers other persons whose names" were to the grand jury unknown. It was shown upon the trial that John E. Seinwerth, who was chief clerk from July 1, 1904, to the end of plaintiff in error's term as circuit clerk of Cook county, was a co-conspirator of the plaintiff in error; that John E. Seinwerth appeared before the grand jury that found the indictment against plaintiff in error as a witness, and informed the grand jury that his name was John E. Seinwerth. The evidence of Seinwerth before the grand jury, other than that he informed the grand jury his name was John E. Seinwerth,

does not appear in this record. It is said, however, the inference to be drawn from the language of the indictment is that the grand jury learned, during its investigation, who the plaintiff in error's co-conspirators were, but did not learn their names, and, as John E. Seiwert was a co-conspirator, the grand jury must have known that fact, and when they averred in the indictment returned against plaintiff in error that they did not know his name they made a mistake of fact, and as they knew he was a co-conspirator of the plaintiff in error, and knew his name when they framed the indictment, there is a variance between the indictment and the proof, and that the conviction cannot be sustained. We do not agree with this reasoning. There is no evidence in this record tending to show that the grand jury knew John E. Seiwert was a co-conspirator of the plaintiff in error, and when they say in the indictment that the plaintiff in error conspired with Charles H. Bradley, "and with divers other persons whose names" were to the grand jurors unknown, we think the inference clearly is that they did not know that John E. Seiwert was a co-conspirator of plaintiff in error, or, as they knew his name, they would have charged him in the indictment by naming him as a co-conspirator of plaintiff in error. In other words, had the grand jury been informed of the fact that John E. Seiwert was a co-conspirator, and also of his name, they would have charged him in the indictment by name as a co-conspirator with the plaintiff in error; but, as they failed to charge him as a co-conspirator by name in the indictment, the inference is they did not know he was a co-conspirator with plaintiff in error at the time they framed the indictment. We think, therefore, it cannot be said upon this record that the grand jury knew John E. Seiwert was a co-conspirator of the plaintiff in error at the time they found the indictment against plaintiff in error upon which he was placed upon trial. We therefore are of the opinion there was no variance between the indictment and the proofs.

It is next urged that the offense, at the time the indictment was found, was barred by the statute of limitations. The indictment was returned on April 28, 1906, and, as the period of limitation is 18 months, it was necessary to show that the conspiracy existed after October 28, 1904. The evidence shows that the pay roll for October, 1904, which was dated October 31, 1904, and the pay roll for November, 1904, which was dated November 9, 1904, of the circuit clerk's office of Cook county, contained fictitious names upon which warrants issued by the comptroller of Cook county, which were received by Bradley and Seiwert, and collected of the county treasurer of Cook county by them, and deposited in the Chicago National Bank to the credit of the plaintiff in error's private account. In

this state, regardless of what the rule may be in other states, in prosecutions for conspiracy the statute of limitations does not begin to run from the time the conspiracy was entered into, but it commences to run from the commission of the last overt act in furtherance of the object of the conspiracy. *Ochs v. People*, 124 Ill. 390, 16 N. E. 662. Here the last overt act in furtherance of the conspiracy was within 18 months of the date of the return of the indictment; hence the offense was not barred by the statute of limitations.

It is urged that the conspiracy between the plaintiff in error and Charles H. Bradley and the conspiracy between the plaintiff in error and John E. Seiwert were separate and distinct conspiracies. From the time plaintiff in error qualified as circuit clerk, down to June 30, 1904, John E. Seiwert had not entered into said conspiracy. On July 1, 1904, he became chief clerk under the plaintiff in error, and Charles H. Bradley acted thereafter as a deputy clerk. Bradley, however, remained in the office of the plaintiff in error and assisted in making out the fictitious pay rolls, obtaining the fictitious warrants, and procuring the money from the county treasury of Cook county thereon. John E. Seiwert during that period was also engaged with the plaintiff in error and Charles H. Bradley, through fictitious pay rolls and otherwise, in wrongfully obtaining money from the county treasurer of Cook county. No new conspiracy was formed, but John E. Seiwert entered into the conspiracy which had already been formed. Every person entering into a conspiracy already formed is deemed, in law, a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design. *Ochs v. People*, supra.

It is also urged that the fees of the office of circuit clerk of Cook county belonged to the plaintiff in error for the eight years he was circuit clerk, and that he could not conspire with Bradley, nor with Bradley and Seiwert, to obtain by false pretenses his own money. Under the provisions of section 31 of chapter 53 of Hurd's Revised Statutes of 1905 the fees earned in the office of the circuit clerk of Cook county were the property of Cook county, and not the property of the plaintiff in error. Especially was this true after said fees had been paid over to the county treasurer of Cook county by the plaintiff in error. It was the custom in Cook county, during the term of service of the plaintiff in error for the clerk of the circuit court to pay to the county treasurer, by check, a sufficient amount to satisfy the salary account of his office, and for the county treasurer to pay the salary account of said circuit clerk's office upon warrants drawn upon the county treasurer by the county comptroller.

It is next urged that the evidence does not establish the guilt of the plaintiff in error

beyond a reasonable doubt. If the witnesses of the people whose testimony is not contradicted are to be believed, then the plaintiff in error and Charles H. Bradley, from some time in the year 1897 up to June 30, 1904, and the plaintiff in error and Charles H. Bradley and John E. Seimwerth from July 1, 1904, to December 4, 1904, systematically robbed Cook county by foisting upon the comptroller and treasurer of said county padded pay rolls. The question whether the witnesses for the people, corroborated as they were by the production of the false pay rolls prepared by the plaintiff in error and his chief clerks, the warrants wrongfully obtained from the county comptroller based upon fraudulent pay rolls, and the books of the Chicago National Bank, were to be believed, was a question for the jury; and, the jury having found the plaintiff in error guilty upon what we think amounted to conclusive evidence of his guilt, we are not disposed to further consider the question as to whether or not the evidence established his guilt beyond a reasonable doubt.

It is next contended that the court erred in overruling plaintiff in error's challenge for cause to two jurors, and forcing the plaintiff in error to challenge said jurors peremptorily, by means whereof, it is said, two of plaintiff in error's peremptory challenges were wrongfully taken from him. The jurors referred to both stated upon their voir dire examination that they knew nothing of the cause, other than what they had read in the newspapers with reference thereto, from which they had formed opinions which they had not expressed; but, regardless of what they had read, they were of the opinion they could give the plaintiff in error a fair and impartial trial upon the law and the evidence. We do not think that either of said jurors disclosed cause for challenge, and are of the opinion the court did not commit error in holding they were competent jurors. *Wilson v. People*, 94 Ill. 299; *Smith v. Eames*, 3 Scam. 76, 36 Am. Dec. 515; *Sples v. People*, 122 Ill. 1 (particular page 261) 12 N. E. 865, 991, 17 N. E. 898, 3 Am. St. Rep. 320; *Id.*, 128 U. S. 131, 8 Sup. Ct. 21, 22, 31 L. Ed. 80.

It is also urged that the state's attorney went outside of the record in his closing argument to the jury. We have read the closing argument of the state's attorney, and do not think it susceptible of the construction put upon it by counsel for plaintiff in error. In any event, we are of the opinion that nothing occurred during the closing argument of the state's attorney which should work a reversal of the case.

It is finally contended that the court misdirected the jury as to the law of the case and refused proper instructions offered upon behalf of the plaintiff in error. We have carefully examined the instructions given and refused, and are of the opinion the jury were fairly instructed as to the law governing this

case. The given instructions of the people complained of, and those of the plaintiff in error refused, relate to the questions considered in this opinion; those given in favor of the people being in accord with the views herein expressed, and those of the plaintiff in error refused being opposed to the views herein expressed.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(230 Ill. 562.)

CHICAGO CONSOL. TRACTION CO. v. MAHONEY.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

1. CARRIERS—ACTION FOR EJECTING PASSENGER—INSTRUCTION.

In an action for ejecting a passenger, an instruction that if the conductor ejected plaintiff, and used more force than was reasonably necessary, and "thereby" wantonly and maliciously injured and humiliated her, as charged, the jury should find for her, was not objectionable as declaring the use of more than reasonably necessary force to be of itself a wanton and malicious injury and humiliation.

2. ASSAULT—EXEMPLARY DAMAGES—WHEN PROPER.

To authorize exemplary or vindictive damages for an assault, either malice, violence, oppression, or wanton recklessness must appear. The assault must partake of a criminal or wanton nature, and if made with considerable provocation, and without malice, yet if it is of a wanton, gross, and outrageous character, it will authorize exemplary damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 54.]

3. SAME—MALICE—INFERENCE.

Malice being a question of fact, it is unnecessary to prove express malice in an action for an assault, since, if it appears that defendant has acted with wanton, willful, or reckless disregard of plaintiff's rights, malice will be inferred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 34.]

4. CARRIERS—ACTION FOR EJECTING PASSENGER—INSTRUCTIONS.

In an action for ejecting a passenger, instructions that, though plaintiff failed or refused to give the conductor a transfer or cash fare, the carrier could not wantonly or maliciously injure her, or use force not reasonably necessary in ejecting her; that she could recover if the conductor ejected or attempted to eject her, and used more force than was reasonably necessary, and thereby wantonly and maliciously injured and humiliated her, as charged; and that if the conductor without provocation assaulted and injured her, as charged, and such assault was malicious, aggravated, and wanton, and resulted in physical injury to plaintiff without her fault, and if justice and the public good required it, the jury could allow exemplary damages—plainly told the jury that malice, or such wanton recklessness as amounted to malice, must be proved before exemplary damages could be awarded.

5. ASSAULT—EXEMPLARY DAMAGES.

In an action for a malicious, aggravated, and wanton assault, exemplary damages, partly

to compensate plaintiff, and partly to punish defendant, may be awarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 54.]

3. SAME—PROVINCE OF JURY.

In an action for a malicious, aggravated, and wanton assault, the court must determine whether the evidence tends to show facts warranting exemplary damages; but the amount recoverable as a punishment is for the jury in the first instance, subject to review by the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, § 56.]

7. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In an action against a carrier for ejecting a passenger, any error in instructing, "when it is said in these instructions" that plaintiff must have exercised ordinary or reasonable care at and before the "accident, it means that she was required to exercise such care as a reasonably prudent person would have used under the same circumstances," there being no other instruction referring to the care required of plaintiff, was harmless to defendant.

3. CARRIERS—ACTION FOR EJECTING PASSENGER—INSTRUCTIONS.

In an action against a carrier for assaulting and ejecting a passenger, instructions requested by defendant to the effect that, if the passenger failed to pay her fare or present a transfer, the conductor could eject her, were properly modified by the words "subject to the limitations elsewhere laid down in these instructions"; such limitations referring to the carrier's duty not to eject her recklessly, etc.

3. EVIDENCE—RES GESTÆ.

In an action against a street car company for ejecting a passenger, who refused to pay her fare or present a transfer, having dropped her transfer on the step, evidence that when she boarded the car witness saw the transfer on the step and that the conductor looked at it was admissible as part of the *res gestæ*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 330-350.]

10. PLEADING—WAIVER OF OBJECTION—AID BY VERDICT.

An objection that a declaration is partly in trespass and partly in case cannot be made after a plea of general issue and verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 1451-1477.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; Lockwood Honoré, Judge.

Action by Tillie Mahoney against the Chicago Consolidated Traction Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

Appellee was a passenger on the Ashland Avenue line of appellant on March 3, 1902. She paid her fare and secured a transfer entitling her to ride upon a north-bound Southport Avenue car, in Chicago. She boarded such a car at Lincoln avenue, and in so doing accidentally dropped her transfer on the back step, where it remained for a time until it was blown into the street. Two other ladies boarded this car at the same time she did. When the conductor came for appellee's fare there was some dispute, which ended by her being put off the car with more or less assistance from the conductor. The testimony as to what was said and the amount of force

used by the conductor is conflicting. The testimony of appellee and two of the other lady passengers is to the effect that the conductor told appellee she was a "damned liar," with reference to her statement that she had lost her transfer, or as to her statement or question to him concerning his having it; also that he grabbed her violently by the arm and shoved her to the platform and off the car; that he pushed her in the back at the time she was stepping off. The testimony on behalf of appellant by another lady passenger, and by the conductor and motorman, is to the effect that the conductor did not use force in putting appellee off the car; that he told her she must produce her transfer, pay her fare, or get off; that he took her by the arm or put his hand on her shoulder when she got up from the seat, but did not use force, and that she walked to the rear of the car and stepped to the ground without assistance; that he did not call her a damned liar, or use other insulting terms; that she stated that if he put her off the car she would make trouble for him—that she had influential friends. It appears from the testimony of the witnesses on both sides that the car was either stopped at the time appellee stepped off, or was going slowly; also, that after the conductor told her she must get off, and before she actually did leave, she sat down beside one of the passengers to get her name and address, which she wrote on a card taken from her pocketbook for that purpose. There is testimony also to the effect that the conductor's attention was called to the fact that the transfer was dropped on the step of the car at the time that occurred, by one of the lady passengers who got on at the same time appellee did, and that the conductor smiled, but did nothing more. He testified he saw a lady pointing to something, but did not know what she was pointing at. Appellee testified that her arm became black and blue the next day where the conductor grasped it, and remained in that condition from 10 to 14 days, and that during that time the least excitement caused her to fall into a faint; that she was hysterical at times during that 10 to 14 days, and very nervous, but before the occurrence had never fainted or been hysterical. The testimony of the family physician, as well as that of a sister-in-law, tends to confirm appellee's statement as to the condition of her arm, as well as to her hysterical and nervous condition, after the occurrence. Appellee testified that she had suffered from an attack of appendicitis shortly before the accident, though an operation was not performed, and that this was the first day she had been out after that sickness. In this statement she was corroborated by her sister-in-law. It appears from the evidence that appellee walked back several blocks after she got off the car, to pick up the transfer; that she went early the next day to the offices of appellant to make complaint against the con-

ductor; and that she went to see her lawyer at his offices downtown before noon of the next day. Upon a trial in the circuit court the jury returned a verdict of \$1,250 against appellant. The Appellate Court affirmed the judgment, and the case is now brought here for review.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant. Orrin O'Brien and A. A. McKinley, for appellee.

CARTER, J. (after stating the facts as above). Counsel for appellant admit that on controverted questions of fact, including the amount of damages, the judgment of the Appellate Court, affirming that of the trial court, is conclusive on this appeal, but insist that, as the evidence is close and doubtful, this court should carefully scrutinize the rulings as to the admission of evidence and see if the instructions state accurately the principles of law applicable to the case. *Kaenders v. Montague*, 180 Ill. 300, 54 N. E. 321; *Chicago & Eastern Illinois Railroad Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74; *Chicago, Rock Island & Pacific Railway Co. v. Steckman*, 224 Ill. 500, 79 N. E. 602.

The main contention of appellant is that there was error in the giving of the fourth and fifth instructions for appellee. These instructions read as follows:

(4) "The court instructs you that, though you may believe, from the evidence, that the plaintiff failed or refused to give the conductor a transfer or a cash fare, the defendant still owed her the duty not to wantonly or maliciously injure her, and not to use more force than was reasonably necessary in order to eject her from the car. Therefore, if you believe, from the evidence, that the defendant's conductor in charge of said car, acting within the scope of his employment, ejected or attempted to eject the plaintiff from said car, and that in so doing he used more force than was reasonably necessary in order to eject her, and thereby wantonly and maliciously injured and humiliated her, as charged in the declaration, you should find the defendant guilty.

(5) "The jury are instructed that if you believe, from the evidence, that defendant's conductor, while acting for the defendant in the scope of his employment, without provocation assaulted and injured the plaintiff, as charged in the declaration, and that such assault was a malicious, aggravated, and wanton one, and resulted in physical injury to the plaintiff, without fault on her part, and if the jury further believe, from the evidence, that justice and the public good require it, then the law is that the jury are not confined in their verdict to the actual damages proven, if any; but they may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant and to deter others from the commission of like offenses."

The contention is that the use of the word "thereby" in instruction 4 made that instruction declare that the use of more than reasonably necessary force in and of itself constituted a wanton and malicious injury and humiliation of the plaintiff. Giving this instruction its ordinary and reasonable grammatical construction, it does not support appellant's contention. It stated that if, in using such force, the conductor wantonly and maliciously injured and humiliated her, as charged in the declaration, etc. The declaration charges that the conductor "wantonly and maliciously assaulted the plaintiff, and called her a liar and other abusive and humiliating names and epithets, with profane language, and he then and there forcibly, maliciously, and with undue violence seized the plaintiff, and dragged and pushed her, and forcibly ejected her from said car." The instruction did not tell the jury, as contended by appellant, that the use of more force than was necessary was a wanton and malicious injury and humiliation, but left it to the jury to find, from the evidence, if it was such a wanton and malicious injury and humiliation as was charged in the declaration.

The rule is "that, to authorize the giving of exemplary or vindictive damages, either malice, violence, oppression, or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature." *City of Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590. If the assault be made with considerable provocation and without malice, yet if it is of a wanton, gross, and outrageous character, it will authorize exemplary damages. *Drohn v. Brewer*, 77 Ill. 280; *Gartside Coal Co. v. Turk*, 147 Ill. 120, 35 N. E. 467. Malice being a question of fact and for the consideration of the jury, it is not necessary that express malice should be proved. If it appears that the party has acted with a wanton, willful, or reckless disregard of the rights of the plaintiff, malice will be inferred. *Farwell v. Warren*, 51 Ill. 467; *Donnelly v. Harris*, 41 Ill. 126; 1 *Sedgwick on Damages* (8th Ed.) §§ 363-368, inclusive; 12 *Am. & Eng. Ency. of Law* (2d Ed.) 23.

Under these authorities we cannot see how it is possible to place a reasonable construction upon instruction 4 that would have misled the jury. It contains nothing about exemplary damages, and therefore, considered alone, the jury could not have been misled. This is admitted by appellant; but it is most urgently insisted that, taken in connection with instruction 5, the jury would be misled into giving such damages, if they believed that the appellant used unnecessary force in ejecting plaintiff from the car. The instructions must be considered as a series. If it be assumed that the jury considered instructions 4 and 5 together, then it must also be assumed that they considered instruction 19, given for appellant along with the other in-

structions; and said instruction 19 states the rule as contended for by appellant—that, even though the jury believed that defendant was guilty of negligence, yet it could not be found guilty “unless the plaintiff shows, by a preponderance of the evidence, that the act complained of by plaintiff was willful, wanton, or malicious.” Instructions 4 and 5, considered by themselves, plainly told the jury that malice, or such wanton recklessness as amounted to malice, must be proved in order to render a verdict against appellant for exemplary damages.

Appellant also contends that instruction 5, as worded, erroneously permitted a double assessment of exemplary damages, partly to compensate the plaintiff and partly to punish the defendant. The decisions are not in entire harmony on the question whether, in such cases, exemplary damages are only incidental to compensatory damages; but, whatever may be the first or controlling consideration, it is evident “that the theory of exemplary damages involves a blending of the interests of society in general with those of the aggrieved individual in particular.” 12 Am. & Eng. Ency. of Law (2d Ed.) p. 7; Cook v. Ellis, 6 Hill (N. Y.) 466, 41 Am. Dec. 757. In this last case it was held that exemplary damages and a fine imposed in the name of the people depended on the same principle; but both are penal, and intended to deter others from the commission of a like crime. In *McNamara v. King*, 2 Gilman, 432, 436, this court said: “In this class of cases the jury may give exemplary damages, not only to compensate the plaintiff, but to punish the defendant.” In *Ousley v. Hardin*, 23 Ill. 403, we held that the “jury may give smart money in the shape of heavy damages, not as compensation alone for the injury received, but as punishment to the defendant who did the wrong.” See, also, *Illinois & St. Louis Railroad Co. v. Cobb*, 68 Ill. 53; *Cutler v. Smith*, 57 Ill. 252; *Grable v. Margrave*, 3 Scam. 372, 38 Am. Dec. 88; *City of Chicago v. Martin*, supra; *Welch v. Ware*, 32 Mich. 77; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582.

It is also objected that this instruction submits to the jury, to be found from the evidence, whether “justice and public good require” that exemplary damages be assessed, and it is insisted that the question whether “justice and public good require” exemplary damages is one of law, and not one of fact to be submitted to the jury. In *Hazard v. Israel*, 1 Bin. (Pa.) 240, 2 Am. Dec. 438, it was stated that in vindictive actions “it is always given in the charge to the jury that they are to inflict damages for example’s sake and by way of punishing the defendant.” In *1 Sedgwick on Damages* (8th Ed.) p. 351, the author says that it has been laid down as a general rule “that with a view to promote the peace and quiet of society and to protect every one in the full enjoyment of his rights the jury are at liberty to give exemplary or

vindictive damages.” In *Day v. Woodworth*, 13 How. (U. S.) 363, 14 L. Ed. 181, the Supreme Court of the United States held that in cases of trespass, where the injury is wanton and malicious, the court would permit juries to add to the measured compensation of the plaintiff something further by way of punishment, or by way of example, as smart money; that this has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. In *Voltz v. Blackmar*, 64 N. Y. 440, it was held that in such cases the jury, in fixing damages, “may disregard the rule of compensation, and beyond that may, as a punishment to the defendant and as a protection to society against the violation of personal rights and social order, award such additional damages as in their discretion they may deem proper.” In *Wabash, St. Louis & Pacific Railway Co. v. Rector*, 104 Ill. 296, it was held error to instruct the jury that the party was entitled to vindictive damages as a matter of right; it being held that the question of such damages was not a question for the court but for the jury. This same doctrine was approved in *Harrison v. Ely*, 120 Ill. 83, 11 N. E. 334, and *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 102. It is for the court to determine whether the evidence tends to show facts which warrant such damages. The sufficiency of the facts is for the jury. The amount which may be recovered as a punishment is for the jury in the first instance, but subject to review by the court. 2 *Sutherland on Damages* (3d Ed.) § 402. In *Foot v. Nichols*, 28 Ill. 486, an instruction substantially in the form of said instruction 5 was approved by this court, and the language complained of, namely, the jury “may give exemplary damages, not only to compensate the plaintiff but to punish the defendant,” was used, and the instruction held correct. Manifestly, on principle and from the authorities, the question as to how much exemplary damages shall be allowed on the grounds of justice and public policy must in the first instance be left to the jury.

Complaint is also made that the second instruction given for appellee was misleading as not being applicable to the facts in the case. That instruction reads: “(2) When it is said in these instructions that the plaintiff must have been in the exercise of ordinary or reasonable care at and before the time of the accident, it means that she was required to exercise such care as a reasonably prudent person would use under the same circumstances.” None of the other instructions given refer in any way to the care that must be exercised by the plaintiff, and the word “accident” is not an apt term for the ejecting of plaintiff from the car. However, we cannot see how it misled the jury. If they understood anything from it that was applicable to the case, it doubtless was that in order to

recover she must have been in the exercise of ordinary and reasonable care when ejected from the car. If she was ejected maliciously, recklessly, and wantonly, this would be more than the law would require. The giving of this instruction, at the most, was harmless error.

Complaint is also made of the modification by the court of the appellant's instructions 6 and 7. These instructions, when presented to the court, stated, in substance, that if the jury believe, from the evidence, that when the conductor demanded a fare appellee failed to pay her fare or produce a transfer entitling her to passage, "then the conductor had a legal right to eject her from said car." The trial judge added, immediately after the words just quoted in each instruction, the words, "subject to the limitation elsewhere laid down in these instructions." The instructions as first drawn were faulty in not stating the manner in which the conductor could legally eject her from the car. On the facts in this case, had those instructions been given without modification, the jury might well have thought them to mean that the conductor would have a legal right to eject her, even though it was done wantonly, maliciously, and recklessly. Had they been given in that form, they would have been in conflict with instructions 16 and 17 asked and given for appellant. These last instructions contained all the essential qualifications. The only criticism of the modification is that all the instructions are to be read as a series, and such words expressly added to a certain few of the instructions might lead the jury to think that the others which did not have such words attached were to be considered by themselves, and not in connection with all the other instructions. Considering the entire instructions as a series, we think the jury understood what the court meant by the modifications.

Complaint is also made of the admission of the testimony of a certain witness on behalf of appellee as to seeing the transfer on the step and as to the conductor looking at it. This testimony was a part of the *res gestæ*, and therefore properly admitted. *Galena & Chicago Union Railroad Co. v. Fay*, 16 Ill. 558, 63 Am. Dec. 323; *Chicago Union Traction Co. v. Brethauer*, 223 Ill. 521, 79 N. E. 287; 1 Sutherland on Damages (3d Ed.) § 405.

Complaint, inferentially, is made that the declaration is partly in trespass and partly in case. Whatever force that objection might have had, if raised at the proper time, it cannot now be availed of, after a plea of general issue and verdict.

Upon a careful examination of this record, assuming, as claimed by appellant, that the evidence is close and doubtful, we find no reversible error. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(230 Ill. 462)

ECKELS et al. v. MUTTSCHALL.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 10, 1907.)

1. APPEAL—ESTOPPEL TO ALLEGE ERROR—ACQUIESCENCE OF PARTY.

Where an action was brought against a street railroad company and the receivers of another company jointly, and at the trial counsel for defendants acquiesced in the statement of the court that plaintiff had brought his suit against the right defendants, defendants cannot on appeal raise any question of misjoinder of parties, though a motion in arrest of judgment was made on that ground.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3611-3616.]

2. EVIDENCE—OPINION—BASIS.

Where, in an action against a street railroad for injuries to one who was struck by a car, the undisputed evidence showed that the car was running at a high rate of speed at the time of the accident, it was not error to refuse to strike out the testimony of a witness that the car was running at the rate of 20 miles an hour at the time of the accident; the witness stating on cross-examination that he knew it was going at that rate, because he knew it to go "very fast out there."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2202, 2270, 2292.]

3. SAME—EXPERT TESTIMONY.

In an action for personal injuries, the testimony of a physician who treated plaintiff at the time of his injury and had examined him a few days before the trial, that plaintiff had degeneration of the spinal cord, based on subjective symptoms only, was admissible; the fact that witness, in arriving at his conclusions, was guided somewhat by what the plaintiff said to him, not making his evidence incompetent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2346, 2373.]

4. STREET RAILROADS—EXCLUSIVE RIGHT TO USE OF STREETS.

A street railroad has not the exclusive right to the use of its car tracks on the public streets of a city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 193.]

5. DAMAGES—MEASURE—INSTRUCTIONS.

In an action against a street railway for injuries to one who was struck by a car, an instruction that plaintiff could only recover for injuries alleged and proved and for damages sustained by reason of said injuries was not erroneous as permitting plaintiff to recover for injuries not the result of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 548-553.]

6. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE—DRIVER AND OCCUPANT OF PRIVATE VEHICLE.

Where a street car is negligently run into a vehicle, one riding in the vehicle, and injured thereby without negligence on his part, may recover for the injuries, although the driver of the vehicle was negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 147-150.]

7. TRIAL—INSTRUCTIONS—SINGLING OUT TESTIMONY.

In an action against a street railway for injuries received by plaintiff while riding in a vehicle struck by defendant's car, the declaration did not allege which way the vehicle was going at the time of the accident, though plaintiff's proof showed it was going east at that time. *Held*, that an instruction, based on tes-

timony of defendant's witnesses, that if the vehicle was being driven in a westerly direction at the time of the accident there could be no recovery, was properly refused, as singling out portions of the testimony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 577-581.]

8. SAME—IGNORING EVIDENCE.

The instruction was also erroneous as entirely ignoring defendant's negligence; it being immaterial which way the vehicle was going at the time of the collision, if defendant was negligent and plaintiff free from negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 613-623.]

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Action by Charles Muttschall against James H. Eckels and others. A judgment for plaintiff was affirmed by the Appellate Court, and defendants appeal. Affirmed.

This was an action on the case, commenced by Charles Muttschall against the West Chicago Street Railroad Company and James H. Eckels and two others, as receivers of the Chicago Union Traction Company, in the superior court of Cook county, to recover damages for a personal injury alleged to have been sustained by plaintiff in consequence of his being thrown to the pavement from a one-horse, two-seated open surrey, in which he was riding upon one of the streets of the city of Chicago, by reason of said surrey being run against by an electric car operated upon the track of the West Chicago Street Railroad Company by the receivers of the Chicago Union Traction Company. The declaration contained one count, and each of the defendants filed the plea of the general issue. A trial resulted in a verdict and judgment in favor of the plaintiff for \$9,000, which has been affirmed by the Branch Appellate Court for the First District, and a further joint appeal has been prosecuted to this court by the defendants. The evidence introduced by the plaintiff fairly tended to show that the plaintiff, at about 7 o'clock on the evening of the 3d of May, 1903, was riding east upon North avenue, in the city of Chicago, between Forty-Fourth and Forty-Fifth avenues, in a two-seated open surrey, drawn by one horse, in company with his brother-in-law, Gustav Natzke, the owner of the horse and surrey, who was driving at the time of the accident; that Natzke and plaintiff occupied the first seat and Mrs. Natzke and her child the rear seat; that as they were riding between Forty-Fourth and Forty-Fifth avenues they were overtaken by an electric car running at a high rate of speed, which struck the surrey from the rear with great force; that the surrey was capsized, the wheels broken off, and it was otherwise damaged, and plaintiff and the other occupants thereof were thrown to the pavement, and the plaintiff was severely injured; that there was a double track at the place of the injury, with ditches upon either side

thereof; that the east-bound track was the south track, upon which Natzke was driving at the time of the injury. Mr. and Mrs. Natzke and the plaintiff all testified that the approaching car was not discovered by them until it was almost upon them, when Mrs. Natzke called out, "My God! there is a car right in back of us!" that Natzke attempted to turn the horse and surrey onto the north track, but the surrey was almost instantly struck by the car and thrown over, and the persons therein thrown out; and that the car ran nearly 100 feet after the collision before it was stopped. The trial court, after overruling motions for a new trial and in arrest of judgment made by each of the defendants, entered a judgment in the following form: "It is considered by the court that the plaintiff do have and recover of and from the defendants his said damages of \$9,000, in form as aforesaid by the jury assessed, together with his costs and charges in this behalf expended, and to be paid in due course of administration as receivers."

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellants. John T. Murray, for appellee.

HAND, C. J. (after stating the facts as above). The first contention of the appellants is that the court erred in overruling their motion in arrest of judgment, on the ground that the West Chicago Street Railroad Company and said receivers of the Chicago Union Traction Company were improperly joined as defendants in said action, as it is said a joint judgment cannot properly be rendered against said defendants, as the judgment against the West Chicago Street Railroad Company should be against said railroad company personally, and the judgment against said receivers of the Chicago Union Traction Company should not be against said receivers personally, but to be paid by them in the due course of administration. If the contention of the appellants that the West Chicago Street Railroad Company and the receivers of the Chicago Union Traction Company cannot be sued jointly in this action for the reason suggested, had that question not been waived upon this record, be conceded to be sound, we think it clear that the appellants have waived their right to raise that question upon this record, if they can waive it; and that they can waive such right we have no question. In this case the record shows that defendants admitted upon the trial that the car tracks on North avenue, at the point of the accident, were owned by the West Chicago Street Railroad Company, and that the road was then operated by the receivers of the Chicago Union Traction Company. After such admission was made the court inquired of counsel: "The effect of that is, if anybody is to blame on the side of the defendants, that they have got the right people as defendants?"

I say, if there is any fault in the operation of the tracks, they have sued the right people?"—to which counsel for the defendants replied, "I don't know of anything to the contrary, your honor." The declaration declared against the West Chicago Street Railroad Company and the receivers of the Chicago Union Traction Company jointly, and the defendants had an opportunity, in replying to the interrogatory propounded to counsel by the court, to state whether they had any objection as to the manner in which the defendants had been sued, and, instead of raising the question of misjoinder now sought to be raised, counsel for the defendants acquiesced in the statement of the court that the plaintiff had brought his suit against the right defendants. We think, therefore, the defendants, after the trial had proceeded to verdict and final judgment, cannot in a court of review, in the face of such admission, raise the question of misjoinder of parties by a motion in arrest of judgment.

The next contention of appellants is that the court erred in refusing to strike out the evidence of the witness Gustav Natzke that the car was running at the rate of 20 miles an hour at the time it struck the surrey. The witness testified, on direct examination, that the car was running at the rate of 20 miles an hour at the time it struck the surrey, and, when cross-examined upon that subject, he said he knew it was going 20 miles an hour, "because I know it to go very fast out there," whereupon defendants moved to strike out the statement of the witness that the car was running at the rate of 20 miles per hour at the time of the accident. The witness was present at the time of the collision, and it was proper for him to express an opinion as to the rate of speed at which the car was moving at the time of the accident, and for the defendants to cross-examine him upon that subject; and the weight to be given to his testimony, after hearing his direct and cross examination, rested with the jury. The car evidently was running at a high rate of speed at the time of the accident, as the undisputed evidence shows the surrey was thrown over, the wheels were broken off, the parties riding therein were thrown to the pavement, and the car ran 100 feet before it was stopped. We do not think the court committed error in declining to strike out the testimony of said witness as to the rate of speed at which the car was running at the time of the accident.

It is also urged that the court erred in permitting Dr. Ide to testify that plaintiff had degeneration of the spinal cord, based upon subjective symptoms only. Dr. Ide had treated the plaintiff from the time of his injury, and had examined him a few days before the trial. He testified fully to the physical conditions he found in the plaintiff immediately after the injury; also just prior to the trial. He stated that the plaintiff was lame; that

he had curvature of the spine and degeneration of the spinal cord. The fact that the doctor, in arriving at his conclusions, was guided somewhat by what the plaintiff said to him, did not make his evidence incompetent, and subject to be stricken out on the motion of the defendants. *City of Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23.

It is also contended that the court gave to the jury improper instructions on behalf of the plaintiff, and improperly refused to give to the jury the fifth instruction offered on behalf of the defendants. The court gave to the jury three instructions on behalf of the plaintiff, all of which, it is contended by the defendants, are erroneous. The first instruction given for the plaintiff informed the jury the defendants had not the exclusive right to the use of their car tracks upon the public streets of the city of Chicago. We think this instruction justified by the holding of this court in *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78. The second instruction was upon the measure of damages, and it is said the instruction permitted the plaintiff to recover damages for injuries not the result of the accident. We do not so read the instruction. The jury were informed thereby the plaintiff could only recover for injuries "alleged and proved," and that he could only recover for damages sustained by reason of "said injuries." This instruction is very similar to an instruction approved by this court in *Chicago City Railway Co. v. Allen*, 169 Ill. 287, 48 N. E. 414. And the third instruction informed the jury that the negligence of the driver of the surrey alone would not relieve the defendants of liability, if the jury believed, from a preponderance of the evidence, that the defendants were guilty of the negligence charged in the declaration, and that plaintiff was free from negligence. The instruction, we think, announced a correct rule of law. If the plaintiff was not guilty of negligence, the defendants would not be relieved of liability to the plaintiff, if they were guilty of negligence, merely on the ground that the driver of the surrey was guilty of negligence. *Chicago Union Traction Co. v. Leach*, 215 Ill. 184, 74 N. E. 118.

The instruction offered on behalf of the defendants, and refused, upon which error is assigned, sought to inform the jury if the surrey in which the plaintiff was riding was being driven in a westerly direction at the time of the accident there could be no recovery. The declaration upon which the case was tried did not allege which way the surrey was going at the time of the accident, although the plaintiff's proof showed it was going east at that time. The instruction was sought to be based upon the testimony of the motorman and conductor in charge of the car, who testified they met the rig at the time of the injury. It is not permissible to single out, in a case like this, a particular fact claimed to be established by the evi-

dence, and instruct the jury that, if such fact is proven, there can be no recovery. If this could be done, each claimed fact might be incorporated in such an instruction, and the plaintiff defeated thereby in a case where, upon all the evidence in the case, he would clearly be entitled to recover. The instruction was also wrong in that it entirely ignored the negligence of the defendants. The gist of the action was the improper operation of the car, and if the accident which caused the injury was the result of the negligent operation of the car by the defendants, and the plaintiff was not guilty of negligence, the plaintiff would be entitled to recover, regardless of which way the surrey was going at the time of the collision.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(230 Ill. 550)

JOLIET STOVE WORKS v. KIEP et al.

(Supreme Court of Illinois. Oct 23, 1907.
Rehearing Denied Dec. 10, 1907.)

1. APPEAL—QUESTIONS NOT RAISED AT TRIAL—PLEADINGS.

The sufficiency of the declaration cannot be raised for the first time either in the Appellate Court or in the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1226-1240.]

2. TAXATION—ASSESSMENT—DESCRIPTION.

An assessment on property described as a certain lot in a certain subdivision, when there was no plat of such subdivision on file, was void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 735.]

3. SAME—VOID SALE—PURCHASE MONEY—SUBSEQUENT TAXES—RECOVERY.

Revenue Act (Hurd's Rev. St. 1905, c. 120) § 213, provides that, when a tax sale is void because of certain specified infirmities, the county clerk shall make an entry opposite to such tracts or lots in the sale and redemption record that they have been erroneously sold, and such entry shall be prima facie evidence of the facts stated, and, unless the error is disproved, the county collector, on demand of the owner of the certificates, shall refund the amount paid and cancel the certificate. Section 214 declares that when the purchaser at such erroneous sale, or his assignee, shall have paid any tax or subsequent assessment which has not been paid by the owner, he shall be entitled to recover from the owner the amount so paid, with 10 per cent. interest. *Held*, that such sections modified the rule of caveat emptor applicable to tax sales, in so far that, when the sale was void for any of the specified defects, the purchaser or his assignee was entitled to recover the money paid from the county and any subsequent taxes paid, with interest, from the owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, §§ 1621-1623, 1645.]

4. SAME—EVIDENCE OF INVALIDITY.

The entry required to be made by the county clerk on the sale and redemption record that the land was erroneously sold is not the only evidence of such fact that may be received by a court in an action to recover the price and subsequent taxes paid under a void sale.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Will County; Dorrance Dibell, Judge.

Action by John Kiep and others against the Joliet Stove Works. From a judgment for plaintiffs, defendant appeals. Affirmed.

C. W. Brown, for appellant. Benjamin Olin and Morrill Sprague, for appellees.

HAND, C. J. This is an action of assumption, commenced in the circuit court of Will county by the appellees against the appellant, to recover the amount of money bid by their assignor at a tax sale of certain real estate situated in said county belonging to the appellant, and subsequent taxes paid thereon by them, under the provisions of sections 213 and 214 of the revenue act (Hurd's Rev. St. 1905, p. 1673, c. 120), on the ground that said tax sale was void by reason of the misdescription of the premises sold. The declaration consisted of the common counts, to which was filed the general issue. The plaintiffs also filed a bill of particulars, which showed they sought to recover of the defendant the amount paid at tax sale of the defendant's real estate on July 2, 1898, \$455.91; interest thereon at 10 per cent., \$370.13; taxes paid on said real estate May 23 or 24, 1899, \$540.19; interest thereon at 10 per cent., \$380.32; taxes paid on said real estate March 1, 1900, \$655.20; interest thereon at 10 per cent., \$410.75. A jury was waived, and the case was tried before the court; and the court held, in certain propositions of law submitted by the respective parties, that the plaintiffs were not entitled to recover the amount bid at the tax sale, but were entitled to recover the amounts of the subsequent taxes paid on said real estate by them and interest on said amounts at 10 per cent. per annum, and rendered judgment in favor of the plaintiffs for \$1,986.46, which judgment has been affirmed by the Appellate Court for the Second District, and a further appeal has been prosecuted to this court.

It appears from the evidence that the defendant in 1897 was the owner of about four acres of land situated in the city of Joliet, upon which was located its plant; that in 1897, and for a number of years prior thereto, said real estate had been assessed for taxation as lot 6 of Assessor's subdivision of block 24, Bowen's addition to Joliet, Will county, Ill., and the taxes levied thereon prior to 1897 paid by the defendant; that the defendant failed and neglected to pay the taxes levied against said real estate under said description for the year 1897, and the said real estate, under the said description, was sold for the taxes of said year on July 2, 1898, for the sum of \$455.91, to William O'Callaghan; that a tax certificate on said sale, under said description, was issued to said O'Callaghan, which certificate was assigned by said O'Callaghan on August 28, 1898, to the plaintiffs;

that on May 24, 1899, the appellees paid the taxes on said real estate under said description, amounting to \$540.19, and on March 1, 1900, they paid the taxes on said real estate under said description, amounting to \$655.20; that, the premises not having been redeemed, on July 30, 1900, the same were conveyed by the county clerk of said county to the appellees under said tax sale, as lot 6 of Assessor's subdivision of block 24, Bowen's addition to Joliet, Will county, Ill., which deed was recorded in the office of the recorder of deeds in said county August 1, 1900. The appellees thereafter notified appellant they had a tax deed to said real estate. About two years thereafter appellees discovered there was no such lot as lot 6 of Assessor's subdivision of block 24, Bowen's addition to Joliet, Will county, Ill., and appellees thereupon caused the county clerk of Will county to make an entry on the tax sale record of said county, opposite the description, "Lot 6 of Assessor's subdivision of block 24, Bowen's addition to Joliet," as follows: "August 25, 1902. Tract sold in error. Void on account of uncertain description. William F. Hutchinson, Co. Clerk." Appellees thereupon executed a quitclaim deed of the premises to W. N. Moore, an officer of the appellant company, and left it with the county clerk, with written directions to deliver it to appellant on payment by it of the money paid by them for taxes on said premises, and on November 2, 1903, appellees executed another quitclaim deed for said premises to the appellant, and offered to deliver it to the appellant on payment to them of the amount of taxes paid by them on said real estate, and, the appellant having refused to repay to appellees the amount of money paid by them for taxes on said real estate, this suit was brought.

The first contention made by appellant is that there can be no recovery under the declaration filed in this case. That question was not raised by demurrer, motion in arrest of judgment, or otherwise, in the trial court, and it cannot, therefore, be raised in either the Appellate Court or in this court for the first time, and need not be considered in this opinion.

It is next contended the proof does not show that there was a misdescription of the real estate of appellant in the assessment for taxation for the year 1897. The real estate of appellant had been assessed under the description of lot 6 of Assessor's subdivision of block 24, Bowen's addition to Joliet, Will county, Ill., for a number of years. It was, however, subsequent to said tax sale, discovered that there was no plat in existence in said county, of record, showing lot 6 of Assessor's subdivision of block 24, Bowen's addition to Joliet, Will county, Ill. The assessment was therefore void (*People v. Chicago & Alton Railroad Co.*, 96 Ill. 369; *People v. Eggers*, 164 Ill. 515, 45 N. E. 1074; *Vennum v. People*, 188 Ill. 158, 58 N. E. 979) for want

of such plat. In the *Vennum Case*, on page 160 of 188 Ill., page 980 of 58 N. E., the court said: "In proceedings for taxation property must be described by reference to government surveys, or by metes and bounds, and, if it is divided into lots, then by a reference to authenticated plats. Where the property described in the application for judgment is designated as a certain lot in a certain subdivision, and there is no such lot as so described in the subdivision referred to, then it is clear that judgment ought to be refused, because a judgment for taxes cannot be rendered against property which has no existence. *People v. Clifford*, 186 Ill. 165, 46 N. E. 770; *People v. Chicago & Alton Railroad Co.*, 96 Ill. 369." The question whether the real estate of the appellant was misdescribed in the assessment of 1897 was a question of fact. The evidence found in this record fairly tends to show that said assessor's subdivision was, in fact, never made, or, if made, the plat thereof was never executed and recorded according to law. The judgment of the Appellate Court is therefore conclusive upon this court that said real estate in the assessment of 1897 was misdescribed.

It is finally contended that sections 213 and 214 of the revenue act do not authorize a recovery of the taxes paid by appellees upon appellant's real estate for the years 1898 and 1899. These sections are as follows:

"Sec. 213. Whenever it shall be made to appear to the satisfaction of the county clerk that any tract or lot was sold, and that such tract or lot was not subject to taxation, or upon which the taxes or special assessments had been paid previous to the sale of said tract or lot, or arises from a double assessment, or that the description is void for uncertainty, he shall make an entry opposite to such tracts or lots in the sale and redemption record that the same was erroneously sold, and such entry shall be prima facie evidence of the fact therein stated; and unless such error is disproved the county collector shall, on demand of the owner of the certificate of such sale, refund the amount paid and cancel such certificate so far as it relates to such tract or lots. The collector shall take credit in settlement of his accounts thereafter with such officers as he may be liable to for their pro rata amounts respectively paid aforesaid.

"Sec. 214. When the purchaser at such erroneous sale, or any one holding under him, shall have paid any tax or special assessment upon the property so sold, which has not been paid by the owner of the property, he shall have the right to recover from such owner the amount he has so paid, with ten per cent. interest, as money paid for the owner's use."

We think it clear, from a consideration of said sections of the statute, that whenever real estate has been sold for taxes, and it afterwards appears (1) that said real estate

was not subject to taxation, or (2) that the taxes thereon had been paid prior to the sale, or (3) that the taxes arose from a double assessment, or (4) that the premises were so imperfectly described as to render the sale void, the holder of such certificate of sale is entitled to receive back from the county collector the amount paid at said tax sale, and if the purchaser, or any one holding under him, at such erroneous sale (that is, a sale of lands not subject to taxation, or where the taxes have been paid prior to the sale, or where the taxes for which the sale was made arose from double taxation, or in case the real estate was so imperfectly described as to render the sale void), shall have paid any taxes upon the real estate sold which have not been paid by the owner of the real estate, he has the right to recover the amount he has so paid, with 10 per cent. interest, from the owner of the real estate, as money paid for the owner's use. We also are of the opinion the entry provided for in section 213 to be made by the county clerk upon the tax record that the sale had been erroneously made is not the only evidence that may be received by a court of that fact. Especially should that be true in a suit to recover taxes paid by a purchaser, or one holding under him, from the owner of the land, as clearly the county clerk could not defeat a right of recovery in such case by refusing to make such entry upon the tax record. In this case the entry by the county clerk had been made, which was introduced in evidence, and the plaintiffs introduced other proof that the real estate of appellant was misdescribed in the assessment of 1897. It is not necessary, therefore, to determine in this case whether the county clerk has the right to make such entry of an erroneous sale upon the tax record after a tax deed has been issued, nor is it necessary to determine whether the holder of the certificate of sale can recover back the amount paid at the sale from the county or county collector after a tax deed is issued on the sale. We think, however, it clear that the purchaser, or any one holding under him, can recover from the owner any tax paid upon the property so erroneously sold until his right is barred by the five-year statute of limitations.

It is urged by the appellant that said sections of the statute should not be construed so as to permit a suit to be brought to recover taxes paid by a purchaser, or one holding under him, if it appear a tax deed has issued upon the sale, as it is said the doctrine of caveat emptor is applied to a tax purchaser, and if he fails to get title to the land he should be held to get nothing and to lose the money invested in the tax title or

to protect his interest therein. Such, undoubtedly, was the common law, and would be the law of this state governing this case, were it not for the sections of the statute above quoted. We think, however, those sections of the statute must be held to control in the decision of this case. Judge Cooley, in his work on Taxation (2d Ed., p. 546), in discussing this subject, says: "The rule of caveat emptor applies to tax purchasers. The purchaser at a tax sale, therefore, either gets a title to the land subject to the statutory redemption or he gets nothing. If he receives a deed which for any reason is subject to fatal infirmity, he will lose what he has paid. This is the rule unless the statute shall recognize an equity in him and provide for it. Sometimes the statute does this by making a provision for the refunding of his money from the public treasury. But sometimes, also, statutes give him a lien upon the land." In numerous of the states statutes somewhat similar to the statute in force in this state exist upon said subject (*Wilson v. Butler County*, 26 Neb. 676, 42 N. W. 891, 4 L. R. A. 589), which statutes appear to have been liberally construed to effect the object of their passage. In *Chapman v. Sollars*, 38 Ohio St. 378, it was held, under a somewhat similar statute to the one in force in this state, that the purchaser at a tax sale might prosecute a suit against the owner to enforce a lien against the land for the recovery of taxes, etc., even after he had failed to recover the possession of the land in an action founded upon a tax deed on the ground that the sale was invalid by reason of irregularity in the tax proceedings.

There appears to be nothing inequitable in a statute which permits a tax purchaser to recover back the amount of his bid from the county, and from the owner any taxes which he has paid upon the land purchased to protect the purchase, if it subsequently appears that the officers of the county and state have sold him land not subject to taxation, or where the taxes have been paid prior to the sale, or where the taxes for which the sale was made arose from double taxation, or in case the real estate was so imperfectly described as to render the sale void, so that the purchaser gets nothing by virtue of his purchase. The state recognized the necessity for bidders and purchasers at tax sales, and by a class of legislation similar to that found in sections 213 and 214 of the revenue act has invited them to attend such sales, in order to secure revenue for the purposes of government.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(230 Ill. 544)

McKINNIE et al. v. LANE.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

1. APPEAL—REVIEW—DECISIONS OF INTERMEDIATE COURT—QUESTIONS OF FACT.

The affirmance by the Appellate Court of a judgment of the circuit court settles all controverted questions of fact adversely to appellant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4322, 4324.]

2. ASSUMPSIT, ACTION OF—COMMON COUNTS.

Where there is an agreement to pay a certain sum in specified articles of personal property at agreed prices on a particular day, a failure to deliver the articles on the day fixed in the agreement converts the transaction into a money obligation, recoverable under the common counts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Assumpsit, Action of, § 19.]

3. CONTRACTS—TIME FOR PERFORMANCE—REASONABLE TIME.

Where there is an agreement to deliver certain articles under a contract, but no date is fixed for delivery, the law will presume delivery to be made on demand or within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 947.]

4. SAME — ACTIONS FOR BREACH — FORM OF REMEDY.

Where defendant was to deliver certain pictures as payment of the balance on a contract, and plaintiff waited two years before suing and made repeated demands during that time, defendant became liable for the agreed value of the pictures, and the common counts were sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1551, 1552.]

5. PLEADING—BILL OF PARTICULARS—OFFICE OF BILL.

The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit the plaintiff to the proof of the particular cause of action therein mentioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 949.]

6. SAME—AMENDMENT OF BILL.

Where a bill of particulars stated that the balance due on an account was to have been paid in pictures, but the evidence showed that it was to be paid in pictures or cash, it is error to refuse leave to amend so as to show the facts.

7. APPEAL—REVIEW—ERROR INDUCED BY APPELLANT.

Where plaintiff was not permitted to amend a bill of particulars to conform to the proof over defendant's objection, defendant cannot urge the variance on appeal, even if it was raised below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3591, 3596.]

8. CONTRACTS — ACTIONS FOR BREACH — INSTRUCTIONS.

Plaintiff's bill of particulars alleged that a balance due on a contract was to be paid in pictures, but the evidence showed that it was to be paid in pictures or cash, and plaintiff asked leave to amend to conform to the proof, but defendant objected, and the amendment was denied. The jury was instructed that, if defendant was to pay the balance either in cash or pictures, then the issue should be found for plaintiff. *Held*, the instruction was proper.

9. APPEAL—PARTIES ENTITLED TO ALLEGE ERROR.

A party cannot complain of an instruction given on behalf of his adversary like one given at his own request.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3602.]

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; R. S. Tuthill, Judge.

Action by Maurice T. Lane against Celestia G. McKinnie, in which defendant's executors were substituted on appeal. From a judgment of the Appellate Court affirming a judgment of the circuit court, defendants appeal. Affirmed.

This suit was brought in the circuit court of Cook county by Maurice T. Lane against P. L. McKinnie to recover the sum of \$1,700, which the former claimed to be due him as a balance on the purchase price of certain paintings sold to McKinnie. The declaration included only the common counts and was accompanied by a bill of particulars, as follows:

To two pictures by Dupres and Mueller	\$3,500
Credit	\$1,700
Two pictures by Hammerstadt. .	100

1,800

Balance due	\$1,700
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The balance of this amount was to be given in pictures at agreed prices. These pictures were demanded and refused and are now suing for the cash.

Maurice T. Lane,

By Wheeler, Silber & Isaacs, Attorneys.

On June 11, 1900, appellee sold to P. L. McKinnie two paintings, for which he claims he was to receive the sum of \$3,500, \$1,700 of which he admits was paid in money, and \$1,800 he claims was to be paid in other pictures or in cash. Two pictures were received by appellee, as he claims, on the balance due, for which he gave McKinnie credit for \$100. A demand for the other \$1,700 worth of pictures was, according to appellee's contention, met with a refusal, whereupon suit was instituted September 11, 1903, by appellee to recover the remaining \$1,700 in money. The cause was tried by jury in the circuit court, and a judgment rendered in favor of appellee for \$1,700. Appeal was prosecuted to the Appellate Court for the First District, where the judgment was affirmed, and by further appeal the record is brought to this court for review. After the trial in the court below, and before the case was passed upon by the Appellate Court, McKinnie died, and his executors were substituted in the case and appear as appellants herein.

McKinnie testified that the purchase price of the paintings was \$1,700, which he paid. He submitted a receipted bill showing the purchase price of \$3,500, but he explains

that by saying: "Mr. Lane called and got his checks for the total amount and brought me a bill made out at \$3,500, which bill at \$3,500 was an absolute and perfect fiction. I told Mr. Lane I did not care to have a bill made out in that manner, but he said to me: 'Doctor, these pictures are worth more than this money; that it to say, you may be able to sell them some time for a larger sum than \$1,700. And I will take from you a few paintings to sell on commission, and you can let some of them go on this, but this \$1,800 on here is simply a booster.' I didn't fancy it, but he persuaded me it was all right. I never agreed to give Mr. Lane any other paintings than the two which he received for these paintings. He wanted me to forward them to him at Pittsburg, which I did, and they are the only paintings which I ever offered to Mr. Lane in the world. It was wholly, purely, absolutely, a fictitious and boosted price." He also submitted in his own behalf a check containing the words, "In full to date." This check was dated June 11, 1900, and was cashed by Lane.

Lane testified that the purchase price of the two oil paintings was \$3,500, to be paid \$1,700 in money and \$1,800 in specific pictures at agreed prices, or in cash; that he received \$1,700 in money on delivery of the two paintings, also two pictures at \$100; that when he called for the remaining pictures, representing the other \$1,700, McKinnie refused to deliver them to him; that he called repeatedly to get them, "three, four, or five times at McKinnie's house," and "at least a dozen times at his office," but was never able to get the remaining pictures. Referring to the check which contained the words "in full to date," he denied that these words were on the check when he received it. He explained the receipted bill by saying: "It was done as I do in thousands of cases dealing with rich people. I merely receipted the bill and called afterwards to get my pictures and could not get them."

Currey & Allen, for appellants. Wheeler, Silber & Isaacs, for appellee.

VICKERS, J. (after stating the facts as above). The affirmance of the judgment by the Appellate Court settles all controverted questions of fact adversely to the contention of appellants.

It is contended by appellants that under the bill of particulars filed in this case recovery could not be had under the common counts. It is well-settled law that where there is an agreement to pay a certain sum in specified articles of personal property, at agreed prices, on a particular day, a failure to deliver the articles on the day fixed in the agreement converts the transaction into a money obligation. *Borah v. Curry*, 12 Ill. 66; *Smith v. Dunlap, Id.*, 184; *Bilderback v. Burlingame*, 27 Ill. 338; *Sleuter v. Wallbaum*, 45 Ill. 43. In the case at bar there

was no agreement fixing the date for the delivery of the pictures. In such case the law will presume delivery to be made on demand, or at least within a reasonable time. The record shows that after delivering the paintings to McKinnie and receiving the \$1,700 in money and \$100 in pictures appellee waited two years before bringing suit, making during that time repeated demands for the pictures. Appellee did all the law required of him, and when McKinnie refused to deliver the pictures as agreed he became liable to pay in money to appellee the sum which they had agreed the pictures would have represented had they been delivered. The common counts were sufficient to support that cause of action. The law is well settled that where a contract has been fully performed, and nothing remains to be done but to pay the money, a recovery may be had under the common counts.

Appellants insist that there is a variance between the bill of particulars and the evidence, in that the bill of particulars states that the balance of the amount was to be given in pictures at agreed prices, while the evidence shows that McKinnie was to pay the balance in pictures or in cash. The object of a bill of particulars is to inform the defendant of the claim he is called upon to defend against, and its effect is to limit and restrain the plaintiff, on the trial, to the proof of its particular cause or causes of action therein mentioned. *Morton v. McClure*, 22 Ill. 257; *McDonald v. People*, 126 Ill. 150, 18 N. E. 817, 9 Am. St. Rep. 547; *Waldner v. Pauly*, 141 Ill. 442, 30 N. E. 1025. At the conclusion of his evidence, appellee asked leave to amend his bill of particulars by inserting the words "or cash," in order that the supposed variance might be obviated. Upon objection by appellants he was not permitted to make the amendment. A bill of particulars may be amended, and it was proper for appellee to ask leave to amend, and leave so to do should have been granted. *Morton v. McClure*, supra; *Waldner v. Pauly*, supra. If the bill of particulars had been amended as requested, there would have been no ground to claim that a variance existed. The refusal of the court to permit the amendment occurred through the objection of the appellants, and they are not now in position to urge the variance, even if the point was raised below. A party cannot complain of an error which he induced the court to make or to which he consented. *Smith v. Kimball*, 128 Ill. 583, 21 N. E. 503; *Oliver v. Oliver*, 179 Ill. 9, 53 N. E. 304; *Conness v. Indiana, Illinois & Iowa Railroad Co.*, 193 Ill. 464, 62 N. E. 221; *Glos v. Murphy*, 225 Ill. 58, 80 N. E. 59.

Appellants complain that it was error to instruct the jury that if they "find, from the evidence, that the defendant was to pay for said pictures \$1,700 in cash and \$1,800 either in cash or other pictures," then the issues

should be found for the plaintiff. It is contended that the expression "either in cash or other pictures," contained in the instruction, is error, because the bill of particulars mentions pictures only. This instruction was proper under the evidence.

Instruction No. 2 given on behalf of appellee, was as follows: "The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury, and the law is that, where a number of witnesses testify directly opposite to each other, the jury are not bound to find the weight of the evidence as evenly balanced, and the jury have a right to determine, from the appearances of the witnesses on the stand, their manner of testifying, their apparent candor and frankness, their apparent intelligence, and from all other surrounding circumstances attending the trial, which witnesses are the more worthy of credit, and to give credit accordingly." In this instruction appellants object to the use of the words "from all other surrounding circumstances attending the trial." Without the use of these words the instruction states the law. Appellants' instruction No. 6 contains these words: "The jury have a right to take into consideration all the facts and circumstances

connected with the case." Appellants' instruction contained words of the same import and meaning as the instruction objected to. A party cannot complain of an instruction given on the behalf of his adversary like one given at his own request. *Springer v. City of Chicago*, 135 Ill. 552, 28 N. E. 514, 12 L. R. A. 609; *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162; *Funk v. Babbitt*, 156 Ill. 408, 41 N. E. 166.

Appellants assign error on alleged improper remarks by appellee's counsel in his address to the jury. We have read the remarks insisted on by appellants as error and see nothing in them to condemn. Appellee had testified that it was his custom in dealing with wealthy patrons, when taking pictures in part payment for sales, to give a receipt in full and later to call for the pictures. It was certainly proper for him to explain to the jury the reasons why he gave a receipt in full to Dr. McKinnie, and comments made by counsel in his argument were in line with the evidence and tended in no way to prejudice appellants' interests.

There is no error in the record, and the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

(230 Ill. 572)

SEARS v. VAUGHAN et al.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 5, 1907.)

1. DEEDS—EXECUTION—MENTAL CAPACITY.

Mere impairment of memory by reason of advanced years does not of itself indicate a want of power to execute a deed; but it must appear that the grantor did not have sufficient mind and memory to comprehend the nature and character of the transaction in which he was engaged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 149-155.]

2. SAME—EVIDENCE—MENTAL CAPACITY.

In a suit to set aside a deed, evidence held insufficient to show that the grantor had not sufficient mental capacity when the deed was executed to understand the nature of the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 638, 639.]

3. SAME—UNDUE INFLUENCE—CIRCUMSTANTIAL EVIDENCE.

While undue influence inducing a deed may be established by circumstantial evidence, yet, when all the circumstances relied on are equally consistent with some other rational theory, the charge is unsustainable, especially where the direct evidence showed mental capacity and absence of undue influence at the time of the transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 637-645.]

4. SAME.

The word "undue," when used to qualify "influence" inducing the execution of a deed, has the legal meaning of "wrongful."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 190.]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172, 7823, 7824.]

5. DEEDS—EXECUTION—UNDUE INFLUENCE.

Influence secured through affection by a grantor for his foster child is not undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 190, 191.]

6. SAME—SCOPE.

Undue influence which will avoid a deed must go to the extent of depriving a party of his free agency, and must operate at the time of the transaction sought to be impeached.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 190-198.]

7. SAME—EVIDENCE—UNDUE INFLUENCE.

Evidence held insufficient to show that a deed executed by decedent to defendant was the result of undue influence exercised over decedent by defendant.

8. SAME—FIDUCIARY RELATION.

The rule that, where a fiduciary relation exists, burden is on a grantee to prove the utmost good faith on her part, and the absence of undue influence, to sustain the conveyance, does not apply to a conveyance by way of gift by a father to his foster daughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 587-593.]

9. EVIDENCE—"PRESUMPTIONS"—NATURE.

"Presumptions" are inferences which common sense draws from the known course of events, or from circumstances usually occurring in such cases.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 73.]

For other definitions, see Words and Phrases, vol. 6, pp. 5535-5541; vol. 8, pp. 7761-7762.]

10. DEEDS—EXECUTION—UNDUE INFLUENCE—BURDEN OF PROOF.

In a suit to set aside a deed from a father to his foster child, evidence that she occupied

a position of influence over the father, or that she exercised or attempted to exercise influence to induce him to execute the deed, did not raise a presumption against its validity sufficient to shift the burden of proof to her, requiring that she prove absence of undue influence by clear and satisfactory evidence, but at most only authorized an inference of fact that the deed might have been the result of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, §§ 587-591.]

Appeal from Superior Court, Cook County; Theodore Brentano, Judge.

Suit by William H. H. Sears against Margaret C. Vaughan and others. From a decree dismissing the appeal, complainant appeals. Affirmed.

This is a bill in equity filed by appellant in the superior court of Cook county to set aside a deed made by J. Lafayette Curtis, dated August 27, 1902, purporting to convey to appellee Margaret C. Vaughan the premises known as 377 Dearborn street, Chicago. In general the bill alleges three grounds for setting aside the deed: First, mental incapacity of the grantor; second, actual undue influence exerted by the grantee and her agents; third, presumptive undue influence arising out of what is alleged to be the fiduciary relation existing between the grantor and the grantee. The cause was heard below and a decree was entered dismissing the bill for want of equity. Appellant, by his appeal, has brought the record to this court for review.

Numerous witnesses were heard on the trial, and the record is voluminous, consisting of over 2,500 typewritten pages, of which over 2,000 are devoted to the testimony.

J. Lafayette Curtis died November 9, 1903, at about the age of 80 years. His wife, Helen A. Curtis, had died in May, 1902. He had resided in Chicago for 30 years, and had been engaged in loaning money, conducting a private bank, and in the real estate business. Prior to coming to Chicago to reside he had lived in Keokuk, Iowa, where he had been engaged in the patent medicine business. He had no children of his own, and about 1860 took appellee Mrs. Vaughan, then about 2¼ years old, from an orphan asylum and raised her, never, however, legally adopting her as his daughter. She was known in her childhood as Maggie Curtis. She was married in 1875 to a man named Vaughan, who shortly thereafter became insane, and was confined in an insane asylum until 1879, when he was discharged as cured. Mrs. Vaughan, soon after her husband's discharge, went with him to Baltimore, Md., when they resided until 1889, when they removed to Mt. Vernon, Ohio, where Vaughan died, about 1892. Mrs. Vaughan, with her four children, continued to reside in Ohio until 1902. Two of her children were unfortunate, and are not capable of caring for themselves. From 1891 until the death of Mrs. Curtis, in 1902, Mr. Curtis supported Mrs. Vaughan and her children in Mt. Ver-

non, Ohio, sending her \$100 per month. Mr. Curtis had acquired considerable property in Chicago, and was also the owner of property in Keokuk, Iowa, and farm lands in Iowa and Minnesota. In 1900 he employed H. L. Cowles, a nephew of his wife, at a salary of \$125 per month, to attend to his business, such as collecting rents, looking after property, dealing with tenants, etc. Mrs. Curtis at this time requested Cowles to keep Mr. Curtis interested in the business, and to consult with him in regard to the management of affairs. Cowles and his wife, Grace Caroline Cowles, took up their residence in the Curtis home, and remained there until about six weeks after the death of Mrs. Curtis, in May, 1902. During that time Cowles acted as the agent of Curtis in looking after the property, and their personal relations were cordial. At the time of the death of Mrs. Curtis, Mrs. Vaughan came to the Curtis home and remained there. Soon after her arrival Cowles and his wife left the house. While Mrs. Curtis was ill, she requested Mr. and Mrs. Cowles to continue to reside with Mr. Curtis, and they agreed to do so. Mr. Curtis was averse to notifying Mrs. Vaughan of the serious illness of her foster mother, saying that she would get there soon enough. The information about the illness of Mrs. Curtis was sent her by a member of the Cowles family, and not by Mr. Curtis. However, when she arrived, Curtis, who had also asked Cowles to remain with him, changed his mind and permitted Mrs. Vaughan to remain. She had difficulties with various members of the Cowles family and other relatives of Mrs. Curtis, and complained of the disposition made by them of her mother's jewels and laces. When informed of her suspicions that certain relatives of Mrs. Curtis were carrying away small articles from the house, Mr. Curtis became angry with them to such an extent that they ceased to visit the house. Mrs. Vaughan remained with Curtis, and no opportunity was given the relatives of Mrs. Curtis to converse with him out of her presence. She slept in the same room with him, and was solicitous as to his wants. On two occasions when H. L. Cowles attempted to secure a private interview with him Mrs. Vaughan interrupted and called Curtis away. On May 20, 1902, about one week after the death of Mrs. Curtis, Curtis made a codicil to his will, making changes that were beneficial to Mrs. Vaughan. On June 6, 1902, Curtis assigned to Mrs. Vaughan his interest in the estate of Henry H. Curtis, of St. Louis, amounting to \$5,631.44. She collected this interest. On July 2, 1902, Curtis conveyed, by two deeds, 160 acres of land in Iowa and some lots and land in Minnesota to Mrs. Vaughan. On July 2, 1902, H. L. Cowles received for Curtis a check for \$12,995, payable to Curtis' order. This was in payment for real estate sold in Chicago. Curtis told Cowles to take charge of

this check, and deposit it next day. Mrs. Vaughan learned about the check, and after a conversation with her Curtis called for and received the check from Cowles. The next day Curtis and Mrs. Vaughan, accompanied by two attorneys, went to the banking house of N. W. Harris & Co., and there Curtis purchased and gave to Mrs. Vaughan \$10,850 worth of bonds. Out of the check \$1,327 was deposited to Curtis' credit, and the record does not show what became of the balance of the check, amounting to \$818. On August 27, 1902, Curtis executed and delivered to Mrs. Vaughan the deed for the property which is in question in this suit. He was 78 years old at the time. The value placed by the appraiser for inheritance tax upon this property was \$43,175. On October 29, 1902, he conveyed to her real estate in Keokuk, and a short time before his death he conveyed to her his residence in Chicago and its contents.

The allegation of the bill is that at the time J. Lafayette Curtis signed the deed in question he was not of sound mind and memory, but, on the contrary, was in his dotage, and that his mind and memory were so impaired at that time as to render him wholly incapable of making any proper conveyance of his real estate. The bill also charges that Margaret C. Vaughan used actual undue influence in procuring the deed, and also that a fiduciary relationship existed between Curtis and Mrs. Vaughan. The evidence is conflicting in most, if not all, material matters. A large number of witnesses were produced by each side who had known Curtis for varying numbers of years, and who were themselves engaged in various businesses and who had met him under conditions which surround one in the ordinary affairs of life. Of these, 27 state facts tending to show that grantor's mental faculties were unimpaired for a period of three months before, and at least that long after, the making of the deed. Twenty-eight witnesses state facts tending to show that during this time J. Lafayette Curtis did not possess the sound mind and memory which the law requires one making a valid transfer of property to possess.

Out of this mass of testimony the following facts may be regarded as established by a clear preponderance of the evidence: J. Lafayette Curtis was a successful business man, who had accumulated property worth in the aggregate about \$150,000, perhaps more. He was close in his dealings, and it had been said of him that he was as hard as adamant. For many years he cared for his own business without assistance, having an office downtown. About 1898 he began to fail physically, and seemed liable to become confused about business affairs. He would also in the same conversation repeatedly ask the same question over and over again. He became subject to forgetfulness, frequently forgetting that he had collected rent, and in one instance he left the house leaving a re-

ceipt on the table while his tenant had gone into another room to get the money. He had great difficulty in counting money, and would ask others to count it for him. He endeavored to take care of his own correspondence, having his wife do the writing for him, and he would dictate a letter over and over again to the same party, making only trifling changes. On one occasion he dictated the same letter 10 times. He lost care about his personal appearance, and his wife dressed him, combed his hair, and brushed his teeth. Mrs. Curtis expressed the greatest solicitude about his being on the streets alone, because he was easily lost, and confused in his mind the streets of Chicago with those of Keokuk. She took great care that he should not go upon the streets alone, but, if occasion demanded that he should do so, she would put his name and address upon a piece of paper in his hatband. He became confused as to the names of relatives, frequently calling them by the wrong name. He was childish in many things, and asked foolish questions. It was difficult for him to keep his mind on any subject, and he frequently walked around talking to himself. He greeted guests repeatedly, apparently not knowing that he had greeted them before. His memory failed about matters of recent date, although he could discuss intelligently matters which had happened many years before. He lost his ability to comprehend simple things; thought that the marriage of a neighbor was a funeral; that John Brown had signed the Declaration of Independence, and asked if he was still living in California; did not readily comprehend that his wife was dead, and referred to her funeral as a reception. He lost, to some extent, his ability to reason about ordinary affairs of life. His mind entertained vagaries, and he did not seem to comprehend business matters readily, such as giving a tenant a lease or getting a check for money. His mind acted slowly when considering a business matter. While H. L. Cowles was managing his affairs, Curtis would sign checks and discuss his business with Cowles, who talked to him about business affairs on the suggestion of Mrs. Curtis. Upon the death of Mrs. Curtis, H. L. Cowles was named by her as one of the executors of her will. In a safety deposit vault were found several thousand dollars' worth of bonds in an envelope, marked: "Property of Mrs. Curtis." Mr. Curtis claimed these bonds as his own, claiming that he had so marked the envelope that, in case of his death before that of his wife, she should have them without trouble. Proceedings were instituted in the probate court to ascertain the ownership of the bonds, and October 23, 1902, Curtis was called as a witness in the case. This was about two months after the deed in question was executed. He was subjected to a very searching examination. His evidence is in the record in this case, and occupies 35 pages of typewritten matter.

While some of his answers indicate a failure to comprehend the questions, his testimony, in the main, is consistent and intelligent. He told the story of placing the bonds in the bank in his wife's name so that, if he died first, she could get them, but, if not, they were to be reclaimed by Curtis. He never departed from this statement, and his evidence shows that he had as much mental vigor as is usually possessed by persons of his age.

It is the deed to the premises known as 377 Dearborn street that is sought to be set aside in this proceeding. This deed was written by M. L. Coffeen, a lawyer and a member of the firm of Tenney, Coffeen, Harding & Wilkerson. Since it is of importance to determine the issue here involved with respect to the execution of this deed, it will be necessary to examine in detail the evidence bearing upon the circumstances attending its execution.

James B. Diver, who was Curtis' agent in Keokuk, testified: "He said that the property here [in Keokuk] that I had charge of was to be Maggie's, and also he intended giving the Dearborn street property to Maggie—Mrs. Vaughan. I think the number of the Dearborn street property is 377. Mrs. Vaughan was in Mt. Vernon at that time. Mr. Curtis didn't say whether she knew of his intention."

M. L. Coffeen testified: "Mr. Curtis and Mrs. Vaughan came to my office together. I was busy when they came in. I went out into the outer office. Mr. Curtis and Mrs. Vaughan were sitting there. I said I would be disengaged in a few minutes and went into my room, and Mr. Curtis followed me in—said that he wanted to talk with me further. Mrs. Vaughan did not come with him in that interview. She stayed in the outer office, and I closed the door. We sat down there alone together in the office. Mr. Curtis told me that he had made up his mind to give his Dearborn street property to Mrs. Vaughan, and again said that he had thought of making a deed to that property to her and holding the deed, because he might want to sell it, and I asked him if he wanted to give her that property outright; if that was what he wanted; if that was in reference to the change in his will that we talked about before or further provision for her. He said yes, it was, but he did not know how he wanted to do it—whether he wanted to change his will or whether he could deed the property. I told him that if he made a deed to the property and held the deed that it would be valueless unless it was delivered, and that, if he wanted her to have that property, he had a right to deed it to her or, if he wanted to change his will and put that in his will, he could do it that way. 'Well,' he said, 'Mrs. Vaughan will have her home, and I want to make a good provision for her, so that she will have income enough to support herself and her family. You know that she has two children that will always

be dependent upon her or upon some one. They can't do anything for themselves to support themselves; I don't want to fix this property—the title to this property—so that the title would get into the names of these children if Mrs. Vaughan should outlive me. I want to have the benefit of that property myself while I live, but I want to make a provision so that, when I die, Mrs. Vaughan shall have the benefit of the property, and that it shall be so fixed that her children will be provided for.' I said: 'Mr. Curtis, you can change your will to cover those conditions if you desire to do so. If you want, you can make a deed of the property to a trustee, reserving the income from the property for your own use and give the income to Mrs. Vaughan while she is alive, so the income will go to these children after her death, if you want to do it that way; or you can make a deed of the property so that she will have the absolute control of it at your death, if you want to, without any trust for her, and make a trusteeship for her children, reserving a life interest if you so desire. There are a number of ways that this thing could be fixed.' 'Well, what would you advise about it?' he asked. I said: 'I think, Mr. Curtis, that if you want to give that property outright to Mrs. Vaughan after your death, and at the same time make a provision with reference to these dependent children, so that the title will be protected from being tied up on account of their disability, that it would be as well to make a deed to the property, reserving your own life estate in it and the income, and let Mrs. Vaughan have the title at your death, with a provision that, if she should die before you die, then that the title should vest in a trustee for the benefit of the children.' He said, 'Well, that is what I will do,' or 'about what I want to do'—something to that effect. He then asked me if he could make such a deed and make a provision so if he had a good chance to sell the property he could sell it himself. I said: 'I do not think a deed with that kind of a string tied to it would give a very good title. What you ought to do, in my opinion, Mr. Curtis, is to either change your will and state in it exactly what you want done with that property, or deed it with specific provisions, so that the title will be absolutely vested where you want it to go. Now, if you want to create a trust for Mrs. Vaughan so she will have only the income, all well and good. If you want her to have absolute control of it on your death, why, make the deed that way, with a provision that if she dies before you die that the title shall vest in a trustee for the benefit of her children.' 'Well,' he said, 'I have—I want to make her just as little trouble as I possibly can, and I am willing—perfectly willing—after my death that she should do whatever she wants to do with that property.' I said 'If you say so, I will draw the papers and make a conveyance of that kind.' Then we had some talk

about a trustee, and I suggested to him that the Illinois Trust & Savings Bank was an organization well equipped to handle a matter of that kind, if it got around where the trust would become operative. Mr. Curtis said: 'Well, concerns like that charge pretty high, don't they?' I said: 'I don't think they charge unreasonably at all. My experience with most of these trust companies is that they are reasonable and fair, and I advise organizations of that kind rather than an individual generally because they have all the equipment to handle matters of that kind properly.' Well, he said he would see about that. That is the substance of what occurred at that time. I saw Mr. Curtis again on the 20th of August. I talked with him on the same subject. I had been looking up the matter we had talked about before, of the conveyance of the premises 377 Dearborn street. I believe it was in that talk that he said he wanted papers made, and I believe that the trusteeship in the Illinois Trust & Savings Bank was at that time again talked about, and he said: 'All right, let the papers go that way.' On this occasion I think, but I don't recall positively, that both Mrs. Vaughan and Mr. Curtis were present. I went to work to get up the deed in accordance with the instructions Mr. Curtis had given me. I did some work in drafting a conveyance on the 25th of August and also on the 26th, looking up authorities with reference to conveyances of that kind, and preparing a form of a deed and getting the matter in shape for execution by Mr. Curtis. I think I gave the papers to him on the 26th of August—it may have been the 25th. I gave a draft of the deed to him, and he took it away with him. I am not positive whether that was the next time I saw him before the time I last referred to. I am not sure whether I saw him in the meantime or not at his house. I said to Mr. Curtis at that time that I had prepared a deed which was as near in accordance with his instructions as I understood it could be, but that I would like to have him take the paper, look it over very carefully, and if he had any suggestions to make about it at all—if it was wrong in any particular, wanted any changes made in it—to let me know, and he took it and went away. I think I saw him on the next day, which I think was the day he came in and executed the deed. That was on the 27th of August, 1902. On that day Mr. Curtis, I think Mrs. Vaughan and Frank Vaughan, somebody else, came down to our office, and Mr. Curtis came into my room and said that 'the paper is all right,' he thought; stated that, or he said this: 'You know I told you I wanted to have the income myself from this property, and as I understand it I go right on and collect the rents and keep the money. It is mine to do anything I am a mind to do with.' I said: 'That is right, Mr. Curtis.' Just about that time, I talked with him two or three minutes

when I was called out of the office for some purpose or other and was out some little time; that is, 8 or 10 or 15 or 20 minutes. I don't know how long. I know I went out. After a lapse of this time I went back into my office. Mr. Curtis was sitting there talking with my partner, Mr. Wilkerson. Nobody was there but Mr. Curtis and Mr. Wilkerson. I think Mrs. Vaughan sat down in the outer office. When I came back, he was talking with Mr. Wilkerson, and he said the matter was all right, and he would execute the deed and sign the deed. I then called a young man who was keeping our books, Mr. Yost, and Mr. Curtis signed the deed, and I think Mr. Wilkerson and Mr. Yost both of them witnessed it, or else—I don't remember just exactly who witnessed the deed just now without looking at it. I think I was one of them, but the deed was executed right there before Mr. Wilkerson, Mr. Yost, and myself. The deed was read over by me to Mr. Curtis at the time very carefully, the day I gave it to him. When the deed was executed, Mrs. Vaughan was called into the room. I think I spoke to her when she came in. I took the paper off my desk and handed it back to Mr. Curtis, and I said to him, 'Now, you have made the deed you can deliver it if you want to,' whereupon he handed it over to Mrs. Vaughan, saying 'Maggie, here is your deed,' or something to that effect. Mrs. Vaughan handed it to me. I told her I would have it recorded. Mr. Curtis was an old man. His hearing was somewhat defective, and he would talk about a matter and go over it several times sometimes, perhaps repeat it a couple of times, bring up the same matter, and was a little slow in his mental action, but he was always very clear in understanding the matters we talked about during the different conversations that we had with him. His conversations with me in these various transactions and the things he said were perfectly intelligible and relevant to the matters under discussion. There was no indication that he did not understand the matters concerning which he was consulting me and concerning which he was giving me directions during these various conversations with him, other than what I have just said. He was slower than some men in arriving at conclusions, and in talking to him he would ask you what you said, over and over again, sometimes, and you had to elevate your voice somewhat to make him understand, but he did understand everything perfectly, as far as I ever saw, so far as his business was concerned that I had to do with. In my opinion he was perfectly capable of transacting ordinary business. In my opinion he clearly understood the nature and effect of all the papers that he ever executed that were prepared by me."

James H. Wilkerson testified: "I first saw J. Lafayette Curtis in July of 1902, at the office of our firm. I saw him there a number of times—10 or more, probably. His busi-

ness was largely with Mr. Coffeen. I don't remember that I discussed business matters with him, with the exception of the conversation in August with reference to the execution of the deed in question in this case. At that time Mr. Curtis came into Mr. Coffeen's room. My recollection is that I was then in his private office and Mr. Coffeen had to leave the office on some errand. I was there in the office and talked with Mr. Curtis for 15 or 20 minutes at least, until Mr. Coffeen returned. Mr. Curtis had with him the draft of this deed, and he asked me if I understood what the effect of the deed was. I told him, after I read it over, that he retained the control of the property during his lifetime, and, if he died, the property went to Mrs. Vaughan; then, that, in case she died, the property went to the trustee, who would manage it and collect the rent and take care of it until (my recollection is) the youngest child reached the age of 30 years, when it would be distributed. He said that was the way he wanted it. He said he wanted her to have property enough so that she could live and keep those children; spoke about some of them not being able to take care of themselves. We had some general conversation that lasted until Mr. Coffeen returned to the office, and he and Mr. Curtis talked with reference to the same theme; that is, whether or not he retained control of the property during his life. I think I went into my own room a few minutes about something, came back in there, and Mr. Curtis said he wanted to sign that deed, and he signed it, and we called in a young man who was then our cashier, and Mr. Curtis said he wanted us to witness the signature, so I wrote my name on the deed to witness the signature and Mr. Yost did the same, and he acknowledged the deed before the notary, and after that had been done he took the deed and handed it to Mrs. Vaughan, who in the meantime had come into the room. From my conversations with Mr. Curtis on these various occasions I think he was of sound mind, and that he was capable of transacting business. I think he knew absolutely everything that was done in connection with that deed. I saw nothing that raised any question at any time as to his entire mental competency."

No other witnesses testify to the occurrences when the deed was executed.

Gwynn Garnett, Clarence T. Morse, and Eugene Garnett, for appellant. Scott, Bancroft, Lord & Stephens (Edgar A. Bancroft and George T. Rogers, of counsel), for appellee Margaret C. Vaughan.

VICKERS, J. (after stating the facts as above). In the foregoing statement we have set out what appear to us as the most salient points in the testimony bearing upon the question at issue. The great volume of testimony given on the trial of this cause cannot be set out within the reasonable limits of a statement

or discussed in detail in an opinion without unduly extending it. With unusual industry counsel for the respective parties have presented every fact and circumstance which bear directly or remotely upon the questions involved. The range of the testimony extends over a period of a half century, and brings into view a great multitude of statements, acts, and circumstances in the life of J. Lafayette Curtis for the purpose of showing whether he had mental capacity on August 27, 1902, sufficient to make a valid deed.

The theory of appellant, both in the pleadings and the evidence, is that the mind of Curtis was so enfeebled by age that he was incompetent to make a deed. It is not claimed that he was insane or that he was subject to any delusions of any kind, either at the time the deed was executed or at any other time. Mere impairment of memory, by reason of advanced years, does not of itself indicate a want of power to comprehend a transaction and to dispose of property. *Francis v. Wilkinson*, 147 Ill. 370, 35 N. E. 150; *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837. In order to justify a court of equity in setting aside a deed or contract on the ground of mental incapacity, it must appear that the grantor did not have sufficient mind and memory to comprehend the nature and character of the transaction in which he was engaged. *Argo v. Coffin*, 142 Ill. 368, 32 N. E. 679, 34 Am. St. Rep. 86; *Graham v. Deuteraman*, 206 Ill. 378, 69 N. E. 237; *Beamer v. Morrison*, 210 Ill. 443, 71 N. E. 402. When the evidence bearing upon the mental capacity of Curtis is considered, it leaves no doubt upon our minds that at the time the deed in question was executed Curtis fully comprehended and understood the transaction in all of its bearings and consequences. The testimony of the attorney who drew the deed is very clear and convincing upon this point. It shows that he fully advised Curtis in relation to the effect of making a deed, as well as adding a codicil to his will. Curtis came to the office and explained what he desired to do with the Dearborn street property and asked Mr. Coffeen in what manner he could best accomplish his purpose. His statements were all clear and rational, and the questions asked by him were intelligent and pertinent. After a conclusion had been reached as to the instrument to be executed, the deed was prepared by Mr. Coffeen and read by him to Curtis. Curtis took the deed away with him and returned the next day, saying that he was satisfied with the deed, and that he was ready to execute it. The deed was then executed and delivered to the grantee. While Mrs. Vaughan accompanied Curtis on these several visits to the attorney's office, she was not present and took no part in the interviews between Curtis and Coffeen. There is nothing connected with the execution of this deed, so far as this record shows, sufficient to raise a reasonable doubt as to the grantor's mental capacity.

The charge of undue influence is equally untenable. While Mrs. Vaughan was no blood relation to the grantor, yet she occupied in his affections the relation of a daughter. She had been brought into the Curtis home when only two years of age. There were no children born to Curtis and his wife; and it is but natural that they should have bestowed upon their foster daughter great affection. The fact that Curtis regarded Mrs. Vaughan and her children as the natural objects of his bounty is shown by the circumstance that he supported her and her children out of his means many years before Mrs. Curtis' death, and by the further fact that in his will, made in 1897, while Mrs. Vaughan was residing in Ohio and when there could be no suspicion of want of capacity or undue influence, a liberal provision was made for Mrs. Vaughan and her children. It is no doubt true that Curtis changed his mind, after the death of his wife, in regard to the amount of property he desired to go to his wife's relatives. The interests of his wife's relatives under the will will be largely reduced if the deed in question is upheld; and it is the fact that the deed reduces the interests of certain legatees and increases the interest of Mrs. Vaughan which is relied on as a circumstance tending to show undue influence. The evidence shows that after the death of his wife disagreements sprung up between Mrs. Vaughan and certain relatives of Mrs. Curtis. It is not material to our purpose to discuss these disagreements or seek to determine who was in the right and who in the wrong, but we only refer to it for the purpose of observing that in these quarrels Mr. Curtis seems to have agreed with Mrs. Vaughan. He believed, evidently, that certain relatives of his wife, with undue haste, were seeking to get possession of certain articles of property which had belonged to his deceased wife. Their conduct in this respect may have had an influence on the mind of Curtis, leading him to reconsider his original intention of disposing of his property for their benefit. Mrs. Vaughan, no doubt, was not unwilling that she should be regarded by Curtis with greater favor than the relatives of his wife, but there is not a particle of evidence in this record that Mrs. Vaughan at any time sought to influence Curtis to execute this deed to her. The appellant's contention on this point is a mere inference sought to be drawn from the manifest change in Curtis' plans for the distribution of his estate, and the fact that Mrs. Vaughan was closely associated with Curtis, thus affording abundant opportunity for her to exercise an influence over him, and that such inference is rendered more probable by the mental condition of Mr. Curtis. The most that can be said of these facts is that they are consistent with the hypothesis that this deed was the result of actual undue influence of the grantee; but they are also equally consistent with the hypothesis that Curtis, either with

or without cause, conceived a dislike for his wife's relatives after her death, and for this or some other reason changed his mind, after his wife's death, in regard to the disposition of his property. Again, it is not unreasonable to believe that after Mrs. Vaughan came to make her home with Curtis, bringing with her her four fatherless children, two of whom, as already shown, were wholly incapable of taking care of themselves, the unfortunate condition of the children appealed to the sympathy of Mr. Curtis, and he, acting from motives of affection and duty, determined to increase the provision for Mrs. Vaughan and her children even if it did diminish the provision for his wife's relatives, who were able to take care of themselves, and whose claims upon his bounty, if any claim can be said to exist, should very properly be regarded as inferior and secondary to the claims of his foster daughter and her unfortunate children. While undue influence may be established by circumstantial evidence, yet when, as in the case at bar, all the circumstances relied upon are equally consistent with some other rational theory deducible from the facts proven, it cannot be held that the charge of undue influence is established, especially where the direct evidence bearing upon the transaction sought to be impeached conclusively shows mental capacity and absence of any undue influence operating at the time of the transaction.

This court has often had occasion to define what is and what is not "undue influence." Among the latest cases on this subject is *Dowie v. Sutton*, 227 Ill. 183, 81 N. E. 395. In that case it was said (page 197 of 227 Ill., page 401 of 81 N. E.): "The word 'undue,' when used to qualify 'influence,' has the legal meaning of 'wrongful.' Hence 'undue influence' means a wrongful influence. But influence secured through affection is not wrongful, and when a will is made in favor of a child at his solicitation and because of partially influenced by affection for him it will not be undue influence. *Dickle v. Carter*, 42 Ill. 376; *Brownfield v. Brownfield*, 43 Ill. 147; *Meeker v. Meeker*, 75 Ill. 260; *Burt v. Quisenberry*, 132 Ill. 385, 24 N. E. 622." Undue influence which will avoid a will or a deed must go to the extent of depriving the party of his free agency (*Francis v. Wilkison*, 147 Ill. 370, 35 N. E. 150; *Wilcoxon v. Wilcoxon*, 165 Ill. 454, 46 N. E. 369); and such influence must operate at the time of the transaction sought to be impeached. In *Re will of Barry*, 219 Ill. 391, 397, 76 N. E. 577, 580, this court said: "It is further contended on the part of the contestants that the will in question is the product of undue influence over the testatrix on the part of William Mumford. Evidence was introduced to show that William Mumford made a trip almost every month from his home in Pittsfield to the home of the testatrix in Mt. Sterling for the purpose of transacting her busi-

ness for her, and that he was her confidential and professional adviser as well as her son-in-law. There is no evidence in the record, however, to show that William Mumford had anything whatever to do with the preparation or execution of the will in question. He was present in the library when the will was executed, but took no part therein, either by word or act. After the will was executed the testatrix sent it to the bank, sealed up in an envelope with other papers, and there it remained for about a year and until after her death. There is no evidence to show any effort on the part of William Mumford to influence the testatrix to make a will, to or favor his son, Barry, in the disposition of her property. In cases in which the burden of proof is thrown upon one standing in a confidential relationship to show the absence of fraud or undue influence in the making of a will, such person must be shown to have been directly connected in some manner with the making of the will. The record fails to show that William Mumford was connected in any manner with the execution of the will. Any suspicion which might be engendered by Mumford's presence in the library when the will was executed cannot be regarded as proof of any such alleged fact. On the contrary, the declarations of the testatrix are in evidence to the effect that William Mumford did not write the will and that he had nothing to do with it."

Finally, it is contended by appellant that the circumstances of this case show a fiduciary relation between appellee Mrs. Vaughan and Curtis in which it is assumed that she was the dominant party, and that the case is for that reason one in which Mrs. Vaughan is required to prove, by clear and satisfactory evidence, the utmost good faith on her part and the absence of undue influence. This position cannot be maintained. The rule contended for is applicable to cases of attorney and client, guardian and ward, and parent and child, where the parent receives a gift or other benefit from the child. But the rule is not applied where the parent makes a will or other provision for his child. In our opinion this case ought to be governed by the same rule in this respect as would apply between father and child. Gifts of this sort are natural, and proceed from that tender solicitude for the welfare of his children that is implanted in the bosom of every parent. To hold that such gifts are presumptively fraudulent would be to reverse the legal basis of all presumptions, and to establish the doctrine that when a parent makes a provision for his child by will or deed it will be presumed to be fraudulent, and cast the burden on the child of proving, by clear and convincing evidence, good faith and the absence of undue influence. Presumptions are inferences which common sense draws from the known course of events or from circumstances usually occurring in such cases. If any presumption exists in

this case, naturally and logically it would be in favor of the validity of the deed, since a gift to his foster daughter by Curtis was, under the circumstances, the usual, ordinary, and reasonable thing to be expected of him; but we do not hold that there is any presumption in the case one way or the other.

Appellant assumes that if the evidence proves, or tends to prove, that Mrs. Vaughan occupied a position of influence in fact over Curtis, the burden of proof shifts from appellant to her, and requires her to prove, by clear and satisfactory proof, the absence of undue influence. In this argument we think that appellant confuses an inference of fact with a presumption of law. There is no presumption of law arising from the relation of these parties which will cast on Mrs. Vaughan the burden, in the first instance, of proving that the execution of this deed was not procured by any undue influence on her part over the grantor. Appellant charges the fact to be that the deed was thus procured. The burden of proof upon that question is on the appellant throughout, and is not shifted to Mrs. Vaughan by proof merely of the relationship between the parties. There is no proof in this record that Mrs. Vaughan exercised or attempted to exercise any influence whatever over Curtis to induce him to execute the deed. If there was such evidence, there might be drawn an inference of fact of more or less strength, depending on the quantity and quality of the evidence upon which it rested, and such inference might be strong enough to justify a decree setting aside the conveyance, unless it was removed by other proof. Such inference, however, is quite a different matter from a legal presumption based on the bare fact that Mrs. Vaughan was the foster daughter of the grantor. If such presumption could be applied, then appellant would be entitled to a decree by merely proving the existence of the relation and the conveyance made while such relation existed, unless Mrs. Vaughan established by clear, satisfactory, and convincing evidence that the transaction was fair and free from all suspicion of undue influence. Such is not the law as applied to the facts of this case.

Finding no error in the record, the decree of the superior court of Cook county is affirmed.

Decree affirmed.

SCOTT, CARTER, and DUNN, JJ. (specially concurring). We agree to the conclusion reached by the foregoing opinion, but we think that opinion erroneously gives the impression that the usual presumption which arises where there is a fiduciary relation and the dominant party secures from the dependent party a gift, bequest, or devise of property does not obtain unless the confidential relation is an ordinary, technical, fiduciary relation, such as that of guardian and ward,

attorney and client, etc. In *Thomas v. Whitney*, 186 Ill. 225, 57 N. E. 808, the following language was quoted with approval: "Certain transactions are presumed, on grounds of public policy, to be the result of undue influence. Such transactions are generally those occurring between persons in some relation of confidence, one toward another. The presence of such relationship creates a presumption of influence, which can generally be rebutted by proof that the parties dealt as strangers at arm's length, that no unfairness was used, and that facts in the knowledge of the one in the position of influence, affecting the matter, were communicated to the other." "Nothing can tend more to produce confusion and inaccuracy in the discussion of the subject of undue influence than the treatment of actual undue influence and fiduciary relation as though they constituted one and the same doctrine." "The term 'fiduciary or confidential relation,' as used in this connection, is a very broad one. It has been said that it exists and that relief is granted in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?" This court in that case then continued as follows: "Transactions between a party and one bearing a fiduciary relation to him are upon his motion prima facie voidable upon grounds of public policy, and the burthen of proof, the fiduciary relation being established, is upon the one receiving the benefit to show an absence of undue influence by establishing the fact that the party acted upon competent and independent advice of another, or such other facts as will satisfy the court that the dealing was at arm's length, or he must show that the transaction was had in the most perfect good faith on his part, and was equitable and just between the parties, or, as some of the authorities say, that it was beneficial to the other party." The law has been so held by this court in many subsequent decisions, among which are the following: *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908; *Leonard v. Burtie*, 226 Ill. 422, 80 N. E. 992; *Morgan v. Owens*, 228 Ill. 598, 81 N. E. 1135.

(230 Ill. 536)

BRUNER et al. v. HICKS et al.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 6, 1907.)

1. APPEAL—REVIEW—FINDING OF CHANCELLOR.

A finding of the chancellor on conflicting evidence will not be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3972.]

2. ESTOPPEL—GROUNDS—ACCEPTANCE OF BENEFITS.

Complainants, up to the time of filing their bill to enjoin defendants from drilling wells for oil or gas on certain premises, under a lease to one of defendants, on the ground that the owners of the premises had subsequently executed a lease for mining for oil and gas to complainants' assignor without notice to assignor or complainants at the time of assignment of defendants' lease, which was alleged to be void, had not done any prospecting for oil or gas on the premises. After filing the bill, they went on the premises against the protest of the owners, sunk wells from which they obtained large quantities of oil and gas, and paid rent of but a nominal amount to the owners, which was received by them on the false representation by complainants that the controversy over the two leases had been settled between the parties, and which amount the owners offered to return to complainants. *Held*, that the owners of the premises were not estopped to challenge the validity of complainants' lease, in that they had not released their homestead right, on the ground that they had voluntarily permitted complainants to enter on the premises, or that they had received rent under the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 260-263.]

3. HOMESTEAD—TRANSFER—LEASE.

A lease of a homestead for the purpose of mining for oil and gas and laying pipe lines and building tanks thereon deprives the owners of a portion of their homestead, though title to the oil and gas may not vest in lessees until discovered and appropriated; and hence the homestead rights of the owners should be governed by the value of the land at the time of execution of the lease and not at the time of discovery of oil and gas, and a lease of homestead land at the time of execution thereof of less value than \$1,000 is void unless the homestead right is released in compliance with statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Homestead, § 199.]

4. APPEAL—PERSONS AGGRIEVED.

Where, in a suit to enjoin defendants from drilling wells for oil or gas on certain premises under lease to one of defendants, on the ground that the owners of the premises had subsequently executed a lease to complainants' assignor without notice to assignor or complainants at the time of assignment of defendants' lease, which was alleged to be void, the court corrected the description in the lease to defendants by making the same correspond with the description intended by the parties, but limited the correction to the owners, complainants were without right to complain thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 947-952.]

5. LANDLORD AND TENANT—IMPROVEMENTS ON PREMISES — REMOVAL—INJUNCTION—WHEN GRANTED.

Where complainants obtained a lease of land for mining for oil and gas as a matter of speculation, and did nothing until other parties acting under a prior lease commenced prospecting for oil and gas, when complainants by temporary injunction stopped them, and went on the land and commenced prospecting against the protest of the owners, and complainants' lease was void, they were properly enjoined from removing property they had placed on the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 533.]

Appeal from Circuit Court, Crawford County; E. E. Newlin, Judge.

Bill by Andrew Bruner and others against Frank Hicks and others. David C. and Mary E. Brubaker intervened as defendants, and also filed a cross-bill, as did the other defend-

ants. Decree for defendants, and interveners and complainants appeal. Affirmed.

This was a bill in chancery filed by Andrew Bruner, John Righter, and W. G. Skelly, in the circuit court of Crawford county, against Frank Hicks, John Kerr, John W. Smith, Lem Neely, David C. Brubaker, and Mary E. Brubaker, to enjoin the said Hicks, Kerr, Smith, and Neely from sinking or drilling any well or wells for oil or gas upon a certain 36-acre tract of land located in Crawford county, by virtue of a certain lease bearing date April 5, 1905, made by said David C. Brubaker and Mary E. Brubaker, the owners in fee of said premises, to said Frank Hicks, and which lease had in part been assigned by Hicks to Kerr, Smith, and Neely, upon the ground that said David C. and Mary E. Brubaker, on the 8th day of December, 1903, had executed a lease of said premises for the purpose of mining and operating for oil and gas, and laying pipe lines and building tanks, stations, and structures thereon to take care of said products, to one George D. McCarty for the period of 10 years or so long as oil and gas might be found on said premises, which lease had been assigned to Bruner, Righter, and Skelly, and which lease, it was alleged, contained a release and waiver of the homestead rights of David C. and Mary E. Bruner in said premises, and was entered into by said McCarty with said David C. and Mary E. Brubaker, and assigned to the said Bruner, Righter, and Skelly, and recorded in the office of the recorder of deeds of said county, without notice to them, or either of them, of the fact that said lease of April 5, 1905, had been made by said David C. and Mary E. Brubaker to Frank Hicks, and which lease to Hicks, it was averred, was void by reason of the fact that said premises were of less than \$1,000 in value, and were occupied by said David C. and Mary E. Brubaker as a homestead, and the homestead rights of David C. and Mary E. Brubaker therein were not waived or released in said lease, and that the premises described in said lease were so imperfectly described therein that they could not be located or identified as the property owned by David C. and Mary E. Brubaker.

A demurrer was sustained to the bill, whereupon a supplemental and amended bill was filed by said Bruner, Righter, and Skelly, in which they omitted to name David C. and Mary E. Brubaker as defendants, and from which they also omitted all averments in regard to the homestead rights of David C. and Mary E. Brubaker in the premises, and averred that the complainants had been let into the possession of said premises by David C. and Mary E. Brubaker under the lease of December 8, 1905, and that they had made valuable improvements on said premises. The misdescription of the premises in the lease of April 5, 1905, and the want of notice to McCarty and his assigns of the lease of April 5, 1905, at the time of the execution of the lease of December 8, 1905, were also

averred, which averments were relied upon to establish complainants' rights under the lease of December 8, 1905, and to avoid the rights of Hicks, Kerr, Smith, and Neely under the lease of April 5, 1905.

On their petition David C. and Mary E. Brubaker were allowed to intervene as defendants to said supplemental and amended bill, and they thereupon filed an answer thereto. They also filed a cross-bill, in which they averred that at the time the lease of December 8, 1905, was made, and at the time of the filing of their answer and cross-bill, said premises were owned in fee by them; that they occupied the same as a homestead; that said premises, at the time said lease was executed, were in value not to exceed \$1,000; and that they had not waived or released their homestead in said premises or abandoned the possession of said premises or surrendered the possession of said premises voluntarily to the complainants, and asked that the lease of December 8, 1905, be canceled and set aside as a cloud upon their title, and that the complainants be enjoined from interfering with their possession of said premises. The other defendants to the supplemental and amended bill also filed an answer and cross-bill. By their cross-bill they asked that the description of said premises in the lease of April 5, 1905, which was admitted to be incorrect, be corrected, and for other relief.

The cross-bills were answered, and replications were filed and a trial was had in open court, and the chancellor entered a decree setting aside and canceling as a cloud upon the title of David C. and Mary E. Brubaker the lease of December 8, 1905, and the assignment thereof to the complainants, and perpetually enjoined the complainants from going upon said premises to prospect for oil or gas, or otherwise, and from removing therefrom any property placed thereon and in the wells drilled by them, and from removing any oil therefrom, directly or indirectly, by themselves, agents, etc., and corrected the description of the premises contained in the lease of April 5, 1905, as against David C. and Mary E. Brubaker, and the complainants have prosecuted an appeal to this court to reverse said decree.

C. S. Conger, J. C. Maxwell, McCarty & Arnold and Brownlee & Browne, for appellants. Parker & Newlin and Jay A. Hindman, for appellees.

HAND, C. J. (after stating the facts as above). The lease in question was executed with the view to transfer a freehold interest in said premises, as it provided the term created thereby might last for an indefinite and undetermined period of time in case oil or gas was discovered upon said premises, and in that regard this lease is not like a lease for a term of years. It was therefore necessary that the lease, to be valid, should contain a release or waiver of the homestead

rights of David C. and Mary E. Brubaker, and if the premises, at the time the lease was executed, were of less value than \$1,000, the lease was void.

The first question presented upon this record for determination is the value of the premises in question on the 8th day of December, 1905, at the time the lease was made to McCarty by David C. and Mary E. Brubaker, as, if said premises at that time were of less value than \$1,000, then the lease from David C. and Mary E. Brubaker to McCarty is absolutely void, and the appellants can predicate no rights thereon, unless it appears that the homestead rights of David C. and Mary E. Brubaker in the premises were waived and released, or the possession of the premises was abandoned by them, or they have estopped themselves from setting up their homestead rights as against the appellants.

The evidence as to the value of the premises on December 8, 1905, was conflicting. The witnesses who testified upon that point—and they were numerous—fixed the value thereof at that time from \$17.50 per acre to \$50 per acre, and the appellants in their original bill, which was sworn to, admitted they were worth less than \$1,000. The trial court held they were worth less than \$1,000. The chancellor who tried the case saw and heard the witnesses, and, in view of the conflict in the evidence, his judgment upon the question of the value of said premises on December 8, 1905, we think should be held to control. It must therefore be held, for the purposes of this case, that said premises at the time the lease to McCarty was executed were worth less than \$1,000. As it is admitted that the homestead rights of David C. and Mary E. Brubaker in said premises were not waived or released, and that they have not abandoned the possession of said premises, the question remains: Did they voluntarily permit the appellants to enter upon said premises to explore and prospect for oil and gas, and did they receive rent from the appellants under the lease of December 8, 1905, subsequent to its date, and thereby estop themselves from asserting the invalidity of said lease by reason of their failure to release or waive their homestead rights therein? Up to the time of the filing of this bill, the complainants had not done any prospecting for oil or gas upon said premises. After the bill was filed, however, and against the wish and protest of David C. and Mary E. Brubaker, they went upon said premises and sunk five wells, from which they obtained large quantities of oil and gas, and the rent provided for in the lease, which they claim to have paid to David C. and Mary E. Brubaker, amounted to but \$2.25, which the trial court found was received by David C. and Mary E. Brubaker by reason of the fraudulent representations made to them by the complainants and their attorneys that the controversy over the McCarty and Hicks leases had been settled

between those parties, and which amount they offered to return to the complainants and deposited for their benefit in court. We think it clear, therefore, that it cannot be successfully contended that the complainants were voluntarily let into the possession of said premises by David C. and Mary E. Brubaker, or that David C. and Mary E. Brubaker, or either of them, ever received, with a full knowledge of all the facts which affected their interest, any rent provided to be paid to them by the terms of the lease of December 8, 1905. We are therefore of the opinion they are not estopped to challenge the validity of said lease by reason of a failure on their part to release their homestead rights in the premises covered by the lease.

It is contended, however, that although the court properly held that the premises on December 8, 1905, were of less value than \$1,000, that fact should not control, as it is said the court, in determining the homestead rights of David C. and Mary E. Brubaker in said premises, should have been governed by the value of said premises on the day on which oil and gas were discovered upon said premises, and not their value on the day on which the lease was executed. We cannot agree with this contention. If the premises, at the time the lease of December 8, 1905, was executed, were less in value than \$1,000, then the lease which attempted to give to McCarty and his assigns the right to use, possess, and enjoy a portion of said premises for the purpose of mining and operating for oil and gas, and laying pipe lines and building tanks, stations, and structures thereon to take care of said products, deprived David C. and Mary E. Brubaker of a portion of their homestead, and, said homestead not having been waived or released in accordance with the terms of the statute, said lease was void. It may be conceded that the title to the oil and gas in said lands did not vest in the appellants as assignees of said lease, until the oil and gas were discovered and appropriated by them. Still the right to occupy the premises for the purposes aforesaid conferred upon McCarty and his assignees a present vested right in said premises, which might last 10 years and might last for an indefinite period if oil and gas were discovered in said premises, and to the extent of that use David C. Brubaker and Mary E. Brubaker were deprived of their homestead rights, which rights they could release to McCarty and his assigns only by an instrument in writing duly signed and acknowledged in accordance with the provisions of the statute governing the release and waiver of homesteads. *Franklin Land Co. v. Wea Gas, Coal & Oil Co.*, 43 Kan. 518, 23 Pac. 630.

It is also contended that the court erred in correcting the description in the lease of April 5, 1905, by making the description therein contained correspond with the description of the premises which the parties intended to cover by said lease. The correction was lim-

ited by the decree to David C. and Mary E. Brubaker alone, and in no way affected the appellants. We think, therefore, they have no reason to complain as against that part of the decree.

It is also contended the decree is erroneous in enjoining the appellants from removing the property which they had attached to the land of David C. and Mary E. Brubaker. From a careful reading of this record, we are impressed with the view that the lease of December 8, 1905, was obtained from David C. and Mary E. Brubaker purely as a matter of speculation and not with a view to prospect their lands, as the Brubakers were led to believe the object of the lease was at the time it was executed, and that nothing was done under the lease by the appellants until other parties, acting under the Hicks lease, commenced prospecting for oil and gas upon the lands of David C. and Mary E. Brubaker, when the appellants, by a temporary injunction, tied the hands of these parties, and then went onto the lands and commenced prospecting for oil and gas against the wishes and protests of the owners of the land, claiming under a lease which was absolutely void, and that, while they may have expended a considerable amount of money upon said lands, we think they did so with a knowledge of all the facts and that they acted at their peril, and that the circuit court did not err in enjoining them from removing the property which they had placed upon the land.

Finding no reversible error in this record, the decree of the circuit court of Crawford county will be affirmed.

Decree affirmed.

(230 Ill. 373)

GILLETTE v. CHICAGO TITLE & TRUST CO. *WEAVER v. SAME* (two cases). *STUART v. SAME*. *BREWSTER v. SAME*. *BODMAN v. SAME*. *DE CAMP v. SAME*. *LOBDELL v. SAME*. *MAXWELL v. SAME*. *HATELY v. SAME*. *BUTLER v. SAME*. *LOGAN v. SAME*. *HENRY v. SAME*. *MERCHANTS' LOAN & TRUST CO. v. SAME*. *LYON v. SAME*. *CUD-AHY v. SAME*. *HALBERT v. SAME*. *HINKLEY v. SAME* (three cases). *LEE v. SAME*. *McCLURG v. SAME*. *PORTER v. SAME*. *PECK v. SAME* (two cases). *STEENBERG v. SAME*. *THRALL v. SAME*. *VALENTINE v. SAME*. *DEERE v. SAME*. *McNALLY v. SAME*. *KNAPP v. SAME*. *HYNES v. SAME*. *SICKEL v. SAME* (two cases). *BERRIMAN v. SAME*. *GAGE v. SAME*. *PHELPS v. SAME*. *SCHMITT v. SAME*. *TWITCHELL v. SAME*. *TAYLOR v. SAME*. *BARBOUR v. SAME*. *FREES v. SAME*. *AMERICAN TRUST & SAVINGS BANK v. SAME*. *WARE v. SAME*. *RANDALL v. SAME*. *NELSON v. SAME*. *KIRK v. SAME*.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 6, 1907.)

1. CORPORATIONS — SUBSCRIPTION TO STOCK — PAYMENT IN PROPERTY.

Where directors of a corporation accept as payment of a stock subscription, in lieu of cash,

rights in unpatented inventions and an unwritten play of no ascertainable market value, without making any inquiries to determine what they are worth, the subscription remains wholly unpaid, where the rights are worthless, since the directors are required to receive cash or its equivalent to the full amount of the subscription.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 538, 542.]

2. SAME—LIABILITY FOR UNPAID SUBSCRIPTIONS—PURCHASERS WITH NOTICE—STOCK “FULLY PAID AND NONASSESSABLE”—“NOTICE.”

Where purchasers of stock, the certificates for which recite that it is “fully paid and non-assessable,” have knowledge of facts sufficient to put them upon inquiry which would show that the stock is unpaid, they do not come within the rule that purchasers of such stock in good faith without notice that it is unpaid are not liable for a balance due on it; and the facts that the corporation had just been organized, and that its stock was being transferred practically without any valuable consideration are sufficient to put a reasonably prudent man upon such inquiry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 543.]

3. SAME—BONUS STOCK WITH SUBSCRIPTION TO BONDS.

Where persons subscribed for bonds of a corporation under the condition that they should receive an equal amount of stock therewith, the money paid on the subscription was payment for the bonds alone.

4. SAME—FAILURE TO TAKE STOCK GIVEN WITH BONDS—EFFECT ON STOCKHOLDER'S LIABILITY.

The fact that subscribers to corporation bonds, with which an equal amount of stock was given, received the bonds, but did not take the certificates of stock, did not affect their liability as stockholders, where under the subscription agreement they were under obligation to receive both, since upon becoming owners of the bonus stock they incurred a contingent liability to creditors, which could not be thus avoided.

5. SAME—UNPAID STOCK ISSUED AS PAID UP—EFFECT UPON HOLDERS WITH NOTICE.

Where certificates of stock were all issued as “fully paid and nonassessable,” although none of it was fully paid, and bond subscribers had notice of it when they subscribed, their contract for “fully paid and nonassessable stock” with their bonds had reference to the stock as it then existed, unpaid, but represented by certificates reciting to the contrary.

6. SAME—LIABILITY OF STOCKHOLDER TO CREDITOR.

The liability of a stockholder to a creditor of the corporation for the unpaid portion of his stock subscription is not affected because the creditor knew when he extended credit that the stock was partly unpaid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 874.]

7. SAME—DISSOLUTION—PAYMENT OF CLAIMS—INTEREST.

Where, by an action to dissolve a corporation, its assets come into the control of a court for administration, interest on the corporation's bonds ceases.

8. APPEAL—NECESSITY FOR EXCEPTION—FINDINGS OF FACT BY MASTER.

Where there was no exception to a master's finding of fact, there is nothing upon which to base an assignment of error attacking it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1552, 1553.]

9. CORPORATIONS—SUBSCRIPTION TO STOCK—LIABILITY FOR UNPAID BALANCE.

Where a person receives duebills for stock with notice that it is unpaid, and transfers

them to another person of no financial responsibility, with notice, who receives the certificates and gives his notes for the purchase price, with the certificates as collateral security, the vendor is the equitable owner of the stock, and liable for the balance due on it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 529.]

10. EQUITY—REFERENCE TO MASTER—CONCLUSION OF LAW—NECESSITY FOR EXCEPTION—DECREE.

Where the master has drawn an incorrect legal conclusion from the facts, the chancellor may embody the correct conclusion in the decree, in the absence of an exception to the master's report; exceptions relating only to matters of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 905.]

11. CORPORATIONS—SUBSCRIPTION TO STOCK—LIABILITY FOR PAYMENT.

A stock certificate, which was issued to M. and afterwards returned and attached to its stub, contained on its back an assignment to B., through whose name lines were drawn in red ink, and M.'s name was written after it. The receipt on the stub was signed by M., but below his signature it was stated in red ink that the stock had been reissued to B. in another certificate, but a line was drawn through B.'s name, and M.'s name substituted. It did not appear that B. owned or had any claim to the stock, or that he knew that his name appeared on the assignment or stub. *Held*, that B. was not liable for the stock.

12. APPEAL—BRIEFS—CONSOLIDATED APPEALS.

Where cases are consolidated on appeal, there should be but one brief and argument and one reply brief.

13. CORPORATIONS—SUBSCRIPTION TO STOCK—ISSUE OF CERTIFICATES—PRESUMPTION.

Where a stock certificate is issued to and receipted for by a person, the presumption is, in the absence of any contrary showing, that he is the owner of the stock.

14. EQUITY—VACATING DECREE—SUFFICIENCY OF PETITION.

A petition that a decree entered May 20th be vacated as to the petitioner and that he be permitted to file a cross-bill, which avers that in May he heard that the decree was about to be entered, without averring the time in May, does not show the exercise of sufficient diligence to be heard before the decree was signed.

15. APPEAL—CROSS-ERRORS.

Where by a supplemental decree the receiver of a corporation is empowered to settle with stockholders for unpaid balances on their stock as found by a former decree, and no appeal is taken from the supplemental decree, cross-errors, on an appeal from the former decree, that it was erroneous because not allowing interest to the date of the decree, should not be considered.

Appeals from Appellate Court, First District, on Appeal from Circuit Court, Cook County; M. F. Tuley, Judge.

Bill by the Buda Foundry & Manufacturing Company against the Columbian Celebration Company, Egbert W. Gillett, for whom Charles W. Gillett, executor, was substituted upon his death, and others, in which the Chicago Title and Trust Company was appointed receiver. From a judgment of the Appellate Court, for the First District, affirming a decree for complainant, defendant Charles W. Gillett appeals. With this case have been consolidated in this court cases

bearing titles and general numbers as follows, to wit: 5,339, Weaver v. Chicago Title & Trust Co., Receiver of Columbian Celebration Co., et al.; 5,370, Weaver v. Same; 5,383, Stuart v. Same; 5,384, Bodman v. Same; 5,385, Brewster v. Same; 5,386, De Camp v. Same; 5,387, Hinkley et al. v. Same; 5,388, Lobdell v. Same; 5,389, Maxwell v. Same; 5,390, Merchants' Loan & Trust Co. v. Same; 5,391, Hatley v. Same; 5,392, Lyon v. Same; 5,393, Butler v. Same; 5,394, Cudahy v. Same; 5,395, Hinkley v. Same; 5,396, Halbert v. Same; 5,397, Logan v. Same; 5,398, Hinkley v. Same; 5,399, Henry v. Same; 5,400, Lee v. Same; 5,401, McClurg v. Same; 5,402, Porter v. Same; 5,403, Peck v. Same; 5,404, Peck v. Same; 5,405, Steenberg v. Same; 5,406, Thrall v. Same; 5,407, Valentine v. Same; 5,408, Deere v. Same; 5,409, McNally v. Same; 5,410, Knapp v. Same; 5,411, Hynes v. Same; 5,412, Sickel v. Same; 5,413, Berriman v. Same; 5,414, Gage v. Same; 5,415, Phelps v. Same; 5,416, Schmitt v. Same; 5,417, Twitchell v. Same; 5,418, Taylor v. Same; 5,419, Barbour v. Same; 5,420, Frees v. Same; 5,421, American Trust & Savings Bank v. Same; 5,422, Ware v. Same; 5,423, Randall v. Same; 5,424, Sickel v. Same; 5,425, Nelson v. Same; 5,430, Kirk v. Same. Affirmed in each case, except that of Edward L. Brewster, in which case judgment is reversed and rendered.

On June 10, 1893, the Buda Foundry & Manufacturing Company, an Illinois corporation doing business in the city of Chicago, filed a bill in the circuit court of Cook county against the Columbian Celebration Company, a corporation, and a large number of its stockholders, under section 25, c. 32, Hurd's Rev. St. 1905, on behalf of itself and all other creditors of said company, for the appointment of a receiver, the dissolution of said corporation, and the enforcement of stockholders' liability. Certain other creditors were later joined as co-complainants. To the bill as amended a large number of defendants interposed general demurrers, which, on June 25, 1894, were sustained by the court, and the bill dismissed for want of equity. An appeal was taken by the complainant to the Appellate Court for the First District. The decree was reversed and the cause remanded by that court, and on February 15, 1895, was redocketed in the said circuit court, and the demurter was thereafter overruled. On May 20, 1905, the cause came on for hearing upon the amended bill, the answers of a large number of defendants, and the replications thereto, the report and supplemental report of the master made in accordance with orders of reference theretofore entered, and the exceptions filed thereto, and on that day a decree was entered by the court which finds, among other things, that during the latter part of the year 1891 Steele MacKaye, who was at that time a playwright and who was a man of

small means, conceived the project of producing a spectacular show or panorama at Chicago during the World's Columbian Exposition, which panorama should exhibit on a lifelike scale the discovery of America by Columbus; that said MacKaye planned that he would write a story of said panorama and construct an enormous building near the exposition grounds, in the said city, in which to give said exhibition, and he proposed to invent certain devices which would be improvements in the methods of scene shifting and in the production of realistic spectacular performances and to use said devices and improvements in said building; that for the purpose of carrying out said project said MacKaye joined with him, as promoters of the scheme, Benjamin Butterworth and Powel Crosley, and secured the services of defendant William L. B. Jenney, an architect of Chicago, who was to work out MacKaye's ideas and put them into practical form; that on January 13, 1892, the said three promoters obtained a charter from the Secretary of State of the state of Illinois for a corporation called the "Spectatoria Company," with an authorized capital stock of \$100,000, consisting of 1,000 shares, of the par value of \$100 each; that said stock was subscribed for as follows, to wit: Steele MacKaye 998 shares, Powel Crosley 1 share and Lewis H. Utz 1 share,—and that said three subscribers formed the first board of directors of said corporation; that at the time of the incorporation of said company the said promoters planned that they would procure patents on MacKaye's proposed stage improvements, and when so procured they would turn over said patents to said Spectatoria Company as pretended payments for the capital stock of said corporation subscribed for by MacKaye, and would then divide the said stock among themselves; that shortly thereafter the said promoters decided that they would organize a second corporation, with a capital stock of \$2,000,000, and that MacKaye should subscribe for all of said stock with the exception of 4 shares, and should pretend to pay for the same by transferring to said corporation the right to use for a limited time in a limited territory all of said MacKaye's inventions and letters patent which might thereafter be issued on said inventions, subject, however, to a royalty of 10 per cent. on the gross receipts secured by said second corporation from the use of said inventions and patents, which should be paid daily to MacKaye; that said promoters planned that said inventions, and the patents to be issued thereon, and the right to said royalty, should be transferred by said MacKaye to the aforesaid Spectatoria Company, subject to the right of the said second corporation to use said patents as hereinbefore mentioned; that said promoters planned to procure money to secure a site and construct a building thereon by having said second corpora-

tion issue and sell \$800,000 of bonds secured by a first mortgage on the said site, building, and patents; that in order to facilitate the sale of said bonds the said promoters proposed that MacKaye should turn back to said second corporation \$800,000 of the capital stock of said corporation when received by him, which stock should be issued by said corporation as bonus for bonds to be sold; that, in order to start and carry out said plan, Butterworth and MacKaye, in 1892, secured loans of several thousand dollars from defendants Edward B. Butler and Egbert W. Gillett, severally, and through them secured the co-operation of defendants J. Foster Rhodes, Henry E. Weaver, Bernard A. Eckhart, and Edward L. Brewster in promoting said plan, and gave to the most of them stock in the Spectorioria Company, and promised each of them stock in the new corporation in return for their assistance, and that with the money so raised a miniature model of the proposed stage and proposed panorama was constructed from the plans drawn by defendant Jenney and was exhibited in the early months of 1892 in a room secured by the promoters in the Auditorium Hotel, in Chicago; that a large proportion of the defendants visited the model show and listened to lectures by MacKaye, in which he explained the enterprise and the plan for financing the same.

The court further finds: That in pursuance of said plan, on May 6, 1892, the Columbian Celebration Company was incorporated, with a capital stock of \$2,000,000, divided into 20,000 shares, of the par value of \$100 each. That said MacKaye subscribed for 19,996 shares of said stock, and defendants Sidney C. White, Jr., Howard O. Edmonds, Powell Crosley, and Benjamin Butterworth 1 share each, and that said five men constituted the first board of directors of said corporation. That thereafter, on May 16, 1892, at the first meeting of said directors, a contract was entered into between MacKaye and the said corporation, by which MacKaye, in consideration of the payment to him of 19,996 shares of the capital stock of said company, full-paid and nonassessable, and the payment to him of said royalty, as heretofore planned, assigned to said company the right to use his said inventions and the manuscript which he would prepare for a term of 15 years in certain states. That thereafter, on May 21, 1892, said MacKaye assigned to said Spectorioria Company, in consideration of the 998 shares of said stock issued to him, his right to said 10 per cent. royalty and all rights in his patents and inventions heretofore mentioned, subject only to the use of the same by the Columbian Celebration Company as hereinbefore mentioned. That on the same day the said Columbian Celebration Company issued its entire capital stock in five stock certificates, all marked "full-paid and nonassessable," as follows: Certificate No. 1 to Steele

MacKaye for 19,996 shares, and certificates numbered 2, 3, 4, and 5, for 1 share each, to Butterworth, White, Jr., Edmonds, and Crosley. That on the same day, or the day following, MacKaye returned certificate No. 1 to said corporation, with his indorsement thereon, directing the transfer of 1,574 shares of said stock, each, to Butterworth and Crosley, and the reissue to himself of 7,349 shares of said stock, and at the same time MacKaye permitted his clerk to indorse on said certificate a direction to reissue 9,499 shares of said stock to be held by said company "for promotion." That at the time of the issuance of such stock no applications had been made by said MacKaye for letters patent, and that the sole assets of the company consisted of claimed devices and inventions not yet developed and untested. That the pretended transfer of said alleged patents to said corporation and the issuing by said corporation to MacKaye of all but 4 shares of its capital stock was a trade made by MacKaye with himself and for the sole benefit of himself and his two co-promoters, and was a fraud upon all such persons who might thereafter become creditors of said company. That in such exchange there was no honest exercise of judgment on the part of said directors as to the value of said inventions, and that it was a fraudulent scheme of MacKaye, Butterworth, and Crosley to obtain possession of said stock without paying anything of known value therefor. That said designs and inventions were without practical form and were undeveloped ideas existing in the brain of MacKaye. That neither on May 21, 1892, nor at any time before or since, was any money or property of any value paid to said company for said stock on account of the subscription therefor or for the reissue thereof, with the exception of 250 shares reissued to defendants E. A. and C. B. Shedd. No question relative to the Shedd stock is presented in this court.

The decree further finds: That at a meeting of the officers of said company on May 17, 1892, it was decided to raise, if possible, \$800,000 to develop the project, and a resolution was passed authorizing the president to procure a series of first mortgage bonds of the denomination of \$1,000, to be numbered consecutively from 1 to 800, bearing interest at the rate of 7 per cent. per annum, and to be secured by a deed of trust to be made by the Columbian Celebration Company to the American Trust & Savings Bank, as trustee, upon all the property, of every description, acquired or that might thereafter be acquired by said company, and the president was directed and authorized to take any and all measures necessary to properly negotiate the aforesaid bonds and to secure the capital necessary for the business of the said company. That in order to facilitate the sale of said bonds said MacKaye contributed to said corporation 8,000 shares of its capital stock, which were a part of the 9,499 shares hereto-

ore mentioned, to be used, and which were used, as a bonus to induce persons to subscribe to the said bonds, and that on July 6, 1892, a subscription for the amount of said bonds was offered to the public, which was as follows: 'Chicago, July 6, 1892. We, the undersigned, hereby subscribe for the number of the first mortgage bonds of the Columbian Celebration Company, of \$1,000 each, set opposite our names, respectively, as hereunder written, subject, however, to the following conditions: First—No subscription shall be binding until the good and valid subscriptions hereunder written amount to five hundred thousand (\$500,000) dollars. Second—Before any subscription shall be binding there shall be deposited with the American Trust & Savings Bank, as trustee, \$800,000 of the capital stock of the Columbian Celebration Company, full-paid and nonassessable, said stock to be held by said trustee to be delivered to the subscribers to said bonds, as follows: Each subscriber, on the full and final payment to the aforesaid trustee of the amount subscribed for by him according to the terms of his subscription, shall be entitled to receive, and the said trustee shall deliver to said subscriber, the number of bonds subscribed and paid for by him, and in addition thereto an amount of the capital stock of the Columbian Celebration Company equal, at its par value, to the par value of the bonds subscribed and fully paid for by such subscriber. The subscriptions shall be paid for in not less than five installments, the first within ten days after the subscriptions become binding according to the terms hereof, the others as the board of directors may determine, provided that thirty days shall elapse after each call before another call is made." That between July 6 and August 26, 1892, subscriptions were signed for over \$500,000 worth of said bonds, and on the last-mentioned date the said company notified the American Trust & Savings Bank, in writing, that it proposed to issue its said bonds to the amount of \$800,000. That the directors had, by resolution, selected said bank as trustee for the subscribers to said bonds, and that over \$500,000 of said subscription had been received by said company on the conditions set forth in the subscription agreement, a copy of which was annexed to said notice, and that in accordance with the said agreement it delivered to said American Trust & Savings Bank 8,000 shares of the capital stock of said company, of the par value of \$800,000. That the shares so delivered were the shares which MacKaye had contributed to said corporation, and were part of the 9,499 shares turned back to said company by him "for promotion," and were represented by stock certificate No. 46, made out in the name of the American Trust & Savings Bank, trustee. That the certificate states on its face that said shares were fully paid and nonassessable. That on September 9, 1892, a resolution was passed by said com-

pany and delivered to said bank, which first set out a copy of the subscription contract and then gave certain directions as to the delivery of said stock and bonds, which were as follows: "(1) Whenever and as often as any such subscriber presents to said trustee the certificate of the secretary of this company that he has paid to the treasurer of this company the full amount of his subscription, the trustee shall deliver to said subscriber the number of bonds, of the par value of \$1,000 each, subscribed for by him, and in addition thereto shares of the capital stock of the company equal in par value to the amount of the said bonds, taking a receipt therefor. (2) Every subscriber to said bonds shall be entitled to and shall receive interest at the rate of seven per centum (7%) per annum upon the amount and from the date of each payment made by him upon his subscription to said bonds, and as the first maturing coupon attached to each of said bonds includes interest from a date prior to the date of such payments, before the delivery of the bonds to the subscribers there shall be indorsed in red ink on the face of such coupon, as having been paid thereon, the amount of interest which has accrued on the bonds prior to the date of the payment, or the average date of the payments, made by the subscribers to the bonds. (3) The trustee shall report to the secretary the date of the delivery of said bonds, the number of bonds delivered, the names of the persons to whom they are delivered, and the amount of accrued interest indorsed upon each of said first maturing coupons. The secretary is directed to certify a copy of this resolution to accompany the mortgage or deed of trust." That on September 20, 1892, 800 of the said bonds were delivered to said bank, and on the same day the said trust deed hereinbefore referred to was executed and delivered to said trustee. That as payments for bonds were made by the subscriber to said company the trustee sent back to the company the certificate for shares of stock standing in the name of the American Trust & Savings Bank, trustee, indorsed in blank, and asking for a reissue of the shares thereby represented in two or more certificates, one to be issued in the name of and delivered to the subscriber for bonds in the amount equivalent to his bond purchase, and the other for the remainder of the 8,000 shares to be issued in the name of and delivered to the trustee, as aforesaid, and the stock was thereafter so reissued from time to time, as requested. That at the time of the filing of the bill herein the said American Trust & Savings Bank, as trustee, had in its possession a large number of the shares of the stock which had been turned over to it as trustee and which had not been delivered to any of the subscribers for bonds, a part of which was held for such subscribers as had paid for said bonds and the balance in trust for said company. That the said savings

bank acted merely in the capacity of trustee, and had never subscribed for or in any way become the owner of any of the said stock.

The decree further finds that the said 8,000 shares of stock so delivered to said savings bank, as trustee, were put back into the treasury of the company by MacKaye without anything being paid for the original issue or its return, and that the bond subscribers, on receiving such bonus stock, or upon becoming either the legal or equitable owners thereof, became liable for the amount unpaid thereon; that each of the subscribers to said bonds was put upon inquiry as to the character of the stock and the right of the corporation to dispose of it at less than its face value, and that each and every one of such subscribers was informed of the way said stock was purported to have been paid for by said MacKaye; that after the said company had raised the sum of \$500,000 from the sale of said bonds it proceeded to secure a site and begin the construction of buildings and machinery, and secured contracts with a large number of singers and actors, and expended the said sum of \$500,000, and contracted obligations, in addition thereto, to an amount exceeding \$300,000; that afterwards an unsuccessful attempt was made to sell the remaining portion of said \$800,000 bond issue, and about May 31, 1893, on account of its liabilities, the company was forced to cease to do business, and on that date said MacKaye filed a bill against the Columbian Celebration Company, under which the Chicago Title & Trust Company was made receiver of said corporation and took possession of all its assets, which consisted chiefly of the above-mentioned unfinished building on leased ground; and that since that date the same has been converted into cash and there is now the sum of \$1,400 in the hands of the receiver. The decree further finds that the proceedings taken under the said bill filed by said MacKaye were taken for the purpose of delaying and hindering creditors in the collection of their claims, and not for the purpose of winding up said corporation, and that said bill was an imposition on the court, and gave it no jurisdiction to grant relief or appoint such receiver thereunder, and that such appointment was invalid; that on October 14, 1895, the court, of its own motion, ordered that the case of said MacKaye against the Columbian Celebration Company should be and was consolidated with this case, and appointed the said Chicago Title & Trust Company receiver of said Columbian Celebration Company in this case, without prejudice to the claim of the Buda Foundry & Manufacturing Company,

and that on said last-mentioned date the bill of said MacKaye was dismissed on motion of complainant; that on April 13, 1896, an order was entered herein directing the said receiver to notify all the creditors of said company to file and prove up their claims and in pursuance of such order and notice claims for labor and material to the amount of \$328,986.64 were filed and allowed, among which was the claim of the Buda Foundry & Manufacturing Company for \$9,378, and also the claim of the First National Bank of Chicago for \$1,886.29; that, in addition to the foregoing, the parties whose names appear in "Table of Bondholders No. 1," hereinafter set out, proved up before the master their first mortgage bonds in the number of bonds set out in column 2 and of the face value set out in column 3; that each of said bonds was dated August 25, 1892, payable January 1, 1894, and bore interest at the rate of 7 per cent. per annum after date, as evidenced by two coupons, one for \$60, payable July 1, 1893, and the other for \$35, payable January 1, 1894, attached to each bond; that all of said bondholders paid their subscriptions to said bonds on or about the date when the installments thereof became due, and that said bonds were delivered by the Columbian Celebration Company to said trust and savings bank, trustee, and were delivered by it to said subscribers; that said bank certified on all coupons maturing July 1, 1893, what sum each of said July coupons should be good for; that the sums so certified on said coupons are set out in column 4 of "Table of Bondholders No. 1" after the names of said bondholders; that said bondholders accepted said bonds with said coupons attached and so certified and acknowledged, the amount so certified to be the amount which should be paid; that interest should not be allowed on any of said bonds subsequent to June 10, 1893 (the date of filing this bill), and that interest at the rate of 7 per cent. per annum on the full value of each of said bonds from June 10, 1893, to July 1, 1893, should be deducted from the balance due on said coupons maturing July 1st as said balance was certified by said bank; that the amount set out in said column 5 of "Table of Bondholders No. 1" is the amount allowed by the court to said bondholders for interest on said bonds to June 10, 1893, and that the amount set out in column 6 is the total amount of principal and interest allowed by the decree to said bondholders; that the claim of each of said bondholders to the amount as set out in said column 6 is allowed, but payment shall be made on said claims only as hereinafter decreed.

TABLE OF BONDHOLDERS No. 1.

Column 1 Names of Owners	Column 2 Number of Bonds	Column 3 Face of Bonds	Column 4 Int. Due on July Coupon	Column 5 Total Interest Allowed	Column 6 Total Claim Allowed
Luther W. Bodman.....	5	\$ 5,000	\$ 168.59	\$ 149.05	\$ 5,149.05
Edwin R. Baker.....	2	2,000	51.50	41.72	2,041.72
Edward B. Butler.....	4	4,000	132.80	117.25	4,117.25
Edward L. Brewster.....	5	5,000	152.25	132.81	5,132.81
Herbert E. Bucklen.....	10	10,000	326.50	287.62	10,287.62
Percy L. Brabon.....	1	1,000	31.85	27.96	1,027.96
John H. Bradshaw.....	5	5,000	157.50	138.06	5,138.06
George S. Baker.....	1	1,000	27.50	25.61	1,025.61
John Cudahy.....	10	10,000	325.50	286.62	10,286.62
Arthur Dixon.....	5	5,000	150.50	131.06	5,131.06
Herbert C. De Camp.....	1	1,000	33.90	30.01	1,030.01
Bernard A. Eckhart.....	5	5,000	152.50	133.06	5,133.06
Patrick J. Farley.....	1	1,000	38.25	34.36	1,034.36
Northern Trust Co., executor of estate of George A. Fuller, deceased.....	3	3,000	101.10	89.44	3,089.44
Merchants' Loan & Trust Company, administrator of estate of Charles W. Fullerton, deceased.....	5	5,000	166.75	147.30	5,147.30
Henry C. Gray.....	5	5,000	172.00	152.56	5,152.56
Franklin D. Gray.....	5	5,000	162.50	143.06	5,143.06
Charles W. Gillett, executor of last will and testament of Egbert W. Gillett, deceased.....	5	5,000	104.00	84.56	5,084.56
James O. Hinkley.....	5	5,000	162.50	143.06	5,143.06
Charles W. Hinkley.....	2	2,000	64.00	56.22	2,056.22
Charles W. Hinkley and James Otis Hinkley, executors of the last will and testament of Watson S. Hinkley, deceased.....	5	5,000	155.50	136.06	5,136.06
Robert L. Henry.....	2	2,000	64.40	56.62	2,056.62
Homer V. Halbert.....	2	2,000	64.00	56.22	2,056.22
John C. Hatley.....	2	2,000	66.10	58.32	2,058.32
Jennie L. Thomas and Florence H. Purdie, administratrices of estate of George W. Hoffman, deceased.....	5	5,000	169.00	149.56	5,149.56
William J. Hynes.....	3	3,000	98.40	84.74	3,084.74
Franklin H. Head.....	5	5,000	154.50	135.06	5,135.06
William L. B. Jenney.....	5	5,000	133.00	113.55	5,113.55
Milton W. Kirk.....	5	5,000	163.00	143.56	5,143.56
Edson Keith estate.....	10	10,000	318.00	278.12	10,278.12
Augustus I. Lewis.....	2	2,000	113.00	48.82	2,048.82
Edwin L. Lobdell.....	5	5,000	151.50	132.06	5,132.06
William H. Lee.....	2	2,000	53.00	45.22	2,045.22
Frank G. Logan.....	5	5,000	172.50	153.06	5,153.06
John Frank Lyon.....	1	1,000	32.40	28.57	1,028.57
Richard S. Lyon.....	3	3,000	99.00	87.34	3,087.34
Charles E. Maxwell.....	2	2,000	64.10	56.32	2,056.32
Franklin W. Morgan.....	1	1,000	33.00	29.11	1,029.11
Eleanor W. McClurg, administratrix of estate of Alexander C. McClurg, deceased.....	2	2,000	64.60	56.82	2,056.82
Eleanor W. McClurg.....	3	3,000	96.90	85.23	3,085.23
Daniel T. Nelson.....	2	2,000	67.20	59.42	2,059.42
Augustus E. Perlewitz.....	1	1,000	30.70	26.81	1,026.81
William R. Patterson.....	1	1,000	32.75	28.86	1,028.86
James W. Porter.....	5	5,000	174.50	155.06	5,155.06
Wm. R. Linn, Sara Phelps, and Edward B. Butler, executors of the last will and testament of Elliott H. Phelps, deceased.....	5	5,000	168.50	149.05	5,149.05
Clarence I. Peck.....	5	5,000	164.00	144.56	5,144.56
Ferdinand W. Peck.....	5	5,000	164.00	144.56	5,144.56
Norman B. Ream and Robert T. Lincoln, executors of the last will and testament of George M. Pullman, deceased.....	50	50,000	1,645.00	1,450.60	51,450.60
Curtis H. Remy.....	5	5,000	170.75	151.31	5,151.31
Mary E. Randall, administratrix of the estate of Charles W. Randall, deceased.....	2	2,000	67.50	59.72	2,059.72
J. Foster Rhodes.....	2	2,000	91.50	83.33	2,083.33
Mrs. Hugh A. Rowland.....	3	3,000	100.80	99.14	3,099.14
Norman B. Ream.....	5	5,000	161.25	141.81	5,141.81
John T. Sickel.....	3	3,000	102.90	91.23	3,091.23
E. A. & C. B. Shedd.....	50	50,000	3,000.00	2,785.83	52,785.83
Anthony Schmitt.....	3	3,000	102.90	91.23	3,091.23
Mrs. Sara Steenberg.....	1	1,000	32.70	28.82	1,028.82
Mrs. Louise A. Stever (formerly Louise A. Barnum).....	1	1,000	34.00	30.11	1,030.11
Robert Stuart.....	5	5,000	160.00	140.56	5,140.56
Albert L. Tucker.....	1	1,000	32.20	28.31	1,028.31
James O. Twitchell.....	1	1,000	32.20	28.31	1,028.31
William A. Thrall.....	2	2,000	67.30	59.52	2,059.52
William G. Talcott.....	1	1,000	32.40	28.51	1,028.51
W. J. Taylor.....	1	1,000	37.40	33.51	1,033.51
Mary A. Tuttle, Edward F. Gorton, John H. Whittemore, Howard B. Tuttle, and Arthur H. Dayton, executors of the last will and testament of Bronson B. Tuttle, deceased.....	5	5,000	112.50	93.06	5,093.06
Alastair I. Valentine.....	3	3,000	100.20	88.54	3,088.54
John H. Whittemore.....	5	5,000	250.00	230.25	5,230.25
James N. Witherell.....	5	5,000	135.75	116.81	5,116.81
Flora M. Young, executrix of last will and testament of John M. Young, deceased.....	2	2,000	62.60	54.82	2,054.82

The court further finds that, in addition to the bondholders whose names are contained in the above table, the parties whose names appear in "Table of Bondholders No. 2," hereinafter set out, are the owners of first mortgage bonds in the number set out in column 2 of said table and of the face value as shown by column 3; that each of said bonds is dated August 25, 1892, and was payable January 1, 1894, and bore interest at the rate of 7 per cent. per annum after date; that said persons whose names are set out in said table paid for the bonds for which they had severally subscribed, but failed and refused to take said bonds from said trustee, although entitled to do so; that the said trustee did not certify on the coupons attached to said bonds and maturing July 1, 1893, the amount for which said bonds should be good, but that said parties are entitled to interest at the rate of 7 per cent. per annum from the date when payments were made for their several bonds, up to June 10, 1893; that said interest to which each of said bondholders is entitled is set out in column 4, and the total amount of principal and interest to which each bondholder is entitled is set out in column 5, of said table, opposite their respective names; and that the claim of each of said bondholders is allowed for the amount set out in said column, but that payment on said claims shall be subject to conditions hereinafter imposed.

pro rata with all other creditors of said company in such fund as shall be collected by the receiver and in the assets now in his possession, in the proportion that the amount of the claim of said bondholder shall bear to the total amount of all claims herein allowed; that said bondholders shall not set off their claims as bondholders against their liability as stockholders. And the court finds that the claims allowed herein exceed the total amount of stock, at its par value, which is or has been held by stockholders over whom this court has jurisdiction; that all of the capital stock of said company is unpaid; and that it is necessary to require all stockholders to pay the sum of \$100 on each share of stock held by them. The court further finds that the defendants whose names appear in the following table of stockholders were among those who signed the subscription for bonds of said company; that they subscribed for the number of bonds set opposite their names in column 2 and paid for said bonds in full; that prior to such payment the said company had deposited with said trustee the number of bonds so subscribed for and a number of shares of the capital stock of said company of the par value of \$100 per share, equal in par value to the par value of said bonds; that at the time of the payment by defendants for said bonds the trustee delivered to

TABLE OF BONDHOLDERS No. 2.

Column 1 Names of Owners	Column 2 No. of Bonds	Column 3 Face Value	Column 4 Interest	Column 5 Total Allowed
Edward C. Berriman.....	3	\$ 3,000	\$ 90.09	\$ 3,090.09
Caroline A. Barbour, administratrix of estate of Edward Barbour, deceased.....	2	2,000	54.81	2,054.81
Charles H. Deere.....	5	5,000	141.95	5,141.95
Benjamin M. Frees.....	1	1,000	28.82	1,028.82
Victor Falkenau.....	5	5,000	112.88	5,112.88
Lyman J. Gage.....	10	10,000	231.96	10,231.96
Henry H. Getty.....	5	5,000	150.30	5,150.30
Charles L. Hutchinson.....	5	5,000	145.35	5,145.35
William Kent.....	5	5,000	142.15	5,142.15
Frederick G. McNally and Harry B. Clow, executors of last will and testament of Andrew McNally, deceased.....	5	5,000	147.77	5,147.77
Murry Nelson.....	10	10,000	179.87	10,179.87
Albert J. Oehring.....	2	2,000	51.36	2,051.36
William R. Page.....	5	5,000	129.79	5,129.79
John T. Shayne.....	2	2,000	40.73	2,040.73
Wilbur F. Studebaker, William R. Innis, and Nelson J. Reilly, executors of the last will and testament of Peter E. Studebaker, deceased.....	5	5,000	82.40	5,082.40
Richard T. Whelpley.....	5	5,000	170.33	5,170.33
Louis C. Wachsmuth.....	5	5,000	143.60	5,143.60
Henry B. Weaver.....	5	5,000	123.76	5,123.76

The court orders and decrees that, as soon as each bondholder whose name appears in the above tables shall have paid to the said receiver such sum as this court shall assess against him by reason of the fact that such bondholder was or is the owner, holder, transferor, assignor, or assignee of unpaid stock in said company, then, and not till then, shall said bondholder be entitled and shall share

defendants the number of bonds set out in column 2 and the number of shares of the capital stock of said company as set out in column 3, and that said defendants are still the holders of said stock and that all of said stock is entirely unpaid; that the several defendants are liable thereon, as holders, for the full face value thereof to the amount as set out in column 4.

TABLE OF STOCKHOLDERS NO. 1.

Column 1 Names	Column 2 Number of Bonds	Column 3 Number of Shares	Column 4 Amount of Liability. Face Value of Stock
Edwin R. Baker.....	2	20	\$ 2,000
Percy L. Brabon.....	1	10	1,000
Herbert E. Bucklen...	10	100	10,000
John H. Bradshaw....	5	50	5,000
George S. Baker.....	1	10	1,000
John Cudahy.....	10	100	10,000
Arthur Dixon.....	5	50	5,000
Bernard A. Eckhart...	5	50	5,000
Patrick J. Farley....	1	10	1,000
Franklin D. Gray....	1	10	1,000
Homer V. Halbert....	2	20	2,000
John C. Hatley.....	2	20	2,000
Charles W. Hinkley...	2	20	2,000
James O. Hinkley....	5	50	5,000
William J. Haynes....	2	20	2,000
Robert L. Henry.....	2	20	2,000
W. L. B. Jenney.....	5	50	5,000
Milton W. Kirk.....	5	50	5,000
William H. Lee.....	2	20	2,000
Frank G. Logan.....	5	50	5,000
Augustus I. Lewis....	2	20	2,000
Charles E. Maxwell...	2	20	2,000
Franklin W. Morgan...	1	10	1,000
Daniel T. Neilson....	2	20	2,000
William R. Patterson...	1	10	1,000
Clarence I. Peck.....	5	50	5,000
Ferdinand W. Peck....	5	50	5,000
Augustus B. Perlewitz	1	10	1,000
James W. Porter.....	5	50	5,000
Norman B. Ream.....	5	50	5,000
Mrs. Hugh A. Rowland	2	20	2,000
Curtis H. Remy.....	5	50	5,000
Anthony Schmitt.....	5	50	5,000
Louise A. Stever, formerly Louise A. Barnum	1	10	1,000
Mrs. Sara Steenberg..	1	10	1,000
Robert Stuart.....	5	50	5,000
William A. Thrall....	2	20	2,000
Albert L. Tucker.....	1	10	1,000
William G. Talcott....	1	10	1,000
W. J. Taylor.....	1	10	1,000
James O. Twitchell...	1	10	1,000
Alastair I. Valentine..	2	20	2,000
John H. Whittemore...	5	50	5,000
Richard T. Whelpley..	5	50	5,000

The decree further finds that among the parties who signed the aforesaid subscription to bonds of said company were the defendants whose names are set out in the following stockholders' table No. 2; that the said defendants subscribed for bonds in number as set out in column 2 opposite their respective names, and that said bonds were of the par value of \$1,000 each; that they paid for said bonds in full and received the same, and became entitled to receive 10 shares of the capital stock of said company, of the par value of \$100 per share, with each bond; that said shares had theretofore been deposited with the said trustee to be held for said subscribers, as provided by the terms of said subscription agreement; that each of said defendants became the owner of the number of shares of said stock set opposite his name in column 3 of said table, and that said defendants have declined and failed to take said shares of stock so owned by them from said trustee, and that said shares are still held by it for said defendants and are all unpaid; that each of said defendants is liable for the par value of said stock; that the amount for which each of said stockholders is liable is

set opposite his name in column 4 of said stockholders' table No. 2.

TABLE OF STOCKHOLDERS NO. 2.

Column 1 Names	Column 2 Number of Bonds	Column 3 Number of Shares	Column 4 Amount of Liability
Charles H. Deere.....	5	50	\$5,000
N. B. Dawson.....	2	20	2,000
Edward L. Brewster...	5	50	5,000
Edwin L. Lobdell....	5	50	5,000
James N. Witherell...	5	50	5,000
Louis C. Wachsmuth...	5	50	5,000

The decree further finds that the parties whose names are found in stockholders' table No. 3, hereinafter set out, subscribed for the number of bonds, of the par value of \$1,000 each, set opposite their names in column 2 of said table; that said parties paid for said bonds in full and became entitled to receive them, and also 10 shares of said stock with each of said bonds; that said bonds and shares of stock had been deposited with the said trustee in conformity with the terms of said subscription agreement, and at the time of said payment were held in trust for said parties and said company, as provided in said agreement; that defendants became the owners of such stock and bonds in the number of bonds and shares of stock of the par value as shown by columns 2, 3, and 4 of said table 3; that said shares of stock are each and all unpaid, and that said defendants are liable to the creditors of said company for the face value thereof; that at the time such payments were made by said defendants the said company was insolvent, and that such defendants declined or failed to take either said bonds or stock so held for them by said trustee, but that the said defendants had incurred liability on said stock and could not and did not rescind their contract for such stock; that each of said defendants is chargeable for his pro rata share of the debts of said company to the extent of \$100 per share of stock so owned by him, the amount of such liability being set out in column 4 of said table.

TABLE OF STOCKHOLDERS NO. 3.

Column 1 Names	Column 2 Number of Bonds	Column 3 Number of Shares	Column 4 Par Value of Stock. Amount of Liability
Herbert C. De Camp..	1	10	\$ 1,000
Benjamin M. Frees...	1	10	1,000
Victor Falkenau.....	5	50	5,000
Lyman J. Gage.....	10	100	10,000
Henry H. Getty.....	5	50	5,000
Edward C. Berriman...	2	20	2,000
Charles L. Hutchinson	5	50	5,000
William Kent.....	5	50	5,000
Murry Nelson.....	10	100	10,000
Albert J. Oehring....	2	20	2,000
William R. Page.....	5	50	5,000
John T. Shayne.....	2	20	2,000
Henry E. Weaver.....	5	50	5,000

The decree further finds that each of the said stockholders whose names are set out in the foregoing stockholders' tables is chargeable for his or her pro rata share of the debts of said company to the extent of \$100 per share, and it is ordered and decreed that each of said defendants shall pay, within 30 days from the date of the entry of this decree, to said receiver, the amount set opposite his or her name in said column 4, and upon such payment, or upon payment after said 30 days, with interest from such time at 5 per cent. per annum, said receiver is directed to execute and deliver to said parties a receipt for said moneys and a full release of any and all liability to said company or its creditors on account of the holding of said shares of stock; and if payment be not made within 30 days from the date of the entry of this decree the said defendants shall be charged with interest at the rate of 5 per centum per annum after such time. The decree further finds that since the commencement of this suit, and prior to its submission to the court for its decision, certain of the defendant bondholders not mentioned in either of the foregoing stockholders' tables departed this life; that their deaths have been suggested of record, and that certain persons or companies, as executors or administrators, have been substituted in the place of the persons so deceased; that said persons, prior to their decease, were the owners of a certain number of bonds and a certain amount of said stock, which was unpaid; and it is ordered and decreed that said executors or administrators pay the amounts due from the estates of said persons for such unpaid stock to said receiver in due course of administration, in the same manner as hereinbefore provided as to other stockholders. Among such persons so deceased are the following: George M. Pullman, Edson Keith, Watson S. Hinkley, Alexander C. McClurg and Charles W. Fullerton.

The decree further finds that the appellant Lyman Ware signed said subscription for two of the said bonds of said company and subsequently paid the sum of \$2,000 for the same; that he received from said trustee two bonds and certificate No. 93 for 20 shares of said stock, and that such stock was a portion of the said 8,000 shares deposited with said trustee; that said Ware indorsed said certificates and directed said company to reissue said stock in two certificates of 10 shares each, one to be issued in his own name and the other to J. Foster Rhodes; that said certificates were so issued and delivered, being certificates numbered 101 and 102, to Rhodes and Ware, respectively, and that thereafter said Rhodes assigned his said certificate No. 101 for said shares of stock to his clerk, George O. Gray; that such certificate was surrendered to the company, and a new certificate was issued to Gray for the same stock; that said Rhodes received no consideration for said transfer; that all of the

stock so issued to Ware, Rhodes, and Gray is unpaid, and that Ware is liable, as the holder of certificate 102, to the creditors of said company in the sum of \$1,000, and that Ware, Gray, and Rhodes are jointly liable in the sum of \$1,000 as assignors and assignees of said stock; and it is ordered and decreed that Ware pay the sum of \$1,000 to said receiver, and also that Ware, Rhodes, and Gray, or either of them, shall pay to said receiver the sum of \$1,000 in the same manner as hereinbefore provided as to other stockholders.

The decree further finds that appellant John T. Sickel signed the said subscription for three of said bonds and paid for the same the sum of \$3,000, and received from said trustee the said bonds and 30 shares of said stock; that said shares were represented in stock certificate No. 168; that on April 27, 1893, said Sickel, without consideration, indorsed on said certificate an order directing said company to reissue said shares to William G. Sickel, and that said stock was so reissued by certificate No. 281, and that said William G. Sickel still holds the same; that said shares were a part of the said 8,000 shares held by said trustee, and that said John T. and William G. Sickel should have known that said shares were unpaid; that William G. Sickel and John T. Sickel are jointly liable to the creditors of said company in the sum of \$8,000, the par value of said stock; and it is ordered and decreed that they pay the said sum to said receiver in the manner hereinbefore provided as to other stockholders.

The decree further finds that Egbert W. Gillett, in his lifetime, subscribed to said subscription agreement for five of said bonds; that he received the said bonds from said trustee, and that at the time he paid for said bonds the said trustee held for him in trust 50 shares of said stock, which were a part of the said 8,000 shares, and that upon said payment he became the owner of said stock and entitled to possession thereof, but that at said time the said company was insolvent and the said Gillett failed or refused to take said stock, and the same, unpaid, remained with the trustee for said Gillett, and that he became liable, as holder of said stock, to said company for the par value thereof; that since this cause was submitted to this court said Gillett has died; that his death has been suggested of record, and an order entered herein substituting Charles W. Gillett, the executor of his last will and testament, as defendant in his place and stead; and it is decreed that said executor pay in due course of administration, the sum of \$5,000 to said receiver in the manner hereinbefore set out as to other stockholders.

The decree further finds that said Gillett became an active promoter in the scheme of MacKaye and Butterworth shortly after its inception; that in return for his services rendered and money advanced by said Gillett

to Butterworth, and not to said company, said Butterworth gave to Gillett shares of stock in the Spectatoria Company and a due bill for 400 shares of the capital stock of the Columbian Celebration Company when the same should be transferred by MacKaye to said Butterworth; that after the transfer of said 1,574 shares of said stock to Butterworth by said MacKaye, as hereinbefore found, said Gillett caused Butterworth to indorse over to Clarence R. Gillett, the brother of Egbert W., certificates numbered 36, 37, 38, and 39, each for 100 shares of the capital stock of said company, which stock was a part of the stock aforesaid issued to Butterworth, and represented the 400 shares contracted to be delivered to said Egbert W. Gillett; that thereafter, on September 27, 1892, said Gillett caused said company to issue in the name of Clarence R. Gillett certificates numbered 61 and 62, each for 200 shares of said stock, in lieu of the four certificates aforesaid, and delivered the same to said Clarence R. Gillett; that he immediately caused said Clarence R. Gillett to indorse said certificates numbered 61 and 62 in blank and deliver the same back to him; and that said Egbert W. Gillett has since held said 400 shares as pretended collateral for a note of \$10,000 made by said Clarence R. Gillett in favor of Egbert W. Gillett, dated July 9, 1892, payable in 60 days, and pretended to be given by the former to the latter as payment for said 400 shares. The decree further finds that in like manner the said Egbert W. Gillett, in the early part of 1892, received a due bill from Steele MacKaye for 500 shares of said stock which were thereafter to be issued to MacKaye; that said order was given to Gillett by said MacKaye in return for services rendered and money advanced by said Gillett to MacKaye in helping to promote the organization of said company; that said money was loaned and services rendered to MacKaye and not the said company; that said Gillett, after retaining said order for several months, pretended to assign the same to his brother, Clarence R. Gillett, and caused said MacKaye, on December 6, 1892, to deliver to Clarence R. Gillett certificates numbered 82 to 86, inclusive, each for 100 shares of the capital stock of said company, all made out in the name of Clarence R. Gillett, and all coming, by various reissues, from the 7,349 shares reissued to MacKaye on May 22, 1892; that said Egbert W. Gillett immediately caused his brother to indorse in blank and deliver to him said certificates for the 500 shares of stock so received by him, and that said Egbert W. Gillett has since retained possession of said stock, ostensibly as security for a note alleged to have been made by Clarence R. Gillett to Egbert W. Gillett for \$12,500, dated December 12, 1892, and pretended to have been given as the purchase price of said stock; that each of said certificates of stock pur-

ported on its face to be full-paid and non-assessable, but that all of said stock was unpaid, and that at the time of making the said pretended sales of said 900 shares of stock at one-fourth their face value to Clarence R. Gillett the latter was without financial ability to pay said notes alleged to have been given for said stock, and that his financial condition was known to his brother, Egbert W. Gillett; that both of said defendants knew that said 900 shares of stock had not been paid for, and that the issuing of the same as full-paid stock, and the transfer of the same, was in bad faith and a fraud upon those who might become creditors of said company; that said Egbert W. Gillett was during his lifetime, and his estate now is, liable as assignor of said stock; that as to the creditors of said company he was during his lifetime, and his estate now is, the real owner of said stock, and that his estate is jointly liable with Clarence R. Gillett, in addition to the sum hereinabove found against him, for the sum of \$90,000; and it is ordered and decreed that Charles W. Gillett, as executor of said estate, and Clarence R. Gillett, pay to said receiver the said sum in the manner hereinbefore provided as to other stockholders.

The decree further finds that shortly after June 16, 1892, said Egbert W. Gillett received from Benjamin Butterworth certificate No. 16 for 165 shares of stock, which certificate was made out in the name of said Butterworth and was indorsed by him in blank; that said 165 shares came, by various reissues, to said Butterworth from the shares given to him by said MacKaye on May 22, 1892; that said stock purported to be full-paid, but it was entirely unpaid, and that all of said persons who received said stock had notice of that fact; that said stock was given to Gillett by said Butterworth in return for money advanced and services rendered to him or MacKaye, and not to said company; that on or about August 15, 1892, said Gillett caused the blank indorsement on said certificate to be filled in by an order directing that 15 of said shares be issued to himself and 150 shares to his brother-in-law, George M. Drake, and thereafter caused the said company to issue certificate No. 33 for 15 shares and certificate No. 34 for 150 shares to Egbert W. Gillett and George M. Drake, respectively; that said Gillett delivered said certificate No. 34 to said Drake, and immediately caused him to indorse said certificate in blank and deliver the same to him, Egbert W. Gillett, and that he has since held the same as pretended collateral security for a note of said Drake for \$7,500, pretended to have been given by Drake to Gillett as payment for said stock; that the sale was not bona fide, and that each of said parties knew, or should have known, that the original issuance of said stock and the subsequent transfers thereof were a fraud upon such persons as might

thereafter become creditors of said company; that since the bringing of this suit said Drake has died, leaving no assets of any kind, and no letters were ever issued in his estate; that as to the creditors of said company the said stock always has been the property of said Gillett and his estate, and that he became liable for the face value thereof; and it is ordered and decreed that his said executor pay to the said receiver, in due course of administration, the sum of \$15,000 in the manner thereinbefore provided.

The decree further finds that said Gillett indorsed certificate No. 33 for 15 shares, and directed the reissue of 10 shares therefrom to Clarence R. Gillett and 5 shares to himself; that thereafter certificate No. 51 for 10 shares of said stock was issued in the name of Clarence R. Gillett and certificate No. 53 for 5 shares was issued to Egbert W. Gillett; that on October 6, 1892, said Clarence R. Gillett and Egbert W. Gillett indorsed the said certificates and directed the reissue of said 15 shares of stock to Henry E. Weaver, and that on the same day the said stock was so reissued by said company to said Weaver; that said stock was entirely unpaid, and the original and subsequent issues thereof were a fraud upon such persons who might thereafter become creditors of said company; that said Weaver, as assignee, and Charles W. Gillett, as said executor, and Clarence R. Gillett, are jointly liable in the sum of \$1,000, the par value of said stock; that Charles W. Gillett, as such executor, is jointly liable for \$500 with said Weaver, as assignor of said certificate No. 53; and Weaver, Charles W. Gillett, as executor, and Clarence R. Gillett, are directed to pay the sum of \$1,000, and Weaver and Charles W. Gillett, as executors, are directed to pay to said receiver the sum of \$500.

The decree further finds that on June 2, 1892, said Butterworth gave to defendant Edward B. Butler certificate No. 14 for 450 shares of stock, for money and assistance contributed by said Butler to Butterworth, and not to said company, in assisting in the promotion of its organization; that said stock was unpaid, and was a part of the said 1,574 shares issued to Butterworth; that on September 26, 1892, Butler indorsed said certificate No. 14, and directed a certificate for 45 shares thereof be reissued to Homer P. Knapp and a certificate for 405 shares thereof be reissued to himself, and that said company so issued said certificates in certificates numbered 59 and 60, respectively, and that the said defendants still retain said certificates; that no money or other consideration was ever paid to said company for said stock, and that that fact was known, or should have been known, by said Butler and Knapp at the time of the issuance of said stock to them; that said Butler is liable to the creditors of said company, as the owner of certificate No. 60, in the sum of \$40,500, and that

he is also liable, as assignor of said certificate No. 59, jointly with said Knapp, in the sum of \$4,500, and that Knapp is liable, as assignee, for the same amount. It is ordered and decreed that Butler and Knapp pay to said receiver the sum of \$4,500, and that Edward B. Butler pay the further sum of \$40,500.

The decree further finds that said Butler subscribed and paid for five of said bonds, and that upon such payment the said trustee delivered to him said bonds and certificate No. 146 for 50 shares of said stock; that thereupon the said Butler returned the certificate and directed the said company in writing to reissue three certificates for said stock—one for 39 shares, one for 10 shares, and one for 1 share—but to make out said certificates in the name of Walter F. Crone, an employé of said Butler, and on April 24, 1892, the new certificates were so issued and delivered to said Crone in certificates numbered 274, 275, and 276; that all of said stock was unpaid, and that Butler and Crone knew, or should have known, that it was unpaid; that said Butler is assignor of said stock and the real owner thereof, and that he and Crone are jointly liable to the creditors of said company for said 50 shares of stock in the sum of \$5,000; and it is ordered and decreed that said Butler and Crone pay to said receiver the sum of \$5,000.

The decree further finds that on July 7, 1892, Steele MacKaye gave to defendant Henry E. Weaver certificate No. 19 for 90 shares of said stock in return for money loaned and assistance given to said MacKaye individually; that said shares of stock came, by various reissues, out of a certificate theretofore issued to MacKaye; that Weaver had been actively engaged in the sale of said bonds and the promotion of said company, and knew how the capital stock had been originally issued, and that such issue, and the subsequent transfers thereof, were a fraud upon such persons as might thereafter become creditors of said company; that no money or other property had been received by said company for the original issue or the subsequent transfers of said stock, and that said Weaver is liable to the creditors of said company, in addition to the sums theretofore decreed to be paid by him, in the sum of \$0,000 due and unpaid on said stock; and it is decreed that such sum shall be paid by him to said receiver.

The decree further finds that on April 28, 1893, said MacKaye made a gift to Edward L. Brewster of certificate No. 273 for 100 shares of said stock on that day standing in the name of said MacKaye, and coming, by various reissues, from the first certificate issued to him; that MacKaye indorsed the said certificate No. 273 and directed that said 100 shares be reissued to said Edward L. Brewster, and that afterward, on April 28, 1893, the said stock was so reissued in certificate No. 282; that after the failure of

the corporation was known, on May 2, 1893, without any indorsement by said Brewster, the said certificate was returned to said corporation and marked "canceled," and a new certificate for 100 shares, No. 288, was issued in the name of Steele MacKaye, and receipted for in his name by S. C. White, Jr.; that the cancellation of said certificate was unauthorized, and as to the creditors of said corporation was void; that said Brewster is the real owner of said stock, and that said shares were unpaid, and known to be by said Brewster, and that he is liable to the creditors of said company in the sum of \$10,000; and said Brewster was ordered and decreed to pay to said receiver the said sum of \$10,000, in addition to the money theretofore decreed to be paid by him.

The decree approves the finding of the master to the effect that all of the general creditors of said company, excepting the employes for the stage and orchestra, were informed of the manner in which said stock was issued to the original subscribers and of the way such stock was purported to have been paid for, at the time they extended credit to the company. The decree also finds various facts in reference to the liability of stockholders who are not before this court, and those findings, in so far as here immaterial, are omitted from this statement. By the decree no interest was allowed upon any claim of any character against the corporation after the filing of the bill, and the decree against each stockholder was for the face value of his stock, without any charge for interest prior to the decree, and the various sums adjudged by the decree against stockholders were made to bear interest at 5 per centum per annum from June 20, 1905, if not paid by that date. The total liabilities of the corporation as fixed by the decree are:

To bondholders who are liable for stock	\$380,293 08
To bondholders who are not liable for stock	52,785 83
To general creditors.....	328,986 64
Total	\$762,065 55

The total of the sums decree to be paid by stockholders or their legal representatives is \$579,000. By the decree each person adjudged a stockholder is required first to pay to the receiver the full par value of his stock. Bondholders are not permitted to set off any part of the bonded indebtedness against their stock liability. All moneys received from stockholders are to be paid pro rata to the various claimants according to the amount of their claims, no matter what the character of the indebtedness, excepting one or two small claims for labor, which are preferred. All other claims are placed on the same footing. The stockholders who are also bondholders will, upon distribution, receive back upon their claims which have been allowed on account of the bonds held by them a portion of the money paid to the receiver by them on account of their stock liability.

The testimony of MacKaye and that of Butterworth was not taken. Both died pending the litigation in the circuit court. They were nonresidents, and no personal service was had upon them, or upon a number of other nonresidents holding stock, which in great part accounts for the fact that the total of the decree against stockholders is much less than the total par value of all the stock.

On July 31, 1905, upon the motion of the receiver, the Chicago Title & Trust Company, for leave to settle the decree against certain of the defendants who desired to adjust their liability under the decree theretofore entered, the court entered a supplemental decree, providing that each defendant could settle his liability under the former decree by paying the amount of the decree against him and interest, and in case such defendant was the holder of a bond or bonds which had been allowed as a claim by the former decree, in adjusting the amount adjudged against him he should have credit for \$300 on account of each \$1,000 bond so theretofore allowed as a claim, upon his releasing the fund created by the earlier decree from any liability to pay anything further on the claim which had been allowed and which was based on such bond.

From the principal decree of the circuit court a large number of defendants prayed separate appeals to the Appellate Court for the First District. The cases were there consolidated for hearing, and judgment was there entered affirming the decree of the circuit court in each instance. A number of the cases so determined in the Appellate Court have been brought to this court either by appeal or writ of error, including this case, in which this statement and the subjoined opinion are written. All of these cases, and another hereinafter mentioned in this statement, brought to this court by the executrix of the will of Henry E. Weaver, now deceased, have been consolidated in this court, and are here to be determined under the title of this case. The titles and numbers of all such cases so consolidated with this case are the titles and numbers set out in the first portion of this statement. Among the cases so consolidated is an appeal by the executrix of the will of Henry E. Weaver, deceased, from a judgment of the Appellate Court for the First District, affirming a decree of the circuit court of Cook county sustaining a demurrer to and dismissing a petition filed by Weaver in a supplemental proceeding in that court which he began after the entry of the principal decree. He died while the appeal was pending in the Appellate Court, and the executrix was substituted.

In the following opinion the word "appellants" will be used as inclusive of appellants, plaintiffs in error, and persons who have departed this life since the time when it is alleged they became stockholders in the Columbian Celebration Company and whose legal representatives are parties to the pres-

ent litigation in this court. The term "appellees" will be used as descriptive both of appellees and defendants in error. Various errors and cross-errors have been assigned, which will sufficiently appear from the opinion.

Leroy D. Thoman, for appellants. Scott, Bancroft & Stephens, E. R. Bliss, Herrick, Allen, Boyesen & Martin, and Horace K. Tenney (Raymond D. Stephens, E. R. Bliss, Edgar A. Bancroft, and I. K. Boyesen, of counsel), for appellees.

SCOTT, J. (after stating the facts as above). First. It is contended by appellants that, in accepting certain property in payment of MacKaye's subscription to the capital stock of the Columbian Celebration Company to the amount of \$1,999,600, the directors fixed that value upon the property offered in the fair and honest exercise of their judgment as to its worth, and that the stock must therefore be regarded as fully paid and nonassessable, even if the directors erred in their judgment as to its value. When the board of directors met on May 16, 1892, the principal asset of the corporation was MacKaye's subscription for stock to the amount above mentioned. The law required the directors, in collecting that subscription, to obtain from McKaye "money or money's worth" to the full amount of the subscription. *Coleman v. Howe*, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133; *Garden City Sand Co. v. Crematory Co.*, 205 Ill. 42, 68 N. E. 724. "Money or money's worth" means cash or its equivalent. If the directors saw fit to accept property in lieu of cash, they could only take it at its fair cash market value, if it was property which had an ascertainable market value. If it had no ascertainable market value, then the only price at which the directors could purchase it was such price as could be realized by selling it to others for cash. On the date last mentioned the directors of the corporation entered into a contract with MacKaye, by which, in satisfaction of his liability on his subscription, MacKaye transferred to the corporation the sole and exclusive right to use 11 alleged new, useful, and valuable improvements in scenic art; also the right to use and produce a "spectatoria" or play entitled "The Great Discovery," of which it is said MacKaye was the author, in the states of Illinois, Indiana, Michigan, Minnesota, Iowa, and Missouri for a period of 15 years, burdened with a 10 per cent. royalty reserved to MacKaye. At the time the contract was made no application had been made for a patent on any of the inventions. The description of the inventions contained in the contract is very general in character. With one or two exceptions the descriptions are not such as would enable the reader to identify the invention. They consist usually of the name given by MacKaye to the invention, followed by a state-

ment of the object of the invention. The play, "The Great Discovery," had not been written. At the time MacKaye's subscription was so satisfied the directors were MacKaye, Butterworth, Crosley, White, and Edmonds. Crosley did not attend the meeting of May 16, 1892, and MacKaye did not vote upon the proposition in reference to the payment of his subscription by the transfer of the rights above enumerated. Those who voted in favor of accepting the proposition were Butterworth, White, and Edmonds. Butterworth was a co-promoter with MacKaye, and a few days later, in accordance with an arrangement effected prior to May 16, 1892, received from MacKaye a considerable portion of the stock subscribed for by the latter. Edmonds was an assistant to Butterworth, as secretary of the World's Columbian Exposition. White was a clerk in the employ of MacKaye and Butterworth, doing clerical work in connection with the promotion of MacKaye's scheme. So far as the transaction of business affecting the corporation was concerned, White and Edmonds were wholly dominated by MacKaye and Butterworth. Edmonds testified that he "never formed any intelligent conclusion as to the value of the patents," referring to the inventions the right to use which was transferred by the contract, and, further, "I did not consider it [the MacKaye proposition, which was accepted] in the sense that I was going to put a lot of money in it myself, but I honestly believed on May 16, 1892, that the resolution was for the best interests of the company and was a good proposition for it." White says: "I don't remember making any inquiry, as a member of the board of directors or an officer, into the merits of these inventions."

It will no doubt be agreed that the rights transferred to the corporation by the contract were without market value. It was, then, the duty of the directors, before accepting the rights transferred by this contract in payment of this large subscription, to ascertain whether those rights had value, and, if so, what the value was. The natural and reasonable method to be pursued in determining that question would have been to have applied to men not interested in the promotion of MacKaye's scheme, who were of wide experience in the production of great spectacular plays, for their views in reference to the worth of the rights which MacKaye proposed to transfer. No such investigation was made. No other steps were taken to ascertain the value of the rights MacKaye proposed to transfer, such as would have been taken by directors seeking to deal honestly and fairly with the assets of the corporation. It was the duty of these directors to ascertain the value of these rights precisely as they would have done had they intended to invest money in such rights themselves, and that they did not do. It is no doubt true that if the directors, in the fair, honest, and in-

telligent exercise of their judgment, make a mistake and accept property at a price greater than its real value, such cannot be regarded as a fraudulent overvaluation of the property; but that rule only applies where the transaction constitutes a valid contract of bargain and sale, made in good faith on the part of the directors, and in the intelligent exercise of fair and honest judgment on their part. There was no such transaction here. The transfer to the corporation was a mere sham. It was, in fact, a sale by MacKaye to MacKaye, and was, in law, a fraud. It was a transfer of the right to use for a period of years, in a limited territory, an unwritten play and inventions not perfected and not accurately described. The writing of the play and the perfecting of the inventions depended upon MacKaye moving in the matter in the future, and he is conceded to have been practically without property other than these inventions and this play. The play, in fact, never was written. Successful applications were made, after the execution of the contract, for patents upon all the inventions except one. As to that one the application was denied. The evidence leads irresistibly to the conclusion that, had the directors on May 16, 1892, after the signing of this contract, sought to have disposed of the rights thereby transferred, they could not, in the world of the drama or elsewhere, have obtained for the rights transferred to the company by that contract anything of value whatever. It follows that MacKaye's stock subscription remained wholly unpaid.

Second. The certificates for MacKaye's stock recited that the shares were "fully paid and nonassessable," and the law is that where stock is so issued, and the holder thereafter sells or assigns the same, and the assignee acquires it in good faith and without notice that it has not been fully paid, he cannot be made liable if in fact the stock is not fully paid. *Coleman v. Howe*, supra; *Sprague v. National Bank of America*, 172 Ill. 149, 50 N. E. 19, 42 L. R. A. 606, 64 Am. St. Rep. 17. Appellants insist that, even if this stock was wholly unpaid, they acquired it in good faith, without notice of that fact, and are therefore not liable. "Notice," in this connection, must be given the ordinary signification of that term, and means knowledge that the stock was unpaid, or knowledge of such facts as would have put an ordinarily prudent man upon inquiry, when the inquiry might reasonably be expected to have led him to knowledge that the stock was unpaid. *Russell v. Ranson*, 76 Ill. 167. Many of the appellants knew precisely how MacKaye had paid for his stock, and all of the appellants acquired their stock, as they knew, within a few months after the organization of this corporation. They obtained it without giving any valuable consideration therefor, except in a few instances, where it is claimed that a small percentage of the face value of the stock was paid therefore by services rendered or by oth-

er methods, not including cash actually paid at the time of the transfer of the stock. The fact that the corporation had just been organized, and that its stock was being transferred without, or practically without, any valuable consideration, was, we think, sufficient to put a reasonably prudent man upon inquiry, and that inquiry would, in our judgment, have led to knowledge of the fact that the stock was wholly unpaid.

Third. Appellants who are bondholders express the view that, having entered into a contract by which they were to pay a certain sum of money to the corporation and receive in exchange therefor bonds equal in face value to the amount of money paid and stock of the corporation, fully paid and nonassessable, to the same amount, the money paid should be held a payment for the stock and not for the bonds, and consequently they cannot now be held liable for the subscription price of the stock. The proof shows conclusively as to the great majority of appellants who are bondholders and satisfactorily as to the other appellants who are bondholders, that each signed a subscription agreement which provided that the undersigned "hereby subscribe for the number of the first mortgage bonds of the Columbian Celebration Company, of \$1,000 each, set opposite our names, respectively, as hereunder written, subject, however, to the following conditions": First, no subscription should be binding until \$500,000 had been subscribed; second, to each subscriber, on the payment of the amount subscribed by him, there should be delivered, by a trustee appointed for that purpose, "the number of bonds subscribed and paid for by him, and in addition thereto an amount of the capital stock of the Columbian Celebration Company equal, at its par value, to the par value of the bonds subscribed and fully paid for by such subscriber." If the par value of the bonds subscribed was fully paid by the subscriber, the money subscribed and paid could only be held to apply upon the purchase price of the bonds. No portion of the money paid would remain to apply on the stock. The agreement plainly indicates that the money paid by the bondholders was payment for the bonds alone. All parties to the transaction, as appears from the evidence, looked upon the stock which accompanied the bonds of each subscriber as a bonus.

Fourth. It appears that a few of the appellants who are bondholders paid their subscriptions and accepted the bonds, but failed or refused to take the stock to which they were entitled from the custody of the trustee, and that a few others paid their subscriptions and failed or refused to take actual possession of either bonds or stock; and it is claimed that these appellants did not become stockholders. Under the subscription agreement, when the necessary \$500,000 was subscribed and payment was made by any subscriber, he became the owner of the stock which was to accompany his bonds. Whether or not he

obtained the certificate or left it with the trustee is a matter of entire indifference. It was by virtue of the subscription contract that he became the owner of the stock. Whether he actually received the certificate is immaterial. *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Spear v. Crawford*, 14 Wend. (N. Y.) 20, 28 Am. Dec. 513; *Burr v. Wilcox*, 22 N. Y. 551. It has also been suggested on behalf of those who did not take actual physical possession of the stock certificates, that if nothing was paid for the stock it was optional with the subscribers to take the stock or leave it when they paid for the bonds. A careful reading of the subscription agreement, which is set out in *hæc verba* in the foregoing statement, shows that the subscribers were under precisely the same obligation to receive the stock that they were to accept the bonds. If, as between themselves and the corporation, they had the right to decline to take certificates of stock for which they had paid nothing, they had no such right as to creditors. When they became the owners of the stock, though they acquired it without paying anything therefor, they incurred a contingent liability to creditors, which was not to be avoided by refusing to receive the certificates. Again, it is urged that the contract did not provide for the delivery of any particular stock, but merely for the delivery of "fully paid and nonassessable stock," and that if the stock delivered or tendered was not of that character the subscriber was under no obligation to accept it. Certificates for all the stock of the corporation had been issued when the subscriptions were taken for the bonds. None of the stock was fully paid and nonassessable. Nothing of value had been paid for it, or any of it. The bond subscribers had notice of this fact, or of such facts as put them upon inquiry. Under these circumstances the contract must be held to have reference to the stock of the company as it then existed, viz., wholly unpaid, but represented by certificates stating that the stock was fully paid and nonassessable.

Fifth. The master found that certain of the creditors knew, at the time credit was extended to them, that the stock issued to MacKaye had been issued as fully paid and nonassessable in consideration of the transfer by MacKaye to the corporation of certain rights in his inventions and in his play entitled "The Great Discovery"; and appellants insist that those creditors are estopped to aver that the stock is not fully paid. In *Sprague v. National Bank of America*, supra, we said that the liability of the stockholder to the creditor for the unpaid portion of the subscription for stock is not "in any wise affected by the fact that the creditor knew or did not know, when he extended credit to the corporation, that the stock was in part unpaid." We are entirely satisfied with that view, and it is decisive of this question.

Sixth. In allowing the claims of the bondholders the court permitted the recovery of interest only to the time of the filing of the bill, and those bondholders who have appealed insist, upon the authority of *Barker v. International Bank*, 80 Ill. 96, that interest should have been allowed to the time of the decree. That was a case of a bill to foreclose a deed of trust given to secure a promissory note, and the case merely announces the ordinary rule. The holder of the note is entitled to a decree for the amount of his note and interest at the rate fixed by the note to the date of the decree, and if the property does not satisfy the debt he is entitled to a decree in personam against the maker of the note. Where the assets of a corporation, including stock liability, are less than its indebtedness, and it passes into the control of a court of chancery for the administration of its assets and for dissolution, the general rule is that interest is not allowed on the claims against the funds. The delay in distribution is the act of the law. It is a necessary incident to the settlement of the estate. The rights of all the creditors are fixed when the court takes jurisdiction of the property. *Williams v. American Bank*, 4 Metc. (Mass.) 323; *Thomas v. Minot*, 10 Gray (Mass.) 263; *Thomas v. Western Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *People v. American Loan & Trust Co.*, 172 N. Y. 371, 65 N. E. 200. It is therefore inequitable that interest should thereafter be allowed on the claims where certain of the claims draw interest at one rate and others draw interest at a lower rate or do not draw interest at all. If interest under such circumstances was allowed at the rate fixed by the contract, and the litigation extended, as here, through many years, the mere lapse of time would enable those holding claims drawing a high rate of interest to materially lessen the proportion of the assets which would pass to those holding claims drawing a lower rate of interest or drawing no interest at all. This is not permitted. Prior to the filing of the bill herein a bill had been filed by MacKaye against the corporation and others for the alleged purpose of protecting the rights of those interested in the corporate property, and a receiver had been appointed in that suit prior to the filing of the bill in this suit. Afterward that suit was consolidated with this, and the receiver who had been appointed in that suit was appointed receiver in this. Under these circumstances we think it not inequitable that the date of the filing of the bill in this suit should be, as it was, fixed by the court as the date when the bonds should cease to draw interest as against the fund to be administered by the court. If this was a case where, after the administration of the fund, there was any party against whom the claim holders could take a personal judgment, as to such party, of course, the claim would draw interest in accordance with the

terms of the contract upon which it was based.

Seventh. On July 31, 1905, after the principal decree had been enrolled, the court entered a supplemental decree, which appellants regard as void. That decree finds that certain of the defendants desired to make settlement of their liabilities as fixed by the decree theretofore entered, and the decree points out a method to be pursued by the receiver in adjusting the liability adjudged against those defendants and against any other defendant desiring to make payment. Appellants have not pointed out any way in which their rights are prejudiced by that supplemental decree, and we have been unable to perceive that they are in any manner harmed thereby.

Eighth. The court allowed a claim against the estate of the corporation, in favor of the First National Bank of Chicago, in the sum of \$1,386.29. It is contended by appellants that nothing was due to the bank. Whether the amount allowed was due depends, so far as this suit is concerned, entirely upon the question whether a finding of the master in reference to a matter of fact is correct. Neither of appellants seems to have excepted to that finding of fact, and there is, therefore, nothing upon which to base the assignment of error attacking this allowance.

Ninth. In the principal brief filed herein on behalf of the appellants, special argument is made as to the liability of each of the following appellants: The executor of the will of Egbert W. Gillett, deceased, Edward B. Butler, Homer P. Knapp, and Edward L. Brewster. Egbert W. Gillett departed this life, testate, after the master's report was filed and before the decree was enrolled. His executor was substituted. Egbert W. Gillett, in his lifetime, rendered certain services and advanced certain moneys to MacKaye and Butterworth, and in exchange received from MacKaye a duebill calling for 500 shares, and from Butterworth a duebill calling for 400 shares, of stock of the corporation. He assigned these duebills to his brother, Clarence R. Gillett, and testifies that he sold the stock to be issued thereon to his brother for 25 per cent. of its par value and took his brother's promissory notes for the purchase price. Clarence R. then presented the duebills, received the certificates of stock, assigned them in blank, and deposited them with Egbert W. ostensibly as security for the notes given for the shares of stock. The notes contained provisions authorizing Egbert W. to sell the stock at public or private sale, before or after the maturity of the notes, without notice to the maker. Egbert W. was held liable for that stock, and also for 150 shares of stock, to which he seems to have been entitled as a bonus, accompanying stock of the Spectatoria Company which he purchased from MacKaye and Butterworth. He caused the certificate

for this stock in the Celebration Company to issue to his brother-in-law, George M. Drake. The same course was pursued in this instance as in that of the transaction with Clarence R. Gillett. Drake gave Egbert W. his promissory note for 25 per cent. of the par value of the stock, and after receiving the certificate assigned it in blank and deposited it with Egbert W., for the apparent purpose of securing the promissory note. That note contained a power of sale similar to that found in the notes given by Clarence R. Both Drake and Clarence R. were practically insolvent. Drake never paid any cash on his note, although a credit of \$50 appears thereon, which was the result of the settlement of an account between the maker and the payee of the note. The notes of Clarence R. also remain in large part unpaid; the credits appearing on those notes having resulted from the closing up of certain business transactions in which Clarence R. and Egbert W. are said to have been interested together. We are satisfied from the evidence that Egbert W. Gillett was the owner of this stock. The certificates assigned in blank were in his possession. Drake and Clarence R. were without financial responsibility, and were evidently mere dummies, to whom Egbert W. caused the certificates to issue. Under these circumstances the decree against him for the face value of this stock was a just and proper one. Cook on Corporations, 253; Houghton v. Hubbell, 91 Fed. 453, 33 C. C. A. 574; Dunn v. Howe, 107 Fed. 849, 47 C. C. A. 13; American Alkali Co. v. Kurtz (C. C.) 134 Fed. 663; Ohio Valley Nat. Bank v. Hulitt, 204 U. S. 162, 27 Sup. Ct. 179, 51 L. Ed. 423.

The master also found that Egbert W. was liable for 50 shares of stock accompanying the bonds for which he subscribed, making a total of 1,100 shares of stock. Egbert W. also acquired 15 additional shares of stock, and received for the same certificate No. 33. Thereafter he returned this certificate and directed the reissue of a certificate for 10 shares to Clarence R. and 5 shares to himself. Certificates issued accordingly, and both were thereafter transferred to Henry E. Weaver. The master did not find Egbert W. liable for these 15 shares of stock. The court, however, without any exception being taken to the report of the master in that regard, found Egbert W. liable for these 15 shares, and entered a decree against him for a total of \$111,500, being the par value of the 1,115 shares. Counsel criticises the chancellor very sharply for entering a decree holding the executor liable for the 15 shares once represented by certificate No. 33, basing his criticism principally upon the fact the master's finding in reference to the liability of Egbert W. in this regard was not challenged by an exception. The master correctly found, as a matter of fact, that Egbert W. had been the owner of these 15 shares. His finding as to the total liability of Egbert

W. was a mistaken legal conclusion. It is not necessary for the party, dissatisfied with the legal construction which the master places upon facts correctly stated to except to the report. "Exceptions relate to matters of fact and the question whether the master has drawn an incorrect legal conclusion from the facts will be heard without exceptions." *Von-Platen v. Winterbotham*, 203 Ill. 198, 67 N. E. 843, and authorities cited at page 202 of 203 Ill., and page 843 of 67 N. E. The conclusion of the chancellor with reference to Egbert W.'s liability for these 15 shares was correct, and was rightfully embodied in the decree, even in the absence of an exception to the report of the master. Counsel is plainly in error in stating that the bill contains no averments under which proof of the facts above stated as to Egbert W. could be made. It is also said that there is no prayer for the relief granted as to Egbert W. There was in the bill a prayer for general relief, which was all that was necessary. Other objections interposed to the decree holding Egbert W. liable for the 1,115 shares of stock are disposed of by what has already been said in this opinion.

Edward B. Butler was held liable for 50 shares of stock upon his bond subscription and for 450 shares of stock which he obtained from Butterworth that were turned over to him by Butterworth on account of money loaned and other favors extended by Butler to Butterworth. Homer K. Knapp was held liable for 45 shares of stock which had been transferred to him by Butler in payment of about \$1,000 which Butler owed Knapp upon the conclusion of a real estate transaction between them. Objections made to the decree in regard to Butler's liability and that of Knapp are disposed of by what is said elsewhere in this opinion.

Edward L. Brewster was held liable by the master for 50 shares of stock. The court found that there was evidence that he had been the owner of an additional 100 shares of stock, and rendered a decree against him for the par value of 150 shares of stock. The finding of the court as to the additional 100 shares of stock charged against Brewster by the decree is based upon the following facts: The blank certificates of stock were printed in a so-called stock book, and each was attached to a stub upon which was printed a blank receipt. When the certificate was issued it was detached from the stub, and the person to whom it was issued and delivered signed a receipt therefor on the stub. Stock certificate No. 273 was issued to Steele MacKaye, and was thereafter returned and again attached to its stub. At the time of the hearing before the master there appeared on the back of the certificate an assignment of the stock represented by the certificate, signed by Steele MacKaye. The blanks in the printed form upon which the assignment is written are filled in with words written in black ink, the effect of which was to make an apparent

assignment of the stock to Brewster. Through the name of Brewster, in the body of the assignment, however, is drawn a line in red ink, and the name "Steele MacKaye" is written in red ink directly after Brewster's name, the effect of which, if the name of Brewster be regarded as erased, is to make the assignment apparently one from MacKaye to MacKaye. Across the face of the certificate is written; "Surrendered and canceled this 28th day of April, 1893, for reissue. Sidney C. White, Jr., Sec'y." The receipt on the stub of that certificate is dated April 22, 1893, and signed "Steele MacKaye." Below MacKaye's signature on the stub is written, in red ink, "Reissued in ctf. No. 282 to E. L. Brewster." A line is then drawn through the name "E. L. Brewster," and below it is written, "S. MacKaye in ctf. No. 288." Certificate No. 282 remains in the stock book, and has never been detached from the stub. It was filled out and signed by the proper officers under date of April 28, 1893, and runs to MacKaye for 100 shares of stock. Across the face is written: "Canceled May 1, 1893. Issued by mistake. Reissued to Steele MacKaye in certificate No. 288. Sidney C. White, Jr., Sec'y." No receipt for this certificate No. 282 appears on the stub. Certificate No. 288 is not in the stock book. The stub of that certificate shows that it was issued to Steele MacKaye, and under the words "From whom transferred" is written, "Steele MacKaye, ctf. No. 273." Following that is a receipt for the certificate No. 283, dated May 2, 1893, and reciting that the certificate is for 100 shares. That receipt is signed, "Steele MacKaye, per S. C. White, Jr." There is no evidence that Brewster ever had certificate No. 273, that he ever owned or had any claim to the stock thereby represented, or that he ever had any knowledge that his name appeared in the assignment on the back of certificate No. 273 or on the stub thereof. White, the secretary, testified, but was asked nothing in reference to Brewster's name appearing in that assignment or on that stub, and the presence of that name in those two places is wholly unexplained. When Brewster testified, counsel for complainants apparently did not seek to charge him with liability as to the stock once represented by certificate No. 273, and he was asked nothing in reference thereto by counsel for either party. We have recited all the evidence considered by the chancellor in determining the question of Brewster's liability for the additional 100 shares of stock now in question, and are of the opinion that it does not prove that Brewster ever owned the stock, and that the decree, in so far as it finds him liable for the value of the additional 100 shares, is erroneous.

Tenth. In addition to the principal brief and argument and brief in reply for appellants, separate briefs and arguments have been filed for each of the appellants Edwin L. Lobdell, Milton W. Kirk, Edward C. Beriman, Lyman J. Gage, and Robert Stuart,

and two separate briefs and arguments have been filed for the executrix of the will of Henry E. Weaver, deceased. There have also been filed two additional reply briefs, one in behalf of Lyman J. Gage and one in behalf of Robert Stuart. These cases having all been consolidated, there should have been but one brief and argument and one reply brief filed on behalf of all those complaining of the decree. We have, however, given to the additional briefs and arguments and the additional reply briefs the same consideration that they would have been entitled to, had they been properly upon the files. The additional briefs and arguments, excepting those filed on behalf of Weaver's executrix, present only questions that have already been disposed of in this opinion. The decree of the circuit court found Weaver liable for the par value of 155 shares of stock. The first brief and argument filed on behalf of his executrix is devoted to the question of his liability for this stock. The only contention made by that brief and argument which requires particular attention is in reference to 90 shares of stock at one time held by Weaver, which the executrix avers he held merely as security for money loaned, and for that reason she conceives that he was not liable therefor. Certificate No. 13 for 4,861 shares of stock was originally issued to MacKaye. He returned that certificate and in lieu thereof several other certificates were issued. One was for 90 shares of stock and was issued to Weaver. That certificate had been detached from the stub and did not appear in evidence. Weaver's receipt for that certificate of stock, bearing his own signature, appears on the stub of the certificate under date of July 7, 1892. The presumption from this, in the absence of any contrary showing, would be that Weaver was the owner of the stock. It is urged that his testimony shows that this was not true. He testifies that he has not any idea where the 90 shares came from; that he does not know what he did with the stock; does not know whether he now has the certificate in his possession; that if he received it he paid for it; that if he paid any one for it he paid MacKaye; that he paid MacKaye \$2,500 for Spectatoria stock; that he thinks MacKaye "turned over some Celebration stock when I did that; don't recollect that I paid anything to him for this stock. I paid MacKaye money for payrolls. Whether that related to this or not, I don't know." On cross-examination he expressed the belief that he loaned MacKaye money on Spectatoria stock of the par value of \$2,500, and that at the same time he thinks he got the 90 shares of stock in the Columbian Celebration Company which is in question, and that MacKaye agreed to pay him \$2,500 and take the stock back at some future time. This testimony, as a whole, is entirely too indefinite to overcome the presumption arising from the fact that the certificate was issued to him, and that he receipted for the same without indicating that

he was other than the absolute owner of the stock represented by the certificate.

After the decree against the stockholders had been entered, and on June 16, 1905, Weaver filed in the circuit court a petition asking that the decree be vacated as to him and that he be permitted to file a cross-bill. From that petition it appears that in May, 1905, he received a letter from Leroy D. Thoman, an attorney at law who had appeared for him and for a great number of other alleged stockholders in the circuit court, advising him that a decree was about to be entered in the case, and stating that Thoman had represented him for 12 years in the litigation; that shortly afterward he was advised by another letter from Thoman that the decree had been entered; that he then made an investigation, and learned that he had been held liable for \$15,500 as a stockholder; that he had not theretofore known that Thoman had acted as his solicitor in the case; that he called upon Thoman, and learned from Thoman that the latter had been retained to act as solicitor for him by E. W. Gillett. The petition avers that Weaver never authorized Gillett to retain Thoman, never authorized Thoman to represent him, and never knew of Gillett's action until advised by Thoman; that at the time he was served with summons he was insolvent, and was unable to retain a lawyer to defend him; that he then believed that he had a good defense to the case made by the bill, but believed that, owing to his insolvent condition, a decree against him would not be collectible; that in April, 1893, he made a voluntary assignment, under the law of the state, for the benefit of his creditors; that in 1899 he filed a voluntary petition in bankruptcy in one of the District Courts of the United States and in due course obtained a discharge in bankruptcy; that John H. Hamline, who at an earlier time had been for many years attorney for petitioner, told him, after the termination of the bankruptcy proceeding, that his discharge would be a complete protection to him as against the claims of the creditors in the case at bar; that Hamline, who represented a portion of the complainants in the bill, then stated that he would not ask for a decree against him, and that, relying upon the statement of Hamline, he (Weaver) paid no further attention to the case; that since the entry of the decree against him he has been advised that it will be necessary for him to file a cross-bill setting up his discharge in bankruptcy. The proposed cross-bill accompanied the petition, and avers that Thoman's appearance for Weaver was without the knowledge or consent of the latter, and interposes the discharge in bankruptcy. To the petition appellees demurred. The demurrer was sustained, and the petition dismissed. Weaver appealed to the Appellate Court for the First District. The decree dismissing the petition was affirmed, and, his death having occurred, his executrix appeals to this

court. The second special brief filed in this court on behalf of the executrix is devoted to the expression of her views with reference to the decree dismissing the petition and the judgment affirming that decree. The decree rendered against Weaver in the original suit was entered on May 20, 1905. The petition avers that he received Thoman's letter in May, 1905, advising him that a decree was about to be entered. It does not appear from the petition at what time in May this letter was received. For aught that is shown it may have been 19 days before May 20. The petition must be construed most strongly against the petitioner. It was his duty, if he desired to be heard in reference to the decree that was to be entered, to present his views or make his defense prior to the time the decree was signed, if he had an opportunity to do so. It does not appear from this petition but that his opportunity so to do was abundant. He could not rightfully rely upon the assurance of the attorney for a few of many creditors that no decree would be taken against him. The petition does not show the exercise of diligence on his part, and for that reason the demurrer thereto was properly sustained, and the judgment of the Appellate Court affirming that decree was correct.

Eleventh. Appellees urge certain cross-errors. Their first contention is that the appellants who were bondholders should not be permitted to share in the fund arising from the stock liability, for the reason that they themselves participated in what appellees regard as a fraudulent scheme designed to prevent collection of the moneys due for stock. The second cross-assignment affords basis for the contention made by appellees that interest at 5 per centum per annum should have been awarded against the stockholders on the amount of their stock liability from the date of the filing of the bill up to the time of the decree, and that, as the decree against each stockholder is only for the par value of the stock held by him, it is erroneous. The supplemental decree above referred to, taken on July 1, 1905, after the filing of the decree against the stockholders, was entered on the motion of the receiver, who is one of the appellees. From that decree none of the appellees appealed, and none of them have sued out a writ of error to review it. On the contrary, they insist it should be affirmed. By that decree the receiver was authorized to make settlement with any of those against whom the decree of May 20, 1905, had passed, in satisfaction of their liabilities as fixed by that decree. As the amount adjudged against each stockholder by the decree of May 20, 1905, is to be accepted by the receiver as in full of his stock liability, those making settlement under the supplemental decree could not thereafter be required to pay any sum in addition to the amount paid in making such settlement. The insistence of appellees that this supplemental

decree should be affirmed might perhaps be regarded as an acceptance of the decree of May 20, 1905, and as an election to abide by the terms thereof. The cross-errors assigned apply as well to the rights of stockholders who made settlement by virtue of the supplemental decree as to those of stockholders who have brought the record of the circuit court here; but those stockholders who did not appeal or sue out a writ of error are not parties to the proceeding in this court, as the decree, as against the various stockholders, was, in effect, a separate decree as to each. The appeal of the stockholder from the decree and the assignment of cross-errors in this court upon that appeal do not bring before this court stockholders not appealing or suing out a writ of error and to whom the particular portion of the decree appealed from does not apply. Appellees, as above indicated, have not questioned the entry of the supplemental decree by the assignment of any error or cross-error in reference thereto. On the contrary, they insist that it was a proper exercise of the power of the circuit court. As we have stated, that decree permits defendants who appeal and defendants who do not appeal to settle their liability as fixed by the decree of May 20, 1905, upon the terms of that decree. Inasmuch as appellees are content with the supplemental decree, we are of the opinion that their cross-errors should not be considered. If the cross-errors are well assigned, the original decree certainly should not be reversed, unless the supplemental decree be also reversed; and, as appellees do not attack the supplemental decree it cannot be reversed merely for the purpose of opening a way for the entry of a judgment here reversing the original decree upon their assignments of cross-error.

The judgment of the Appellate Court in this case, and in all the cases consolidated herewith, will be affirmed, excepting only the case of Edward L. Brewster, appellant, against the Chicago Title & Trust Company, receiver, and others. In the Brewster Case, so excepted, the judgment of the Appellate Court will be reversed, and the decree of the circuit court will be reversed in so far as it requires Brewster to pay the sum of \$15,000 on account of stock liability, and a judgment here will be entered against Brewster, and in favor of the receiver, for the sum of \$5,000, with interest thereon at 5 per centum per annum from June 20, 1905, which shall be in full of Brewster's stock liability, and which, when collected, shall be distributed by the receiver in accordance with the directions of the circuit court. The costs of this court occasioned by Brewster's appeal will be divided, one-half to be paid by Brewster, and the other half by the appellees. In each of the cases other than that of Brewster the ordinary judgment for costs will be entered against the appellant.

Appellees move that the cost of a supplemental abstract filed by them be taxed. The

supplemental abstract was unnecessary. The motion will be denied.

Judgment affirmed in each case excepting that of Brewster. In Brewster's Case, judgment of the Appellate Court and decree of the circuit court reversed, and judgment here.

(230 Ill. 495)

KENT v. CHICAGO TITLE & TRUST CO.
et al.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 6, 1907.)

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; M. F. Tuley, Judge.

Bill by the Buda Foundry & Manufacturing Company against the Columbian Celebration Company and others, in which the Chicago Title & Trust Company was appointed receiver. From a judgment of the Appellate Court, affirming a decree for complainant, defendant William Kent appeals. Affirmed.

Murry Nelson, Jr., and Samuel Adams, for appellant. Scott, Bancroft & Stephens, Herick, Allen, Boyesen & Martin, E. R. Bliss, and Horace K. Tenney, for appellees.

PER CURIAM. This is an appeal by one of the defendants to the suit in the circuit court of Cook county, the decree in which was reviewed in the case of Gillett v. Chicago Title and Trust Co., 82 N. E. 891. The opinion in that case disposes of all questions presented here. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(230 Ill. 440)

NELSON v. CHICAGO TITLE & TRUST CO.
et al.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 6, 1907.)

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Cook County; M. F. Tuley, Judge.

Bill by the Buda Foundry & Manufacturing Company against the Columbian Celebration Company and others, in which the Chicago Title & Trust Company was appointed receiver. From a judgment of the Appellate Court, affirming a decree for complainant, defendant Murry Nelson appeals. Affirmed.

Murry Nelson, Jr., and Samuel Adams, for appellant. Scott, Bancroft & Stephens, Herick, Allen, Boyesen & Martin, E. R. Bliss, and Horace K. Tenney, for appellees.

PER CURIAM. Appellant, in the circuit court of Cook county, was one of the defendants to a bill in chancery filed in that court by the Buda Foundry & Manufacturing Company against the Columbian Celebration Company and others. In the circuit

court a decree passed against him. He appealed to the Appellate Court for the First District, where the decree of the circuit court was affirmed, and he now prosecutes a further appeal to this court.

The decree of the circuit court which is thus brought before us was reviewed by this court in the case of Gillett v. Chicago Title & Trust Co., 82 N. E. 891. Charles W. Gillett's testate was a codefendant with Nelson in the circuit court. All objections here presented by appellant which relate to that decree were disposed of adversely to his contentions in the Gillett Case. It is unnecessary to repeat what was there said. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(230 Ill. 619)

BATES v. BATES MACH. CO.

(Supreme Court of Illinois. Oct. 23, 1907. Rehearing Denied Dec. 4, 1907.)

1. CONTRACTS—ACTION FOR BREACH—FORM OF REMEDY—ASSUMPSIT—CASE.

Assumpsit lies for breach of contract not under seal, and case lies where, at the time of the breach, a fraud is committed by the party violating the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1549-1557.]

2. ELECTION OF REMEDIES—INCONSISTENCY OF ACTIONS.

A party to a contract, who sues in case for damages in consequence of the other party fraudulently assigning patents to a third person, instead of to the party as provided by the contract, waives his right to sue in assumpsit for breach of contract.

3. LIMITATION OF ACTIONS—STATUTES—APPLICABILITY.

An action in case by a party to a written contract for damages in consequence of the other party's fraud committed at the time of breach of contract is within Limitation Act (Hurd's Rev. St. 1905, p. 1333, c. 83) § 15, providing that civil actions not otherwise provided for shall be commenced within five years after the accrual of the cause of action, and not within section 16, providing that actions on written contracts shall be commenced within ten years after the accrual of the cause of action.

Carter, J., dissenting.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Will County; Dorrance Dibell, Judge.

Action by the Bates Machine Company against Albert J. Bates. From a judgment of the Appellate Court (120 Ill. App. 563), affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

C. W. Brown and Calhoun, Lyford & Sheean, for appellant. John H. Garnsey, for appellee.

HAND, C. J. This was an action on the case, commenced by the appellee against the appellant, to recover damages alleged to have been sustained by the appellee in consequence of the appellant having fraudulently and deceitfully assigned and transferred to the Consolidated Steel & Wire Company, instead of

to the appellee, as he was bound to do by his contract in writing bearing date January 28, 1888, certain patents issued to him by the United States covering a woven wire fence and the machine for manufacturing such fence, which fence and machine were the inventions of appellant. A jury was waived, and a trial before the court resulted in a judgment in favor of the appellee for the sum of \$55,800, which, on appeal, was affirmed by the Appellate Court for the Second District, and a further appeal has been prosecuted to this court.

The case was tried upon a declaration containing five counts, to which the appellant interposed the plea of the general issue and three special pleas; the last special plea being that of the five-year statute of limitations. A demurrer was sustained to all of said special pleas, and, the appellant having preserved proper exceptions to the ruling of the court in that regard, it is here urged by the appellant as ground of reversal that the court erred in sustaining the demurrer to the plea of the five-year statute of limitations filed by him in bar of said action. Section 15 of chapter 83 of the Revised Statutes, entitled "Limitations" (Hurd's Rev. St. 1905, p. 1333), reads as follows: "Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." The usual action brought to recover damages for a breach of contract not under seal is assumpsit, but an action on the case will lie where, at the time of the breach of a written contract, a fraud is also committed upon the other party to the contract by the party violating the contract; and in this case the appellee appears to have waived its right to sue in assumpsit for the breach of the written contract, and to have elected to bring an action in case against the appellant for the wrong committed by the appellant in fraudulently and deceitfully assigning and transferring said patents to the Consolidated Steel & Wire Company instead of to it, as it was averred it was his duty to do by virtue of the terms of the written contract of January 28, 1888. The action was, therefore, not based upon the written contract, but was based upon the fraudulent acts of the appellant in making the assignment and transfer of said patents to said Consolidated Steel & Wire Company, and the only office of the written contract was to establish a duty from the appellant to the appellee to transfer to it said patents. We think, therefore, that it cannot be said, as is contended by the appellee, that section 16 of the limitation act, which provides that actions upon "written contracts,

or other evidences of indebtedness in writing, shall be commenced within ten years next after the cause of action accrued," applies in this case, but think, as there is no specific provision in the limitation act which applies to actions on the case for fraud and deceit, the provision found in section 15 of the limitation act which provides that "all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued," is the limitation that must control in this case, and that the court erred in sustaining the demurrer of the appellee to said plea of the statute of limitations.

In *Knight v. St. Louis, Iron Mountain & Southern Railway Co.*, 141 Ill. 110, 30 N. E. 543, it was held that the 10-year limitation provided for in section 16 of the limitation act will not apply by reason of the fact alone that a cause of action is supported by evidence in writing, but that the 10-year limitation applies only when a cause of action is upon a contract in writing or upon other evidences of indebtedness in writing, and it is generally held in those states where, as in Illinois, the common-law forms of action remain in use, that the statute does not fix the bar by the cause of the action but by the form of the action. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 268. In *Christy v. Farlin*, 49 Mich. 319, 13 N. W. 607, the plaintiff brought an action of assumpsit for the breach of the covenant of seizin in a deed. The 6-year statute of limitations was pleaded, which was the limitation which applied to an action of assumpsit. It was, however, contended that the 10-year limitation, which barred an action of covenant (as the action was brought upon a covenant contained in a deed), should be applied. It was, however, held that it was the form of the action which fixed the bar, and that, the plaintiff having sued in assumpsit, the 6-year limitation, which applied to the action of assumpsit, and not the 10-year limitation, which applied to an action of covenant, must be applied.

The court having erred in sustaining a demurrer to said plea of the statute of limitations, the judgments of the circuit and Appellate Courts will be reversed, and the cause remanded to the circuit court for further proceedings in accordance with the view herein expressed.

Reversed and remanded.

CARTER, J. (dissenting). I do not concur in this opinion. I think the judgments of the lower courts are correct. My reasons are sufficiently set forth in the opinion of Mr. Justice Farmer, handed down in the Appellate Court. *Bates v. Bates Machine Co.*, 120 Ill. App. 563.

FARMER and VICKERS, JJ., took no part in the consideration or decision of this case.

(170 Ind. 153)

CHICAGO, I. & L. RY. CO. v. TOWN OF SALEM. (No. 20,900.)¹

(Supreme Court of Indiana. Dec. 12, 1907.)

1. MUNICIPAL CORPORATIONS — LIGHTING CROSSINGS—RAILROADS—VIOLATION OF ORDINANCE—COMPLAINT.

A complaint against a railroad company for violating an ordinance requiring the lighting of crossings at night, alleging the due incorporation of the town, defendant's ownership and operation of a railroad through the town; the crossing of three named public streets therein, the proper enactment of the ordinance; the maintenance by the plaintiff of electric lights at street crossings in the town of 2,000 candle power; that the three named streets at the railroad crossing were much traveled by the public at all times of the day and night and were very dangerous unless lighted; that defendant had failed to put up and maintain lights of such candle power at crossings as required by the ordinance, and was running and had continued for a long time to run its cars and locomotives through the town—was sufficient in form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1395.]

2. SAME — POWERS — EXERCISE — REASONABLENESS.

All powers possessed by cities and towns are expressly conferred by legislative enactment, or implied when necessary to accomplish some municipal purpose, so that where a town has conferred on it an express general or specific power, or when a power is implied as essential to the carrying out of some express municipal duty, the mode of exercising the power, must as a matter of law be reasonable or the ordinance will be void.

3. RAILROADS — REGULATION — ORDINANCES — LIGHTING CROSSINGS—REASONABLENESS.

Acts 1905, p. 219, c. 129, declares that town trustees may require railroad companies operating a line over a street to maintain a street light at the crossing to be lit at night during the passage of any train, and for not less than 30 minutes prior thereto, provided that the railroad be not required to maintain any different kind of light at such crossing from that maintained by the town at other street crossings. *Held*, that the term, "kind of light," had reference to general classification as electricity, gas, oil, etc., rather than to grades or degrees of the same class, and that the town was authorized to require railroads to maintain at all crossings within the town the same kind of lights maintained by the town at its other street crossings, and no other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 753.]

4. SAME—REASONABLENESS.

Under Acts 1905, p. 219, c. 129, authorizing towns to require railroad companies to light railroad crossings with the same kind of lights maintained by the town at other street crossings for a period not less than 30 minutes prior to the passage of each night train over the crossing, an ordinance requiring railroads to maintain an electric light of 2,000 candle power at such crossings and to keep the same burning for not less than 30 minutes prior to the passage of trains during such nights as the city's streets are lighted on nonmoonlight nights was not unreasonable as requiring lights of too great power; they being the same as those maintained by the town.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 753.]

Appeal from Circuit Court, Washington County; Thos. J. Buskirk, Judge.

Action by the town of Salem against the Chicago, Indianapolis & Louisville Railway

Company. From an order sustaining a demurrer to defendant's answer, it appeals. Affirmed.

See 76 N. E. 631, 634.

E. C. Field and H. R. Kurrie, for appellant. Mitchell & Mitchell, for appellee.

HADLEY, J. Suit by appellee against appellant for the violation of a town ordinance, requiring it to maintain lights at points where its railroad crosses the public streets of said town. The ordinance is in these words:

"Whereas, it is necessary for the safety and security of citizens and other persons from the running of trains through the town of Salem, by railroad companies running and operating railroads through the town that an electric light be kept and maintained as hereinafter directed at certain crossings where said railroad or railroads intersect certain streets in said town, Now Therefore,

"Section 1. Be it ordained by the board of trustees of the town of Salem, in Washington County, Indiana, that it shall hereafter be the duty of every railroad company running and operating a railroad through said town to keep and maintain an electric light at every point where the main track of said railroad company upon which it runs any regular train or trains during the nighttime, crosses or intersects at grade any public street in said town; such electric light shall be of two thousand (2000) candle power to light the crossing of such railroad where they are placed and maintained in such a manner as to enable citizens and other persons traveling and passing over such crossings to see the track and protect themselves from the danger of running trains on such railroad, Provided, such lights shall not be required to exceed in power those now in use for lighting the streets of said town; that the town of Salem now maintains and supports electric lights of two thousand (2000) candle power each, for lighting the streets and intersections thereof.

"Sec. 2. All lights provided in section 1 hereof shall be lighted at night during the passage of every train and for not less than thirty minutes prior thereto. Provided, said lights shall not be required to be kept burning or lighted during such hours or parts of hours when the moon shall be shining so as to give sufficient light to light the crossing as hereinbefore required. And provided further such lights shall not be required to be kept burning nor lighted during such hours or parts of such hours when the lights in use for lighting the streets of said town shall not be lighted or burning. The purpose of said last provision being to exempt such railroad company or companies from lighting such crossing at any time or times when the streets of said town are not lighted.

"Sec. 3. Any railroad company or railroad companies who shall fail to keep and maintain such lights as hereinbefore provided or

who shall violate any of the provisions of this ordinance shall upon conviction thereof be fined and forfeit to said town the sum of ten dollars (\$10.00) for each and every offense."

The complaint is in a single paragraph. Defendant's demurrer thereto for insufficient facts was overruled. An affirmative answer in one paragraph was held bad on demurrer, and, the defendant refusing to answer further, judgment was given upon the complaint in favor of the plaintiff for \$10 and costs, from which the defendant appeals, and assigns error on all adverse rulings.

The complaint, filed before a justice of the peace, alleges the due incorporation of the town; the defendant's ownership and operation of a railroad through the town; the crossing of three named public streets therein; the proper enactment of the ordinance; the maintenance of the plaintiff of electric lights at street crossings in said town of 2,000 candle power; the three named streets at the railroad crossings are much traveled by the public at all times of the day and night, and are very dangerous without being lighted; that the defendant had failed to put up and maintain lights at its said crossings, as required by said ordinance, and is now running and has continued to run for a long time its cars and locomotives through the town and over said crossings at all times of the day and night. The complaint, as to its formal averments, is good on demurrer, under the ruling in *Town of Brookville v. Gagle*, 73 Ind. 117; *Hardenbrook v. Ligonier*, 95 Ind. 70.

In its answer to the complaint the defendant admits that it owns and operates a railroad through the plaintiff city, crossing the three named public streets; that it has but two regular passenger trains and one freight train which pass through said town and across said streets in the nighttime, and no extra passenger, and not exceeding two extra freight trains passing through said town after night; that if defendant is required to maintain lights at said several crossings, and have said lights burning for half an hour before and during the passage of all trains, the aggregate burning time for all trains would not exceed two hours per night on the average; that the present schedule has existed for many years, and there is no probability of its being changed in the near future; that there is, has been, and will be in the near future, very little travel on said streets and across the railroad in the nighttime; that an electric light of 2,000 candle power, which the defendant is required by said ordinance to maintain at each of said crossings, will brightly illuminate said streets for a distance of 300 feet on each side of the crossing, and sufficiently to enable travelers to use said streets for a distance of 600 feet on each side of the crossing. The defendant has no means of its own for the production of electricity. There is but one electric light plant in the

town. The town maintains electric lights of 2,000 candle power at its street crossings, which electricity it obtains from said plant by direct current, under which system it is impossible to extinguish one without extinguishing all lights. The town maintains its lights all night, except on moonlight nights, and the defendant cannot secure 2,000 candle power lights except by connection with said town system, and having it supplied by said direct current, so that it could not turn off its lights at said crossings without extinguishing all the lights in the town. It is impossible, therefore, for the defendant to maintain the lights required by said ordinance without having them burn from 7 to 10 hours every night, except moonlight nights, and which will impose upon the defendant an expense of \$72 per annum for each light; that, if said lights could be extinguished except for the times required by the ordinance at the passage of trains, the expense to the defendant would not exceed \$10 per annum per light; that an incandescent light at each of said crossings will clearly illuminate the entire right of way at said points, and defendant can construct and maintain such lights at an expense to it of not exceeding \$1 per month for each light; that by reason of the premises the ordinance is unreasonable and void in this: (1) The defendant cannot comply therewith without assuming greater burdens than the said town is allowed by law to put upon it. (2) It is the purpose of said town to require the defendant thereby to maintain three high power lights, and burn them at all times, to relieve it of part of its burdens of street lighting. (3) The said ordinance is so indefinite and uncertain as to be void upon its face. (4) The said town cannot require more of defendant than that it light its right of way at said crossings, while there is danger from a train that is about to use it, and the said ordinance requiring high power lights is therefore void. (5) The act of the General Assembly, in so far as it empowers towns to pass ordinances requiring lights at railway and street crossings at the sole expense of the railroad company, violates the fourteenth amendment to the Constitution of the United States. The answer in a more concrete form, comes to this: The ordinance under the conditions existing in Salem is unreasonable and void, because it is, first, uncertain; and, second, because it requires the defendant to maintain stronger and longer lights than is necessary to light the crossings, thus entailing upon it an annual expense of \$72 per light, while the defendant could light the entire right of way at the crossings during all the time the city lights are kept burning, with incandescent lights, at an expense not exceeding \$1 per month for each light. The law relating to the powers of municipal legislative bodies is settled in this state to the effect following: (1) All powers possessed by cities and towns are expressly conferred by legislative enact-

ment, or implied when necessary to accomplish some municipal purpose. (2) When a city council or board of trustees of a town has conferred upon it by the Legislature an express general power, or when a power is implied as being essential to the carrying out of some express municipal duty, the mode of exercising the power must, as a question of law, be reasonable, or the ordinance will be declared void. (3) When a power is specifically conferred by the General Assembly, but the manner of its exercise is not prescribed, the mode of employing it must be reasonable or it will be held invalid. (4) When the Legislature, under the sanction of the Constitution, provides that a particular thing may be done, and points out the way for doing it, courts will not strike down the law, or ordinance passed in pursuance thereof, or abridge the authority, because they may deem it to be unreasonable or against public policy. *Railway Company v. Town of Crownpoint*, 146 Ind. 421, 422, 45 N. E. 587, 35 L. R. A. 684, and cases cited; *Skaggs v. Martinsville*, 140 Ind. 476, 39 N. E. 241, 33 L. R. A. 781, 49 Am. St. Rep. 209; *Chamber v. Greencastle*, 138 Ind. 330, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 300; *Dillon's Mun. Corp.* § 328. The trustees of appellee city derived power to legislate on the subject of lighting railroads at street crossings from section 31 of the towns and cities act of 1905 (Acts 1905, p. 231, c. 129), which reads as follows: "The board of town trustees shall have the following powers * * *

(14) to require any railroad company, operating a line of railroad over a street of the town, to maintain a street light at such crossing, to be lit at night during the passage of every train, and for not less than thirty minutes prior thereto: Provided, that such board shall have no authority to require such railroad to maintain any different kind of light at such crossing from that maintained by the town at other street crossings." By this statute the Legislature has declared that the board of trustees has the right to require railroad companies to maintain lights at the points where their road crosses the town streets, but the same act specifically declares that that authority shall extend only to requiring the same kind of lights maintained by the town at its own street crossings. The statute would mean the same thing if phrased thus: The board of trustees shall have power to require railroad companies to maintain at all points of street intersection by their railroad the same kind of lights maintained by the town at its other street crossings, and no other. We think, however, that the term "kind of light" refers to class, or sort, rather than to grades, or degrees, of the same class; that is, that it refers to such general kind and classifications as electricity, gas, oil, and the like, and not to various grades of such general classes. And, while the town board was without authority to require of appellant a light different in kind

from that maintained by the town at its street crossings, it was not compelled to exact of appellant the same degree, or strength, of light in use by the town if it should deem a lesser grade adequate to properly light the crossings. In other words, the town had no authority to require a stronger light, but might have required a lesser degree of the same light from that maintained by the town.

This brings our question within the fourth rule above set out, namely, that when the Legislature grants a specific power, and specifies how it may be exercised, this court cannot question the power, if constitutional, or the reasonableness of the manner of its exercise. Therefore the admissions of the answer, in effect, that the city maintains at its other street crossings lights of the same kind as those required of appellant, preclude us from any inquiry into the reasonableness of the strength of the lights to light the crossings. And, even if the Legislature had not foreclosed us, we should hardly feel at liberty to hold that the board of trustees, in this instance, had abused its discretion in the selection of a proper light. The ordinance cannot be held invalid for uncertainty or indefiniteness. There is strong reason for believing that the one before us is the result of a studied and successful effort to cure the infirmities in a former ordinance of the town, upon the same subject, and which was held invalid by this court in *Chicago, etc., R. R. Co. v. Town of Salem*, 166 Ind. 71, 76 N. E. 631. The ordinance held void in the case just cited provided that the lights to be maintained by the railroad company "shall be electric lights of such candle power, not exceeding two thousand (2,000) candle power, and giving such lighting service as the town of Salem maintains." It was held that these words of the ordinance "do not attempt or purport to furnish a standard by which the railroad company's guilt or innocence may be determined upon a charge of noncompliance." No such objection can be urged against the ordinance before us. In this the duty of the railroad company is definite and certain. It shall maintain at every point where the main track of the railroad, upon which it runs trains in the night, crosses a street of the town, an electric light which shall be 2,000 candle power strong. Neither is the ordinance assailable for being uncertain and indefinite as to the times when the lights shall be set, or the length of time they shall be kept going, as insisted upon by appellant. The language of the ordinance is, "All lights * * * shall be lighted at night during the passage of every train and for not less than thirty minutes prior thereto,"—except that the company shall not be required to keep its lights burning when said crossings are lighted by the moon sufficiently to enable travelers to see the track and protect themselves from running trains, or when the town's street lights shall not be lighted and burning. The provisos and exceptions are

made for the benefit of the lighting railroad company. Such company has control, and of all others knows best when its trains will pass the crossings: It can be no hardship to require it to take notice of the passage of its trains, and no uncertainty, as affects the company, to require it to light the crossings accordingly, and, if it finds it profitable and convenient to extinguish the lights between trains, it may rightfully do so. It would be wholly impracticable for the town to fix certain and definite periods for lighting, since the schedule for the running of trains and orders for special trains would be constantly liable to change. The exigencies of the business requiring more extra trains on one day than upon another, and the running of such trains during the different times of the day and night, would invest the subject with so much uncertainty that the town board might reasonably expect a train to pass at any time of the night, and so would be without any reliable data for periodical lighting. Rather than condemn the ordinance for unreasonableness in its requirements concerning the lighting and burning of the lights, all the exceptions and concessions relating to the subject, and of which appellant complains, are beneficial to the company, and evidently so intended; in the words of the ordinance, "the purpose being to exempt such railroad company from lighting such crossings at any time when the streets of said town are not lighted." We think the case is fully within the rule declared in *Railroad Company v. Crawfordsville*, 164 Ind. 70, 72 N. E. 1025. A 2,000 candle power light may be stronger than is necessary to properly light the crossings in ordinary weather, but it is not alleged, and we cannot assume, that it would be excessive in foggy, heavy, or stormy weather, when it is most needed. Hence there is no ground for saying that either the statute which authorizes or the ordinance passed as a police measure to conserve the safety of citizens in traveling the streets of the town, in the nighttime, is so unreasonable in its exaction as to amount to an invasion of constitutional right. It is, therefore, not in conflict with the Constitution, either state or federal.

The demurrer to the answer was properly sustained.

Judgment affirmed.

(169 Ind. 442)

NATIONAL BISCUIT CO. v. WILSON. (No. 21,158.)

(Supreme Court of Indiana. Dec. 11, 1907.)

1. APPEAL — REVIEW — PRESUMPTIONS — VERDICT—APPLICABILITY TO COMPLAINT.

Where a complaint contained three paragraphs, each alleging a different ground of negligence relied on, and the jury found in answer to proper interrogatories that the negligence alleged in two of the paragraphs was not proved, it must be presumed that a general verdict in favor of plaintiff rested on the negligence averred in the other paragraph; there being no affirma-

tive finding exonerating defendant from the negligence charged therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3753, 3759.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—RES IPSA LOQUITUR.

Plaintiff, an employé in defendant's bakery, was injured by the fall of a freight elevator on which he was taking a heavy load of flour to the third floor. The capacity of the elevator was sufficient to carry the load, and the fall was caused by the breaking of a large cogwheel through the center, which would not result from mere use or wear. Held, that the happening of the accident was not prima facie proof of negligence under the doctrine *res ipsa loquitur*, and that in the absence of some proof that the wheel or its attachments were defective or improperly maintained, or to show that the fall was due to defendant's negligence, plaintiff could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 893.]

Appeal from Circuit Court, Marion County; H. C. Allen, Judge.

Action by Melvin L. Wilson against the National Biscuit Company. From a judgment for plaintiff, defendant appeals. Case transferred from Appellate Court under Burns' Ann. St. 1901, § 1337j, subd. 2. Reversed, with directions.

See 81 N. E. 947; 80 N. E. 33; 78 N. E. 251.

Miller, Elam & Fesler, for appellant. John M. Bailey and F. C. Durham, for appellee.

MONTGOMERY, J. Appellee brought this action to recover damages for a personal injury caused by the falling of a freight elevator while in appellant's employ. The first paragraph of complaint alleged, in substance, that appellant was engaged in carrying on a bakery business in the city of Indianapolis, and maintained an elevator in its business house for the purpose of transporting merchandise and employes from one floor to another in the building; that by long-continued use and overloading the elevator had become worn and out of repair; that appellant failed and neglected to inspect the elevator, and suffered the same to remain out of repair and unsafe; and that because of its weak and unsafe condition, while appellee was transporting a quantity of flour to the third floor of the building, a large cogwheel connected with said elevator broke, without warning, and the elevator fell, with appellee, to the basement, causing the injuries of which he complains. In the second paragraph of complaint appellant was charged with actionable negligence in failing to provide and equip the elevator with proper safety devices to prevent the same from falling in case of accident. The third paragraph alleged that the old, worn, and shaky condition of the elevator caused one of the loaded trucks placed thereon by appellee to roll to one side so as to catch upon the joists of the second floor and break the cogwheel, thereby precipitating the fall. Appellant answered by general de-

nial. A trial by jury resulted in a verdict for appellee. Appellant unsuccessfully moved for judgment in its favor upon the answers of the jury to interrogatories, and for a new trial, and thereupon judgment was rendered upon the general verdict in favor of appellee.

It is alleged that the court below erred in overruling appellant's motion for judgment upon the answers of the jury to interrogatories notwithstanding the general verdict, and in overruling appellant's motion for a new trial. The jury found in answer to proper interrogatories that the elevator was equipped with the safety appliances usually placed upon freight elevators; and, also, that the elevator did not catch upon the second floor, and thereby cause the fall. It is accordingly manifest that the verdict cannot rest upon the proximate negligence charged in the second and third paragraphs of complaint. *Gilliland et al. v. Jones*, 144 Ind. 662, 43 N. E. 939, 55 Am. St. Rep. 210; *Evansville, etc., R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Olds v. Moderwell et al.*, 87 Ind. 582; *Frazer v. Boss*, 66 Ind. 1; *Chicago, etc., R. Co. v. Cunningham*, 33 Ind. App. 145, 69 N. E. 304; *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488; *Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456. There is no affirmative finding exonerating appellant from the charge of negligence embodied in the first paragraph of complaint, and we must assume that the general verdict rests upon that paragraph, and the court therefore rightly overruled appellant's motion for judgment in its favor. The grounds of appellant's motion for a new trial were that the verdict is not sustained by sufficient evidence, and is contrary to law; and that errors of law occurred at the trial in giving certain instructions.

The fifth and seventh instructions complained of related to the burden and manner of proving contributory negligence, and were within the rule approved by this court, and not erroneous. *Pittsburgh, etc., Ry. Co. v. Collins* (Ind. Sup.) 80 N. E. 415, and cases cited.

It is charged that the twenty-third instruction left the determination of the amount of damages to the discretion of the jury, without reference to the evidence or rules of law. The instruction was not subject to this criticism. *Pittsburgh, etc., Ry. Co. v. Collins*, supra, and cases cited. It appears from the evidence of appellee that he had been in appellant's employ first as a salesman driving a wagon, and had used the elevator occasionally in bringing down goods weighing from 300 to 500 pounds at a time for his wagon. About two weeks prior to the accident he was given a position which kept him about the bakery, and at the time of receiving his injury was engaged in unloading flour from a dray and taking it to the third floor of the building. Twenty-seven sacks of flour, each weighing 98 pounds, were

loaded upon two trucks, and these wheeled and placed crosswise upon the elevator. Appellee set the elevator in motion, and started up with the load, and, when three or four feet up, the elevator began shaking and jarring, accompanied with cracking noises, and when about the second floor dropped 16 inches, then rose about 18 inches, and then fell to the bottom of the basement. The elevator moved a little faster than an ordinary walk, and always shook some, but worse when heavily loaded. Appellee made no effort to turn off the power. Other witnesses testified that the elevator vibrated considerably when heavily loaded and was occasionally tightened up; that belts would slip once in a while with a heavy load, causing the elevator to stop momentarily, and then it would move on. The elevator was of 3,000 pounds capacity, and had a floor platform about 11 feet long and 5 feet wide.

This is, in substance, all the evidence furnished by appellee with reference to the happening of the accident. Is such evidence sufficient to sustain the charge of negligence made in the first paragraph of the complaint? It will be remarked that no effort was made to point out the specific cause or defect from which the accident resulted; but the jury was left to infer or merely guess at the proximate cause. There was no evidence from appellee as to the length of time the elevator had been in use, or that it had ever been overloaded, or was out of repair in any respect which might cause such an accident. No failure to repair was proved, inasmuch as no special defects were shown. We are unable to say from the evidence that the vibrations mentioned were not such as appear in any freight elevator carrying a similar burden. The driving belt occasionally slipped, and allowed the elevator to stop, but this belt only served to hoist and not to support the elevator, and its slipping would not account for the fall. If a mere showing that such an accident occurred raised a presumption that appellant was guilty of negligence, and imposed upon it the burden of explaining the circumstances and showing such facts as would exempt it from blame, then this verdict can be sustained. But this is not the law, and the doctrine *res ipsa loquitur* does not apply to cases of the class to which this belongs. When an employé is injured while operating a freight elevator, the mere happening of an accident raises no presumption, and cannot serve as proof of the master's negligence. *Hill v. Iver-Johnson, etc., Co.*, 188 Mass. 75, 74 N. E. 303; *Moran v. Racine Wagon Co.*, 74 Hun, 454, 26 N. Y. Supp. 852; *Kirby v. Rainer, etc., Co.*, 28 Wash. 705, 69 Pac. 378; *Robinson v. Wright, etc., Co.*, 94 Mich. 283, 53 N. W. 938; *Davidson v. Davidson*, 46 Minn. 117, 48 N. W. 560; *Haynie v. Hammond Packing Co.* (Mo. App.) 103 S. W. 581; *Rush v. Murphy* (Iowa) 112 N. W. 814. The cases cited involving accidents from defective passenger

elevators are but remotely in point upon the question here presented. The general principle upon which our conclusion rests is firmly established. In the case of *Wabash, etc., Ry. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. Rep. 193, this court, through Mitchell, C. J., in discussing a master's liability to a servant, said: "Where, however, an action is predicated upon an injury resulting from an act or omission which could only become tortious on account of the relations which the parties sustained to each other, and where the very substance of the wrong complained of itself was the failure to act with due foresight, then the right of action depends primarily upon so fixing the relation of the parties as to show the defendant's obligation, and upon showing further that the harm and injury complained of was such as a reasonable man in defendant's place would have foreseen and provided against. In such a case it is not enough to show that an accident happened, and that death or injury resulted therefrom. Negligence is not to be presumed from the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional and extraordinary character." See, also, *Cleveland, etc., Ry. Co. v. Ward*, 147 Ind. 256, 259, 45 N. E. 325, 46 N. E. 462; *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 237, 31 N. E. 956; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 221, 12 N. E. 380; *Pittsburgh, etc., Ry. Co. v. Adams*, 105 Ind. 151, 163, 5 N. E. 187; *Louisville, etc., Ry. Co. v. Orr*, 84 Ind. 50, 55; *Patton v. Texas, etc., Ry. Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361; *Northern Pac., etc., Co. v. Dixon*, 139 Fed. 737, 740, 71 C. C. A. 555; *Chicago, etc., Co. v. O'Brien*, 132 Fed. 593, 596, 67 C. C. A. 421; *Droney v. Doherty*, 186 Mass. 205, 71 N. E. 547; *Welsh v. Cornell*, 168 N. Y. 508, 61 N. E. 891; *Sacks v. Dolese*, 137 Ill. 129, 27 N. E. 62; *Redmond v. Delta Lumber Co.*, 96 Mich. 545, 55 N. W. 1004; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864, 15 Am. St. Rep. 613; *Baldwin v. Railway Co.*, 68 Iowa, 37, 25 N. W. 918; *Kansas, etc., Co. v. Salmon*, 11 Kan. 83; *Duntley v. Inman*, 42 Or. 334, 70 Pac. 529, 59 L. R. A. 785; *Brymer v. Southern Pac. Ry. Co.*, 90 Cal. 496, 27 Pac. 371; *Minty v. Union Pac. Ry. Co.*, 2 Idaho (Hasb.) 471, 21 Pac. 660, 4 L. R. A. 409; *Louisville, etc., Co. v. Allen's Adm'r*, 78 Ala. 494; *Palmer Brick Co. v. Chenail*, 119 Ga. 837, 47 S. E. 329; *Edgens v. Gaffney*, 69 S. C. 529, 48 S. E. 538; *Short v. New Orleans, etc.*, 69 Miss. 848, 13 South. 826; *Stewart v. Van Deventer*, 138 N. C. 60, 50 S. E. 562; *Moore Lime Co. v. Johnston's Adm'r*, 103 Va. 84, 48 S. E. 567; *Glasscock v. Swofford, etc., Co.* (Mo. App.) 74 S. W. 1039.

It was shown by appellant, and the fact is undisputed, that the elevator fell because the large cogwheel, 30 inches in diameter, in which the worm worked, broke, together with the surrounding casing. This wheel broke through the center, which would not

result from mere use or wear. Appellee, as we stated above, made no attempt to explain the cause of the fall, but left the matter to conjecture and speculation. There was no proof by appellee that this wheel or its attachments were defective either in material or workmanship, or improperly maintained. An eyewitness of the accident in a position to observe accurately testifying for appellant stated that one of the trucks placed upon the elevator by appellee caught at the second floor, and held until the continued application of the motor power caused the break and consequent fall. The jury rejected this account of the accident, and adopted the theory of the first paragraph of complaint, and in doing so left the verdict without support from the evidence.

The judgment is reversed, with directions to sustain appellant's motion for a new trial.

(169 Ind. 463)

BOARD OF COM'RS OF CLINTON COUNTY v. GIVEN. (No. 20,858.)

(Supreme Court of Indiana. Dec. 12, 1907.)

1. STATUTES—CONSTRUCTION.

In giving a practical construction to a law, the court is required to look to the defects which existed at the time it was passed and so construe the law as to advance the remedy and suppress the mischief contemplated by the legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 290-292.]

2. COUNTIES—COUNTY TREASURER—DELINQUENT TAXES—COLLECTION—FEES.

Acts 1901, p. 309, c. 138, provided that the treasurer of all counties having a population of more than 100,000 should receive from each delinquent taxpayer, in addition to taxes and penalties, a demand fee of \$.50 which should belong to the treasurer in addition to his salary. By Acts 1903, p. 60, c. 29, § 21, amending section 153 of the general tax law (Acts 1891, p. 260, c. 99), it was provided that demand and levy fees should be charged and received by such treasurer, but the words "in addition to his salary" were omitted, and Acts 1907, p. 502, c. 248, § 4, increasing the salaries of county treasurers, provided that nothing contained therein should affect any law authorizing the payment to county treasurers of the fees for demanding or collecting delinquent taxes. *Held*, that such fees collected by a county treasurer from delinquent taxpayers and paid into the treasury fund of the county belonged to the county, and not to the treasurer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Counties, §§ 107, 125.]

On rehearing. Petition overruled.

For former opinion, see 80 N. E. 965.

JORDAN, J. A petition for rehearing is presented in this case, based upon the grounds that the court erred, first, in holding that the county, and not the treasurer, is entitled to the demand fees in the collection of delinquent taxes; second, in holding that the complaint in this case does not state a cause of action.

We believe that the question herein involved was so fully considered at the original hearing that in reason very little in addition

can be said in support of the conclusion reached. But, by reason of the earnest contention of counsel for appellee that the petition for rehearing ought to be granted, we have concluded to give some further expression of our views in regard to the interpretation of the law involved in this appeal. In the construction of a statute it is the spirit and purpose thereof for which regard must be had. If the legislative intent is fairly expressed therein, the law should be so construed by the courts as to carry out such intent. In fact, it is the duty of the court to accept a valid act of the Legislature, and give full force and effect to its provisions. Where the statute is clear upon its face, and is fairly susceptible of only one construction, such construction must be given. As we view the act herein involved, there is no doubt nor ambiguity therein in regard to the intention of the Legislature in respect to the ownership of the fees in dispute in this case. That under its positive or express declaration they were intended to be the property of the county is beyond successful controversy. *State v. Sopher*, 157 Ind. 360, 61 N. E. 785. The mischief or evil which the Legislature, in the enactment of the fee and salary acts of 1891 (Acts 1891, p. 446, c. 194) and 1895 (Acts 1895, p. 319, c. 145) intended to remedy or abrogate was that of compensating county officers by the fees charged and taxed by them, as authorized by former laws. In giving a practical application and construction to a law, a well-settled rule requires a court to look at the mischief or defects which existed at the time of its passage, or, as in this case, which existed at the time of the enactment of the fee and salary act of 1891, from which the act of 1895 was principally copied. In construing the statute, where the same is open to construction, it is the province and duty of a court to so construe or interpret it as to advance the remedy and suppress the mischief as contemplated by the legislative department. *Spencer v. State*, 5 Ind. 41; *State ex rel., etc., v. Denny*, 67 Ind. 148; *State ex rel., etc., v. Forkner*, 70 Ind. 241; *City of Evansville v. Summers*, 108 Ind. 189, 9 N. E. 81; 1 Cooley's Blackstone, Com. (4th Ed.) p. 79.

To reiterate, at least in part, what we said in our former opinion, section 119 of the fee and salary act of 1895 (Acts 1895, p. 350, c. 145) provides that, "in case such delinquent tax and penalty is paid on demand, such treasurer shall charge and receive from such delinquent, in addition to the taxes and penalty, the sum of twenty-five cents, and where a levy is made he shall charge and receive, in addition to his other costs, the sum of fifty cents for such demand." At the session of 1901 the Legislature passed an act concerning the collection of delinquent taxes in counties having a population of more than 100,000, according to the last preceding United States census. Acts 1901, p. 309, c. 138. The first section of this act provides that

"after the first Monday in May the treasurer of all counties in the state having a population of more than one hundred thousand, according to the last preceding United States census, shall cause a list to be made of the delinquents, with the amount due," etc. This section, with some exceptions, is of similar import as is section 119 of the fee and salary act of 1895. It requires the county treasurer of the counties to which it is applicable, either in person or by deputy, to make a demand of every resident taxpayer who is delinquent for the amount of his delinquent taxes and penalty thereon, etc. It further provides, as does section 119, supra, that, in case such delinquent taxes and penalty are paid upon demand, such treasurer shall charge and receive from such delinquent, in addition to the taxes and penalty, the sum of 50 cents for such demand, which (i. e., demand fee) "*shall belong to the treasurer in addition to his salary provided by law.*" (Our italics.) It will be noted that this section increases the demand fee from 25 to 50 cents. By section 2 of the same act it is provided that the levy fees, in case a levy and sale of personal property to pay delinquent taxes, "*shall belong to the treasurer in addition to his salary provided by law.*" (Our italics.) There can be no doubt, under the provisions of this statute, in respect to the demand and levy fees belonging to the treasurer, for the Legislature has seen proper to expressly declare they shall belong to him "in addition to his salary." The act of 1901, supra, under the express limitation therein provided, was intended to apply only to the treasurer of Marion county, as the latter county was the only one at that time that contained the required population. In 1903, by an act (Acts 1903, p. 60, c. 29, § 21) amending section 153 of the general tax law (Acts 1891, p. 260, c. 99), the demand and levy fees were increased, and it was provided, as in the act of 1901, that the treasurer "shall charge and receive, etc., such fees," but the provision "in addition to his salary," as the same appears in the act of 1901, was entirely omitted. This certainly is significant in respect to the intent of the Legislature. Counsel for appellee, however, claim that in amending section 153 of the tax law the Legislature regarded as superfluous the clause "in addition to his salary," as inserted in the act of 1901, and therefore it was omitted. It is further argued that, inasmuch as it appears to have been the intention of the Legislature by the act of 1901 to give the fees in controversy to the treasurers of the more populous counties of the state, it must follow that the act of 1903 was intended to make uniform throughout the state the law awarding the fees in question to the county treasurer. We are not impressed with this view of the case. Counsel further argue that by the act of 1907 (Acts 1907, p. 502, c. 248), whereby the annual salaries of county treasurers throughout the state are increased, there is a clear legis-

lative construction or interpretation of the law, to the effect that county treasurers were to receive as their own the demand and levy fees as a compensation in addition to their salaries. It is a well-known fact that the Legislature was induced to pass the salary act of 1907, *supra*, increasing the salaries of county treasurers, because of the enactment at the same session of the public depository law. Section 4 (page 504) of the salary act of 1907 reads as follows: "All laws in conflict herewith are hereby repealed: provided, however, that nothing in this act shall repeal or affect any provision of any law existing at the time of the passage of this act providing compensation to county treasurers for services performed by them as treasurers for cities of this state, or treasurers for city school boards or boards of school commissioners, nor shall this act affect any provision of any existing law authorizing the payment to county treasurers of fees for demanding or collecting delinquent taxes. * * *" It is argued that by the saving provisions of this section the Legislature recognized that the demand and levy fees authorized to be paid to a county treasurer, under the then existing laws, in the collection of delinquent taxes, belonged to such treasurer, and not to the county. This argument is wholly untenable. The purpose of these provisions is manifest. The Legislature appears to have inserted them in the above repealing section out of "an abundance of caution," in order to fully show that by the legislation increasing the salaries of county treasurers it did not intend thereby to repeal or affect the provisions of any law existing at that time which might provide compensation for county treasurers in addition to the salaries therein provided; or, in other words, to fully disclose by the provisions in question that, as to such laws, the Legislature intended to leave them unaffected and unchanged. It did not thereby intend to give an interpretation in respect to existing laws as to whether any fee or fees thereunder authorized to be charged and received by the county treasurer for the performance of official services should belong to that officer, instead of the county. It is evident that the Legislature intended that all such laws were to remain unrepealed and unaffected, subject to judicial interpretation or construction. In fact, the only law existing at the time of the passage of the salary statute of 1907, awarding to a county treasurer, as his own, the demand and levy fees, was the act of 1901, *supra*. This latter act the Legislature intended should not be affected by the repeal declared in section 4, *supra*.

Did we consider it necessary to search for legislative interpretation, subsequent to the session of 1895, in respect to the ownership of the demand and levy fees herein involved, we might resort for that purpose to the act of 1901, *supra*. This act, as previously stated, is applicable alone to the treasurer of Marion county. It cannot in reason be con-

tended that prior to its passage that official was not governed by the provisions of the fee and salary act of 1895 in respect to turning these fees into the county treasury in like manner as were other county treasurers throughout the state. Certainly the Legislature which passed that statute must have recognized the fact that under the provisions of the fee and salary act of 1895 the treasurer of Marion county was denied the right to receive and retain for his own use the demand and levy fees arising out of the collection of delinquent taxes; otherwise, it would not have provided therein that such fees should belong to him in addition to his salary, thereby bringing such provision clearly within the exception of section 136 of the fee and salary law of 1895. Had the Legislature, at the session of 1901, believed or recognized that the treasurer of Marion county was, at that time, under existing laws, entitled to receive these fees as his own, certainly then it would not have considered it essential or necessary to declare that they should be received by him as an additional compensation for his official services in collecting the delinquent taxes of his county.

We have again given the questions presented by appellee's counsel a careful consideration, but remain fully confirmed in the views advanced or expressed in our former opinion. Petition overruled.

(40 Ind. App. 630)

JAQUA v. HARKINS et al. (No. 6,177.)

(Appellate Court of Indiana, Division No. 1
Dec. 11, 1907.)

1. DRAINS—ESTABLISHMENT—STATUTES—RETROACTIVE OPERATION.

Acts 1905, p. 480, c. 157, § 14, repealing all laws previously enacted relating to drainage, but providing that such repeal shall not affect pending proceedings in which a ditch has been ordered, or which will not affect any body of water exceeding 10 acres in area at high-water mark, preserves all ditch proceedings that have progressed to final establishment and all pending proceedings not finally established, where the drains would not affect lakes having a greater surface area at high water than 10 acres.

2. JUDGMENT—RENDITION IN VACATION—VALIDITY.

A judgment rendered in vacation is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 389.]

3. SAME—ENTRY.

A judgment in drainage proceedings was pronounced two days before adjournment of the court, the entry of which would cover over 300 pages of the record. It was impossible for the clerk to enter the judgment until two weeks after the term, whereupon it was agreed that the judgment should be prepared and entered as of the date of its rendition, which was in term time. It was prepared, recorded, and signed by the judge in vacation, and afterwards, on the third day of the next succeeding term, was read and approved by the judge in open court. *Held*, that the judgment was duly rendered in term time; the entry being a mere ministerial act, which might be performed in vacation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 522.]

4. SAME—"RENDITION"—"ENTRY."

The rendition of a judgment and the entry thereof are distinct from each other; the rendition of the judgment being the act of the court which gives efficacy to the judgment, while the entry is the act of the clerk intended merely to preserve a memorial thereof.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6082-6084; vol. 3, pp. 2400-2408.]

Appeal from Circuit Court, Jay County; J. W. Macy, Special Judge.

Action by Alonzo L. Jaqua against William H. Harkins and others. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

D. T. Taylor, Allen Zollars, and Frank B. Jaqua, for appellant. Smith & Moran, E. E. McGriff, and S. A. D. Whipple, for appellees.

HADLEY, P. J. This action was brought by the appellant to vacate and set aside certain proceedings had in the Jay circuit court in the attempted establishment of a ditch to enjoin the construction of said ditch, and to quiet his title as to assessments made against his lands for the construction thereof.

The complaint avers appellant's ownership of certain described lands in Jay county, Ind., having situate thereon a fresh water lake of more than 10 acres surface, of the value of \$10,000; and alleges that on a day named certain of the appellees filed in the Jay circuit court their petition for drainage, wherein they alleged that their lands could be best drained by the construction of an open ditch along and over the course of the Salamonla river, between points named, for a distance of more than 21 miles; that such proceedings were had upon said petition as that said matter was referred to certain drainage commissioners, who afterward made their report in favor of said proposed drainage, and assessed the benefits and damages that would in their opinion be occasioned thereby against the lands set out in their said report, including those of appellant, described in said complaint; that afterward, on June 22, 1905, said report was by the Jay circuit court confirmed, and said drain established, and a superintendent of construction appointed, but that no entry was ever made in the order books of said court of the confirmation of said report, the establishment of said ditch, and the appointment of said superintendent of construction, but on July 20, 1905, in vacation, the petitioners and contractors for said ditch illegally and fraudulently attempted to cause the records to show the confirmation of said report, the establishment of said ditch, and appointment of said superintendent of construction; that one of the appellees, assuming to act as superintendent of construction, awarded to certain other of the appellees contracts for the construction of said proposed work; that said contractors were threatening to, and would if not enjoined, enter upon the lands described and destroy said lake, and otherwise do the

appellant irreparable injury; that said proposed ditch was located within less than 10 rods of the west line of said fresh water lake; that the bottom of said proposed ditch would be 4 feet below the water level of said lake, which would entirely drain the same, and that said ditch was not designed to and would not empty into said lake; that the order and judgment establishing said ditch was void because of the repeal of the law under which said proceedings were instituted, before the rendition of said judgment. Upon issues joined, trial was had by the court, a judgment rendered for appellees upon a special finding of facts and conclusions of law, exceptions were taken to each of the conclusions of law, and motion for new trial was filed by appellant, which was overruled. The court found that the petition for the drain in question was filed on the 10th day of August, 1904; that the usual preliminary proceedings were had, and on the 17th day of April, 1905, the commissioners appointed for that purpose filed their report in said cause and fixed the 10th day of May, 1905, as the time when the parties named in said report should appear thereto; and that on the 22d day of June, 1905, the report of the commissioners was confirmed and the drain established. The court also found that the lake that would be affected by said drain had a surface area at high water of 7.54 acres. Appellant upon this finding contends that the act of the General Assembly of 1905, concerning drainage, which went into effect April 5, 1905 (Acts 1905, p. 456, c. 157), repealed the law under which said drain was being constructed; and, since the order establishing the same was not made until after this law went into effect, there was no law under which such order could be made, and hence the same was void.

Since the filing of appellant's brief, the Supreme Court has settled this question adversely to him in the cases of Taylor v. Strayer (Ind.) 78 N. E. 236, Clemans v. Hatch (Ind.) 78 N. E. 1065, and Smith v. Gustin (Ind.) 80 N. E. 959, where it is held that the saving clause in the repealing section of said act of 1905 expressly preserves all ditch proceedings that had progressed to final establishment, and also pending proceedings that had not reached final establishment where such drains would not affect lakes of a surface area, at high water, of 10 acres or more.

The appellant also contends that, since the order establishing the drain was entered on the order book and signed by the judge in vacation, it is void. The finding of the court on this point was that on June 22, 1905, in open court, the Honorable Richard K. Erwin, sitting as special judge, pronounced the judgment of the court, confirming the report of the commissioners and establishing the drain, and appointed a superintendent of construction. Minutes of these orders were at that time transcribed on the court's docket, and then read in open court to the attorneys

present representing the different parties interested; that it was then agreed between said attorneys and said court that Mr. Whipple, an attorney then present and who represented the petitioners and this appellant in said proceedings, should prepare the formal entry of said order, present it to the other attorneys for approval, and on their approval it was to be presented to the court for his approval, and then given to the clerk to be by him entered upon the order book as of the said 22d day of June; that said term of the Jay circuit court expired by operation of law on the 24th day of June, two days after said order and agreement; that at the time of the adjournment of said court the business of said court was so congested that the clerk thereof was two weeks behind in his entries of the orders and minutes thereof; that the report of said drainage commissioners contained about 300 pages of legal paper closely written, and it was impossible for the clerk to record the same within the remaining two days of the term; that afterwards said Whipple prepared said entry as directed, submitted it to the other attorneys and to the court, all of whom approved it. It was then given to the clerk on the 20th day of July and duly recorded by him, and within two days thereafter it was read and signed by the said special judge, said recording and signing being in vacation; that afterwards, on September 6th, and the third judicial day of the next ensuing term of the court, said order was reread and approved in open court by said judge. The court also found that there was no fraud perpetrated by any one in procuring the pronouncement of the order or the recording thereof. The facts so found are not questioned here, and must therefore be taken as true. If they do not exhibit what amounts to at least legal fraud, this proceeding cannot be sustained, since it is upon this ground alone that appellant has any standing in court. *State v. Hindman*, 159 Ind. 586, 65 N. E. 911; *Cotterell v. Koon*, 151 Ind. 182, 51 N. E. 235; *Asbury v. Frisz*, 148 Ind. 513, 47 N. E. 328.

It is well settled a judgment rendered in vacation is void. *State v. Hindman*, supra. But there is a wide distinction between the pronouncement of the court of the sentence of the law and the recording of the same by the clerk. "The rendition of a judgment, it will be remembered, is an entirely distinct thing from the entry of it. The former is the act of the law through the mouth of the judge; the latter the act of the clerk. The former gives force and efficacy to the judgment; the latter preserves a memorial of it. The former is a judicial act; the latter a ministerial act." 1 Black on Judgments, § 179. "The rendition of a judgment and the entry of such judgment are different and distinct, each from the other. The former is the act of the court, while the latter is the act of the clerk of the court." *Smith v. State*, 71 Ind. 250; *Anderson v. Mitchell*, 58 Ind.

592. The judicial act must be performed while the court is in session; the ministerial act may be done at another time, provided always that the record is afterwards examined, approved, and signed by the judge. The practice of entering judgments in vacation prevailed at common law. *Freeman on Judgments* (3d Ed.) § 38 et seq.; *Sieber et al. v. Frink*, 7 Colo. 148, 2 Pac. 901. And there is no express provision in our Code prohibiting this practice. The practical necessity and reasons for the rule are so fully and clearly stated in the case of *Board v. Sullivan*, 51 Wis. 115, 8 N. W. 12, that we quote: "There having been a sufficient direction to the clerk to enter judgment, and he having entered it as of the term at which the action was tried and the decision filed, it would seem absurd to hold the judgment irregular because the labor of drafting the judgment was done in vacation. * * * The entry of judgment by the clerk is not a judicial act. He is the mere clerk of the court to draft and put in formal shape what the court has already adjudged, and this ministerial act may as well be done in vacation as in term time. It often happens that the judge files his findings in cases tried by him at the very close of the term, and adjourns court before it would be possible to put the judgment in form during the term; and, if the rule contended for by counsel for the appellant were established, no judgment could be entered in such case until the next term, which might very injuriously affect the rights of the party entitled thereto." This case seems to be written for the case at bar. Here was a judgment pronounced two days before adjournment, the entry of which would cover over 300 pages of record. Sufficient other judgments and proceedings were ready for entry to occupy the time of the clerk for two weeks, and it was impossible to enter this judgment before that time. If the rule was that the judgment could not be made effective until the next term, which was over two months distant, it would mean the delay of a great and important work for that period, which, in this case, would throw the work into the winter months and possibly entail great loss and hardship upon parties interested. Our conclusion in this case can be easily distinguishable from the cases of *Mitchell v. St. John*, 98 Ind. 598, *Passwater v. Edwards*, 44 Ind. 343, *State v. Thistlethwaite*, 83 Ind. 317, and *State v. Hindman*, 159 Ind. 586, 65 N. E. 911, cited by appellant. In the latter case judgment was rendered and entered after the close of the term. In the others the entry was made by the clerk in vacation without any agreement of the parties, and without thereafter being examined or signed by the judge.

In the case at bar the judgment was regularly rendered in open court, at a time regularly fixed for the hearing, in the presence of the attorneys of the parties; and the entry afterwards prepared and entered under agreement of the parties as of the date of

rendition, examined, approved, and signed by the judge and at the earliest opportunity thereafter reread in open court and approved by the court, all without any objection from appellant or any claim that the judgment as entered is not in exact conformity with the one rendered. Such a judgment is not fraudulent, and is not void. *Ridgway v. Morrison*, 28 Ind. 201; *Griffith v. State*, 36 Ind. 406; *Kent et al. v. Fullenlove*, 38 Ind. 522; *Chamberlain v. City of Evansville*, 77 Ind. 542; *Catterlin v. City*, 87 Ind. 45; *Jones v. Carnahan et al.*, 63 Ind. 229; *De Armond v. Preachers' Aid Society*, 94 Ind. 59; *Black on Judgments*, § 180; *Iliff v. Arnott*, 31 Kan. 672, 3 Pac. 525; *Shackelford v. Miller*, 91 N. C. 181; *Sieber et al. v. Frink*, supra.

No points or arguments have been made on the motion for a new trial. All questions thereon are therefore waived.

Judgment affirmed.

(40 Ind. App. 620)

STAMETS et al. v. PLANO MFG. CO.
(No. 6,094.)

(Appellate Court of Indiana, Division No. 2.
Dec. 11, 1907.)

1. PLEADING — ANSWER — DENIALS — GENERAL ISSUE.

Where, in an action on a fidelity bond, the complaint averred that the employment of the principal was continuous, and that the second year's employment began on December 1, 1898, at the termination of the first year's employment, an allegation in the answer that the second contract of employment was not entered into until February 27, 1899, was a mere denial of the alleged fact that the employment was continuous; such fact being provable under the general denial pleaded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1280.]

2. INSURANCE — FIDELITY BOND — CONSIDERATION — CONTINUOUS EMPLOYMENT.

A continued employment of the principal in the fidelity bond by plaintiff furnished a valuable consideration for the continuing liability of the sureties on the bond which expressly provided for a continuous liability during the period of employment.

On rehearing. Petition overruled.

For former opinion, see 82 N. E. 122.

RABB, J. The third paragraph of the separate answer of the defendants Harris, Van Zandt, Klenck, and Haury set forth, among other things, that the second contract of employment of the principal in the bond, Stamets, by the appellee was not entered into until February 27, 1899, nearly three months after the termination of the first contract of employment between the parties, and that this was a material averment overlooked by the court in deciding the case. This fact was not overlooked by the court; but these allegations were, at most, but a denial of the facts averred in the complaint, that the employment of Stamets by appellee was continuous, and that the second year's employment began on the 1st day of December, 1898, at the termination of the first year's employment. One paragraph of the separate answer of

these defendants was a general denial, and all facts that could be given in evidence on this subject were admissible under the general denial.

It is also earnestly insisted that the only consideration for the bond sued upon is the first service contract entered into between the appellee and the principal. The continued employment of the principal, Stamets, by the appellee, furnished a valuable consideration for the continuing liability of the sureties on the bond, and the express terms of the bond provided for such continuous liability, and clearly contemplated such continued employment.

Petition for rehearing overruled.

(40 Ind. App. 608)

CITY OF VALPARAISO v. SCHWERDT.
(No. 5,930.)

(Appellate Court of Indiana, Division No. 1.
Dec. 10, 1907.)

1. TRIAL — ISSUES OF LAW AND FACT — QUESTION FOR JURY.

Where the probative facts are undisputed and all reasonable minds can draw but one inference therefrom, the question is one of law for the court, and conversely, where the facts are such that different inferences may be reasonably drawn therefrom, the question is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 320, 321.]

2. MUNICIPAL CORPORATIONS — STREETS — DEFECTS — CARE REQUIRED OF PEDESTRIAN.

A person walking along a public street, while bound to use his faculties for observation in an ordinary and reasonable way, proportionate to the dangers to be apprehended from the time, place, and existing conditions, is not bound to keep his eyes constantly on the pavement, nor to make an active search for defects, he being entitled to assume that the street is reasonably safe for travel, and is not negligent under all circumstances in failing to discover even an open defect, especially when his attention is diverted by other sufficient cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1678.]

3. SAME — EVIDENCE — QUESTION FOR JURY.

In an action for injuries to a pedestrian by an excavation in a sidewalk into which she fell, evidence held to require submission of the question of plaintiff's contributory negligence to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1754-1756.]

4. SAME — INSTRUCTIONS — DEGREES OF NEGLIGENCE.

An instruction that a traveler is held to the exercise of only ordinary care, and that slight negligence which is merely a want of extraordinary care will not defeat a recovery for an injury received in consequence of a defect in a public sidewalk, if the evidence shows the city was negligent in permitting the defect to exist, etc., was erroneous as authorizing the jury to divide negligence into degrees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1761.]

5. APPEAL — INSTRUCTIONS — PREJUDICE.

Where, in an action for injuries to a traveler by a defect in a city sidewalk, the evidence required submission of plaintiff's contributory negligence to the jury, an erroneous instruction authorizing a recovery, though plaintiff was chargeable with slight negligence, was prejudicial to the city.

Appeal from Circuit Court, Porter County; W. C. McMahan, Judge.

Action by Belle Schwerdt against the city of Valparaiso. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

H. H. Loring, for appellant. O. B. Tinkham, for appellee.

HADLEY, P. J. This was an action brought by appellee against the appellant on account of injuries sustained by appellee as a consequence of falling on a defective sidewalk on Lafayette street, in said city of Valparaiso. The sidewalk, where the accident occurred was paved with brick, and was $4\frac{1}{2}$ feet wide. At the place of the accident some of the bricks had become loosened and a part of the embankment had washed out, the washout and loosened bricks extending into the sidewalk about 18 inches. At this place the sidewalk was $3\frac{1}{2}$ feet above the street, and it was averred that appellant had carelessly and negligently permitted the defect in the sidewalk to remain for a period of six months; that appellee, while prudently and carefully walking along said street unaware of such dangerous opening, and while her attention was momentarily diverted from said walk to a gentleman who addressed her, stepped into the hole, and was injured. Trial was had by jury and general verdict rendered in favor of appellee, together with answers to interrogatories, motion by appellant for judgment on the answers to interrogatories, and motion for new trial, were overruled.

There is no conflict in the evidence on the substantial facts, and it conclusively shows that the opening extended into the walk from the outside about 18 inches, leaving 38 inches of the walk inside of said opening in good condition for travel; that this opening was on the same street and on the same side of the street and within $2\frac{1}{2}$ blocks of appellee's residence, and was between appellee's residence and her church and the business portion of the city; that appellee passed over this sidewalk several times before the injury; that she noticed the opening about six weeks prior to the date of the injury, but that she neither saw it or knew of it when injured; that, at the time of the injury, she was walking slowly along said street about 10 o'clock in the morning on a bright, sunshiny day; that as she neared the opening in the sidewalk, she addressed a remark to a gentleman on the porch of a nearby dwelling. This remark was replied to, and she proceeded on her way a few steps, when the gentleman uttered a sharp exclamation, which caused her to turn quickly. In doing so her foot slipped on one of the loose bricks and down into the excavation, and she was thereby precipitated over the embankment on her head and shoulders. These being the undisputed facts, do they necessarily entail the ultimate inference on our part that appellee

was contributorily negligent? It is elementary that issues of fact must be decided by the jury. But where the probative facts are undisputed, and where all reasonable minds can draw but one inference from them, the question to be determined is one of law for the court (*Chicago, etc., R. Co. v. Martin*, 31 Ind. App. 308, 65 N. E. 591, and cases cited; *City of Indianapolis v. Mitchell*, 27 Ind. App. 589, 61 N. E. 947; *Louisville, etc., Ry. Co. v. Williams*, 20 Ind. App. 576, 51 N. E. 128; *B. & O. Ry. Co. v. Walborn*, 127 Ind. 142, 26 N. E. 207); the theory of this rule being that, where there is no disputed issue of fact and in reason no controversy as to the inferences to be drawn from the undisputed facts, no real question of fact is left for the jury to pass upon (*Mosheuev v. District of Columbia*, 191 U. S. 247, 24 Sup. Ct. 57, 48 L. Ed. 170). Where, however, different inferences might reasonably be drawn by reasonable men from undisputed facts, the question becomes one for the jury. *B. & O. Ry. Co. v. Walborn*, supra; *Indianapolis v. Mitchell*, supra. A person on a city street has a right to assume that the same is reasonably safe for travel. *Stevens v. City of Logansport*, 76 Ind. 498; *Noblesville Gas Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579. A person walking along a public street is bound to use his faculties for observation in an ordinary and reasonable way proportionate to the dangers to be apprehended from the time, place, and existing conditions; but he is not bound to keep his eyes constantly upon the pavement. *City of Indianapolis v. Mitchell*, supra; *City of Bluffton v. McAfee*, 23 Ind. App. 112, 53 N. E. 1058. He is not required to make an active search for defects (*Lord v. Mobile*, 113 Ala. 360, 21 South. 360), or to look for danger at every step (*Cummings v. New Rochelle*, 38 App. Div. [N. Y.] 583, 56 N. Y. Supp. 701). He has the right to assume that the public officers have done their duty, unless there is some notice, or he has some knowledge to put him on his guard. *Dickson v. Hollister*, 123 Pa. 421, 16 Atl. 484, 10 Am. St. Rep. 533. He is not, as a matter of law, guilty of negligence, under all circumstances, in failing to discover even an open defect. *Barnes v. Marcus*, 96 Iowa, 675, 65 N. W. 984.

This is especially true when his attention is diverted by some sufficient cause, as when he steps in an open hatchway while looking at other objects (*Barstow v. Berlin*, 34 Wis. 357), or struck his foot on a misplaced plank while looking at a runaway (*Welsenberg v. Appleton*, 26 Wis. 56, 7 Am. Rep. 89); or while running along with his hands in his pockets stumbled over a projection (*Wilton v. Flint*, 128 Mich. 156, 87 N. W. 86); or while watching children at play stepped into a hole in the sidewalk (*Collins v. Janesville*, 117 Wis. 415, 94 N. W. 809); or where, upon hearing a whistle that startled and frightened her, she stumbled over a loose plank (*Graves v. City of Battle Creek*, 95 Mich. 268, 54 N. W. 757, 19 L. R. A. 641, 35 Am. St. Rep.

561); or where one was accosted by a friend and slipped upon a hummock of ice (Kenyon v. Mondovi, 98 Wis. 50, 73 N. W. 314); or where one, in going down the steps of a restaurant and on reaching the pavement, suddenly turned, and in doing so stepped into an opening leading into a basement (City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271); or where a person while looking at a ferryboat stepped into a hole in the sidewalk (Woods v. Boston, 121 Mass. 337); or where a lady, on leaving her home, endeavored to step over an open water box situated immediately in front of her doorstep, and which she knew was there, stepped into the same (Mosheuevel v. District of Columbia, supra). In all these cases it was held that whether the party injured was exercising due care was a question of fact for the jury. So in the case before us, on the facts here shown, whether appellee under all the circumstances of the case was exercising the care of an ordinarily prudent person is a question upon which reasonable men might differ, and, this being true, it was a question to be determined by the jury, and their decision is binding upon us. It is urged that appellee had knowledge of the defect, and hence was charged with greater care than if she had no such knowledge. She testified that she saw and noticed the defect six weeks before the accident, but that she did not know of the defect at the time of the accident. As was said in *City of Bluffton v. McAfee*, supra: "Whether appellee, at the time of the injury, knew of the defect, was a fact for the jury to find, and they say she did not. This is in no sense inconsistent with the finding that she did know of the defect when she passed by it a month before. She might have known of it a month before, but did not necessarily charge her with knowledge of it when injured. She was charged with no duty with reference to it, and the question was not whether she had at some prior time known of it, but whether she knew of it at the time of the injury." The jury expressly found that she had no knowledge of the defect at the time of the accident. Our decision upon this question determines the questions raised on the complaint and the answers to the interrogatories.

Instruction 9, given by the court upon request of the plaintiff, was as follows: "The court instructs the jury that a traveler on a public street or sidewalk is held to the exercise of only ordinary care. Slight negligence, which is merely a want of extraordinary care, will not defeat a recovery for an injury received in consequence of a defect in a public sidewalk, provided the evidence shows that the city authorities were guilty of negligence in permitting the defect to exist, and that the traveler was injured thereby, unless the evidence also discloses that the injured person was not using ordinary care at the time of the injury." It is urged that this instruction is erroneous,

in that it was misleading and fixed a wrong standard of negligence, and with this contention we must agree. It is true some jurisdictions have recognized degrees of negligence. *Coggs v. Bernard*, 2 Lord Raymond, 909. But modern authority, as a rule, has discarded such subtle refinements. Since negligence has reference to a course of action that must vary under varying circumstances, it cannot be set off into divisions by mathematical lines. And to say to a jury that a person may be guilty of a little negligence, and not be culpable, is removing all standards for its guidance, and turns it loose in the fields of conjecture and caprice. It is true the jury are told that lack of the exercise of ordinary care will defeat recovery; but what impression does this statement make on the average mind when coupled with the statement previously made, that "slight negligence which is merely lack of extraordinary care" will not defeat recovery? Where does ordinary care end and extraordinary care begin? What is the difference between negligence and slight negligence? A refinement of distinction is here sought that would be confusing and dangerous to recognize, and our courts have uniformly failed to give it sanction. The rule of action as clearly enunciated and adhered to by our courts in cases like this is that a person shall exercise ordinary and reasonable care. What is such care is governed and measured by the facts and circumstances of the particular case. *Lake Erie, etc., Ry. Co. v. Ford* (Ind.) 78 N. E. 969, where the court say: "There has been much discussion in the books concerning the correctness of the old doctrine as to degrees of negligence. * * * While we apprehend that the adverse opinions which have been expressed concerning such doctrine were not intended to be understood as militating against the view that the legal standard of care is not the same in all relations, or to discountenance the practice of charging the jury in terms that indicate the extent of care required as great, ordinary, or slight, * * * yet the point which we wish to enforce now is that in all cases negligence consists simply in a failure to measure up to the legal standard of care. * * * The very statement of the general rule that reasonable care must depend upon the circumstances of each particular case. It is, however, inaccurate to say, as many of the cases do, that the degree of care varies with the particular circumstances. It is only reasonable care that is required in any case; but the greater the danger, or the more likely the communication of fire and the ignition of property of others, the more precautions and the closer vigilance reasonable care requires." If the plaintiff has exercised such care, he is held to be free from negligence in any degree. If he has failed to exercise such care in any particular, he is held to be guilty of negligence, and cannot recover; but he cannot be held to have exercised such care, and also be guilty of even slight

negligence. The one is absolute denial of the other.

Practically the only question in this case was whether appellee was negligent at the time of the injury. The evidence on this point presents facts which we have determined involve doubts sufficient to make it a question for the jury; but such submission should be made with very clear instructions as to the rights and duties of the parties. The instruction in question is not clear, and recognizes a distinction in negligence not sanctioned by our authorities, and was therefore reversible error, as was said in *Lake Erie, etc., Ry. Co. v. Ford*, supra: "The viciousness of the instruction in question lies in its tendency to lead the jury to infer that the legal standard of ordinary care was raised by the circumstances recited, thus making possible the inferences that a great but undefined extent of care was required, whereas all that the law exacted was the ordinary care which the situation demanded, or such care as it is to be assumed that an ordinarily prudent man would exercise in the circumstances, were the risk his own." The quotation is applicable, except the apparent purport of instruction 9 was to lower, instead of raise, the standard of care required, and to make distinctions in degree of negligence.

For error in this instruction, cause reversed, with instructions to grant a new trial.

(40 Ind. App. 649)

YANTHIS et al. v. KEMP et al. (No. 6,690.)
(Appellate Court of Indiana, Division No. 2.
Dec. 12, 1907.)

APPEAL—TIME OF TAKING—BONDS—WAIVER.

An appeal was granted in the March term of court on condition that an appeal bond with sureties be filed within 30 days. The bond was not filed until the April term, though within the time designated, and the transcript was filed as a term time appeal. The appellees were present when the court rendered judgment and when the appeal was granted. *Held* that, though it was necessary to approve the bond in term time to render the appeal a term time appeal, appellees, not having made any objection to the order granting the appeal, would be deemed to have waived the approval of the bond in term time, and the appeal would be considered a term time appeal, and not a vacation appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2080-2092.]

Appeal from Circuit Court, Marion County; Henry C. Allen, Judge.

Action by George Yanthis and others against William Kemp and others. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Motion to dismiss appeal overruled.

Franklin McCray, for appellants. Wm. H. Agborn, for appellees.

COMSTOCK, J. Action for the possession of real estate. The trial court sustained a demurrer to the complaint, and rendered judgment in favor of appellees for costs.

Appellees appear specially, and move to

dismiss the appeal for the reason as stated in motion, that it is a vacation appeal, and no notice has been given to the appellees or any steps taken to bring them into court, although more than ninety days have expired since the filing of the transcript. Judgment was rendered on the 21st day of March which was the sixteenth day of the March term, 1907, of the Marion circuit court. On the same day an appeal was prayed and granted on the condition that he file an appeal bond in the sum of \$200 within 30 days, with surety to be approved by the court. On the 11th day of April, 1907, which was the tenth day of the April term of said court, an appeal bond was filed in the sum of \$200 and approved by the court. The transcript was filed May 8, 1907. To perfect a term time appeal, an appeal must be prayed and granted, and the penalty of the bond must be fixed and the surety named during the term at which the judgment was rendered. The record discloses that appellees were present when the court rendered judgment and when the appeal was granted, conditioned upon the filing of a bond within the time named to be approved by the court. No objection was made to the order. An appeal bond is for the benefit of the appellee. The bond was filed and approved by the court within the time designated, and the transcript filed as a term time appeal. It may be reasonably concluded that appellee waived the naming of the surety during the term at which judgment was rendered. *Buchanan v. Milligan*, 125 Ind. 332, 25 N. E. 349; *Price v. Huddleston*, 86 Ind. 450, 75 N. E. 972.

This case is distinguished from *Kellogg v. Ridgely et al.* (No. 6176, decided by this court October 13, 1907) 81 N. E. 1158. In the case last named the record does not disclose that the surety on any bond was approved by the court.

Motion to dismiss appeal overruled.

FARRA v. BRAMAN et al. (No. 5,954.)¹
(Appellate Court of Indiana, Division No. 1.
Nov. 21, 1905.)

1. INSURANCE—MUTUAL BENEFIT SOCIETIES—CONTRACT—WHAT CONSTITUTES—BY-LAWS.

The by-laws of a mutual benefit society enter into and become a part of the contract between the society and the insured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1854, 1855.]

2. SAME—RIGHTS OF BENEFICIARIES—VESTED INTEREST—EXPECTANCY.

The beneficiary of a benefit policy does not take a vested interest at the time of the making of the contract, but merely an expectancy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1849.]

3. SAME.

A member of a benefit society designated in his application his wife, E., as the beneficiary of the fund. *Held* that, after the parties were divorced, E. could not be considered as the wife

¹ Rehearing denied, 84 N. E. 155. Superseded by opinion in Supreme Court, 86 N. E. 843.

of the member at the time of his death, nor was she his widow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1948, 1968.]

4. SAME—DESIGNATION OF BENEFICIARIES.

Where a contract of benefit insurance provides that the benefit fund is payable, in event of death, to persons of a particular class, a beneficiary who claims the fund must, in the absence of a valid designation, establish the fact of membership in such class at the time of the insured's death; and hence, to make a designation available after the death of insured, there must have existed such relation between the beneficiary and the member at the time of the latter's death as is contemplated by the agreement and the laws and by-laws of the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1929, 1930.]

5. SAME—TRANSFER OF INTEREST IN CERTIFICATE—EQUITABLE ASSIGNMENT.

Where a member of a benefit society assigned all his right and interest in and to his certificate to plaintiff, delivering the certificate to plaintiff, and performed all things within his power to have the transfer made, the transfer constituted an equitable assignment enforceable in equity, even though the member did not comply strictly with the rules of the society.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1873-1876.]

6. SAME.

A rule of a benefit society providing the order in which relatives of the member shall take the fund if the designated beneficiary be not living at the death of the member has no application where the person named as beneficiary is totally incapacitated from taking the fund.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1975.]

Appeal from Superior Court, Allen County; John Morris, Jr., Special Judge.

Action by Ada A. Farra against Eva J. Braman and another. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

W. & E. Leonard, for appellant. Vesey & Vesey and Heaton & Yapple, for appellees.

WATSON, J. Appellant, formerly Ada A. Reid, widow of John F. Reid, brought an action against Eva J. Reid, now Eva J. Braman, the divorced wife of said John F. Reid, and the Pennsylvania Company, to recover \$500 alleged to be due said appellant upon a benefit certificate issued by the Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh to decedent. It was asked that Eva J. Reid be required to set up any claim she might have to said fund or be forever barred. Said Eva J. Reid was notified by publication because she was a nonresident and her place of residence unknown. The answer of the Pennsylvania Company admitted its liability for the amount evidenced by the certificate, and requested that it be allowed to pay the same into court, and be relieved from all liability thereon until the proper beneficiary was determined. The court granted the prayer of said company, and decreed that said Eva J. Reid had no claim to said fund. On July 11, 1905, said Eva J. Braman filed an application to open the above judgment. She also filed

an answer of general denial to the first and second paragraphs of the complaint, and filed a cross-complaint against appellant and codefendant, the Pennsylvania Company. The judgment was opened, and appellant filed an additional third paragraph to the complaint. On September 11, 1905, appellant, as the administratrix of the estate of John F. Reid, filed a cross-complaint against said Eva J. Reid and the Pennsylvania Company. Appellee demurred to each paragraph of the complaint, and to the cross-complaint of the administratrix. Appellant then dismissed the first paragraph of the complaint, and the cross-complaint, filed as administratrix, and demurred to the cross-complaint of appellee. The court overruled the demurrer to the cross-complaint, and sustained the demurrer to the complaint. Appeal was taken on the latter ruling.

The following are substantially the facts set out in the second paragraph of the complaint. The Pennsylvania Company, a corporation organized under the laws of the state of Pennsylvania for the primary purpose of owning and operating railroads, operates in connection therewith a relief department, known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh." This relief department is conducted on the lines of a mutual benefit society. It embraces a large number of lines of railroads, including the line formerly known as the "Pittsburgh, Ft. Wayne & Chicago Railroad," which runs through the city of Ft. Wayne. The object of said relief department, as shown by the book of rules, is to establish and manage a fund, known as the "Relief Fund," to pay accident or sickness benefits to the members, and, in the event of death, to pay such fund to the relatives and those dependent upon the insured, or to the beneficiaries specified in the application, who must be dependent upon such member. The complaint then sets out the manner of accumulating said fund, the method of management, and the qualifications for membership. John F. Reid became a member on June 1, 1890. At that time he was the husband of appellee, and named her as the beneficiary, but he so named her as his beneficiary because she was at that time his wife, and was dependent upon him. The fund was payable only to relatives or others dependent upon the insured. On October 17, 1899, after becoming a member of said relief department, John F. Reid was granted an absolute divorce from appellee, and on October 17, 1901, was intermarried with appellant, who is now his widow. Subsequently to said marriage decedent requested the local agent of said association to change the name of the beneficiary first named in the application, to wit, Eva J. Reid, and substitute therein the name of Ada A. Reid, and "the said John F. Reid, at said time, did and performed all things that he could do and perform in an effort to have the name of this

plaintiff substituted in lieu and instead of the beneficiary first named in said application, but that, owing to the neglect and failure of the said agent of said association, the name of this plaintiff (appellant) was not actually substituted as the beneficiary in place of the name of Eva J. Reid, but that the said John F. Reid did all that he could do and all that was in his power to consummate the same." On October 15, 1902, said John F. Reid was accidentally killed. He was at that time a member in good standing of said Relief Department. The accident occurred before the actual substitution of appellant's name as beneficiary, but was not due to his failure to do all things necessary to effect such substitution. Proof of loss was made and the company notified. Appellant demanded payment of the \$500, the amount of the policy, but said company refused to pay the same. Appellee was joined because she claimed to have an interest in said fund, that such claim is void, and the joinder was in order that she might set up any claim she might have. Appellant prayed that she be declared the real beneficiary, that she have judgment against said company for \$500, and that Eva J. Reid be required to set up any claim she might have or be forever barred.

The third paragraph of the complaint repeats substantially the same facts as above, but, in addition, set out the following averments: The member may, by the rules, substitute another person as beneficiary without the knowledge or consent of the person first named. The absolute divorce was granted on the ground of adultery by said Eva J. Reid. The decree gave the husband the custody of their only child, and refused her any alimony or support. Said husband never supported her in any manner thereafter, and the decree of divorce is still in full force. Said Eva J. Reid thus ceased to be a member of the class for whose benefit the fund was payable. Said decedent never gave said company any reason for continuing her as beneficiary, nor did said company ever know of, approve, or ratify said continuance. Immediately after the marriage of decedent with appellant, he assigned to her all his interest in said certificate, and all his right to participate in said relief fund to the extent of \$500. He delivered to her the book of rules and the certificate, which she has since had continuously in her possession. At that time he informed her that the insurance was her property in case anything happened; that she should keep said certificate carefully, and draw the money in event of his death. At the time of delivering to appellant said certificate and book of rules, he assured her that it was for the purpose of vesting in her the absolute title to the same. She accepted the assignment and thereafter paid all assessments on said certificate, said assessments being in the sum of \$35.

The following regulations of the Relief Department, made part of the complaint, are

essential to the consideration of the question involved:

"(3) The object of this department is the establishment and management of a fund to be known as a 'Relief Fund' for the payment of definite amounts to employees contributing to the fund, who under the regulations shall be entitled thereto, when they are disabled by accident or sickness, and in event of their death, to the relatives or other beneficiaries specified in the applications of such employees."

"(28) An applicant may, in his application or subsequently, designate a beneficiary, to receive his death benefit other than relatives entitled to recover the amount payable in the event of the death of the applicant, on giving good and sufficient reasons for such designation.

"(29) Benefit payable on account of the death of a member, shall be payable only to the beneficiary or beneficiaries designated in his application to receive the same, if living at the death of said member. If the designated beneficiary shall not be living at the death of said member, then the benefit shall be payable to the wife (or husband), or in the event of the applicant at death having no wife (or husband) living, then to the children of the member collectively, each to be entitled to an equal share, including, as entitled to the parent's share, the issue of any deceased child, or, if there be no children or such issue living, then to the father and mother of the deceased member jointly, or the survivor, or if neither of these be living then to the next of kin if there be any such, payment in behalf of such next of kin to be made to the legal representatives of the deceased member. If there be no relatives living, the benefits otherwise payable shall lapse, and the amount thereof shall remain as part of the Relief Fund, without claim for the same, and the necessary funeral expenses and proper expenses incident to the disability and death of the deceased member, shall, in such case, be paid from the fund."

The application provided that the "death benefit shall be payable to my wife, Eva J. Reid, of Fort Wayne, Indiana, or to such other person or persons as I shall subsequently duly designate in writing, in substitution therefor, with the approval of the superintendent of the relief department, if living at the time of my death, and not withdrawn as my beneficiary; otherwise," etc., in the order designated in rule 29. It is a fundamental rule of law that the by-laws of mutual benefit societies enter into and become a part of the contract between the insuring society and the insured. *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 131, 148, 149, 36 N. E. 429; *Supreme Lodge K. of P. v. Knight*, 117 Ind. 489, 490, 20 N. E. 479, 3 L. R. A. 400; *Holland v. Taylor*, 111 Ind. 121, 125, 12 N. E. 116. It is also well settled that the beneficiary of a benefit policy does not take a vested interest at the time of the making of the contract, but

merely an expectancy. *Carter v. Carter*, 85 Ind. App. 73, 72 N. E. 187; *Bunyan v. Reed*, 34 Ind. App. 295, 70 N. E. 1002; *Nye v. Grand Lodge*, supra; *Masonic, etc., Ass'n v. Burkhardt*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Gentry v. Supreme Lodge K. of H. (C. C.)* 23 Fed. 718; *Hellenberg v. Independent Order of B'nai Berith*, 94 N. Y. 580, 585; *Sabin v. Phinney*, 134 N. Y. 423, 423, 31 N. E. 1087, 30 Am. St. Rep. 681; *Masonic, etc., Ass'n v. Bunch*, 109 Mo. 560, 579, 19 S. W. 25; *Benton v. Brotherhood of R. R. Brakemen*, 146 Ill. 570, 574, 34 N. E. 939; *Niblack, Accident Insurance & Benefit Societies* (2d Ed.) § 212.

The question involved in this case is as to the effect of the divorce of the beneficiary designated in the application as "my wife, Eva J. Reid." The rights of the parties depend upon the contract entered into, and such rights must be determined by an interpretation of said contract. The decision must rest, of course, upon this particular contract. The authorities are numerous and seemingly in great conflict, but there are grounds for valid distinctions. In cases where the contract provides that the designated beneficiary must be of a particular class it has been held that, if the person so designated is a member of the required class at the time of such designation, the fact of a subsequent divorce will not, in the absence of a sufficient designation of some other capable beneficiary, bar the right of such beneficiary to recover the amount of the policy. *Brown v. Grand Lodge A. O. U. W.*, 208 Pa. 101, 57 Atl. 176; *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Courtois v. Grand Lodge A. O. U. W.*, 135 Cal. 552, 67 Pac. 970, 87 Am. St. Rep. 187. A divorced wife could not by any construction be designated as "the wife" of the member at the time of his death, nor is she the widow of the deceased. *Fletcher v. Monroe*, 145 Ind. 56, 43 N. E. 1053; *Billan v. Hercklebrath*, 23 Ind. 71; *Smith v. Smith*, 35 Ind. App. 610, 14 N. E. 1008. But, where the contract provides that the benefit fund is payable, in event of death, to persons of a particular class, a beneficiary who claims such fund must, in absence of a valid designation, establish the fact of membership in such class at the time of the death of the insured. Therefore, to make a designation available after the death of the insured, there must have existed such relation between the beneficiary and the member at the time of the death of the member as is contemplated by the agreement and the laws and by-laws of the order. *Order, etc., v. Koster*, 55 Mo. App. 186; *Schonfeld v. Turner*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Tyler v. Odd Fellows, etc., Ass'n*, 145 Mass. 134, 13 N. E. 360; *Niblack, Accident Insurance & Benefit Societies* (2d Ed.) § 164.

The second paragraph of the complaint alleges that decedent assigned to appellant all his right and interest in and to said certificate and delivered the same to her; that he performed all things within his power to have said transfer made. It may be that he

did not strictly comply with the rules of said Relief Department prescribed by the by-laws thereof, but such a transfer as herein alleged should be regarded and is an equitable assignment and enforceable in equity. *State ex rel. Wright, Adm'r, v. Tomlinson et al.*, 16 Ind. App. 602, 45 N. E. 1116, 59 Am. St. Rep. 335. Nor is the latter proposition contrary to reason. Under such a provision, the parties manifestly contemplate their relationship at the happening of the contingency—i. e., the death of the insured—upon which the fund becomes payable, and words in the contract indicating the beneficiary as one of that class are only descriptive and indicate the relationship which, if existing at the time the right to the benefit fund vests, will permit the recovery of such fund. *Order, etc., v. Koster*, supra. In the case at bar the purpose of the society, as set forth in the by-laws, is, in the event of the death of the insured, to pay the benefit fund to the relatives or other beneficiaries specified in the application. The word "or" is evidently used in the disjunctive sense, for the application blank signed by the insured specifically provides that a beneficiary, other than a relative, can be appointed only on giving good and sufficient reasons. Appellee was designated in said application as "my wife." No reasons were given for making her the beneficiary apart from the fact that she bore such relationship to the insured. But, at the death of said John F. Reid, she did not, by reason of the divorce, sustain such relationship to him. Not under the most liberal interpretation of the word relative can she be said to be a member of such class. Rule 29 provides the order in which the relatives shall take said fund if the designated beneficiary shall not be living at the death of the member. The fact that the individual named as beneficiary was alive at the death of the insured does not affect what has previously been said, for in interpreting the contract as a whole it must be assumed that said rule applies only where such beneficiary is one capable of taking under the terms of the contract. This regulation has no application where the person named as the beneficiary is totally incapacitated from taking said fund. Any other construction would render the terms of the contract contradictory and inconsistent with reason.

The averments of the second paragraph of the complaint are sufficient to constitute a cause of action, and the court below erred in sustaining the demurrer to the complaint.

Judgment reversed.

(40 Ind. App. 651)

BRANDT v. HALL et al. (No. 5,976.)

(Appellate Court of Indiana. Dec. 13, 1907.)

1. JUDGMENT — PARTIES—JOINDER—JOINT AND SEVERAL LIABILITY.

Burns' Ann. St. 1901, § 577, authorizes judgment against one or more of several defendants. Section 578 declares that in a suit

against several defendants the court may in its discretion render judgment against one or more of them, leaving the action to proceed against the others, whenever a separate judgment is proper, and section 579 provides that, though all the defendants have been summoned, judgment may be rendered against any of them severally if plaintiff would be entitled to judgment against such defendants if the action had been brought against them alone. *Held* that, where plaintiff sued more than one defendant on a contract, he was entitled to judgment against the one against whom he proved a cause of action, though the complaint alleged only a joint liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 416.]

2. PARTNERSHIP—CONTRACTS—NATURE AND FORM.

Contracts with partners are joint.

3. PLEADING—ISSUES—MATTERS TO BE PROVED.

In an action to recover usury, an allegation that an investment company from whom the loan had been originally procured had sold and transferred the assignment of plaintiff's wages to defendant, "who claimed to succeed to the business of the investment company," was a mere recital, and not a direct allegation that defendant succeeded to the general business of such investment company, so as to require plaintiff to prove that fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 1224.]

4. APPEAL—NEW TRIAL—MOTION—FORM—REVIEW.

Where the order book entry of a motion for a new trial showed that it was filed as a part of the proceedings in the cause, and was so acted on by the court, and no motion to strike was made on the ground that only one of the defendants was named in the caption, review of the order overruling the motion would not be refused for that reason on appeal.

5. USURY—ASSIGNMENT OF WAGES.

Plaintiff borrowed \$40 from an investment company, receiving only \$36 in fact, agreeing to pay interest at the rate of 10 per cent. a month, and assigned his monthly wages as security. He continued to pay \$4 a month for several months, when the investment company assigned the contract to defendants, who continued to take monthly assignments of plaintiff's wages until he had paid in all \$70 usurious interest. Defendants claimed that the transaction was not a loan, but a purchase of plaintiff's time at a discount. *Held*, that the transaction was a mere cover for usury, and that defendants were only entitled to the original amount of the loan, with interest at the legal rate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 31, 32.]

6. APPEAL—REVIEW OF EVIDENCE.

Where all the material facts are established by evidence, which is not conflicting, the Appellate Court will weigh the evidence and give it such effect as in its judgment should have been given by the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

Appeal from Circuit Court, Steuben County; Emmett A. Bratton, Judge.

Action by Henry Brandt against Frank A. Hall and others. From a judgment for defendants, plaintiff appeals. Reversed, with instructions.

P. V. Hoffman and E. M. McKennon, for appellant. Mountz & Brinkerhoff and Brown & Carlin, for appellees.

MYERS, J. This was an action by appellant to recover from appellees a sum of mon-

ey alleged to have been paid by the former to the latter as usurious interest. The complaint is in one paragraph, and alleges, in substance, that appellees were partners; that appellant in August, 1902, while in the employ of the Baltimore & Ohio Railroad Company, borrowed \$40 from the Garrett Investment Company, which company took from appellant an assignment of his monthly wages, and exacted and received usurious interest at the rate of 10 per cent. a month, which he paid until July, 1903; that the usurious interest paid by appellant on account of said loan, and \$10 by him paid on the principal, more than paid said principal and legal interest thereon; that said company, instead of surrendering the assignment of wages to appellant, sold and transferred the same to appellees, "who claimed to succeed to the business of the Garrett Investment Company"; that the defendants continued to exact and receive assignments of his monthly wages to secure said loan and received \$4 a month as interest until March, 1904; that the defendants for the month of February, 1904, having such assignment, took and received out of said money the said principal sum of \$40 originally loaned, together with interest for said month; that appellees and their assignors have thus received \$70 usurious interest, which they unlawfully hold, etc., wherefore, etc. This complaint was answered by a general denial. Trial by jury. Verdict for defendants, and, over appellant's motion for a new trial, judgment was rendered for appellees.

The only error assigned is based upon the action of the court in overruling appellant's motion for a new trial. The reasons assigned by this motion are (1) that the verdict is not sustained by sufficient evidence; and (2) that it is contrary to law. Appellees insist that the judgment should be affirmed because the evidence fails to establish a partnership between appellees. We agree with appellees that there is no evidence in this case tending to establish a partnership; and at common law their contention would be correct. *Tomlinson v. Collett*, 3 Blackf. 436, and the principle announced in that case was followed in *Dickensheets v. Kaufman*, 28 Ind. 251, and *Graham v. Henderson*, 35 Ind. 195, but the court in *Louisville, etc., R. Co. v. Treadway*, 143 Ind. 689, 702, 40 N. E. 807, 41 N. E. 794, in considering sections 577, 578, 579, *Burns' Ann. St.* 1901, said: "Under these sections, it has been held by this court that the trial court possessed chancery powers in adapting its judgment to the rights of the parties [citing authorities]; 'that, if a plaintiff sue two or more jointly and only prove a liability as to one, he is entitled to a judgment against that one—[citing authorities].'" These sections of our Code have been liberally construed, to the end that courts might in the administration of justice be freed from technicalities which tend to obstruct rather than aid in ending litigation. The court in *Nico-*

demus v. Simons, 121 Ind. 564, 567, 23 N. E. 521, in speaking of section 577, *supra*, says "that it was the intention of the lawgiving power by the enactment of said section, in all actions having more than one party plaintiff or more than one party defendant, to confer upon the courts power to brush aside all technical objections which disregard what is substantive, and depend upon mere form, and to render judgment according to the rights of the parties as disclosed by the evidence and embraced within the subject-matter covered by the issues tendered." In *Hubbell v. Woolf*, 15 Ind. 204, which was an action against partners, the court held that, "under these statutory provisions, we think it clear that in actions against several upon contract, whether the contract be joint and several, or joint only, the plaintiff may have judgment against one or more of the defendants, if he shall make out a good cause of action against them, although he fails as to the others. This proposition is settled by the case of *Blodget v. Morris*, 14 N. Y. 482. *Seldon, J.*, in delivering his opinion, says after quoting a statutory provision substantially like our own: "This provision applies to all actions indiscriminately, whether founded upon contract or upon tort; and, as I understand its terms, it is immaterial whether the complaint alleges a joint liability only or one which is joint and several. The right of recovery is to be regulated in this respect by the proof, and not by the allegations in the complaint. In other words, every complaint against two or more defendants is to be treated as both joint and several. The object of the provision obviously is to prevent a plaintiff, who proves a good cause of action against part of the defendants, but not against the others, from being put to the expense and delay of a new action. It was not intended to change the law in any other respect; but simply applies to actions upon contract, the same rules which, at common law, were applied to actions for torts." The rule in the *Hubble Case* has been followed and approved in a number of recent decisions. *Louisville, etc., R. Co. v. Treadway*, *supra*; *Hassler v. Hefele*, 151 Ind. 391, 50 N. E. 361; *Chicago, etc., R. Co. v. Vandenberg*, 164 Ind. 470, 73 N. E. 990. In *Clafin v. Butterly*, 2 *Abbott's Prac.* (N. Y.) 446, the action was against Butterly and Devin as partners. Butterly was conceded to be not liable, and the question depended upon the right to have judgment against one only; the plaintiffs having sued the defendants as partners. The court, after referring to a section of the Code, of which section 577, *supra*, is practically in the same language, held that "this language is broad enough to admit of a judgment being recovered against one of two persons sued as partners, and of a judgment being rendered in the same action against the plaintiffs in favor of the other defendant." See, also, *Harrington v. Higham*, 15 Barb. (N. Y.) 524; *Hine v. Bowe*, 21 *Wkly. Dig.*

(N. Y.) 558. Partnership debts are joint debts, and contracts with partners are joint contracts. *Crosby v. Jeroloman*, 37 Ind. 264; *Dickson v. Indianapolis Cotton Mfg. Co.*, 63 Ind. 9. In *Stafford v. Nutt*, 51 Ind. 535, 538, it is held that, "under the Code, a general denial puts the plaintiff upon proof of the joint liability, *if he would obtain a joint judgment.* [Our italics.] But, if he do not prove the joint liability, it does not follow that the plaintiff wholly fails in his action. The Code has changed the common-law rule, as it was in actions at law, and has made it like the common-law rule in suits in chancery."

Appellees also insist that appellant must fail in this appeal, for the reason that the theory of his complaint is that they were successors in business of the Garrett Investment Company, and that the record discloses no evidence tending to prove this fact. From an examination of the complaint, we conclude that there is no direct allegation to the effect that appellees succeeded to the general business of the Garrett Investment Company; the statement on that subject being a mere recital.

Appellees further contend that the grounds assigned for a new trial ought not to be here considered for the reason that in the caption of the motion only one of the appellees is named. The order book entry shows that the motion was filed as a part of the proceedings of this cause, and so acted upon by the court. No motion was made to strike it from the files, and in our judgment a ruling which would prevent a consideration of this motion on appeal would be so extremely technical as to be wholly without justification, and one which we cannot sanction. Considering the reasons relied on by appellant in his motion for a new trial, the record discloses without contradiction that on July 28, 1902, appellant obtained a loan from the Garrett Investment Company of \$40; that he actually received \$36; that at that time he was in the employ of the Baltimore & Ohio Railroad Company as a conductor, and to secure the repayment of said \$40 he executed to said company a written assignment of his monthly wages then due or to become due from said railroad company; that thereafter upon demand of said investment company, he continued to pay \$4 a month until his November pay day, 1902, when, in addition to the \$4, he paid \$10 on the principal, and thereafter paid \$3 a month for two months, when the \$10 was returned to him, and he thereafter continued to pay \$4 a month until July, 1903, when by a written assignment of the instrument, whereby he had assigned his monthly wages to the investment company, the same was transferred to appellee, Frank A. Hall; on August 20, 1903, appellant in writing released and assigned to said Hall the sum of \$40 of the wages then earned and due, or which might thereafter become due and owing him from the said railroad company for

the months of the years 1903 and 1904, and directing the paymaster of said railroad company to pay Hall on or before September, 1903, pay day of said company or any succeeding day of any month covered by the assignment the sum of wages sold and set over at the option of said Hall. No money was actually paid by said Hall to appellant on account of said August assignment to him, and appellant thereafter paid to said Hall \$4 each month for six months, or until he had paid \$24. In February, 1904, Hall turned into the railroad company the wage assignment, and on April 25th received from the company \$40 on account thereof. On the day Hall obtained the wage assignment from the investment company appellant called on him concerning it, and said "he was not prepared to pay it just at the present, and did not want the assignment turned into the company"; and Hall testified: "That it was against the rules of the company for their employes to make these assignments, and that Brandt suggested that he would pay it later on, and that he would sell his time to me each month at a discount of 10 per cent.," and on August 20th made the assignment. The last assignment was in January. That he bought \$40 worth of time for \$36, continuing to do this each month at a discount of 10 per cent. a month. That he knew nothing about the dealings between appellant and the investment company, and said nothing about the assignment or purchase from the investment company being incorrect. That one Thomas represented the investment company, and he knew the line of business Thomas was in, which was buying time. Hall was asked the following questions, and made the following answers: Q. What do you call buying time? A. Buying a man's time that he has got coming to him. Q. But, if you make a contract of this kind of which you give a man a certain amount of money, you then take an assignment of his wages? That is taken to secure that isn't it? A. Yes, sir. Q. With the agreement that he can have it as long as he pays the 10 per cent. a month—that is the arrangement? A. That is the arrangement providing he sells the time every month—sells it on a discount. In answer to other questions, he said he did not consider the transaction a loan of money. On November 12, 1903, Hall wrote to appellant, saying: "Could you kindly favor us with a payment of at least \$10 on loan this pay day? I have obligations outside of the business to meet, and am, therefore, compelled to draw in on the heaviest loans." The wage assignment to the investment company and the one to Hall were practically of the same tenor, and it is not questioned but that the original transaction between the investment company and appellant was a loan by the company upon which it received a usurious rate of interest.

As to all the material facts in this case, there is no conflict in the evidence. And in

such cases it has been held that "an appellate court will weigh the evidence, and give it such effect as, in its judgment, should have been given by the court which tried the cause." *Taylor v. Lohman*, 74 Ind. 418, 422, and cases there cited. In *Riley v. Boyer*, 76 Ind. 152, referring to the case of *Roe v. Cronkhite*, 55 Ind. 183, it is said that "this court held that, where the jury trying a cause in the face of uncontradicted evidence returned a verdict contrary thereto, such verdict should be set aside, and a new trial granted." The undisputed facts and the evidence above set out together cover all the material evidence given in the cause, and from which but one conclusion must follow, and that is the transaction was a loan of money for which appellant was paying at the rate of 10 per cent. a month, and that the buying of time claimed by appellee was a mere subterfuge to hide the usurious charge, and, this being true, this court is not bound by the decision of the trial court. *Knickerbocker Ice Co. v. Gray*, 165 Ind. 140, 72 N. E. 869; *Lake Erie, etc., Ry. Co. v. Juday*, 19 Ind. App. 430, 457, 49 N. E. 843. The evidence in this case, without dispute, clearly shows that the original transaction was a loan by the investment company to appellant; that the investment company collected from appellant \$4 a month for the use of \$40; that the investment company sold to Hall this demand against appellant, and thereafter the transaction was continued between appellant and Hall. Hall was to receive 10 per cent. a month. At the end of six months he had collected \$24. The principal sum he still claimed to be due, and which he afterwards collected out of money due appellant from the railroad company. The transaction upon its face was one tainted with usury, and therefore Hall was not entitled to retain anything more than the \$40 and interest thereon at the rate authorized by law. *Baum v. Thoms*, 150 Ind. 378, 50 N. E. 857, 65 Am. St. Rep. 368; *Gilman v. Fultz*, 37 Ind. App. 609, 77 N. E. 746; *Reed v. Helm*, 15 Ind. 423, 430; *Brown v. Follette*, 155 Ind. 316, 323, 58 N. E. 197; *Freeport Bank v. Hagemeyer et al.*, 91 Hun (N. Y.) 194, 36 N. Y. Supp. 214; *Scott v. Reed*, 83 Minn. 203, 85 N. W. 1012; *Krumsleg v. Missouri, etc., Trust Co.* (O. C.) 71 Fed. 350.

Judgment reversed, with instructions to the trial court to sustain appellant's motion for a new trial.

ROBY, C. J., HADLEY, P. J., and WATSON, COMSTOCK, and RABB, JJ., concur.

(40 Ind. App. 630)

COLLINS v. GREEN. (No. 6,168.)

(Appellate Court of Indiana, Division No. 2
Dec. 11, 1907.)

1. FRAUDS. STATUTE OF—CONTRACTS AFFECTING REAL ESTATE.

A parol contract binding one to purchase real estate and convey the same to another is not within *Burus' Ann. St. 1901, § 6629a*, pro-

viding that no contract for the payment of money for finding a purchaser for the real estate of another shall be valid unless in writing, etc., but is within section 6629, rendering contracts for the sale of lands unenforceable unless in writing, and the purchaser cannot maintain an action for the difference between what the land would have cost him and what it was worth on the refusal of the vendor to convey, unless performance is shown.

2. SAME—PERFORMANCE.

A parol contract bound one to purchase real estate and convey the same to another. The latter did not pay any part of the price and the former did not make the conveyance, but sold the land to a third person. *Held* not to show performance taking the contract out of the statute of frauds.

Appeal from Circuit Court, Dubois County; E. A. Ely, Judge.

Action by Nicholas Collins against Culvin Green. From a judgment for defendant, plaintiff appeals. Affirmed.

Cox & Hunter and Bretz & McFall, for appellant. Wm. A. Traylor and Bomar Traylor, for appellee.

ROBY, C. J. It is averred that Collins employed Green to purchase for him certain real estate, agreeing to pay him \$760 when the purchase was made; that Green did buy the real estate for the sum of \$9,540 and took a warranty deed therefor; that he refused to convey the same to Collins, but sold it to another party for \$960 more than the cost thereof; and that it was worth \$12,000, wherefore Collins demanded damages in the sum of \$3,000. The trial court held that the contract was within the statute of frauds. Section 6629a, Burns' Ann. St. 1901, provides "that no contract for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate," etc. The contract set out is not a contract for the finding or procuring of a purchaser, etc., and is therefore not affected by this section of the statute. The contract is averred to have been one for the purchase of lands by Green and for a subsequent conveyance by him to Collins. Section 4 of the statute of frauds (section 6629, Burns' Ann. St. 1901) renders contracts for the sale of lands unenforceable, "unless the * * * contract, * * * shall be in writing * * *," etc.

Appellant seeks to recover the difference between what the land would have cost him and what it was worth. This he could only do upon the theory that he was entitled under his contract with Green to a conveyance of the land. It is argued that the contract was taken out of the statute by performance. The trouble with this is that the facts do not show performance. The contract required a conveyance to Collins which was not made, and because of the failure to make which the action is brought. Collins did not pay any part of the purchase money. No facts tend-

ing to establish a trust of any kind are set up, and the conclusion reached by the trial court was the correct one.

Judgment affirmed.

(40 Ind. App. 646)

HUNT et al. v. OSBORN. (No. 6,540.)

(Appellate Court of Indiana, Division No. 2. Dec. 12, 1907.)

1. WORK AND LABOR—SERVICES RENDERED VOLUNTARILY—PLEADING.

There can be no recovery for services rendered voluntarily and without expectation at the time to charge therefor, and a complaint to recover for services rendered must show that they were not gratuitously rendered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Work and Labor, § 41.]

2. SAME—PRESUMPTIONS.

Ordinarily the law will imply both a request and promise to pay for services rendered, when accepted by the party benefitted, but this presumption may be rebutted by evidence that the relation of the parties was such or the circumstances were such as to exclude the inference that they were dealing on the footing of a contract.

3. ADMINISTRATORS—SERVICES RENDERED DECEDENT—DISPUTED CLAIM—INSTRUCTIONS.

In an action on a claim for services rendered, filed against a decedent's estate, the claimant must show by a preponderance of the evidence that the services were rendered at the request of the decedent, who promised to pay for them; and hence an instruction placing on defendant the burden of proving that the services were gratuitously rendered is erroneous.

4. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

In an action on a claim for services rendered, filed against a decedent's estate, an erroneous instruction, placing on defendant the burden of proving that the services were gratuitously rendered, is not harmless, where the question on which the decision depends is whether or not claimant expected to charge for the services, and where there is evidence, sufficient to support a verdict for defendant, tending to show that the services were acts of neighborly kindness for which claimant expected no compensation, and that the claim was an afterthought.

Appeal from Circuit Court, Hancock County; R. L. Mason, Judge.

Action by Joseph Osborn against Nathan Hunt, administrator of Henry Hunt, and others. From a judgment for plaintiff and an order overruling a motion for a new trial, defendants appeal. Reversed, and new trial ordered.

Wm. W. Cook and Chas. H. Cook, for appellants. Chas. L. Tindall and Robert E. Martin, for appellee.

RABB, J. The appellee filed a claim against the estate of Henry Hunt, deceased. The claim was not allowed by the appellant, the administrator of the estate, and went upon the issue docket for trial. No answer was filed. The cause was submitted to a jury for trial, and a verdict returned in favor of appellee for \$100. Appellant's motion for a new trial was overruled by the court, and judgment rendered in favor of appellee upon the verdict. The overruling of appellant's motion for a new trial is the only error assigned here.

Among the reasons set forth in the motion for a new trial by appellant was the giving to the jury by the court of appellee's instruction No. 4, which reads as follows: "If you believe from a fair preponderance of the evidence that the plaintiff performed the services, or any part thereof, mentioned in his claim under the direction of deceased, then you should allow him reasonable pay for such services so performed, unless it is shown by a fair preponderance of the evidence that such services were performed under such circumstances that the claimant is not entitled to pay therefor, and the burden of proving such defense by a fair preponderance of the evidence is upon the defendant." It is well settled that for services voluntarily rendered by one person for another, with no expectation at the time the services are rendered to charge therefor, there can be no recovery. 8th Am. & Eng. Ency. (2d Ed.) 1079, and cases cited. And ordinarily a complaint to recover for services rendered the defendant must show that the services sued for were not gratuitously rendered. It must appear that there was an agreement to pay for them, or circumstances must be shown from which the law will imply a promise to pay therefor. Taggart, Adm'r, v. Tevanny, 1 Ind. App. 344, 27 N. E. 511; Warring v. Hill, 89 Ind. 498. It is also well settled that ordinarily the law will imply both a request and promise to pay for services rendered by one person for another, when the beneficial results of such services have been accepted by the party for whom they were rendered. But this presumption of a promise to pay for such services may be rebutted by evidence that the relation of the parties was such, or the circumstances under which they were rendered were such, as to exclude the inference that they were dealing on the footing of a contract. Chamness v. Cox, 2 Ind. App. 485, 28 N. E. 777; Estate of Reeves v. Moore, 4 Ind. App. 492, 31 N. E. 44.

Our statute permits of matters of defense to be given in evidence without plea in claims filed against a decedent's estate, and an affirmative defense to appellee's claim could have been offered, and in such case the estate would then have the burden of establishing such affirmative defense by a preponderance of the evidence; but the burden of establishing his claim was upon the appellee. He must show by a preponderance of the evidence, not only that the services charged for were rendered, but that they were rendered at the request of the decedent, and that he promised to pay for them. This burden could be met by proof of services rendered, their beneficial character, and their acceptance by the decedent. From these circumstances the law would presume the request and promise to pay, but the presumption is not a conclusive one, and may be rebutted by proof of facts and circumstances showing that the services were gratuitously rendered, and this

would not be proof of an affirmative defense, but a denial of the promise to pay. The instruction quoted, which placed the burden of making out a negative defense to appellee's claim upon the appellant, was clearly erroneous. Young v. Miller, 145 Ind. 652, 44 N. E. 757; Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560; Elliott on Evidence, § 189; Phipps v. Mahon, 141 Mass. 471, 5 N. E. 835. Nor can we say that this error was harmless. The question on which the decision of the case hinged was whether or not at the time the services were rendered the appellee expected to charge for them. It was claimed by the estate that they were mere acts of neighborly kindness rendered without charge or expectation of pay therefor at the time, and that the charge now made was an afterthought. There are facts and circumstances in evidence tending to support this theory, and, had the verdict of the jury been in favor of the estate, this court could not have disturbed it on the evidence.

Cause reversed, and new trial ordered.

ALERDING et al. v. ALLISON. (No. 5,648.)¹
(Appellate Court of Indiana. Dec. 13, 1907.)

APPEAL—AFFIRMANCE.

Where no reversible error is presented by the record, the judgment will be affirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4454.]

Appeal from Circuit Court, Hamilton County; Ira W. Christian, Judge.

Action between Herman Alerding and another, as executors, and Irene Allison. From a judgment for Irene Allison, the executors appeal. Affirmed.

Shirts & Fertig, Hefron & Harrington, and Geo. H. Batchelor, for appellants. Lafayette Perkins and Smith, Duncan, Hornbrook & Smith, for appellee.

PER CURIAM. No reversible error is presented by the record in this case. The judgment is therefore affirmed.

(42 Ind. App. 179)

PITTSBURGH, C. & ST. L. RY. CO. v. WARRUM. (No. 6,078.)²

(Appellate Court of Indiana, Division No. 2 Dec. 10, 1907.)

1. APPEAL—HARMLESS ERROR—RULINGS ON DEMURRERS.

Where no evidence was introduced in support of the first paragraph of the complaint, and the finding and judgment rest on the second paragraph, the error, if any, in overruling a demurrer to the first paragraph, is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4090.]

2. RAILROADS—INJURIES TO PERSON ON PUBLIC HIGHWAY—REASONABLE CARE.

A railroad is bound to exercise reasonable care in the conduct of its business to avoid injury to a person rightfully on a public highway.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1235.]

¹ Superseded by opinion in Supreme Court, 83 N. E. 1006. Motion to modify mandate withdrawn.

² Rehearing denied, 84 N. E. 356. Transfer denied.

3. SAME.

In the use of public streets by railroads and street cars, trains and cars have the right of way over travelers on the highway, but in all other respects their rights to the use of the highway are only equal.

4. DEDICATION—PURPOSES OF DEDICATION—PUBLIC USE.

A dedication of land at common law or under the statute must be made to the public, and not to a private person or corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 1.]

5. SAME—ACQUISITION BY RAILROAD FOR RIGHT OF WAY.

One platted land into lots, blocks, and streets. One of the streets, designated as "Railroad street," extended several blocks, and through the length of the tract platted. Lots were laid out on both sides of the street. A railroad was built on it, and side tracks were laid to various buildings on adjoining lots. The street was continuously used by the public for about 50 years. Held, that the railroad did not acquire the street for railroad purposes, to the exclusion of the right of the public to use it as a street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 20–28.]

6. SAME—ACCEPTANCE.

An acceptance by the public of a street dedicated to its use is necessary to perfect the dedication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 64.]

7. SAME.

An acceptance by the public of a street dedicated to it may be proved in different ways, and is shown by uncontradicted evidence that the street has been continuously used by foot travelers for over 50 years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 73, 74.]

8. SAME—USER BY RAILROAD.

Where the rights of the public to a street dedicated to it once attached, a railroad could not acquire the exclusive right to the use of the street by any length of user.

9. MUNICIPAL CORPORATIONS—STREETS—GRANT OF RIGHT OF WAY TO RAILROAD.

The council of a city, though vested with large powers with reference to the streets of a city, have no power to grant to a railroad the exclusive right to use a public street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1483.]

10. DEDICATION—STREETS—ACCEPTANCE.

Whether or not a street dedicated to the public as a street has been accepted by the public authorities is a matter of law dependent on facts, and what had or had not been done in the past by the municipality, with reference to work and improvements on the street, must be manifested by the records of its council and the testimony of witnesses who knew the facts, and it cannot be proved by a resolution of the council purporting to recite what has been done in the occupancy and use of the street.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, § 88.]

11. MUNICIPAL CORPORATIONS—STREETS—CONTROL.

A resolution of the council of a city, reciting that a street platted as a public street had not been accepted by the public authorities, that the city had never exercised jurisdiction over it, and that a railroad had exclusively occupied the street for many years, and granting to the railroad the use and occupancy of the street, did not affect the rights of the railroad and the public in the street, for, if the rights of the public had once attached, they could not be destroyed by the council, and, if they had not attached, the resolution was unnecessary.

12. RAILROADS—INJURIES TO PERSON ON PUBLIC HIGHWAY—MAINTAINING PLATFORM IN STREET.

The act of a railroad in maintaining a platform in a public street, with the consent of the municipal authorities, does not exclude the public from passing over it; the rights of the railroad and the public being reciprocal.

13. SAME—ACTIONS FOR INJURIES—PLEADINGS AND PROOF.

Where, in an action against a railroad for injuries to a person in a public street struck by a mail pouch thrown from a rapidly moving train, the complaint alleged that for more than two years it had been the custom of the railroad to permit bags of mail to be thrown from trains while in motion, and thereby subject persons on a street to great hazard of life, proof of the throwing off of mail sacks by postal clerks at other points than the particular spot where plaintiff was struck was admissible.

14. SAME—NEGLIGENCE OF MAIL CLERKS ON TRAINS.

A railroad company is not primarily liable for the negligence of railway mail clerks, and the only ground on which it is liable for their acts is that the clerks travel on its cars and have it in their power by dangerous practices to injure those who may lawfully be in close proximity to the track, and to whom it owes the duty of exercising reasonable care to protect from injury by reason of the passage of its trains, and that it has without objection suffered mail clerks to indulge in such dangerous practice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1252, 1253.]

15. SAME—EVIDENCE.

Where, in an action against a railroad company for injuries to a person in a public street struck by a mail pouch thrown from a rapidly moving train, the complaint alleged that for more than two years it had been the custom of the company to knowingly permit large bags of mail to be thrown from the trains by mail clerks while the trains were in rapid motion, it was essential to a recovery to show that it was the custom to throw the mail where it was liable to do injury to some person, but it was not essential that the evidence show that it was thrown off customarily at the exact spot where plaintiff was struck; the negligence of the company being in permitting the dangerous practice.

16. SAME.

Where, in an action against a railroad company for injuries to a person on a street struck by a mail pouch thrown from a rapidly moving train, the evidence showed that plaintiff was injured while on a railroad platform occupying a public street; that the traveling public and those having business with the company used the entire platform, and that similar accidents were liable to happen anywhere along the platform because of the custom of the mail clerks in throwing mail pouches from rapidly moving trains, a finding that the company was guilty of actionable negligence was warranted.

17. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in an action against a railroad for injuries to a pedestrian in a public street struck by a mail pouch thrown from a rapidly moving train, the evidence affirmatively established negligence on the part of the company, and there was no evidence to the contrary, error, if any, in admitting in evidence a municipal speed ordinance, was harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4161–4170.]

18. DAMAGES—PERSONAL INJURIES—COMPLAINT—INSTRUCTIONS.

Where the complaint in an action for personal injuries alleged that plaintiff was rendered unconscious for three days, and was disabled from doing a full day's work on account of his

injuries, a charge authorizing the jury, in estimating the damages, to take into consideration all loss of time to plaintiff caused by his injuries, was proper, as against the objection that no damages on that account were averred in the complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 410.]

19. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Where, in a personal injury action, there was evidence of loss of time on account of plaintiff's injuries, the court did not err in charging the jury to take into consideration loss of time by plaintiff caused by his injury, though damages on that account were not averred in the complaint, since the court below would have permitted an amendment to the complaint to correspond to the proof, and the amendment will be considered as having been made on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4220.]

20. RAILROADS—INJURIES TO PERSONS ON PUBLIC STREETS—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action against a railroad for injuries to a pedestrian on a public street struck by a mail pouch thrown from a rapidly moving train, evidence held insufficient to show contributory negligence precluding a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1360.]

21. APPEAL—HARMLESS ERROR.

Where the uncontradicted facts require a judgment for the successful party, the court on appeal will affirm the judgment, notwithstanding intervening errors in the admission of evidence or instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4034.]

Appeal from Circuit Court, Rush County; Will M. Sparks, Judge.

Action by John W. Warrum against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John T. Rupe, for appellant. Wm. Ward Cook, Smith, Cambern & Smith, and McBane & Glascock, for appellee.

RABB, J. Appellant's passenger depot in the city of Greenfield is located half way between Pennsylvania street on the east, and Mechanic street on the west. In front of the depot the appellant has built for the accommodation of its business a substantial brick depot platform from 12 to 16 feet wide, and extending from Pennsylvania to Mechanic streets which, from its location and manner of construction, is convenient for use by the public as a sidewalk, and it is claimed by the appellee that this platform is laid along the side of and within the limits of a public street of said city, and that the public have a right to and do use it as a sidewalk. The appellee while passing along said platform on his way to his work, and on no business relating in any manner to the affairs of the appellant, was struck and injured by a mail sack thrown by a United States postal clerk from a mail car in one of appellant's passenger and mail trains while the same was running at a high rate of speed over appellant's road. This action was brought against appellant to recover damages for the injury,

charging appellant with negligence. The substantial averments of the complaint with reference to the charge of negligence are that for more than two years last past it has been the daily custom of the United States mail clerks on the mail cars running over appellant's road to throw from the rapidly moving trains running over said road, onto the said alleged sidewalk, large sacks of mail at such time and in such manner as to be dangerous to those using said walk, and that this was done with the knowledge of appellant, and without objection from it, and that appellee had no knowledge that it was the custom of such mail clerks to throw out such mail from rapidly moving cars at a point west of appellant's depot, but that such was the fact, and that the practice was known to and permitted by the appellant. The cause was tried by a jury, and verdict and judgment for appellee.

One of the errors assigned and relied upon for reversal is the action of the court below in overruling appellant's demurrer to the first paragraph of the complaint. The record affirmatively shows that no evidence was introduced in support of this paragraph of the complaint, and that the finding and judgment rest exclusively upon the second paragraph of the complaint. This assigned error, if any, was therefore harmless.

The overruling of appellant's motion for a new trial is assigned as error, and under this assignment numerous questions are presented. One of the reasons assigned for a new trial is that the evidence fails to support the verdict. It is urged, among other things in support of this reason, that the evidence shows without contradiction that the place where appellee was injured belonged to the railroad company exclusively, and that the appellee had no legal right on the premises, his business there being in no manner connected with the business of the company, and that, therefore, the company owed him no duty except to refrain from committing a willful injury. This raises the question as to whether or not the platform or sidewalk upon which appellee was walking at the time of his alleged injury was on a public street of the city of Greenfield. If the place where the appellee was injured was a public highway, then he had a right to be there, and the appellant was bound to exercise reasonable care in the conduct of its business to avoid injury to him. *Louisville, etc., Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155, and cases cited. In the use of public streets by railroads and street cars, the cars have the right of way over travelers on the highway for the reason that the cars used on the railroad are more cumbersome and difficult to stop and control than are vehicles used by travelers on the public highway, but in all other respects their rights to the use of the highway are equal. *Chicago, etc., Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218, and cases cited. The evidence shows

without conflict that in the year 1853 one Pierson laid out and platted an addition to the then town of Greenfield; that he duly acknowledged the said plat, and caused it to be recorded in the recorder's office of Hancock county; that among several streets properly shown on said plat was one designated as "Railroad street," extending several blocks, the entire length of said addition; that lots were laid out on both sides of the street for its full length, those abutting the street between Mechanic street and what is now known as Pennsylvania street being much smaller than those along the squares east of Pennsylvania street. The evidence shows without dispute that this street was opened and built upon for its whole length, the lots lying east of Pennsylvania street being generally occupied by residence property, while the ground between Pennsylvania and Mechanic streets was sold to persons who built mills, elevators, warehouses, and blacksmith shops upon them, and that some of these buildings were used for other purposes. It also shows that about the time this addition to the town was laid out and the street opened the appellant's railroad was built upon it, and that side tracks were laid in the streets to these various mills, elevators, and warehouses, and that these tracks have ever since so remained. It also shows that the defendant company's first depot, both for passenger and freight, was built on the north side of this street on ground now occupied by Pennsylvania street. The evidence shows, without dispute, that this street has been continuously used by the public for travel since it was opened, and is still so used. It does not show, however, that the portion of the street opposite the mills, warehouses, and elevators, and occupied by appellant's main and side tracks, was ever used by teams or vehicles, but it does show without dispute its constant use by pedestrians. The evidence fails to disclose whether or not the railroad company was ever expressly granted the right of way over this street, either by the owner of the land or the authorities of the town or city, until the 6th day of March, 1901, but it does show its continuous use by the company since its first occupation in 1853 or 1854. The evidence does not show that either the authorities of the town of Greenfield, if it ever was an incorporated town (on which question the evidence is silent), or the city authorities, expressly accepted Railroad street as a public street of said town or city; or that they ever improved the same or caused the same to be worked at any point between Pennsylvania and Mechanic streets. It is earnestly contended by appellant that the evidence affirmatively shows that the street in question was not dedicated to the public, but to the railroad company for railroad purposes. This contention cannot be sustained. There is no such thing at common law or by virtue of any provision of our statutes as the dedication of property to a private person or

corporation. Dedications must be made to the public. *Lake Erie, etc., v. Whitham*, 155 Ill. 514, 40 N. E. 1014; *McWilliams v. Morgan*, 61 Ill. 89; *Washburn on Easements*, 205; *Watson v. Chicago, etc.*, 46 Minn. 321, 48 N. W. 1129. Railroad companies do not and cannot acquire their right of way in this manner, and there is nothing on the plat introduced in evidence in this case indicating a reservation of any kind in favor of the railroad in the dedication of the ground in question. The premises were laid out as a street. It is so marked on the plat, so designated by the proprietor of the addition in the statement accompanying the plat and recorded with it. Lots were sold by the owner with reference to the plat, and, so far as he was concerned, there was a complete and irrevocable dedication of the ground to the public and the lot owners as a public street. The railroad company acquired no rights whatever under the dedication. The mere naming of the street "Railroad street" gave them no rights, and all the legal rights they had in the premises, so far as the evidence discloses, prior to the 6th day of March, 1901, they acquired by prescription. It is insisted that the evidence fails to show an acceptance of the street. An acceptance by the public of the street dedicated to its use is necessary to be shown in order to perfect the dedication. Such acceptance may be proved in several different ways, and there are some modes of proving an acceptance of a dedicated public street that do not appear in the evidence in this case. It does not appear that the public authorities ever at any time formally accepted this street, or that they impliedly accepted it by making improvements or doing work on this particular part of the street; but it is in evidence, without controversy or contradiction, that this part of the street has been constantly used by foot travelers practically ever since it was laid out.

Appellant insists, however, that the evidence shows that this use is only such use as is habitually made by the public of the railroad's private right of way wherever the same remains open and is convenient for public travel. This insistence is probably true; and, if it were shown that the appellant was the legal owner of these grounds as their right of way, the evidence would not be sufficient to establish a right in the public to use the way. But such is not the question here. Here the appellant has never been granted the exclusive right of way over these premises by any person authorized to give it such right. On the contrary, the premises were dedicated by the owner to the public. In the case of a use for travel by the public of a railroad company's private right of way, the legal right to the way is in the company. The public have only a permissive use. In this case the public have the right to the way, and the railroad company is but a permissive user; and the question is whether or not the user shown in the evidence by the public is

an acceptance of the dedication. That such acceptance can be as effectually shown by such a continuous user as in any other manner is well settled in the cases of *Summers v. State*, 51 Ind. 201; *Strunk v. Prickett*, 27 Ind. App. 586, 61 N. E. 973; and *Elliott on Roads and Streets*, § 154, and cases cited.

Appellant urges that its occupation of the land for more than 50 years gives it the exclusive right to continue its occupancy. The evidence discloses that the company's use of the land has not been exclusive in the past, but has been concurrent with its use by the public as a highway; the only difference being that the railroad company has made more and different use of it than the public. The company's user of the premises for the purpose of their road for all these years has fully established their right, by prescription, to so use it, but only in common with the public. It takes the place of a grant from the owner of the land and a franchise from the municipal corporation. But it does not give the company, who entered upon the street without legal right, the right to elbow off those who have had the legal right to use it ever since its dedication by the owner. The rights of the public to the street once attached, the appellant could not acquire the exclusive right to the use of the street by any length of user. *Manion v. Lake Erie*, etc. (Ind. App.) 80 N. E. 166; *Wolfe v. Sullivan*, 133 Ind. 331, 32 N. E. 1017; *Louisville*, etc., v. *Downey*, 18 Ind. App. 146, 47 N. E. 494.

Appellant introduced in evidence a copy of the proceedings of the common council of the city of Greenfield at a meeting held March 6, 1901, as follows: "Be it resolved, by the common council of the city of Greenfield, that whereas Railroad street in said city, so-called, between Pennsylvania street and Mechanic street, has been platted as a street, but that the same has never in fact been accepted, used or improved as a street, by the city or town of Greenfield, or by the public authorities, and said city has never claimed or exercised jurisdiction over it as such, and the same has always been as it now exists between said Pennsylvania and Mechanic streets, used, occupied and held exclusively for railroad purposes, and that the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, now the owner and operating the railroad passing through said city and over and upon the ground above described, and that said railway company is proposing to construct a new passenger station upon its grounds, lots 6, 7, 8 and 9 of Pierson's addition to said city, and in the construction thereof it will be necessary that said company occupy with its buildings, platforms, and tracks, a part of the ground south of its said grounds, consisting of lots 1 to 10, both inclusive, in said Pierson's addition, and said new station and depot and facilities, being found to be needed for the accommodation of the public, and of great benefit and improvement to the said city; and the said rail-

way company desiring to be fully protected in its use of the said ground, so to be used and occupied for its said new station and facilities connected therewith. Now, therefore, for the purpose of disclaiming any and all right in said city in the said ground and any and all jurisdiction over the same as a street, and to fully protect the said railway company, its successors and assigns, in the full use thereof, it is now and be it resolved, that the said city does fully disclaim all rights in and jurisdiction over the said ground, as a street and does declare the truth of the foregoing facts recited, and that it will not in future make any claim thereto as against said railway company, its successors or assigns, and that full and complete authority is now and hereby granted to said railway company, its successors and assigns, to use and occupy the said ground between the said Pennsylvania and Mechanic streets for their depot and platforms and station facilities, fully and freely in all respects. And that this authority shall be irrevocable and shall at all times fully protect the said company, its successors and assigns, in such an occupation against any and all claim by said city at any time, of right in or jurisdiction over said ground as a street or public highway." It is claimed by appellant that this resolution vested the company with complete, exclusive right to the street, or at least that part of it on which their platform was built, and where the accident to appellee occurred. We do not see our way clear to adopt this view. It is true that the city council is vested by the Legislature with very large powers with reference to city streets, but they have no power to grant to a railroad company the exclusive right to use a public street. *Louisville*, etc., v. *Downey*, supra; *Indianapolis*, etc., v. *State ex rel.*, 37 Ind. 494; *Sherlock v. Kansas City*, etc., 142 Mo. 172, 43 S. W. 629, 64 Am. St. Rep. 551; *Lockwood v. Railroad Co.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. Rep. 547; *Manion v. Lake Erie*, etc., supra.

Nor are the recitals in this resolution in reference to what has been done by the railroad company in the occupancy and use of the street, and what has not been done by the city or town authorities, of any legal effect. Whether or not the premises in question had been accepted as a public street is a matter of law, dependent on facts that cannot be proved by a resolution of the common council of Greenfield, and what had or had not been done in the past by the town or city authorities with reference to work and improvements upon the street, or by the company in reference to their occupancy of the street, would have to be made manifest by the records of the city council with reference to those matters, and the testimony of sworn witnesses who knew the facts and circumstances regarding the matter. And, if the rights of the public in the premises as a public street had once attached, they could not

be destroyed by this renunciation of the common council. If they had not attached, the resolution of the council would be entirely unnecessary and meaningless. The full extent of appellant's rights acquired under this resolution was to the street for all necessary purposes, including the construction of their depot platform; but it could give the company no exclusive right to the portion of the street occupied by this platform. The act of the railroad company in laying the brick platform in the public street, though with the full consent of the city authorities, was no more effective to exclude the public from passing over it than laying their track by consent of the same authorities, in a recognized public street, would exclude the traveling public from walking, riding, or driving over their rails, ties, and roadbed. The reciprocal rights of the company and of the public would be precisely the same in one case as the other. The evidence in the case being sufficient to justify a finding that Railroad street, between Mechanic and Pennsylvania streets, was a public street in the city, and that the place where the appellee was struck was in the limits of the street, the appellee, therefore, was neither a trespasser nor a mere licensee, but was where he had a lawful right to be, and the railroad company was bound, in the exercise of its rights, to observe reasonable care not to injure him. It was bound to observe the same care toward him as it was required to exercise toward those who used the platform for some purpose connected with appellant's business.

The point is made that the evidence fails to establish the facts averred in the complaint constituting the charge of negligence against appellant. The complaint avers, among other things, that it was the custom of the postal clerks to throw off the mail from fast trains at a point west of appellant's depot, where it was likely to injure persons lawfully upon the platform. The evidence fails to sustain this averment. There is no proof that mail sacks were ever thrown off the appellant's trains by postal clerks at a point west of appellant's depot prior to the time of the appellee's injury. If this was all the complaint contained upon the subject of appellant's negligence, the point urged by it in this respect would be well taken; but the complaint further charges that "for more than two years last past it has been, and still is, the daily custom of the defendant at said station to knowingly permit large bags of mail to be discharged from said trains by mail clerks and agents, while said trains were in rapid motion, upon said sidewalk, at such time and in such manner and place, which subjected the persons who might be upon the sidewalk at such time to great hazard of life and limb."

There are other allegations in the complaint describing the sidewalk or platform, and averring its use by the public and the patrons of the road for the purposes of travel.

These averments, though by no means artistically drawn, are sufficient to admit proof of the throwing off of mail sacks by postal clerks at other points along the platform in question than west of the depot, or the particular spot where appellee was struck. The testimony of Mr. Tuttle, a drayman, was to the effect that the mail carrier generally received the mail between the depot and Pennsylvania street, that the mail clerks kicked it off the cars, and that it fell on the platform between Pennsylvania street and the depot, and it was fairly inferable from the evidence that the platform was as much frequented by passers-by east of the depot as it was west of the depot.

Our attention is particularly directed to the case of *Muster v. C., M. & St. P. Ry.*, 61 Wis. 325, 21 N. W. 223, 50 Am. Rep. 141. In that case the plaintiff was engaged at work on a scaffold at the defendant's depot. A mail clerk threw a mail sack from a passing mail train, which struck and knocked down the scaffold, injuring the plaintiff. It was averred in the complaint that the postal clerks were in the habit of throwing off the mail at the depot, and that the practice was dangerous and was known to the defendant, and permitted without objection from it. The evidence showed that the mail had never been thrown off at the depot before, but at the mail catch 200 feet away, and there is nothing in the case tending to show that at the place where the mail was customarily discharged any danger was to be apprehended. The railroad companies are not primarily liable for the negligence of the servants of the government in discharging their duties. They are in no sense servants or employees of the company, and the only ground upon which the railroad company is held liable for their acts is that the mail clerks travel on the company's cars, and, by reason of that fact, have it in their power, by dangerous practices, to injure those who may lawfully be in close proximity to the company's road, and to whom the company owes a duty of exercising reasonable care to protect from injury by reason of the passage of its trains, and that the company have, without objection, suffered such mail clerks to indulge in such dangerous practices. Here the dangerous practice charged was throwing off mail at this station at a place where it was liable to injure some person or persons who had a right to be there. It is essential that the evidence should show that it was the custom to throw the mail where it was liable to do injury to some person, but it was not essential that the evidence show that it was thrown off customarily at the exact spot where the party was eventually struck. The evidence in this case would justify the jury in concluding that it was just as dangerous to throw the mail off on the platform east of the depot as it was west of the depot. The traveling public and those having business with the company, the

evidence in the case indicates, used the entire platform, from one end to the other, and the east end quite as much as the west end; and it was simply a matter of chance that the accident took place west of the depot rather than east of it, and that a similar accident was liable to happen anywhere along the platform. The negligence of the company was in permitting the dangerous practice, and the evidence, we think, is amply sufficient to sustain this charge.

The distinction between this case and the Munster Case, *supra*, is that in this case the evidence affirmatively shows that at the point where the mail was customarily discharged there was danger of injuring persons by throwing it from the moving trains, while in the Munster Case the evidence does not disclose that the place where the mail was discharged was one where danger of injury to any person could have reasonably been apprehended.

Among other reasons given for a new trial was the introduction in evidence of a speed ordinance of the city of Greenfield. Admitting that this evidence was incompetent, a question we do not decide, there is no dispute that the postal clerks customarily threw the mail sacks on the platform between Mechanic and Pennsylvania streets, and that this place where the mails were thus thrown was in constant use by the traveling public and by the patrons of the road. These facts were not denied, and we think that they affirmatively establish negligence on the part of the railroad company in the absence of any countervailing evidence. The company was bound to know of this custom from the length of time that it had prevailed, and, if they would excuse themselves upon the ground that the custom prevailed over their objection and remonstrance, it was for them to prove that they had made such remonstrance, or that they had used reasonable effort to prevent the practice. Nothing of the kind appears in evidence; and we therefore think that the evidence not only justified, but required, a finding that the appellant was guilty of negligence in permitting this practice to prevail. It is only to the question of negligence that the speed ordinance and the testimony in reference to the speed of the train was addressed, and therefore, if there was error in admitting this evidence, it was harmless.

Objection is made to the introduction in evidence of the improvement of Depot street. This may have been an error; but we do not see how it could have been harmful, justifying the court in reversing this case.

Exception is taken to the sixteenth charge, given by the court to the jury on its own motion. The objection to this charge is that it authorizes the jury to take into consideration all loss of time to the appellee caused

by his injury, and that no special damages on that account were averred in the complaint. It is averred in the complaint that plaintiff was rendered unconscious for three days, and disabled from doing a full day's work on account of his injuries. We think these allegations are sufficient to justify the instruction, and, if they were not, and there was evidence of a loss of time on account of appellee's injuries, the court below would have permitted the complaint to be amended to correspond to the evidence in this respect, and the amendment will be considered as having been made here.

Objection to some other charges given by the court to the jury are made, none of which we think are sufficient, if erroneous, to justify a reversal of this case.

It is urged by appellant that the evidence affirmatively shows the appellee to have been guilty of contributory negligence in failing to take notice of the approach of the train when he knew it was coming, and could easily have seen it, and that had he given the approaching train attention he could have avoided the accident that happened to him. The evidence shows that the appellee was walking along a wide platform, and that he was several feet away from the edge of the platform next to the appellant's road, in a place where he would be amply safe and secure from the passage of the train. He knew the train was coming, but he had no reason to apprehend that the train would either leave the track and injure him, or that somebody on board the train would throw a missile from it and strike him. There is no ground for holding the appellee guilty of contributory negligence. The evidence in this case shows, without contradiction, that the appellee, while passing along the company's platform at a safe distance from the company's track, was struck and severely injured by mail sacks thrown by a postal clerk from a mail car passing at a high rate of speed over the appellant's road; that it had been for more than two years the custom of the mail clerks on this road to throw off the mail sacks upon this platform, along which the public passed daily and hourly; that the place where the platform was built was a part of a public street that had been dedicated to the public use as a street many years before; and that it had been constantly and continuously used from the time of its dedication up to the time of the appellee's injury by the public who had occasion to use it as a place of travel.

These facts appearing without controversy require the court to affirm this judgment, although there may be intervening errors of the court in the admission of evidence or instructions given to the jury.

Judgment affirmed.

(41 Ind. App. 614)

LOWDEN v. PENNSYLVANIA CO.(No. 5,944.)¹(Appellate Court of Indiana, Division No. 1.
Dec. 10, 1907.)**1. TRIAL—GENERAL VERDICT—SPECIAL FINDINGS—INCONSISTENCIES.**

Special findings inconsistent with the general verdict will control the latter only when on the face of the record there is such antagonism that both cannot stand, after considering all provable facts and reasonable deductions from any evidence, admissible under the issues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

2. EVIDENCE—PRESUMPTIONS.

The law presumes that a person possessing good eyesight must have seen that which was in range of his vision, if he gave attention and looked.

3. RAILROADS—STREET CROSSINGS—INJURY TO PEDESTRIANS.

One crossing a street on which trains and street cars are operated is bound to know that the crossing is a place of danger, and to avoid being guilty of contributory negligence he is required to exercise such care as an ordinarily cautious person would use under similar circumstances to avoid injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1022.]

4. SAME—TRIAL—GENERAL VERDICT—EFFECT.

A general verdict in favor of a pedestrian, suing a railroad company for injuries in a collision with a train at a street crossing, is a finding that she exercised ordinary care.

5. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In an action against a railroad for injuries to a pedestrian struck by a train at a railroad crossing, the burden of proving plaintiff's negligence is, under Acts 1899, p. 58, c. 41, on defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1121.]

6. RAILROADS—ACCIDENTS AT CROSSINGS—VERDICT AND FINDINGS.

The complaint in an action against a railroad for injuries to a pedestrian in a collision with a train at a street crossing alleged that as the pedestrian proceeded over the crossing she continued to look and listen. Special findings showed a straight track from the place of the accident of 600 feet, and also placed the pedestrian in the center of the track 80 feet from the approaching train. The train was operated at such speed that the entire distance of 600 feet could be run in less than half a minute. A street car had passed, and other cars were on the track, and the pedestrian could not hear the approaching train because of noise. *Held*, that the special findings were not inconsistent with a general verdict in favor of the pedestrian.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1216; vol. 46, Trial, §§ 857-860.]

7. SAME.

A motion for judgment on answers to interrogatories notwithstanding the general verdict must be decided on the special findings and the pleadings alone, and the court cannot consider the sufficiency of the evidence to support the general verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

Appeal from Circuit Court, Boone County; Samuel R. Artman, Judge.

Action by Mattie M. Lowden against the Pennsylvania Company. From a judgment

for defendant notwithstanding the general verdict for plaintiff, she appeals. Reversed, and new trial granted.

Wymond J. Beckett, A. J. Shelby, and Elliott & Elliott, for appellant. Samuel A. Pickens, Robt. F. Davidson, and Owen Pickens, for appellee.

MYERS, J. Appellee on September 27, 1904, while operating its locomotive and cars in and along Kentucky avenue, a street in the city of Indianapolis running northeast and southwest, at a point on said avenue intersected by West street, extending north and south, struck and injured appellant, and for damages on account of said injuries appellant brought this action. Trial by jury and a general verdict in favor of appellant, and answers to 49 interrogatories, were returned. Appellee's motion for judgment on the answers to interrogatories notwithstanding the general verdict was sustained, and judgment rendered for appellee. The correctness of this ruling is the only question presented.

The complaint, after describing Kentucky avenue and West street at the point where the accident occurred, showing the location of the track on which appellee was operating its locomotive and cars, and the location of two street car tracks, charges that while appellant was proceeding across said tracks, exercising care and diligence and continuing to look and listen for approaching trains, and without her fault, was negligently struck and knocked down and injured by a locomotive and train of cars which appellee was negligently running backward along said avenue; that said locomotive and cars were being run in and along said avenue at a speed of 25 miles an hour, without ringing the bell attached to the locomotive, and without a watchman or other person upon the rear end of said locomotive or tender, as the same was backing, to warn persons of its approach and to prevent accidents; that all and each of the aforesaid negligent acts were in violation of ordinances of the city of Indianapolis, then in full force and effect, making it unlawful to run or cause a locomotive, car, or train of cars to be run backward through said city without providing a watchman or other person on the rear end of such locomotive, car, or train of cars to warn persons of their approach, making it the duty to ring the bell attached to the locomotive whenever the same should be moving in and through the city, and making it unlawful to run or permit a locomotive or train to be run along any track in said city at a greater speed than 4 miles an hour. The complaint also alleges that for several years appellee had maintained a flagman at the place in question, whose duty it was to notify people who were crossing or about to cross of the approach of the locomotive or cars, and that said flagman failed to so notify appellant.

The answers to the interrogatories show:

¹ Rehearing denied. Transfer to Supreme Court denied.

That Kentucky avenue, in the city of Indianapolis, at the point crossed by West street, is 80 feet wide, and from curb to curb 70 feet wide. That in and along said avenue there was one track, which appellee used in running its trains, and from the center of this track to the curb on the south was 50 feet 4 inches. To the south of said track, and running parallel with the same along said avenue, were two street car tracks. The distance between the two outside rails of the street car tracks was 14 feet 2 inches. The nearest street car rail to the rail of the railroad track was 7 feet 1 inch, and the distance from the curb on the south side of the avenue to the first street car rail was 26 feet 3 inches, and the sidewalk on the south side of said avenue was 10 feet. The distance from the center of the railroad track south to the center of the first street car track was 12 feet. That at the time of the accident appellee was running its locomotive, with three cars attached, backward, drawing the cars after it, from the southwest and toward the northeast, along Kentucky avenue, and while appellant was crossing said avenue and near the west side of West street, at about 9:43 in the morning, she was struck by said locomotive. That the railroad track immediately west of West street extends southwest on a straight line about 600 feet. That said locomotive was running at the rate of about fifteen miles an hour, and the bell thereon, at the time of the accident, was not ringing. Appellant was familiar with said crossing, and that trains were frequently run upon the railroad track. Appellant approached the railroad track from the southeast. Her age was 52, her eyesight, hearing, and powers of locomotion good, and, had she looked in a southwesterly direction when between the curb and the first street car track, or when between the rails of the street car track and the railroad track she could have seen the locomotive and train approaching; but she could not have heard it, because of noise from wagons, street cars, and wind from the southeast. Immediately before appellant passed over the street car track next to the railroad track, a street car passed southwestwardly, and there were other street cars on the track. She could have stood between the street car track and the railroad track without danger from the locomotive. At the time she crossed the street car track next to the railroad track the locomotive was about 30 feet from the place of the accident. When she first saw the locomotive it was about 30 feet away and she was in the center of the railroad track. She did not see the locomotive approaching and attempted to cross before the locomotive reached the crossing.

The rule is that special findings of fact inconsistent with the general verdict will control the latter only when upon the face of the record there is such antagonism that both cannot stand after indulging all provable

facts and reasonable deductions which might have been made in support of the general verdict from any evidence legitimately admissible under the issues. *Indianapolis St. R. Co. v. Marschke*, 166 Ind. 490, 77 N. E. 945; *Southern Indiana R. Co. v. Peyton, Adm'r*, 157 Ind. 690, 61 N. E. 722; *Chicago, etc., R. Co. v. Leachman*, 161 Ind. 512, 517, 69 N. E. 253; *Stoy v. Louisville, etc., R. Co.*, 160 Ind. 144, 148, 66 N. E. 615. If by any reasonable hypothesis the special findings can be reconciled with the general verdict, the latter must stand. *Princeton C. & M. Co. v. Roll*, 162 Ind. 115, 68 N. E. 169; *Guedelhofer v. Ernsting*, 23 Ind. App. 188, 55 N. E. 113. Appellant's sense of sight was good, and, this being true, the law presumes that she must have seen that which was within the range of her vision if she gave attention and looked. *Chicago, etc., R. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Baltimore, etc., R. Co. v. Rosborough* (Ind. App.) 80 N. E. 869. And as the special findings show appellant in a position where she could have seen the locomotive in time to have avoided injury had she looked in the direction from which the locomotive was approaching, it is argued that she must be presumed to have seen it and failed to heed what she saw, thereby contributing to her injury, and upon the theory of concurring negligence cannot recover.

Under all the facts she was bound to know that the crossing was a place of danger, and to avoid being guilty of contributory negligence she was required to exercise such care as an ordinarily careful and cautious person would use under all the apparent or similar circumstances to avoid injury, and the general verdict amounts to a finding in her favor upon that issue. In actions of this character the burden of proving contributory negligence is on the defendant. *Acts 1899, p. 58, c. 41*. The complaint alleges that as appellant proceeded over the crossing she continued to look and listen. The special findings show a straight track to the southwest from the place of the accident of 600 feet. Had the locomotive which collided with appellant run the entire distance at a speed of 15 miles an hour, the time consumed would have been less than one-half minute. The findings also place appellant in the center of the railroad track, and 30 feet or $1\frac{4}{11}$ seconds from the approaching locomotive, when she first saw it. From two points before entering on the track she could have seen it, had she looked to the southwest. But considering these findings in connection with the finding that a street car had just passed to the southwest and other street cars were on the track (how near the crossing does not appear), and that she could not hear the approaching locomotive because of noise from wagons, street cars, and wind from the southeast, does not certainly exclude the existence of other conditions which might have been in evidence under the pleadings and an excuse furnished

by her for not looking to the southwest at the particular time and place as would justify the jury in its general finding that she used ordinary care. And if this be true, or if from the whole evidence facts are exhibited "of a character to be reasonably subject to more than one inference or conclusion under established rules of law, then the ultimate fact of contributory negligence or due care" should be left to the jury. *Greenawaldt v. Lake Shore, etc., R. Co.*, 165 Ind. 219, 74 N. E. 1081; *Baltimore, etc., R. Co. v. Rosborough, supra*; *Wabash R. Co. v. Biddle*, 27 Ind. App. 161, 59 N. E. 284, 60 N. E. 12.

Inferentially appellee says that the trial court heard the evidence and may have been moved to a certain extent in making the ruling here challenged because of no evidence from which presumptions or intendments might arise to support the general verdict and reconcile the special findings therewith. This question on appeal must be decided upon the special findings and the pleadings alone (*Indiana, etc., Gas Co. v. Long*, 27 Ind. App. 219, 59 N. E. 410), and we know of no good reason why the trial court should not be required to pass upon the question under precisely the same rules as those governing appellate courts, for in this manner only is the same question presented to both courts.

Judgment reversed, with instructions to overrule appellee's motion for judgment, and that a new trial be granted appellant, and for further proceedings not inconsistent with this opinion.

FEDERAL LIFE INS. CO. v. KERR. (No. 6,104.)¹

(Appellate Court of Indiana, Division No. 2.
Dec. 11, 1907.)

1. INSURANCE — REINSURANCE — EXTENT OF LIABILITY OF REINSURER.

Act March 11, 1867 (Acts 1867, p. 150, c. 71; Burns' Ann. St. 1901, § 4956), amended in 1897 (Acts 1897, p. 276, c. 180; Burns' Ann. St. 1901, § 4858), expressly confers upon all insurance companies the power to reinsure their risks, with the consent of the insured, and provided that the liability of a company thus reinsuring to the person whose property is insured shall be the same as if the original policies had been issued by such company. Act March 9, 1897, § 15 (Acts 1897, p. 318, c. 195; Burns' Ann. St. 1901, § 4914c), and Act Feb. 10, 1899, §§ 18, 25 (Acts 1899, pp. 37, 39, c. 28; Burns' Ann. St. 1901, §§ 4894c1, 4894j1), recognizes the right and limits its exercise. The liability of an original insurer upon its contract with insured became absolute after the expiration of two years, and neither breach of warranty nor misstatement in the application was available to it as a defense. *Held*, that the original insurer could not deprive insured of his vested contract interest by contracting to reinsure his risk with the provision that the liability of the reinsurer should be conditioned upon the truth of every statement, representation, and warranty contained in the application.

2. SAME—ACTION AGAINST REINSURER—RATIFICATION OF CONTRACT.

By bringing suit against the reinsurer, the policy holder ratified and adopted the contract

of reinsurance so far only as it was authorized by law.

3. SAME—STATUTE A PART OF CONTRACT.

The statute authorizing reinsurance is part of the contract of reinsurance, and stipulations in conflict therewith are void.

4. SAME—POLICY—NOTICE TO POLICY HOLDER.

Where a policy of reinsurance issued to be attached to the original policy provided that the policy of reinsurance was subject to the contract of reinsurance with the original insurer, but did not convey the idea to the policy holder that a new contract was being made for him, it charged the policy holder only with notice of a contract of reinsurance such as the statute allowed the original insurer to make.

5. PLEADING—ACTIONS FOUNDED ON WRITTEN INSTRUMENTS—FILING INSTRUMENTS.

Under Burns' Ann. St. 1901, § 365, requiring that, when a pleading is founded upon a written instrument, the original or a copy thereof must be filed with the pleading, in an action on an insurance policy issued by one company and subsequently assumed by another, it was not necessary to file the contract of reinsurance between the two insurance companies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 831.]

Appeal from Circuit Court, Dubois County; E. A. Ely, Judge.

Action by William R. Kerr against the Federal Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

C. A. Atkinson, J. W. Wilson, D. D. Corn, and L. A. Whitcomb, for appellant. E. P. Richardson and A. H. Taylor, for appellee.

ROBY, C. J. The Model Life Insurance Company, a corporation organized under the laws of this state, issued a policy of insurance for \$1,000 upon the life of Clara A. Kerr, dated March 5, 1902; William R. Kerr, the husband of said insured being named as beneficiary. One of the provisions contained in said policy was that the same "shall be undisputable after two years from its date of issue for the amount due, provided that the premiums are duly paid as set forth above." The insured departed life December 8, 1904, having paid all premiums as provided by said contract. On March 12, 1904, the Federal Life Insurance Company, of Chicago, Ill., appellant herein, entered into a written contract with the Model Life Insurance Company, by the terms of which the Model Company transferred all its assets to the Federal Company, the latter assuming its obligations in consideration thereof. The contract is an extended one, covering 31 typewritten pages of the transcript. The eleventh article thereof was in terms as follows: "The assumption of any liability in respect to any certificate or policy thereunder is conditioned upon the literal and actual truth of each and every statement, representation, and warranty contained in the application to said first party for such certificate or policy, or in any warranty, stipulation or application for reinstatement thereof, or in any health, revival or renewal certificate furnished to said first party." It

¹ Rehearing denied, 85 N. E. 796. Superseded by opinion in Supreme Court, 89 N. E. 336. Rehearing denied, 91 N. E. 230.

thereafter issued a "policy of reinsurance," which was in terms as follows:

"Incorporated under the Laws of Illinois.

"Federal Life Insurance Company.

"Number, 6103. Amount, \$1,000.00

"Chicago.

"This policy of reinsurance is issued to Clara Kerr, of Algiers, county of Pike, state of Indiana, to be attached to certificate or policy No. 3251, of the Model Life Insurance Company of Indiana, and subject to all the provisions of the contract of re-insurance between said Model Life Insurance and this company, dated March 12, 1904, constitutes policy 6103 of the Federal Life Insurance Company, of Chicago, Illinois. Whereas, the said Federal Life Insurance Company does hereby assume the foregoing certificate or policy of said The Model Life Insurance Company in accordance with the terms of said reinsurance contract. Now, therefore, this policy and the said certificate to which it is to be attached constitute the holder thereof a policy holder of the said Federal Life Insurance Company, and the said Federal Life Insurance Company hereby assumes and grantees any obligation or indebtedness which may hereafter be established on account of such original policy or certificate, subject to the terms and conditions hereof and of said reinsurance contract; provided that all premiums or assessments required to maintain such policy or certificate in force shall be paid to the said Federal Life Insurance Company, as provided in the said original policy or certificate of said reinsurance contract. No change of policy or certificate further than the attachment of this reinsurance policy to said policy or certificate of the said The Model Life Insurance Company is necessary in order to bind the said Federal Life Insurance Company to the payment of the same, subject to the provision hereof and of the said reinsurance contract. The receipt and retention of this reinsurance policy by the policy holder above named shall operate as a ratification of the obligation hereby assumed by the Federal Life Insurance Company and as an acceptance of the terms hereof by the said policy holder. In witness hereof, the said Federal Life Insurance Company has caused these presents to be signed by its president and assistant secretary at the city of Chicago, state of Illinois, this 12th day of March, 1904.

"W. E. Brimstin, Assistant Secretary.

"Isaac Miller Hamilton, President."

Appellee sued to recover judgment for the amount of the policy, with interest. Demurrer to the complaint was overruled. Appellant answered, setting up article 2 as above quoted, and averring the falsity of certain statements contained in the insured's application to the Model Company. Demurrers to such answers were sustained.

The act of March 11, 1867, entitled, "An act authorizing insurance companies to re-

insure their risks and close up their business," is as follows: "Section 1. Be it enacted by the General Assembly of the state of Indiana, that any insurance company organized under the laws of this state may re-insure, by and with the consent of the insured, all their outstanding risks, in any joint stock insurance company authorized to transact business of insurance in Indiana, and such policy and contract of reinsurance shall be as binding upon the company making the same, and its liability to the party whose property is insured shall be the same as if the original policies had been issued by such company. * * * Acts 1867, p. 150, c. 71 (section 4956, Burns' Ann. St. 1901). When this act was passed the act of June 17, 1852 (1 Rev. St. 1852, p. 331, c. 54), entitled, "An act for the incorporation of insurance companies defining their powers and prescribing their duties," was in force. Section 20 (page 334), of that act was as follows: "Every such company may make insurance upon vessels, freight money, goods and effects, on the life or health of any person, or on money lent upon bottomry or respondentia; and they may also make insurance against fire, on any dwelling house or other building, merchandise or other property within the United States." This section, with an amendment including the power to insure property in the territories and in British America, and extending their scope of business to include insurance against lightning, explosions and tornadoes, is still in force. Act March 8, 1897; Acts 1897, p. 276, c. 180; section 4858, Burns' Ann. St. 1901. Section 2 of the act of March 11, 1867, provided for the return of all securities belonging to the company on deposit in the auditor's office upon a showing that it had "re-insured all of its outstanding risks or cancelled the same, and returned the unearned premiums thereon to the party insured," etc. In the act of February 10, 1899 (Acts 1899, p. 30, c. 28), "for the incorporation of life insurance companies on either the stock or mutual plan, defining their powers—prescribing their duties—" etc., the right to retire from business is limited (section 18: section 4894c1, Burns' Ann. St. 1901) by requiring that the retiring company show to the circuit or superior court of the county that it has reinsured all of its policies, and that it has no unpaid liabilities of any character. Section 25 (section 4894f1, Burns' Ann. St. 1901) still further limits the power to re-insure by requiring that two-thirds of the persons insured shall consent thereto. Section 15 of the act of March 9, 1897 (Acts 1897, p. 313, c. 195, section 49140, Burns' Ann. St. 1901), likewise places limitations upon companies organized under that act with regard to reinsurance or transfer of risks. It thus appears that the power to transfer all risks is expressly conferred by section 1 of the act of 1867, and not otherwise. This act is a general one applicable to all companies en-

gaged in the business of life insurance, as set out in section 3 of the act as amended in 1897 (section 4858, Burns' Ann. St. 1901). Neither section 18 or 25 of the act of 1899 nor section 15 of the act of 1897 purport to confer a right to transfer or reinsure risks. They recognize the existence of such a right, and limit its exercise. Section 1 of the act of 1867 declares that the liability of the company making the reinsurance "shall be the same as if the original policy had been issued by such company."

Appellant relies upon this section as authority for taking over the business of the Model Company, and there is no other warrant for the transfer. Its terms must, therefore, be complied with. Any so-called reinsurance contract that the Model Company might make containing stipulations inconsistent with the statute was beyond its power, and therefore ineffective. The liability of the Model upon its contract with the insured became absolute after the expiration of two years. Neither breach of warranty nor misstatement in the application was available to it in defense to an action on the policy after that time. The contract of reinsurance in so far as it undertook to deprive the policy holder of a vested contract interest was beyond the power of the Model Company to make. *Court of Honor v. Hutchens* (Ind. App. No. 5,857) 82 N. E. 89. By bringing this suit against the appellant, the appellee ratifies and adopts the contract of reinsurance so far only as it was authorized by the statute. The statute is a part of the contract. Stipulations in conflict with it are void. The contracting companies knew this. The policy holder knew it also. In bringing suit against appellant the beneficiary recognizes the validity of the contract, the legitimate end of which was to substitute one company for another. The references in the policy issued by appellant to the reinsurance contract were not so framed as to convey the idea to the policy holder that a new contract was being made for him, and such references are effective only to charge him with notice of a contract such as the statute permitted the Model Company to make, and the court did not err in sustaining demurrers to the appellant's answers.

A question of practice has been argued, arising upon appellant's demurrer to the complaint. The original policy issued by the Model Company and the policy of assumption issued by the Federal were both made parts of the complaint, but it is insisted that the reinsurance contract should also have been made a part thereof. The statute requires that, when a pleading is founded upon a written instrument, the original or a copy thereof must be filed with the pleading. Section 385, Burns' Ann. St. 1901. The appellee's action was founded upon the policy issued by the Model Company subsequently assumed by the appellant. The contract of reinsurance might be "useful as an instru-

ment of evidence" (*Mutual Benefit Life Ins. Co. v. Cannon*, 48 Ind. 265), but the action is not founded upon it, and it was not therefore a necessary exhibit (*Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352).

Judgment affirmed.

(230 Ill. 623)

McREYNOLDS v. PEOPLE.

(Supreme Court of Illinois. Oct. 23, 1907. On Rehearing, Dec. 11, 1907.)

1. STATUTES—CONSTRUCTION.

In construing a statute, every word, clause, and sentence should, if possible, be given effect. [Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 282-288.]

2. SAME—GENERAL AND SPECIFIC WORDS.

The rule ejusdem generis does not apply in the construction of statutes, where the specific words of a statute signify subjects greatly different from one another.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 272.]

3. WAREHOUSEMEN — OFFENSES BY WAREHOUSEMEN.

Hurd's Rev. St. 1905, c. 38, § 124, provides that whoever fraudulently utters any receipt or other written evidence of the delivery of any grain, flour, pork, etc., when the quantity specified therein has not in fact been delivered, and is not at the time of issuing the same still in store and the property of the person to whom the receipt is issued, shall be imprisoned as therein prescribed. Section 125 provides that whoever, having given any such receipt, shall sell or in any manner remove from the place of storage any such property without the consent of the holder of the receipt, shall be imprisoned as therein prescribed. *Held*, that the words "wharf or place of storage or in any warehouse, mill, store or other building," describing the place in which the property is situated, did not limit the operation of sections 124, 125 to buildings alone in which goods were received in store for hire, but that the same extended to all buildings in which goods were stored, whether for hire or otherwise, and hence one who, being the owner of an elevator, and having issued a receipt for grain therein also owned by him, thereafter removed the same without the consent of the holder, violated section 125.

4. SAME.

The words of section 124, forbidding the utterance of "any receipt or other written evidence of the delivery or deposit of any grain," etc., and those which forbid the utterance of the writing unless the goods are "still in store and the property of the person to whom or to whose agent the receipt is issued," etc., do not show that the statute does not cover a writing evidencing the deposit in a building of grain belonging to the owner of that building; but the requirements of the section in that regard are satisfied where such a writing is assigned, transferred, or delivered to another.

5. SAME.

A receipt evidencing the deposit of corn in an elevator is within Hurd's Rev. St. 1905, c. 38, §§ 124, 125, notwithstanding it reserved the right to store or intermingle the grain with other grain of the same grade.

6. SAME—INDICTMENT—VARIANCE.

An indictment under Hurd's Rev. St. 1905, c. 38, § 125, providing that whoever, having given a receipt or other written evidence of the deposit of grain, shall sell or in any manner remove such grain from the place of storage, without the consent of the holder of the receipt, shall be punished as therein prescribed, charged that defendant, having given such a receipt, removed

a large amount of the corn, "to wit, all of the said 4,670 bushels and 40 pounds," but the proof showed that 3,000 bushels of corn were left in the elevator. *Held* no variance.

7. SAME—OFFENSES BY WAREHOUSEMEN.

In a prosecution for a violation of Hurd's Rev. St. 1905, c. 38, § 125, it does not avail defendant that corn exceeding the amount of the receipt was in cars standing on railroad tracks in a yard which was a part of the elevator property and operated in conjunction with it; the "place of storage," within that section, being the elevator, and not the yard.

Cartwright and Vickers, JJ., dissenting.

Error to Criminal Court, Cook County; Julian W. Mack, Judge.

George S. McReynolds was convicted of a violation of Hurd's Rev. St. 1905, c. 38, § 125, providing that whoever, having given a receipt evidencing deposit of grain, etc., shall sell or in any manner remove from the place of storage such grain, etc., without the consent of the holder of the receipt, shall be punished as therein prescribed, and he brings error. *Affirmed*.

William J. Hynes and Cornelius Lynde (Colin C. H. Fyffe, of counsel) for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (James J. Barbour, of counsel), for the People.

SCOTT, J. McReynolds was convicted of a violation of section 125 of chapter 38, Hurd's Rev. St. 1905, in the criminal court of Cook county, and sentenced to the penitentiary. He has sued out a writ of error for the purpose of having the record reviewed by this court. That section of the statute refers to the section immediately preceding it, and the two read as follows:

"Sec. 124. Whoever fraudulently makes or utters any receipt, or other written evidence of the delivery or deposit of any grain, flour, pork, wool, salt, or other goods, wares or merchandise, upon any wharf or place of storage, or in any warehouse, mill, store or other building, when the quantity specified therein has not in fact been delivered or deposited as stated in such receipt or other evidence of the delivery or deposit thereof, and is not, at the time of issuing the same, still in store, and the property of the person to whom or to whose agent the receipt is issued, or for the whole or any part of which any other receipt is outstanding, or uncanceled, shall be imprisoned in the penitentiary not less than one nor more than ten years.

"Sec. 125. Whoever, having given any such receipt or written evidence of deposit or storage as is specified in the preceding section, or being in the possession or control of such property, shall sell, encumber, ship, transfer, or in any manner remove from the place of storage, or allow the same to be done, any such grain, flour, pork, wool, salt, or other goods, wares and merchandise, without the written consent of the holder of such receipt or other evidence of deposit or storage, except in cases of necessity for the purpose of saving such property from loss or damage by fire, flood or other

accident, shall be imprisoned in the penitentiary not less than one nor more than ten years."

The indictment charges that McReynolds, on September 19, 1906, had in storage in a building commonly called a "grain elevator," of which he was possessed, in Cook county, 4,670 bushels and 40 pounds of corn, and that he made a receipt and written evidence of the deposit of that corn in that elevator, which recited that the corn was subject only to the order of McReynolds thereon, and that on the 25th day of September, in the county of Cook, McReynolds delivered the document to the Corn Exchange National Bank of Chicago, a corporation, which thereupon became the holder thereof, and that thereafter, on January 18, 1906, without the written consent of the bank, which was still the holder of the document, McReynolds removed from said building "a certain large amount of said grain, * * * to wit, all of the said 4,670 bushels and 40 pounds of said grain." By proper averment the exception in section 123, supra, was negatived. It is conceded that the averments of the indictment as they are above recited are in accordance with the facts, except it is contended that the corn was not all removed, but, on the contrary, that about 3,000 bushels thereof remained in the elevator.

McReynolds was engaged in the grain business in Chicago, where he owned the elevator mentioned in the indictment. So far as appears from this record, he used his elevator exclusively for the purpose of handling grain owned by him, and did not receive therein, for any purpose, personal property owned by any person other than himself. The receipt or written evidence of deposit in question is as follows:

Elevator A.

McReynolds Elevator Company.

No. 2501. Lbs. 261560
Bush. 4670
Lbs. 40

Received in store from cars, forty-six hundred seventy and 40lbs. bushels of corn three (3) yellow, subject only to the order hereon of McReynolds & Company and the surrender of this receipt and payment of charges.

It is hereby agreed by the holder of this receipt that the grain herein mentioned may be stored with other grain of the same grade by inspection.

This grain is subject to regular rates of storage, loss by fire or heating at owners' risk.

McReynolds Elevator Company,

H. T. Pardee, Secretary.

So far as this suit is concerned, the names "McReynolds Elevator Company" and "McReynolds & Company" were mere trade names used by McReynolds. On the day of its date, McReynolds, in the name of "McReynolds & Co.," by indorsement written on the back of the receipt, assigned the same to the bank, and delivered it, together with a number of other like receipts similarly indorsed, to the said bank to secure his note for \$100,000. On January 19, 1906, the bank held receipts of this character, including the one in-

volved in this suit, to secure said indebtedness, for corn in the said elevator to the amount of 75,854 bushels. On that day bankruptcy proceedings were instituted against McReynolds, and it was then found that there were but 2,992 bushels of corn in the elevator. It is not clear whether this corn was of as good a grade as No. 3 yellow. The corn represented by the receipt described in the indictment was owned by McReynolds and was in his elevator at the time the receipt was written and transferred to the bank.

Assignments of error which question the action of the court in overruling a motion to quash each of the counts of the indictment and in passing on instructions necessitate a construction of the sections of the statute above set out. Plaintiff in error contends, in this connection: (1) "The statute, sections 124 and 125 of the Criminal Code, under which the indictment was drawn, runs only against warehousemen, wharfingers, and other persons who conduct the business of storing the goods of others for hire;" (2) the statute does not cover the case of one who utters a receipt or other written evidence of the deposit of his own property in his own building, but only applies where there has been an actual bailment; (3) the receipt has "no legal effect to represent the property in the goods therein described or to convey title to the goods," and it is therefore not such a receipt as is covered by the statute. Section 124, *supra*, contemplates the delivery or deposit of certain commodities "upon any wharf or place of storage, or in any warehouse, mill, store or other building." Plaintiff in error contends that the rule *ejusdem generis* applies, and that the words last quoted in fact mean "upon any wharf or other place of storage of the same kind, or in any warehouse or other building of the same kind." It is then asserted that the word "wharf" and the word "warehouse" have definite meanings in the law, and indicate places where goods are received and stored for profit; that the statute only applies to places of that character and to persons who receive and store the goods of others for gain. In 1851 a law was enacted in this state entitled "An act relating to warehousemen, wharfingers and other persons, and to prevent fraud." Gen. Laws 1851, p. 9. The first four sections of that law denounce certain acts which by that statute were made criminal. Each of those sections begins, "that no warehouseman, wharfinger, or other person," and the rule for which plaintiff in error here contends no doubt there applied; the "other person" intended by that statute being a person engaged in the business of the same kind as that of a warehouseman or wharfinger. The statute of 1851 continued to be the law of this state until July 1, 1874. It was repealed by an act approved March 5, 1874 (Rev. St. 1874, p. 1011, c. 131). Sections 124 and 125, *supra*, were part of an act approved March 27, 1874, which went into effect on July 1,

1874, at the same time that the act of 1851 ceased to be the law. While the statute of 1851 was in force, the Constitution of 1870 was adopted, section 1 of article 13 of which reads: "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses." Thereafter the Legislature of 1871 passed an act which was approved April 25, 1871 (Laws of 1871-72, p. 762), and which divided public warehouses, as defined in article 13 of the Constitution, into three classes, and section 25 of that act provides: "Sec. 25. Any warehouseman of any public warehouse who shall be guilty of issuing any warehouse receipt for any property not actually in store at the time of issuing such receipt, or who shall be guilty of issuing any warehouse receipt in any respect fraudulent in its character, either as to its date or the quantity, quality, or inspected grade of such property, or who shall remove any property from store (except to preserve it from fire or other sudden danger), without the return and cancellation of any and all outstanding receipts that may have been issued to represent such property, shall, when convicted thereof, be deemed guilty of a crime, and shall suffer, in addition to any other penalties prescribed by this act, imprisonment in the penitentiary for not less than one, and not more than ten years."

It is at once apparent, upon a comparison of section 25, *supra*, with section 125, *supra*, as plaintiff in error states, that the latter includes persons and covers acts not included in or covered by the former. The question is: Does the latter act include one who does not receive the goods of another for the purpose of storing them for profit? We think a comparison of the enactment of 1851 with sections 124 and 125, *supra*, aids in determining the meaning of the present statute. It is to be observed that the act of 1851 is limited in its operation by the words descriptive of the persons to whom it shall apply; those words being, as hereinabove pointed out, "warehouseman, wharfinger or other person." Sections 124 and 125, *supra*, do not contain these words, but instead, for the apparent purpose of indicating the persons at whom the statute is aimed, each section begins with the word "whoever," which would seem to make the statute of more general application than that of 1851. If the later statute is limited, as contended by the plaintiff in error, the limitation must be gathered from the words "in any warehouse, mill, store or other building." Do the words "mill, store or other building" mean only buildings in which goods are received in store for hire? If so, it is manifest that the words "mill" and "store," as used in the statute, are superfluous, because both would be included in the term "or other building," and it is certain that the word "mill," at least, does not ordinarily indicate a place or building in which goods are stored

for hire. It is a cardinal rule of construction that every clause, sentence, and word in a statute should, if possible, be given effect. The rule *ejusdem generis*, moreover, does not apply "where the specific words signify subjects greatly different from one another, for here the general expression might very consistently add one more variety. In such case, the general term must receive its natural and wide meaning." 26 Am. & Eng. Ency. of Law (2d Ed.) p. 610. If plaintiff in error's contention that the word "warehouse," as used in this statute, means only a warehouse in which goods are stored for hire, then the word "mill" is of such greatly different significance that the rule under discussion cannot be held to so limit the words "or other building" as that they will include only buildings in which goods are so stored. It seems extremely improbable that the Legislature, by the use of the words "wharf or place of storage, or in any warehouse, mill," etc., intended to place upon the operation of the statute on this subject, so far as persons brought within its purview are concerned, precisely the same limitation that is removed by using in the statute of 1874 the word "whoever" in lieu of the words "warehouseman, wharfinger or other person," as found in the statute of 1851, and yet this would be the precise result if the construction of counsel for plaintiff in error be the correct one. In our opinion the Legislature intended sections 124 and 125, *supra*, to include all buildings, of every kind and character, in which goods, wares, and merchandise are or may be stored, whether for hire or otherwise.

It is then urged that words of section 124, *supra*, especially those which forbid the utterance of "any receipt or other written evidence of the delivery or deposit of any grain," etc., and those which forbid the utterance of the writing unless the goods are "still in store and the property of the person to whom or to whose agent the receipt is issued," etc., show conclusively that the statute does not cover a writing evidencing the deposit in a building of goods belonging to the owner of that building. It may be conceded that the ordinary meaning of the word "receipt" would not indicate a writing evidencing a transaction of the kind mentioned, but there might well be written evidence that the owner of certain grain had deposited that grain in a building owned by him. If the owner made a written statement that grain owned by him had been so deposited, and signed the same, and thereafter transferred the writing to another for the purpose of conveying the grain, that writing, as against him, would be written evidence of the deposit of the grain in the building in question, and would, we think, satisfy the requirements of the statute in that regard. Such a writing would only be regarded as "issued" when assigned, transferred, or delivered by the owner of the building to some other person. If the owner of the building made such a

writing and rightfully kept it in his own possession, it would, of course, be entirely ineffective for all purposes. It is when he has assigned, transferred, or delivered such writing to another that it is "issued," within the meaning of the statute.

Counsel for plaintiff in error have cited a number of cases arising in other states which they deem important in the consideration of the questions which we have just been discussing. We have examined those cases and the statutes in the various states under which they arose, and are of the opinion that those statutes are so materially different from our own that the cases should not be given controlling effect, especially in view of the history of legislation on this subject in this state.

The receipt in the case at bar reserved to McReynolds the right to "store" or intermingle the grain with other grain of the same grade, and it was, in fact, so intermingled. It is urged that this receipt had no legal effect "to represent the property in the goods therein described or to convey title to the goods," and that the statute does not apply for the reason that the Legislature could not have intended to protect a document which was without legal effect, so far as transferring the goods or any property interest therein was concerned. Plaintiff in error, for the purpose of showing that his view of the effect of this receipt is the correct one, relies principally upon the cases of *Union Trust Co. v. Trumbull*, 137 Ill. 146, 27 N. E. 24, and *Snydacker v. Blatchley*, 177 Ill. 506, 52 N. E. 742. In the *Trumbull Case* there was a contest between the creditors of Hall & Co., an insolvent firm. One Vehmeyer held a receipt, the legal effect of which, so far as the question now under consideration is concerned, was the same as that of the receipt in the case at bar. The firm made a voluntary assignment under the law of the state. Vehmeyer claimed a specific lien upon certain property of the character indicated by his receipt. The court held that certain other persons were entitled to liens upon that property, and that Vehmeyer was not entitled to a specific lien, as claimed. The assets were not sufficient to satisfy the liens of such other persons. There is nothing in the opinion that indicates the view of the court in reference to the rights of Vehmeyer as against Hall & Co. under the receipt, had the claims of such other persons not intervened, or had the assets been sufficient to satisfy the claims of all. Vehmeyer was merely denied all rights as a secured creditor. In the *Snydacker Case* the instrument executed, while denominated a grain receipt, was, in effect, a chattel mortgage, and the court merely held that as there was no acknowledgment and recording and no change of possession the instrument was not valid as against third parties. It is manifest that neither of these cases warrants the conclusion that a receipt, such as that before

us, does not affect the title to or the ownership of the property as between the person signing it and the holder thereof. So far as the title to the grain itself, or so far as the creation of any lien thereon, is concerned, as to third parties the receipt was, of course, absolutely without effect.

The vendor may sell a quantity of grain, part of a mass, the quantity so sold not being identified or separated from the mass and not being delivered, and the title thereto will pass as between the vendor and the vendee. *Cushing v. Breed*, 14 Allen (Mass.) 376, 92 Am. Dec. 777; *Kimberly v. Patchin*, 19 N. Y. 330, 75 Am. Dec. 834; *Yenni v. McNamee*, 45 N. Y. 614; *Young v. Niles*, 20 Wis. 616; *O'Dell v. Lyda*, 46 Ohio St. 245, 20 N. E. 472; *Merchants' Bank v. Hibbard*, 48 Mich. 118, 11 N. W. 834, 42 Am. Rep. 465; *National Exchange Bank v. Wilder*, 34 Minn. 149, 24 N. W. 699. See, also, reasoning of opinion in *Cloke v. Shafroth*, 137 Ill. 393, 27 N. E. 702, 31 Am. St. Rep. 375. It is, of course, true, that where the property sold has not been identified or separated from the common mass replevin could not be maintained; but it is also true that if the whole was destroyed by fire without the fault of the owner of the building in which the grain was stored, and while that sold was still unidentified and undelivered, the loss would fall upon the vendee to the extent of the grain sold to him. *Hoyt v. Fire Ins. Co.*, 26 Hun, 416. It seems equally clear that if the owner of a building had therein 10,000 bushels of corn in a common mass and should sell 1,000 bushels to each of 10 different persons without identifying or separating any of that sold and make and assign to each vendee a receipt like unto that assigned by McReynolds to the bank, and that by proper indorsement and transfer all the receipts should come to the hands of the same party, this party could then maintain replevin for all the corn if it still remained undisturbed in the vendor's building. Had the transaction between McReynolds and the bank been intended as a sale, we think the title to the corn would have passed as between the vendor and the vendee, and that the receipt having been indorsed and delivered as collateral security, it was, in legal effect, an unrecorded and unacknowledged chattel mortgage, possession of the property remaining with the mortgagor, and that it was such an instrument as comes within sections 124 and 125, *supra*.

It is urged that there is a fatal variance between the allegations and proof, because, it is said, there were 3,000 bushels of corn in the elevator which was of the description specified by the receipt, while the indictment charged that a large amount of the corn, "to wit, all of the said 4,670 bushels and 40 pounds," had been removed. The point is that the proof would not support a conviction, in view of the phraseology of the indictment, unless it showed the removal of all

the corn. By a fundamental rule of evidence the averment of the indictment made proof of the removal of all or any portion of the corn admissible. There was no variance.

Evidence was introduced which showed that on the 19th of January, 1906, there were 6,000 bushels of corn in cars standing on railroad tracks in a yard which was a part of the elevator property and which was operated in conjunction with the elevator. It is insisted that the first instruction given at the request of the prosecution was erroneous, because it advised the jury, in substance, that the fact that McReynolds owned this corn in the yard was without significance. We think the instruction was correct. McReynolds was required by the law to keep the corn in the "place of storage," which was the building, and not the yard.

We have carefully considered other assignments urged by counsel which question the action of the court in passing on instructions to which the foregoing portion of this opinion does not apply and in permitting evidence to go to the jury over the objection of McReynolds. The indictment, by proper averment, charges a violation of section 125, *supra*. Evidence was admitted to which no objection of any character was interposed and which was in no wise questioned or disputed, which, as we have above construed the statute, conclusively establishes the fact that McReynolds is guilty of the crime for which he was tried. The alleged errors pointed out by such other assignments, even if well assigned, would not, under these circumstances, warrant reversal. Under our construction of the statute they are harmless in any event, and for this reason it is unnecessary to lengthen this opinion by discussing them.

The judgment of the criminal court will be affirmed.

Judgment affirmed.

CARTWRIGHT and VICKERS, JJ. (dissenting). It is the rule in the construction of statutes that the Legislature are presumed to have used words in their ordinary and popular meaning; and, applying that rule to sections 124 and 125 of the Criminal Code, it, in our opinion, forbids the interpretation given to them in the foregoing opinion. The words, "any receipt or other written evidence of the delivery or deposit of any grain, flour, pork, wool, salt, or other goods, wares or merchandise, upon any wharf or place of storage, or in any warehouse, mill, store or other building," contained in section 124, when given their ordinary meaning, can only be applied to an acknowledgment by one person to another of the delivery or deposit of such property with the person giving the instrument by the person to whom it is given. We do not see how the words can be applied to an instrument by which a person acknowledges that he has his own goods or property in his own warehouse, mill, store,

or other building. It is only one who has "given any such receipt or written evidence of deposit or storage" who can be guilty of the offense specified in section 125.

Another rule is that criminal statutes shall be strictly construed, and in this case we think that rule is violated by giving the most liberal construction possible to the words of the statute, so as to bring the instrument executed by the plaintiff in error within the terms of the statute. Under the rule of strict construction, always adopted in construing statutes creating crimes, we do not see how the instrument in question can be held to be a receipt or written evidence of deposit or storage of grain with the plaintiff in error.

On Rehearing.

SCOTT, J. Plaintiff in error, by his petition for rehearing, contends, among other things, that the cases of *Sykes v. People*, 127 Ill. 117, 19 N. E. 705, 2 L. R. A. 461; *Mayer v. Springer*, 192 Ill. 270, 61 N. E. 348, and *State v. Stockman*, 30 Or. 36, 46 Pac. 851, are of controlling importance in this case, and erroneously assumes that, as those cases were not discussed in the opinion herein, they did not receive the consideration of the court. In the *Sykes* Case the court considered whether section 25 of the warehouse act was repealed by sections 124 and 125 of the Criminal Code, and determined there was no such repeal. It was there decided that the sections of the Criminal Code referred to include "places of deposit or of storage not public warehouses as designated in the warehouse act," and make unlawful certain things not made unlawful by the warehouse act. There is nothing in that opinion which even remotely indicates the view of the court as to whether those sections extend to and include a building where the business of "storing the goods of others for hire" is not conducted, which is the question in reference to which plaintiff in error deems the case important. The opinion heretofore filed in this case recognizes the law to be as it is stated in the case last referred to, and, indeed, the law so stated was not in any wise questioned by defendant in error. In *Mayer v. Springer*, supra, the court determined that a mill in which the business of a public warehouseman was not ordinarily conducted did not become a public warehouse where the owner occasionally received and stored therein grain upon which he held an option of purchase, and it was said that isolated instances of so receiving grain would not convert "a mill, store, barn, or granary" into a public warehouse.

It is urged that this case shows that the word "mill," as used in the statute, comes within the same class of buildings or places of deposit as a warehouse or a wharf, and that for this reason it is apparent that the rule ejusdem generis must be held to apply to the words "warehouse, mill, store or other

building," as used in section 124, supra. We think no such conclusion can fairly be drawn. In fact, "mill" is by that opinion classed with "store," "barn," and "granary." Certainly a barn signifies a place greatly different from a wharf or warehouse, and does not, within any ordinarily accepted meaning of the word, indicate a place where the business of "storing the goods of others for hire" is conducted. The two Illinois cases above mentioned have no application whatever to the controverted legal questions arising upon this record. We stated in the original opinion herein our reason for declining to give weight to cases relied upon by plaintiff in error (including *State v. Stockman*, supra) which had been determined in other jurisdictions, and nothing is to be added to what was there said in reference to such adjudications.

The petition for rehearing will be denied.
Rehearing denied.

(230 Ill. 584)

NOBLE v. FICKES et al.

(Supreme Court of Illinois. Oct. 23, 1907.
Rehearing Denied Dec. 5, 1907.)

1. WILLS—DEFINITION.

A "will" is an instrument whereby one disposes of property to take effect after death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 183.]

2. SAME—PROBATE—PRIMA FACIE CASE.

Under the statute of wills (Hurd's Rev. St. 1905, c. 148), § 2, prescribing the essentials to admit a will to probate, proof that a will was signed by the testator, or in his presence by some one under his direction, that it was attested by at least two or more credible witnesses, that two witnesses saw the testator sign the will in their presence, or that he acknowledged the same to be his act and deed, and that he was of sound mind and memory when he signed or acknowledged the will, make a prima facie case entitling it to probate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 697-710.]

3. SAME—FORM OF WILL—ESSENTIALS.

If the maker's intention to dispose of his estate after death is sufficiently manifested and lawful, and the instrument is executed according to the statute, it will operate as a will, regardless of its form.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 228.]

4. EVIDENCE—PAROL—ADMISSIBILITY TO SHOW A WILL.

Parol testimony is inadmissible to add to, alter, or contradict the terms of a written contract or other instrument, and to show that an undelivered warranty deed attested by two witnesses was intended as a will; there being nothing in the instrument imparting to it a testamentary character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2135; vol. 49, Wills, § 95.]

Cartwright and Carter, JJ., dissenting.

Appeal from Circuit Court, Carroll County; O. E. Heard, Judge.

Thomas Noble appeals adversely to Maggie Fickes and others, from a judgment denying probate of an alleged will. Affirmed.

This is an appeal from the circuit court of Carroll county from a judgment denying probate of an instrument alleged to be a will of John Noble. The instrument offered for probate is in the form of a statutory warranty deed, and purports to convey, in consideration of natural love and affection, 503½ acres of land in Carroll county to Thomas Noble, son of John Noble. The instrument was executed on August 24, 1897, and was duly acknowledged by John Noble and attested by two credible witnesses, Jacob Slayman and Don R. Fraser. On June 10, 1898, John Noble executed a last will, the fifth clause of which is as follows: "Fifth—The remainder of my estate, both real and personal, excepting the home farm, containing 503½ acres, which I have heretofore deeded to my son Thomas Noble, I give, devise and bequeath to my sons, Robert Noble, Thomas Noble and John W. Noble, share and share alike." This will was duly admitted to probate on the 11th day of July, 1904, and properly recorded in Carroll county. At the time of his death John Noble left nine surviving children, the three sons mentioned in clause 5 of his will, and six daughters, Elizabeth Tipton, Ada Ostandere, Isabelle Summerville, Anna Herrington, Maggie Fickes, and Lydia McPeak. Two of the daughters, Elizabeth Tipton and Ada Ostandere, filed a bill in partition against the other children, alleging that the instrument involved in this suit was null and void as a conveyance, for the reason that it had not been delivered in the lifetime of their father. Thomas Noble, the appellant in the case at bar, answered the bill, alleging that the deed was executed and delivered on the day of its date; that it was deposited with Joseph S. Miles, the cashier of the First National Bank of Mt. Carroll, to be delivered to him upon the death of his father; and that, relying upon the deed, he had made large expenditures and improvements in the erection of valuable buildings on the premises. Thomas Noble filed a cross-bill in that case, alleging the substance of the matter set up in his answer, and praying for a decree establishing his title under the deed. Upon a hearing the cross-bill was dismissed, the deed in question was declared of no effect for want of delivery, and Thomas Noble was allowed a credit of \$3,000 on notes due his father's estate, on account of expenditures made by him in improvements upon the farm. Thomas Noble appealed from that decree to this court, and the decree was affirmed in all respects except as to the allowance of the \$3,000 credit, and the decree was reversed, and the cause remanded for further proceedings in accordance with the views there expressed. See *Noble v. Tipton*, 219 Ill. 182, 76 N. E. 151, 3 L. R. A. (N. S.) 1645. Upon reinstatement of the cause in the circuit court, Thomas Noble asked leave to withdraw from the files the deed in question and for leave to file a supplemental answer, for leave to strike out of the cross-bill all aver-

ments in regard to delivery of the deed, and to amend by inserting in his answer and cross-bill, in lieu of such averments, that said deed was a testamentary disposition of said lands by John Noble to him, and asked the court to continue the hearing until said deed could be admitted to probate. The court denied these several motions of Thomas Noble and proceeded to enter a decree in conformity with the previous decision of this court. Thomas Noble again brought the case to this court, assigning error upon the refusal of the court to allow his motions to amend and to continue. The decree was again affirmed, and the opinion of this court on the last appeal is reported as *Noble v. Tipton*, 222 Ill. 639, 78 N. E. 927. In neither of the former appeals to this court was the question presented or determined that is involved in this appeal. In the first appeal it was determined that the instrument in question could not be sustained as a deed for want of delivery in the lifetime of John Noble. In the second appeal it was decided that upon the reversal of a decree and remandment of a cause by this court, with directions to proceed in conformity with the views expressed in the opinion, it is the duty of the trial court to be governed by the views expressed in entering its decree, and if the questions involved, or any of them, have been decided upon their merits, that the trial court has no power to permit amendments to the pleadings so as to change the issues involved and make a retrial necessary of the questions so determined. The sole question presented for determination in the present case is whether the instrument offered for probate can be sustained as a testamentary disposition.

Skinner & Coe and C. L. Hostetter, for appellant. Ralph E. Eaton, for appellees.

VICKERS, J. (after stating the facts as above). A will is an instrument by which a person makes a disposition of his property to take effect after his death. 1 Jarman on Wills, 26; Schouler on Wills, p. 1; 1 Redfield on the Law of Wills [4th Ed.] c. 2, § 2, par. 1; Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265. Under section 2 of our statute of wills (Hurd's Rev. St. 1905, c. 148) to entitle a will to probate four things must concur: First, it must be in writing and signed by the testator, or in his presence by some one under his direction; second, it must be attested by at least two or more credible witnesses; third, two witnesses must prove that they saw the testator sign the will in their presence, or that he acknowledged the same to be his act and deed; fourth, the witnesses must swear that the testator was of sound mind and memory at the time of signing or acknowledging the will. Proof of the foregoing facts, in the absence of any proof of fraud, compulsion, or other improper conduct, will make a prima facie case entitling the will to probate. *Dickie v. Carter*, 42 Ill. 376; *Crowley v.*

Crowley, 80 Ill. 469; Thompson v. Owen, 174 Ill. 229, 51 N. E. 1046, 45 L. R. A. 682; Canatsey v. Canatsey, 130 Ill. 397, 22 N. E. 595; Harrison v. Weatherby, 180 Ill. 418, 54 N. E. 237. There is no prescribed form for a will, either under our statute or by the common law. If the intention of the maker to dispose of his estate after death is sufficiently manifested, and this intention be lawful in itself, and the instrument be executed in conformity to the statute, it will operate as a will regardless of its form. Jarman on Wills, 34; 1 Redfield on Wills (4th Ed.) c. 6, div. 7-9; Robinson v. Brewster, 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 285. In the Brewster Case the following instrument was held a valid will: "Know all men by these presents that I, Joseph Robinson, for the consideration of one dollar to me in hand paid, as well as my affection, do hereby assign and set over to my daughter, Eliza Jane Brewster, all of my property, both personal and real, to have the same after my death. Witness my hand and seal this seventh day

his
of May, 1877. Joseph X Robinson. [Seal.]
mark.

Attest: J. S. Post. E. McClellan." In a note to section 266 of Schouler on Wills, a large number of cases, both English and American, are collected, showing where various kinds of instruments, such as notes, bonds, deeds of indenture and deeds poll, and other writings, have been held valid as wills.

After an exhaustive examination of all the authorities accessible to us, we think the rule may be laid down that any writing, however informal it may be, made with the expressed intent of giving a posthumous destination to the maker's property, if executed in accordance with the statutory requirements, will be a good testamentary disposition. We have not been able to find a case in this state where a testamentary disposition in the form of an ordinary deed of bargain and sale has been sustained, although a number of cases are to be found where such instruments have been declared testamentary in character and void because not executed in compliance with section 2 of our statute of wills. Where such deeds have been actually delivered to the grantee in the lifetime of the grantor, they have been sustained as a present grant of a future interest. Thus, in Shackleton v. Seabee, 86 Ill. 616, a deed containing the words, "this deed not to take effect until after my decease—not to be recorded until after my decease," which had been delivered to the grantee in the lifetime of the grantor, was held to pass a vested remainder in fee to the grantee. Livery of seisin having been abolished by our statute, no intermediate life estate is necessary to support a remainder. In Harshbarger v. Carroll, 163 Ill. 636, 45 N. E. 565, the words in the deed were: "This indenture, made this seventeenth day of March, in the year of our Lord eighteen hundred seventy-one, between Samuel Harshbarger, Sr., party

of the first part, and Sylvia Harshbarger and her heirs (only to take effect at the death of the grantor)," etc. It was held that such a deed, duly executed and delivered in the lifetime of the grantor, vested a remainder in the grantee. Bowler v. Bowler, 176 Ill. 541, 52 N. E. 437, is another case of the same class. There the words of the deed were: "Not to be of any force and effect until after the death of the grantor." The deed was upheld as a good conveyance in present of a future estate in fee. Other cases of the same class no doubt might be found, but these are sufficient to illustrate the rule established by them. In all of these cases it is to be noted that there was an actual delivery of the deed to the grantee in the lifetime of the grantor. Had there been no delivery, the instruments could not have been upheld as deeds, and whether they could have been supported as testamentary dispositions would have depended upon whether the statutory requirements relating to the attestation of wills had been complied with.

In Olney v. Howe, 89 Ill. 556, 31 Am. Rep. 105, speaking of an assignment of a promissory note, made by a separate instrument, and other personal property, containing the clause, "possession of the same to be given to and taken by the party of the second part immediately upon the decease of the party of the first part," this court, speaking by Mr. Justice Baker, said (page 559 of 89 Ill. [31 Am. Rep. 105]): "The writing is essentially testamentary in its nature, and, omitting for the present the element of contract, its object was to make disposition of property after the death of the owner. It did not, after such death, take effect as a testamentary devise, for it was not executed and witnessed as required by the statute of wills." Cline v. Jones, 111 Ill. 563, a case much relied on by appellant in the case at bar, is a case where a father executed a deed to one of his children, but did not deliver it. The evidence showed that the grantor retained control of the deed and did not intend it to take effect until after his death. In disposing of that case, this court said (page 569): "The deed, by its purport, was absolute, conveying the grantor's entire interest, to operate immediately. But the evidence shows the deed was not intended to be absolute, but to be qualified in its effect; that it was not intended to convey the grantor's whole interest, but that he meant to have a life estate unless the grantee should move upon the land, which she never did; that the deed was not intended to operate presently, but only upon the grantor's death or going upon the land to reside. The evidence shows the distinct intention not to create a present estate in the grantee. As, then, there was never any actual delivery of the deed, but the grantor ever kept it in his own possession, and as it never was his intention that the deed should presently take effect and become operative according to its terms, there was no delivery of the instru-

ment as the deed of the grantor, and it was not valid as a deed. As Mrs. Jones never moved on the land, this made the deed one to take effect at the grantor's death, which was a disposition of property of a testamentary character, and invalid because not in compliance with the statute of wills." Many other cases are to be found where this court has held deeds and other instruments disposing of property at the death of the maker invalid because they were testamentary in character and not executed in strict conformity with the statutory enactments regulating the making of wills. See *Bovee v. Hinde*, 135 Ill. 137, 25 N. E. 694; *Hayes v. Boylan*, 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326; *Oliver v. Oliver*, 149 Ill. 542, 36 N. E. 955; *Wilson v. Wilson*, 158 Ill. 567, 41 N. E. 1007, 49 Am. St. Rep. 176; *Rountree v. Smith*, 152 Ill. 493, 38 N. E. 680; *Hollenbeck v. Hollenbeck*, 185 Ill. 101, 57 N. E. 36; *Wilenou v. Handlon*, 207 Ill. 104, 69 N. E. 892; *Oswald v. Caldwell*, 225 Ill. 224, 80 N. E. 131. In many of these cases, and perhaps others of the same class, the instrument under consideration has been freely spoken of by this court as testamentary in its character and therefore invalid because not executed in accordance with the statute of wills; but none of these cases can be regarded as an authority holding that the instruments under consideration would or would not be sustained as valid testamentary dispositions if such instruments had been properly executed under the statute of wills. The case in hand is therefore, so far as we are advised, the first one to come before this court involving the validity of an ordinary deed of bargain and sale as a testamentary disposition.

Upon the general proposition that a valid will may be made in the form of an ordinary deed of bargain and sale, we entertain not the slightest doubt, where the formalities of the statute are properly observed, and it clearly appears on the face of the instrument that it is not to take effect until the death of the maker. The inherent difficulty with the instrument involved in this case is that there is nothing in the writing itself which imparts to it a testamentary character. To give it this character a resort must be had to extrinsic facts depending on parol evidence. The admissibility of such evidence for the purpose of establishing the *animus testandi*, when offered for the purpose of supporting the writing as a testamentary disposition, is, in our opinion, the most serious question involved in this case. It is a well-established rule that parol evidence is inadmissible to add to, alter, vary, or contradict the terms of a valid written contract or other instrument of a solemn and conclusive nature. *Elliott on Evidence*, § 568; *Rigdon v. Conley*, 141 Ill. 595, 30 N. E. 1060. The rules for the admission and exclusion of parol evidence in regard to wills are essentially the same which prevail in regard to contracts generally. Such evidence is not receivable to show

the intention of the testator except to enable the court, where the question arises, to give the language such an interpretation as, from the circumstances in which he was placed, it is reasonable to presume the testator intended it should receive, or, as it is sometimes expressed, to put the court in the testator's place. 1 *Redfield on Wills* (4th Ed.) p. 496. Under the lax rules that formerly prevailed in England, especially in the ecclesiastical courts, where wills of personal property were probated, cases may be found where a resort to extrinsic parol evidence was allowed for the purpose of establishing testamentary intent, where there was no ambiguity on the face of the instrument, and the instrument afforded no evidence that it was only to take effect upon the death of the maker; and there are some decisions in this country to be found in the earlier reports where instruments in the form of a deed of gift have been admitted to probate out of regard to the giver's testamentary purpose, which was disclosed by extrinsic parol evidence. Some of these cases may be found collected in the note above cited from Schouler on Wills. This question is very ably discussed by Chancellor Kent in *Mann v. Mann's Ex'rs*, 1 Johns. Ch. (N. Y.) 231, where the earlier cases are carefully reviewed and the rule of law deduced, as follows: "It is a well-settled rule that seems not to stand in need of much proof or illustration, for it runs through all of the books from Chaney's Case, 5 Co. Rep. 68, down to this day, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of a will, or to explain the intention of the testator, except in two specified cases: First, where there is a latent ambiguity arising dehors the will as to the person and subject-matter meant to be described; and, second, to rebut a resulting trust. All of the cases profess to go upon one or the other of these grounds." See 1 *Redfield on Wills* (4th Ed.) p. 501.

In *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458, the question arose as to the admissibility of parol evidence to show the testamentary intention in the making of a deed which was unambiguous on its face. That court, in a well considered and exhaustive opinion, held that such evidence was not admissible, and expressed its conclusion as follows: "We have had difficulty in finding a case in which the exact point before us is raised, but it seems manifest that the same rule that forbids the contradiction of an established will should forbid the contradiction of the same instrument as a means of establishing it as a will, when its terms plainly show it to be a deed conveying a present interest. It is only when the writing is of doubtful import that interpretation by the aid of extrinsic evidence becomes necessary, and in such case interpretation—not contradiction—is permissible. We are reluctantly driven to the conclusion that we cannot give effect

to the deceased's manifest desire—a desire so well established and so apparently well grounded and just as to merit our approbation—but we fear that the trite saying that 'hard cases make bad law' would be applicable should we sustain the complainant's contention. To do so would be to override established rules and principles essential to the protection of the rights of heirs." There are very strong reasons why this rule should be applied in this state. Our statute requires wills to be in writing. If an unambiguous deed, which on its face purports to convey a present interest, can be converted into a will by proving an *animo testandi* in the maker by parol evidence, the effect is not only to change the legal character of the instrument, but to ingraft upon it one of the essentials of a will by parol, in the face of our statute, which requires all wills to be in writing.

This case is clearly distinguishable from *Cline v. Jones*, supra, and other cases in line with it, including the case between these parties decided in 219 Ill. 182, 70 N. E. 151, 3 L. R. A. (N. S.) 1645, where the question at issue was whether a deed had been delivered. Delivery is largely a question of intention and may be shown by any competent evidence. Evidence on that point does not contradict or vary the terms of the instrument, but bears on the question whether the instrument, in fact, ever had a legal existence. It would be a strange result if the same evidence which destroyed the instrument as a deed should bring it to life as a will.

Our conclusion is that it would be an unsafe rule to hold that an undelivered deed, which by chance happened to be attested by two witnesses, could be converted into a will by parol evidence.

The decree of the circuit court of Carroll county is affirmed.

Decree affirmed.

CARTWRIGHT and CARTER, JJ. (dissenting). We do not regard the facts of this case as sufficient to justify defeating the intention of John Noble, nor the reasoning of the foregoing opinion as justifying the conclusion reached. In a great many cases this court has held that if a deed is not delivered to the grantee in the lifetime of the grantor, but is intended to take effect only upon the death of the grantor, it is testamentary in character and invalid as a deed. For the purpose of showing the intention of the grantor parol evidence is admissible, and if by such evidence it is shown that the deed was not intended to operate presently, but only upon the grantor's death, it is uniformly declared to be a testamentary disposition of the property, and not operative, unless executed in conformity with the statute of wills. *Oswald v. Caldwell*, 225 Ill. 224, 80 N. E. 131, and cases there cited.

The evidence shows that the instrument in

question in this case was deposited with the will of John Noble, in the same envelope, in a bank, and the indorsement made upon the envelope by his direction manifested his intention that the instrument was not to be effective and not to be delivered until his death. In the suit for the purpose of setting aside the instrument as a deed, it was claimed to be a testamentary disposition of the property, and invalid as a deed for want of delivery. It was competent in that suit to prove the intention of John Noble for the purpose of showing that the intended disposition of the farm was testamentary in character and ambulatory until his death, and we do not see how it can be now held that the same evidence is not admissible or competent to prove the same fact. We do not see how it can consistently be said that the instrument amounts to a testamentary disposition of the property described in it, and yet that it is not a testament, although it was executed with all the formalities required in the case of a will. If the effect of the evidence by which the instrument was invalidated as a deed had been to vary or contradict the plainly expressed terms of the instrument, it would have been incompetent. But that was not the effect in the other suit, nor in this one. The delivery of a deed is an essential part of its complete execution; but it is not shown on the face of a deed or by its terms. The delivery or nondelivery of a deed is almost wholly a matter of intention. A delivery may be by acts without words, or words without acts, the only requirement being that the evidence shall show an intention of the grantor that the deed shall become operative and effectual (*Gunnell v. Cockerill*, 79 Ill. 79); and the acceptance of a deed for the benefit of the grantee, such as this one, will be presumed (*Haenni v. Bleisch*, 146 Ill. 262, 34 N. E. 153).

Proof of delivery or nondelivery of an instrument does not in any manner add to its terms, and if it is admissible to show an intention that the instrument shall only become operative upon the death of the grantor, and is therefore of a testamentary character, we see no logical ground upon which it can be said that it is not competent to establish the instrument as a will, provided it is executed in conformity with the statute of wills. The fact that no instrument in the form of a deed has ever been held by this court to be a will is of no more consequence than the fact that no instrument in the form of a deed has ever been declared by this court not to be a will. No weight is to be given to either.

The four requirements of the statute of wills which are mentioned in the foregoing opinion, and which entitle an instrument to probate as a will, were all fully complied with in this case, and the evidence shows that the deed was deposited with the will, to be delivered after the death of the mak-

er, and to take effect at that time. References to the instrument as a deed of bargain and sale, and the conclusion that it would be an unsafe rule to hold that such a deed, which by chance happened to be attested by two witnesses, could be converted into a will by parol evidence, are inappropriate in this case. The instrument is not a deed of bargain and sale, and expresses no valuable consideration whatever. The form of a statutory conveyance was used in part; but it did not follow that form by expressing a consideration paid, and the only consideration expressed or in fact existing was "natural love and affection" for the son. The uncontradicted evidence is that John Noble was advised by his attorney that a delivery would be essential to make the instrument effective as a deed, but that he could make a deed, and, if it was properly witnessed, and failed as a deed, it might be good as a testamentary disposition of the farm, and would operate as a will. The witnessing was not by chance or accident, but was at the request of the maker of the instrument.

There was further evidence which, in our opinion, was entirely competent and sufficient to meet all the requirements of the law and fix the character of the instrument as a will. In disposing of his property by the instrument, which is in form a will, the testator referred to the property described in the deed as being a part of his estate at his death, and declared his intention that it should go to Thomas Noble by virtue of this instrument. After disposing of other property, not including the home farm described in the deed, he devised the remainder, expressly excepting from the operation of the residuary clause the home farm, containing 503½ acres, with the statement that it had been deeded to his son, Thomas Noble. He was not only presumed to know the law regarding the necessity of a delivery to make the instrument operative as a deed, but was also advised by his attorney as to the law, and the will shows that he regarded the home farm as a part of his estate, which would pass by the residuary clause, unless excepted therefrom. The two instruments were deposited together, and, as the will referred to the deed, they are to be construed together. When so construed, there can be no doubt, as we think, that the instrument was intended to operate as a will. Not only is the plain intention of Thomas Noble defeated by the decision in this case, but the absurd result is reached that in making his will he designed to die intestate as to the home farm, and that it is, in fact, intestate property. As we understand it, such an intention and such a consequence will always be avoided where it is possible, and we see

no good reason either for defeating the intention of the maker of the instrument or holding the property to be intestate estate.

(196 Mass. 583)

McDONALD v. LOVELL et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Dec. 10, 1907.)

MASTER AND SERVANT—INJURIES TO SERVANT—USE OF APPLIANCES—ASSUMED RISK.

Plaintiff, an employé in a candy factory, was injured by the slipping of a rough ladder, which stood on an ordinary wooden floor and slipped because it was placed too far from the wall. *Held* that, the ladder having been in use when plaintiff entered defendant's service, plaintiff assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 551-553.]

Exceptions from Superior Court, Suffolk County; Edgar J. Sherman, Judge.

Action by Abellina O. McDonald against Clarence N. Lovell and others. At the close of the evidence a verdict was directed for defendants, and plaintiff brings exceptions. Overruled.

The action was in tort to recover damages sustained by plaintiff while at work in defendant's candy factory by a fall caused by a ladder slipping from under her while taking a box from a shelf. She testified that she was employed to buy ribbons and artificial flowers at wholesale houses and to use the same in trimming candy boxes, and that part of the material was on shelves in the storeroom, which were reached by a rough ladder made of unplanned boards, the same width all the way up. The top of the ladder rested on the edge of an upper shelf about an inch wide, without anything to hold the ladder in place; the bottom resting on the floor, which was of smooth boards. On the occasion of the accident she went up the ladder, which slipped from under her, causing the injuries.

Thos. J. Kenny and Jos. P. Bell, for plaintiff. Matthews, Thompson & Spring, for defendants.

PER CURIAM. The plaintiff was of full age and not lacking in intelligence. The ladder, though rough and homely, was sound, exactly what it appeared to be, and suitable for the purpose for which it was used. The floor was an ordinary wooden floor. If the foot of the ladder was placed too far from the wall it would slip and the plaintiff knew it.

The ladder was there in use when the plaintiff entered the defendant's service. That an employer owes the employé no duty to change such an appliance, and that the employé on entering the service impliedly agrees to assume such risk as there is in the use of it, is too plain for argument or the citation of authorities.

Exceptions overruled.

(77 Ohio St. 130)

STEWART et al. v. HERRON.

(Supreme Court of Ohio. Nov. 19, 1907.)

SALES—CONTRACT—CONSTRUCTION—TIME OF PAYMENT.

J. R. S. entered into a written agreement with S., J., and G., whereby he agreed to sell, and they agreed to buy in equal proportions, 360 shares of corporate stock on certain terms and conditions, which were in part: (1) "The purchase price of said stock shall be its par value of one hundred dollars (\$100.00) per share." (2) "Said stock shall remain in the name of said J. R. Stewart, until it is fully paid for as herein provided," etc. (3) "All dividends declared on said stock shall be paid to said J. R. Stewart, until it is paid in full. Enough of said dividends shall be retained by him to make four per cent. on the balance of said purchase price unpaid at the time said dividends are respectively declared, and the balance thereof applied by him on said purchase price; and as soon as said stock is fully paid for, either through dividends or otherwise, it shall be delivered to said purchasers. In case the dividend declared any year shall be less than four per cent. no interest shall run on said purchase price in excess of the dividend declared, and if none be declared there shall be no interest." (4) "Should said purchasers desire to make payments on said purchase price in addition to the dividends from time to time declared on said stock, they shall have the option of doing so." There was no express promise by the purchasers to pay for said stock, and no time named in the contract itself within which it was to be performed. *Held*, the contract is not wanting in mutuality or consideration. No time of payment being fixed by said contract, the law implies—from their agreement to purchase—a promise and engagement on the part of the purchasers to pay, through dividends or otherwise, within a reasonable time.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Petition by John W. Herron, as administrator of Jacob R. Stewart, for leave to sell corporate stock, and George F. Stewart and W. T. S. Johnson file cross-petition. Judgment for administrator, and cross-petitioners bring error. Judgment of circuit court reversed and of court of common pleas affirmed.

The defendant in error, John W. Herron, as administrator of the estate of Jacob R. Stewart, deceased, filed his petition in the probate court of Hamilton county, Ohio, asking the direction and instruction of said court as to the disposition proper to be made by him of 360 shares, of the par value of \$100 each, of the capital stock of the Bradford Machine Tool Company, a controversy having theretofore arisen between plaintiffs in error and certain of the next of kin of Jacob R. Stewart, deceased, as to who was the legal owner of said stock. To this proceeding instituted by the administrator, all persons in interest, including the Bradford Machine Tool Company, were made parties defendant, and entered their appearance therein. The plaintiffs in error George F. Stewart and W. T. S. Johnson filed their answer and cross-petition, asserting a claim to said 360 shares of stock under and by virtue of the following written contract made with decedent, Jacob R. Stewart, in his lifetime: "J. R. Stewart agrees to sell 360 shares of

the capital stock of The Bradford Mill Company to W. T. S. Johnson, George F. Stewart and Lewis N. Gatch, and said W. T. S. Johnson, George F. Stewart and Lewis N. Gatch agree to buy the same in equal proportions, on the following terms and conditions, viz.:

(1) The purchase price of said stock shall be its par value of one hundred dollars (\$100.00) per share. (2) Said stock shall remain in the name of said J. R. Stewart until it is fully paid for as herein provided. During the time it stands in his name he shall retain full power to vote the same; provided, however, that if said purchasers unite in requesting that it be voted in any particular way, it shall be voted in accordance with their unanimous request; and provided, also, that in case of his ceasing to take an active part in the business, said stock thereafter, until it is delivered to said purchasers, shall be voted in accordance with the request of any two of them. (3) All dividends declared on said stock shall be paid to said J. R. Stewart, until it is paid in full. Enough of said dividends shall be retained by him to make four per cent. on the balance of said purchase price unpaid at the time said dividends are respectively declared, and the balance thereof applied by him on said purchase price; and as soon as said stock is fully paid for, either through dividends or otherwise, it shall be delivered to said purchasers. In case the dividend declared any year shall be less than four per cent., no interest shall run on said purchase price in excess of the dividend declared; and if none be declared, there shall be no interest. (4) Should said purchasers desire to make payments on said purchase price, in addition to the dividends from time to time declared on said stock, they shall have the option of doing so. (5) Said W. T. S. Johnson and George F. Stewart severally agree to remain in the employ of said The Bradford Mill Company until each has paid his respective share of said purchase price, and in case either one of them withdraws from that employment before that time, excepting in the case of his death, he shall be entitled in severalty to so much of his portion of said stock as has been theretofore paid for, and to a sixty-day option on the balance of said portion at par, with six months time in which to pay for it; and this contract shall be terminated as to him, but it shall continue pro rata as to the other parties. In case either of said purchasers shall die during the continuance of this contract, the remaining two may acquire his interest in said contract, and in the stock covered by it, by paying to his estate an amount equivalent to that theretofore credited on his portion of said purchase price, and this contract shall continue on that basis. If they decline to do this, said J. R. Stewart shall pay that amount to said estate in cash. In either event, this contract as to said decedent shall be terminated, but it shall continue pro rata as to the other parties. (6)

The provisions of this contract as to dividends shall not apply to any dividend that may be declared at the close of the current fiscal year of said company; but said dividend shall be carried to the account of said J. R. Stewart, and no part thereof applied to the payment of said purchase price. Executed in quadruplicate this 23d day of September, 1899. [Signed] J. R. Stewart. W. T. S. Johnson. George F. Stewart. Lewis N. Gatch." By appropriate pleadings the validity of this contract was challenged and denied by Carrie E. Stewart, widow of Jacob R. Stewart, and by Gertrude Stewart Titus and Mary L. Hazelton, his children and heirs at law.

On February 10, 1900, the Bradford Mill Company was reorganized under the name of the Bradford Machine Tool Company. There was no change in the issue or distribution of stock, or in the officers or directors of the company, except that said Lewis N. Gatch was elected vice president thereof. On the date last above named the original contract was modified or amended by agreement of all the parties thereto, and the following indorsement was made thereon: "It is hereby agreed by the parties hereto that this contract in all its terms and conditions shall apply to 360 shares of stock of the Bradford Machine Tool Co., instead and in lieu of the said 360 shares of stock of the Bradford Mill Co., and that on this agreement said J. R. Stewart may surrender for cancellation said stock of the Bradford Mill Co., upon the issuance to him of the same amount of stock of the Bradford Machine Tool Co., which he agrees to hold subject to the terms of this contract and to the rights of the parties thereto in place of said surrendered stock. This agreement is made in order that the plan may be consummated by winding up the affairs of the Bradford Mill Co., by the surrender of its stock by its stockholders and the transfer of its assets to the Bradford Machine Tool Co., upon the issuance to said stockholders respectively of amounts of stock of the Bradford Machine Tool Co., equal to those of the Bradford Mill Co., surrendered by them. Cincinnati, Ohio, Feb. 10, 1900. J. R. Stewart. George F. Stewart. W. T. S. Johnson. Lewis N. Gatch." In 1901 the office of vice president was abolished, and Gatch ceased to be an officer, though he remained a director in the company. On February 11, 1902, the following writing was executed by the distributees of the estate of J. R. Stewart, deceased: "We consent and agree that Lewis N. Gatch may assign to George F. Stewart and W. T. S. Johnson, his interest in the contract of September 23, 1899, relating to 360 shares of Bradford Machine Tool Co. stock, leaving the contract in full force as at present excepting that Stewart and Johnson shall have all the rights and be subject to all the obligations that are now in Stewart, Johnson and Gatch." This writing was signed and delivered, with notice to

Johnson and Stewart that such signing and delivery should be without prejudice to the rights of the widow and daughters. On February 27, 1902, the administrator filed his application herein for instructions in the premises, and on March 3, 1902, an order issued upon said application authorizing the administrator to act in accordance with the above writing of February 11, 1902. Accordingly, on that date, the administrator indorsed upon said contract the following: "Cincinnati, Ohio, March 3, 1902. In accordance with an order of the Probate Court of Hamilton County, Ohio, this day made in the matter of the estate of Jacob R. Stewart, deceased, No. 49142 of said court, I hereby released the above named Lewis N. Gatch from any further obligation to said estate by reason of the within contract. John W. Herron. Admr., T. R. Stewart." At the same time W. T. S. Johnson, George F. Stewart, and Lewis N. Gatch indorsed upon said contract the following: "In consideration of one dollar and the mutual agreements of the undersigned, Lewis N. Gatch does hereby assign, without recourse, to W. T. S. Johnson and George F. Stewart all his right, title and interest in and to the within contract and the 360 shares of stock of the Bradford Machine Tool Company to which it relates. Said Johnson and Stewart hereby accept said assignment and assume any obligation which may have been imposed upon said Gatch by said contract. The above is done upon the written consent (dated Feb. 11, 1902), of Carrie E. Stewart, widow of the within named J. R. Stewart; George F. Stewart, Gertrude Titus and Mary Hazelton, his children, and John W. Herron, administrator of his estate. Done at Cincinnati, Ohio, this 3d day of March, 1902. Lewis N. Gatch, George F. Stewart, W. T. S. Johnson."

In the probate court the cause was heard and submitted upon an agreed statement of facts, which is fully set out in the record. Upon this hearing the probate court found and adjudged that the original contract made and entered into between Jacob R. Stewart and George F. Stewart, W. T. S. Johnson, and Lewis N. Gatch, because of uncertainty and indefiniteness as to the time of its performance, was voidable by the administrator; and instructed him that he had full right to terminate the same, but the court allowed to said George F. Stewart and W. T. S. Johnson so much of said stock as had been paid for by them; and gave them a 60-day option on the balance, at par, with 6 months' time in which to pay for the same, after the exercise of such option. Upon an appeal to the court of common pleas in which all the parties united, the court held that the contract, as modified by the writing of February 10, 1900, was a good and valid contract of mutual obligation, by the terms of which Jacob R. Stewart agreed to sell, and George F. Stewart, W. T. S. Johnson, and Lewis N. Gatch agreed to buy and pay for it

at its par value in money, 360 shares of the capital stock of the Bradford Machine Tool Company. From this judgment the administrator and the objecting distributees of the estate of Jacob R. Stewart prosecuted error to the circuit court, where the judgment of the court of common pleas was modified. The circuit court affirmed as to two-thirds of the number of shares of stock in question, reversed as to the one-third, and entered judgment accordingly. Again, none of the parties were satisfied with this judgment, and in consequence all are now seeking relief therefrom in this court. The plaintiffs in error are here, asking that the judgment of the court of common pleas, holding the contract valid, be reinstated and affirmed without modification. The defendants in error, by cross-petition, ask that said contract be declared wholly void.

Maxwell & Ramsey, for plaintiff in error.
W. C. Herron, for Herron, administrator.
John W. Warrington, for defendants in error.

CREW, J. (after stating the facts as above). The rights of the respective claimants to the 360 shares of stock involved in the present controversy must, as is apparent from the above statement of facts, be ascertained and determined from a consideration of whether or not the agreement of September 23, 1899, was, and is, a valid contract of mutual obligation binding upon all the parties thereto. It is claimed by defendant in error that this agreement is void and of no effect, because, as they insist, it is wholly uncertain and illusory in its nature, and is without mutuality or consideration. Referring to the writing itself, we find in the initial paragraph thereof this language: "J. R. Stewart agrees to sell 360 shares of the capital stock of the Bradford Mill Company to W. T. S. Johnson, George F. Stewart and Lewis N. Gatch, and said W. T. S. Johnson, George F. Stewart and Lewis N. Gatch agree to buy the same in equal proportions, on the following terms and conditions, viz." Here we have, pertinently and plainly expressed, mutual and concurrent engagements, equally obligatory upon the respective promisors—upon the one to sell, and upon the others to purchase, the 360 shares of stock upon such terms as are in said instrument expressed, and such as are necessarily implied therefrom. It is then further in said writing stipulated and agreed that "the purchase price of said stock shall be its par value of one hundred dollars (\$100.00) per share." Thus we find in the language and terms of the instrument itself absolute certainty as to parties, subject-matter, and consideration—every element necessary to a complete and valid contract of purchase and sale—and, if the foregoing were the only provisions of said instrument, it could not be doubted but that the contract as thus expressed would be one of binding obligation upon all the parties thereto. But we are told by counsel for defendants in error that, by force

of the provisions of the third clause of said instrument, the vendor, J. R. Stewart, is wholly deprived of the right to demand or exact payment for said 360 shares of stock from the purchasers thereof in any manner other than by application to the purchase price of future dividends on the stock itself; and that the effect of this is to destroy and extinguish any previously expressed personal obligation on the part of said purchasers, and to convert what would otherwise be a valid contract of mutual and binding obligation into a mere unilateral agreement without consideration. The language of this clause is as follows: "(3) All dividends declared on said stock shall be paid to said J. R. Stewart, until it is paid in full. Enough of said dividends shall be retained by him to make four per cent. on the balance of said purchase price unpaid at the time said dividends are respectively declared, and the balance thereof applied by him on said purchase price; and as soon as said stock is fully paid for either through dividends or otherwise, it shall be delivered to said purchasers. In case the dividend declared any year shall be less than four per cent. no interest shall run on said purchase price in excess of the dividend declared, and if none be declared there shall be no interest." It will be observed that the language of the clause is not that payment of the purchase price shall be made, or may be exacted, only out of dividends declared, but that: "All dividends declared on said stock shall be paid to said J. R. Stewart until it [the purchase price] is paid in full." In other words, the mode of payment prescribed is not exclusively from dividends on the stock itself, neither is payment conditioned wholly, or finally, upon the alternative that dividends shall be declared, but the only requirement is that all dividends declared shall be applied in payment of the purchase price. This stipulation or requirement is in no wise necessarily inconsistent with, nor does it in any manner impair, avoid or extinguish, the obligation theretofore imposed upon the purchasers by their express words of formal agreement to purchase. "That which is made certain in one part of a written instrument cannot be overcome or changed by words in another part, unless such other words are of equal or greater certainty." *Brown et al. v. Fowler et al.*, 65 Ohio St. 509, 63 N. E. 76. In *Ashland Mutual Fire Insurance Co. v. Housinger & Norton*, 10 Ohio St. 10, this court had under consideration and review a policy of fire insurance, one clause of which provided for the payment of all losses or damages not exceeding the sum insured. There was a subsequent clause in said policy which the company claimed limited its obligation to two-thirds of the loss actually sustained. In construing said policy, this court said: "In the first sentence or provision the company undertakes unconditionally to pay all losses or damages not exceeding the sum insured; and the only way of avoiding its obligation is

to show that the promise thus clearly and unconditionally expressed is retracted or varied in the succeeding sentence. But it is a rule to so construe an instrument, if practicable, that the whole may stand. 'Ut res magis valeat, quam pereat.' Nothing but a clear and unambiguous expression in the latter sentence, amounting to a necessity for it, could justify our regarding the subsequent provision in a contract as utterly inconsistent with the preceding provision."

But it is said that by the provisions of the fourth clause of said instrument the parties have themselves clearly evinced their understanding and intent that the dividends on the stock should be the only method of payment that could be exacted, and that the plain purpose of this clause was, and is, to exempt the purchasers from any liability to pay out of their own money or means, except upon their "desire" or "option" so to do. The clause reads as follows: "Should said purchasers desire to make payments on said purchase price in addition to the dividends from time to time declared on said stock, they shall have the option of doing so." While it is obviously true that the option thus extended to make payments from time to time in addition to the dividends declared neither creates nor imposes an obligation upon the purchasers to make such additional payments, yet it is equally true that the giving of the option does not operate to discharge and release the purchasers from such obligation and liability as they assumed under and by virtue of their express agreement to purchase the 360 shares of stock, which J. R. Stewart, in terms, concurrently promised and agreed to sell them.

Among the considerations recognized in law as sufficient to support a contract is that of mutual promises, or, as it is sometimes expressed, a promise for a promise. In our everyday business relations, many of our most familiar and common contracts depend for their validity upon the application of this principle. And the doctrine is very generally, if not universally, recognized that, where there is mutuality of engagement so that each party has the right at once to hold the other to a positive agreement, a sufficient consideration is provided and the contract is binding upon each. What, then, considering all its terms and provisions, is the proper construction, and legal effect of this writing of September 23, 1899, modified by the indorsement of February 10th, 1900? It is claimed that inasmuch as this writing contains neither express engagement to pay the purchase price of \$36,000, nor fixes definitely the time within which the agreement shall be performed and said purchase price be fully paid, therefore it is wholly uncertain and illusory in its nature, and should not be enforced. As to the first of these propositions, it is enough to say that the agreement of George T. Stewart, W. T. S. Johnson, and Lewis N. Gatch to purchase the 360 shares of

stock of the Bradford Mill Company necessarily implies a promise on their part to pay for it. *Railroad Co. v. Brown*, 26 Ohio St. 223. As to the suggestion that time of performance is not therein specified, the rule is well settled that, where no time for performance is fixed by the contract itself, the law implies that performance is to take place within a reasonable time, and that the parties so intended and agreed. *Lewis v. Tipton*, 10 Ohio St. 88, 75 Am. Dec. 498; *Curtiss v. City of Waterloo*, 38 Iowa, 266; *Griffin v. Ogletree*, 114 Ala. 343, 21 South. 488; *Wright v. Maxwell*, 9 Ind. 192. The written agreement here in question definitely fixes the amount to be paid, and refers to it throughout as the "purchase price." Immediately upon the execution of this writing the purchasers were entitled to receive, and did receive, the full beneficial interest in the 360 shares of stock, and the same were thereafter voted in accordance with their wishes and directions; and the dividends thereon, amounting to several thousand dollars, were applied as a credit on the purchase price of said stock. We must presume that the parties thereto intended this instrument to have some operation, and it would seem but reasonable that, if as claimed, only a gift of the stock was intended, that then naturally and necessarily, the instrument and transaction would have assumed a very different form. To adopt the construction contended for by defendants in error would be to import into the written contract of the parties a condition nowhere found or expressed in the instrument itself, viz., that, if dividends fall, payment of the purchase price would not be exacted—and to thus, by judicial construction, render the instrument frivolous and ineffectual, and defeat rather than sustain it. But the rule is elementary that if the language of a contract is susceptible of two constructions, one of which will render it valid and give effect to the obligation of the parties, and the other will render it invalid and ineffectual, the former construction must be adopted. Applying the foregoing principles and rules of construction to the contract now under review necessarily leads to the conclusion that this contract is not wanting either in consideration or mutuality of obligation, and that it is therefore binding and obligatory upon the parties, and imposes upon the purchasers the obligation to pay the full purchase price of \$36,000, "through dividends or otherwise," but in terms allows them a reasonable time within which to realize this amount from dividends that may be declared. The following authorities, with more or less direction, bear upon the propositions above considered: *Lewis v. Tipton*, 10 Ohio St. 88, 75 Am. Dec. 498; *Railroad Co. v. Brown*, 26 Ohio St. 223; *Palmer v. Hummer*, 10 Kan. 464, 15 Am. Rep. 352; *Fisher v. Hopkins*, 4 Wyo. 379, 34 Pac. 809; *Carter White Lead Co. v. Kinlin*, 47 Neb. 409, 416, 68 N. W. 536; *Minneapolis*

Mill Co. v. Goodnow, 40 Minn. 497, 42 N. W. 356, 4 L. R. A. 202; Scott v. Lord Ebury, 2 L. R. C. P. 255; Nunez v. Dantel, 19 Wall. (U. S.) 560, 22 L. Ed. 161; Brown v. Rounsavell, 78 Ill. 589; McCartney et al. v. Glassford, 1 Wash. St. 579, 20 Pac. 423; DeRutten et al. v. Muldrow et al., 16 Cal. 505.

In view of the conclusion above reached, it is unnecessary to consider whether the fifth clause of said contract provides a valuable and sufficient consideration, independent of the purchase price agreed to be paid, or the effect, if any, on the rights of the parties, of alleged part performance by the purchasers, in the lifetime of said Jacob R. Stewart.

The further claim is made in this case by counsel for defendants in error that said contract, if mutually binding upon the parties thereto, is nevertheless wholly incapable of performance by the administrator. We are of opinion, however, that as performance on his part would only require of the administrator that he receive and credit upon said contract the amounts paid upon the purchase price, through dividends or otherwise, and when fully paid that he transfer and deliver said stock to the persons entitled thereto, that no legal obstacle exists to prevent his full and complete performance of said contract in the due course of administration.

The judgment of the circuit court will be reversed, and the judgment of the court of common pleas will be affirmed.

SHAUCK, C. J., and PRICE, SUMMERS, and DAVIS, JJ., concur.

(77 Ohio St. 90)

BRYANT v. AMERICAN BONDING CO.

(Supreme Court of Ohio. Nov. 19, 1907.)

1. INSURANCE—INDEMNITY BOND—LIABILITY FOR PREMIUM.

A bond procured by a state officer to be issued by a bonding company to the state guaranteeing the faithful performance of duty by such officer, which is in terms indefinite as to duration, will, in the absence of any stipulation to the contrary, be regarded as remaining in force during the incumbency of such officer on his present term, and, where the consideration for such bond moving from the officer to the company is the payment in advance by the officer of a specified annual premium, he will be liable to the company for such payment during the term for which the company is liable to the state on the bond.

2. SAME.

But where, in a trial to recover against the officer for an annual premium, the application is introduced in evidence by the company as constituting in part its right of recovery, that instrument becomes a part of the bond, and, if its language, taken in connection with that of the bond, imports that the bond is to run indefinitely, one year at a time, providing payment of the annual premium is made, the contract will be treated as continuing only upon the condition of mutual assent by the parties, and, if such assent is not had, the officer will not be liable to the company in such action.

3. SAME—REFUSAL TO RENEW.

Because of the refusal by the officer to assent to a renewal and his refusal to pay an annual premium, the obligation of the company

under the bond to the state for future conduct of the officer does not attach.

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by the American Bonding Company against Edward S. Bryant. Judgment for defendant was reversed by the circuit court, and he brings error. Reversed.

The controversy originated in a suit before a justice of the peace. In its bill of particulars the plaintiff below, the American Bonding Company, of Baltimore, Md., alleged its corporate capacity and its authority to transact business in Ohio. It further alleged that June 16, 1903, the defendant, Edward S. Bryant, as colonel of the Second Regiment Ohio National Guards, made application to the plaintiff for a bond in the sum of \$4,000, to run indefinitely, for an annual premium of \$12, that defendant paid the first annual premium, and that at the end of one year an annual premium became due on said bond and application, which defendant has refused to pay, and asking judgment for the same and costs. By answer the defendant admitted the corporate capacity and right to do business in Ohio of the plaintiff, admitted the making of the application and the issuing of the bond, and denied that the bond might be renewed and continued except upon mutual agreement between plaintiff and defendant, admitted that he paid the annual premium for the year ending June 16, 1904, and alleged that prior to the above date he notified the plaintiff that he did not desire a renewal and did not agree to such renewal or continuance of the bond after that date. The justice found for the defendant. Motion for a new trial was overruled and a bill of exceptions taken. On error to the common pleas by the company the judgment was affirmed. These judgments were reversed by the circuit court; that court holding that the justice erred in overruling the motion for a new trial. Defendant below brings error. Further facts, bearing upon the issues, will be found stated in the opinion.

Wade H. Ellis, Atty. Gen., W. H. Miller, C. R. Painter, and George H. Jones, for plaintiff in error. Earl D. Bloom and Edward Beverstock, for defendant in error.

SPEAR, J. (after stating the facts as above). By the bill of exceptions it appears that at the trial the plaintiff introduced in evidence the application and the bond. It was thereupon admitted by the parties that prior to June 16, 1904, defendant notified the company that he did not desire a renewal of the bond; that the defendant was and still is colonel of the Second Regiment, Ohio National Guards, and that he has given no bond since the giving of the bond in question; that his term of office has been continuous, and that the defendant is required by the laws of Ohio to give bond to the state for the faithful performance of his duties. No other or further evidence was offered.

One of the grounds for new trial was that the finding and judgment of the justice was against the weight of the evidence; but the record presents simply a question of law, and no duty of weighing evidence devolved upon the circuit court. Nor are we here called upon to give construction to the statute of the state with reference to the duties of a colonel of an Ohio regiment with respect to the property of the state, or otherwise, or his duty with respect to the giving of a bond of the character here shown; the admission of the record being that such officer was, by the laws of the state, required to give bond for the faithful performance of his duties, and no further reference to the statute is here necessary, except to say that the claim is made by plaintiff in error that the statute does not give to the colonel of a regiment the custody or control of the property of the state enumerated in the bond, nor of the public funds therein mentioned, and that the bond in these respects was prepared under a misapprehension of the company's real liability with respect to the official conduct and responsibility of the officer; and, while the statute requires some sort of a bond of the colonel of a regiment, it does not require the character of bond imposed by the company on the officer in this instance. Because of this error, it is insisted the premium required is far in excess of an amount adequate to insure the actual risk incurred; and this fact may account for the officer's disinclination to renew the bond.

The question presented, therefore, is: What is the legal effect of the bond, taken in connection with the application, each paper being an essential part of the transaction between the parties? Both having been introduced in evidence by the company, we are relieved of consideration of the query, which might otherwise arise, whether or not the application is part of the bond, for the act of the company in basing its right of recovery in part upon that instrument incorporates it for all the purposes of the case. As tersely stated by counsel for the defendant in error, the concrete question is: Is the plaintiff in error liable to pay a premium at the end of the first year, if he continues in office and gives no other bond, or is he absolved from such payment on giving notice, before the expiration of the year, that he does not desire a renewal of the bond? The justice and the common pleas answered that he was not so liable. The circuit court answered that he was. The contention of counsel in support of the judgment of the circuit court is, in brief, that this, being a surety bond guaranteeing the faithful discharge of his duties by an officer, of necessity must be coextensive with the duration of such office. Hence, as Col. Bryant has been, and still remains, such officer, the company is bound to the state to make good its guarantee, and this continuing obligation implies necessarily the yearly payment of the premium by the

officer; otherwise, the company would be subject to loss without corresponding consideration or benefit accruing to it. As a proposition at large, this statement will be assented to, because if the contract, when properly construed, imposes a continuing liability, the duty to pay premiums would seem to follow. But the question remains: What is the proper construction of this contract? And first what is the nature of the contract? Is it one simply of suretyship, one of those known as voluntary contracts, or is it rather one of the class issued for a money consideration, and because of a desire for pecuniary gain? If the former, then it is one wherein the surety is regarded as a favorite of the law, and all doubtful questions to be resolved in his favor. If the latter, then he is regarded as an insurer, whose contract, being drawn by the surety himself, and for a money consideration, is, if ambiguity exists in the language, to be resolved most strongly against the surety. *Supreme Catholic Knights of America v. Fidelity & Casualty Co.*, 63 Fed. 48, 11 O. C. A. 96; *Mechanics' Savings Bank & Trust Co. v. Guarantee Co. (C. C.)* 68 Fed. 459; *Cowles v. U. S. Fidelity & Guaranty Co.*, 32 Wash. 120, 72 Pac. 1032, 98 Am. St. Rep. 838. Manifestly the simple fact that a premium is paid by the officer establishes beyond question that the contract does not belong to the former class.

Coming now to an examination of the contract—the application for the bond and the bond itself—we find that the applicant, in consideration of the issuing of the bond, agrees to pay the company an annual premium in advance of \$12 and \$3 (though why the latter sum is named does not appear), and binds himself, his heirs, etc., to indemnify the company against all loss, etc., resulting from his default, etc., which the company may sustain by reason of having executed said bond, or any renewal or continuation thereof. The application contains this further significant clause. To the question to be answered by the applicant respecting the duration of the bond, "How long to run?" the answer is, "Indefinitely, one year at a time, renewed." And the character of the risk, as given in the application, is: "Faithfully discharge duties of office of colonel of 2d Infantry, O. N. G." No other clause of the application in any way qualifies these statements. The bond is as follows: "Know all men by these presents: That we, Edward S. Bryant, as principal, and the American Bonding Company, of Baltimore, as sureties, are held and firmly bound unto the state of Ohio, in the penal sum of four thousand dollars (\$4,000.00), for the payment of which, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents. Sealed with our seals, and dated this 16th day of June, 1903. The condition of the above obligation is such, that, whereas, the said Edward S. Bryant, who is commandant

of 2d Infantry, Ohio National Guard, has, as commandant of said regiment, been intrusted with property of the State of Ohio, including all ordnance stores, clothing, camp and garrison equipage, in possession of said organization, together with public funds coming into his hands as such officer, and for such state property and funds as may hereafter be issued or placed in his charge as said commanding officer: Now, if the said property or public funds, or either, shall be delivered to the said Edward S. Bryant, and the same shall be safely kept and at all times in readiness for immediate use, in a place appropriate for that purpose, and no part of the said public property permitted to be used or taken from such place of deposit for any other purpose than for the use and benefit of such organization or other lawful public service; and if said property and funds shall be turned over to his successor in office (first causing new bonds to be executed by his successor, to the acceptance of the adjutant general), or shall be returned to the state in good condition, and shall at all times be subject to the orders of the Governor of Ohio, then this obligation shall be void; otherwise to be and remain in full force and virtue in law. Edward S. Bryant. [Seal.] American Bonding Company of Baltimore. [Seal.]

The bond was deposited with the Adjutant General of the state.

It will be noted that there is no definite term stated for the duration or life of the obligation. That feature is left entirely to inference. It therefore cannot be determined in this case, except by reference to the application. There are three parties to the contract—the applicant, called in legal parlance the “risk,” the state, and the company. The consideration moving to the company from the “risk” is the annual premium to be paid. The basis of the right of the state under the contract might rest upon the principle of a contract made for its benefit by another, which it has accepted; but it can also rest upon the further consideration of the employment by it of the officer, such employment giving also to the state the control of the conduct of the officer. The state, under these facts, being a party to the contract, reaping advantage from it, should be held to have had knowledge of the entire contract, and to have accepted the indemnity subject to any infirmities attaching to the transaction. In other words, it would take cum onere. Then what follows? The applicant, the “risk,” could not be heard to claim that the bond would remain in force after his refusal to pay the premium, and it is difficult to see how the beneficiary, the state, could successfully make that claim. One thing is certain: The contract is, as to duration, at least ambiguous. The bond contains no express declaration on the subject, and the application, as hereinbefore recited, justifies the understanding by the applicant that its continuance depended

upon a renewal at the end of the year by the payment of the annual premium; and it is hardly conceivable that the company, when it accepted the application and issued the bond, in good faith supposed that it was to be bound during all the years that the officer might serve as colonel, when at the same time the annual premiums, the basis of its contract, were not being paid, and that its only recourse would be to resort to an action to recover. The contract is silent as to the party who may exercise the option to continue or terminate the contract; but clearly, if such right belongs with anyone, it must belong to the one who has procured the contract and is obliged to pay the premiums.

It is not necessary in this case to carry the rule respecting insurance contracts as far as it has been held in many reported cases. It is sufficient to apply to the contract the modified rule, clearly recognized in this state, viz., that where clauses of such a contract are susceptible of two interpretations, which seem equally fair, that should be preferred which is least favorable to the company, but, like other contracts, they should receive a reasonable construction in order to carry out the presumed intention of the parties as expressed by the language used. We are of opinion, therefore, that a bond of this character, indefinite as to duration, will, standing alone, be held to remain in force during the incumbency of the officer on his present term, and the officer will remain liable for the payment of annual premiums so long as liability to the state on the bond continues. But where the application has been made a part of the bond, as in this case, and its language taken in connection with that of the bond imports that while the bond may run indefinitely, but one year at a time, and continued providing the annual premium is paid, the contract should be regarded as continuing only upon the condition of mutual assent, and, if such assent is not had, the officer will not be liable for the premiums. And, further, that in case the officer refuses to assent to a continuance of the contract liability for future conduct of the officer does not attach.

These conclusions require that the judgment of the circuit court should be reversed, and the judgment of the common pleas affirmed.

Reversed.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and DAVIS, JJ., concur.

(77 Ohio St. 150)

WATTERSON v. HALLIDAY, Auditor, et al.
(Supreme Court of Ohio. Nov. 19, 1907.)

TAXATION—EXEMPTIONS—PARISH HOUSES.

Parish houses, otherwise known as the residences of the priests and bishops of the Roman Catholic Church, are not exempt from taxation and legal assessments, by virtue of section 2 of article 12 of the Constitution of Ohio, nor by the provisions of section 2732. Rev. St. 1906, although such places of residence are used by the

priests and bishop for the discharge of many duties of a religious and charitable nature, which are imposed by the vows of their ordination and rules of the church.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Taxation, § 410.]

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

Action by John A. Watterson against Halliday, auditor, and Barron, treasurer, of the county of Franklin. Judgment for defendants, and plaintiff brings error. Affirmed.

See 81 N. E. 1198.

On the 16th day of April, 1898, John A. Watterson filed his petition against the above-named defendants in error, praying for an order enjoining the collection of taxes and assessments levied and assessed on various parcels of real estate in said county, most of which are located in the city of Columbus. In his petition he asserted that the legal title to said real estate was being held by him as Bishop of the Roman Catholic Church in and for the diocese of Columbus, which includes Franklin and other counties, and which title he held in his name in trust for the sole use of said church; the property being its places of public religious worship, its public parochial schools, academies, asylums, cemeteries, and institutions of purely public charity, and for no other purposes whatsoever. The petition definitely describes each piece of property and the uses to which the same are devoted, and claims that each of said parcels is exempt from taxation and assessments for street and other public improvements. The defendants answered jointly, setting up the grounds on which they relied to justify the levying and collection of the taxes and assessments charged against the several parcels of property. The answer was subsequently amended, and to the answer a reply and amendments thereto were filed, so that the issues were finally made up. The case was heard in the court of common pleas, and from its decree an appeal was taken to the circuit court, where the cause was heard on the same issues, supplemented by certain other amendments. During the long pendency of the action, the successors in office of the original defendants were made parties defendant, and Bishop James J. Hartley, now bishop of the Columbus diocese, has been substituted for the original plaintiff in the action. The circuit court made findings of fact and announced its conclusions of law, and granted an injunction as to a large part of the real estate, on the ground that it was exempt from taxation, but not exempt from assessment for certain public improvements, and refused an injunction as to other parcels of real estate, which are called the houses of the bishop and priests. The findings of fact bearing on this class of the property appear in the opinion. Error is prosecuted in this court to reverse the decree of the circuit court and to procure a judg-

ment exempting the property not released by the decree.

Luke G. Byrne, Joseph M. Howard, Ledyard Lincoln, and E. J. Blandin, for plaintiff in error. Henry A. Williams, and Karl T. Webber, for defendants in error.

PRICE, J. (after stating the facts as above). After this case had been submitted and considered on the elaborate briefs of counsel of record, and a judgment rendered, it was allowed that other eminent counsel, not connected with such briefs for the plaintiff in error, might be heard orally and by brief in furtherance of his claims in this proceeding. These additional arguments have been made, and we now briefly state our views of the long-continued but still important controversy. The plaintiff in error prevailed in the lower court in a large measure, and the defendants have filed a cross-petition in error, asking a reversal of so much of the decree of the circuit court as exempts from taxation certain pieces of property therein pointed out. As a result of the findings and decree of the lower court, so largely in favor of the plaintiff in error, his present complaint is narrowed to the question of taxing what are denominated "priests' houses," or commonly known as residences of the priests. All the oral argument centered upon this question, and its decision is controlled by the facts as found by the circuit court; for we are not required to wade through the great mass of testimony in order to arrive at a conclusion on its weight, where conflict exists. It is not out of place here to say in advance that we do not regard the claim of plaintiff in error as either technical or frivolous, for the cause he represents has substantial character and legal merit worthy of the careful consideration we have given it. Nor is the idea entertained by this court that the great Catholic Church here represented, and which is always loyally submissive to the lawful authority of the state and nation, is now seeking to evade the discharge of a legal obligation, if that obligation is made to appear. The earnestness of its appeal refutes such a view of the case.

The diocese of Columbus, like the others, is a jurisdictional division of the Roman Catholic Church, and is presided over by the bishop. By virtue of his appointment as such bishop, and under the laws governing such church in the state of Ohio, all the property mentioned in the petition and cross-petition is held by the plaintiff (the Bishop) in his own name, in trust for the sole uses and purposes of said Roman Catholic Church, such as its places of public religious worship, its public parochial schools, academies, its congregations in the respective parishes, and its institutions of purely public charity, and its public institutions of learning. The diocese is divided into parishes, which are presided over by a pastor appointed by the

bishop, and the church edifice, schools, priests' houses, and other buildings upon the church property, within the respective parishes, belong in equity to the respective parishes. (See second finding of fact.) It has also been found, in general, that the Roman Catholic Church is an institution which has for its chief and primary object and purpose the teaching and extending of its recognized forms of religious belief and worship into all parts of the world, and that it was founded to continue the work of Christ on earth, and "to teach, govern, sanctify and save all men" (third finding of fact); also, that charity is included in all its teachings, purposes, and practices, as subordinate to its spiritual teachings and purposes, but as an essential part of its general scheme of church work (fourth finding of fact); also, that the public, without distinction or discrimination as to race, condition, creed, or otherwise, are fully admitted to all the churches and religious services, to the public parochial schools, academies, asylums, and to all its other charitable institutions, and all its churches, schools, academies, educational institutions, asylums, hospitals, and other purely public charitable institutions and societies, and the benefits derived therefrom are open and free, and available to all persons upon the same conditions, irrespective of creed, race, condition, or otherwise (fifth finding); also, it has been found by the lower court that the members of the church support and maintain it and its schools and benevolent, educational, and charitable institutions by their voluntary contributions, and all the real estate in controversy was donated and purchased and paid for, in so far as the purchase price has been paid, by the voluntary contributions and offerings of the members of said church, and its congregations, and by others interested in the religious, educational, and charitable purposes of said church (sixth finding). The only purpose of acquiring and holding the real estate in controversy was to subserve the religious, educational, and charitable purposes of the said church, and the respective congregations and charitable institutions, and the buildings thereon, are permanent, and intended to and do subserve the same purpose; and no part of said real estate or buildings has ever been leased or otherwise used with a view to profit, and no income, rent, or profits whatever is or has ever been derived from either said real estate or the buildings thereon (seventh finding). The bishop and priests are celibates, and, under the vows of their ordination, their entire lives are devoted to teaching and preaching the gospel, administering the sacraments; to works of purely public charity; to organizing religious congregations and benevolent, charitable, and temperance societies; to building churches, public parochial schools, asylums, hospitals, and other institutions of purely public charity, and sustaining them

(eighth finding). The duties of the priest are multifarious. He administers all the affairs of the church, both spiritual and temporal, and has charge of the public parochial schools, societies, hospitals, and charitable institutions within the parish; is principal of the parochial schools, attends them daily, and sometimes teaches in them. He must go to the church edifice every morning to celebrate mass, and there administer the sacraments every day, and sometimes more frequently. He must conduct services in the church every Sunday and on holidays. He must, and does, respond at all hours of the day and night to calls from sick persons, irrespective of creed, and those in distress, or desiring to make confessions, the latter being required to be heard in the church, except occasionally confessions of men. He solemnizes the marriage rite, and conducts religious exercises at baptism and burials (ninth finding). The priest performs many of his duties at his place of residence, known as the "priests' houses." He there keeps the books of account of the financial transactions of his parish, and also a record of the marriages, baptisms, interments, and confirmations. The priest's house is used as a place of instruction for converts and for children preparing for the first communion. Sometimes classes of school children are taught there. The confessions of men are occasionally heard there. The total abstinence pledge is administered and the marriage ceremony occasionally performed there. It is the duty of the priest to keep a light perpetually burning in the church edifice in front of the Blessed Sacrament (tenth finding). The priests' houses are also used as places for the distribution of gifts to the worthy poor, regardless of their religious belief, their race, and without discrimination. Contributions are there received and dispensed. The priest is in charge of the houses and dispenses these charities. Temperance, benevolent, and other charitable societies and institutions are there formed and fostered. The committees of the church and school, as well as the church choir, sometimes meet there. Family and neighborhood disputes are there settled, and the priest is the arbitrator to settle such disputes. The religious, charitable, educational, and benevolent work of the congregations is directed and carried on from the priests' houses. The parents of the school children, teachers and scholars, and others interested in the work of the congregation and its societies there consult the priest about the schools and the work of the congregation (eleventh finding). All of the priests' houses are in constant and hourly use for said purposes, and these facts, together with the frequency of the demands for the priest's presence at the church, render his residence in the immediate vicinity thereof to a great convenience, if not a necessity, and all are free of charge, and no profit is derived therefrom (twelfth finding). The

priests lodge and board in the priests' houses, which, with respect to all the property in controversy, are built on the grounds attached to the respective churches and schools, except in the second parcel, where the priest's house is separated from the combined church and school by a 20-foot alley, and all were built and paid for and furnished by the voluntary contributions of the respective congregations; and the grounds thus occupied are not more extensive than they might be, and be reasonably appropriate and necessary for their proper occupancy, use, and enjoyment of the schools and churches, if used for no other purpose than as connected therewith. These houses are sometimes separated from the church and school, and in others are directly connected with them. The priests and bishop and their assistant priests, and the domestics, are the only persons that lodge in said houses (thirteenth finding). On the facts thus stated, the circuit court held that the houses of the bishop and priests are not exempt from taxation. Has the law been properly applied to the facts?

Our constitutional provision with reference to taxation, as it stood before the late amendment exempting certain classes of bonds, and so far as pertinent here, reads: "Laws shall be passed, taxing by a uniform rule all moneys, credits, etc., * * * also all real and personal property, according to its true value in money; * * * but burying grounds, public school houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any purpose, and personal property, to an amount not exceeding in value two hundred dollars for each individual, may by general laws be exempted from taxation. * * *" See section 2 of article 12. This section furnishes the governing principle for all laws levying all taxes for general revenue, and, as to the class of property now in controversy, the Legislature has provided section 2732, Rev. St. 1906, in part as follows: "The following property shall be exempt from taxation: First. All public school houses, and houses used exclusively for public worship, the books and furniture therein, and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit; all public colleges, public academies, all buildings connected with the same, and all lands connected with public institutions of learning not used with the view to profit. * * * Second. All lands used exclusively as graveyards, or grounds for burying the dead, except, etc. * * * Third. All property, whether real or personal, belonging exclusively to the state or United States. Fourth. County buildings (describing them). Fifth. All lands, houses and other buildings belonging to any county, township or town, used exclusively for the accommodation or support of the poor. Sixth. All buildings belonging

to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining, and belonging exclusively to, such institutions." By later legislation armories of lawfully organized military organizations were added to the exemption under this clause. By the terms of the above provision of the Constitution and the sixth clause of section 2732, Rev. St. 1906, both already quoted, it is urged that the residences of the bishop and priests are exempt, and therefore we are required to consider, if not construe, these provisions in the light reflected by the facts of the case. As to exemptions claimed by individuals and corporations for profit, the rule seems to be that the right to exemption under the law should be reasonably clear, the presumption being that all property is subject to taxation by a uniform rule, to the end that all property bear its due share of the burdens of government. And, while we do not apply strict rules of construction in cases where religious, charitable, and educational institutions seek exemptions, we think such right to exemption should appear in the language of the Constitution or statute, with reasonable certainty, and not depend on their doubtful construction. A much more stringent rule is laid down in *Lee, Treasurer, v. Sturges*, 46 Ohio St. 153, 19 N. E. 560, 2 L. R. A. 556. In that case the question was the liability to taxation of certain stock in a corporation, which the owner claimed to be exempt under the statute. *Spear, J.*, in the opinion, on page 159 of 46 Ohio St., page 563 of 19 N. E., 2 L. R. A. 556, uses this language: "And, further, that, when an exception or exemption is claimed, the intention of the General Assembly to except must be expressed in clear and unambiguous terms." But we are not disposed to use that rule in this case, believing that the rule, as we now have stated it, is as liberal as plaintiff in error can ask, viz., that the right to exemption should appear in the language of the Constitution or statute with reasonable certainty, and not depend on their doubtful construction. There is no presumption of exemption from taxation because the institution claiming it is of a religious or charitable nature, for it is perfectly competent for such institutions to own property clearly subject to taxation. Looking again to the constitutional provision under consideration, we see that burying grounds, public schoolhouses, houses used exclusively for public worship, institutions of purely public charity may, by general laws, be exempted from taxation. The burying grounds or cemeteries mentioned in the pleadings and findings were declared exempt by the lower court; also, the churches and cathedral, as places used exclusively for public worship; also the public parochial schools, and the church's institutions of purely public charity. Other "public school-

houses," and "public property used exclusively for any public purposes" are not involved, for the Catholic Church is not claiming to own such "public schoolhouses" and such "public property." And, when the General Assembly acted under the authority of this constitutional authority, it said, in section 2732, Rev. St. 1906, that "public schoolhouses, and houses used exclusively for public worship, * * * and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with view to profit," are exempt. And by the sixth clause, "all buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit," are exempt. It is manifest, from the carefully worded language of these provisions, that the Legislature intended to place strict limitations upon exemptions, and great caution has been exercised in the terms expressed, so that the right of exemption conferred would not be abused or unduly enlarged, and such restrictions are essential to a fair and equitable sharing in the burdens of taxation.

In the case at bar, we find that the Catholic Church erected its places of public worship, and they are houses used exclusively for that purpose, and the different parishes provided places of residence for their priests, and whether denominated parish houses, or houses for the priests, they were erected and are being used by the priests and their assistants as places of residence. While they are celibates, and not the heads of families, as is common in Protestant denominations, they necessarily have household help and domestic service in order that these houses be what they should be—places of residence. While the priests devote themselves wholly to the service of God and to works of religion and charity, although universal in character, they, like other men, have the physical and temporal wants for which provisions must be and are made. Besides the religious and charitable duties performed, and the dispensing of charities in these houses, they are places open to social calls and the extension of the proper and pleasant amenities of life. The religious rites and ordinances of the church organization are celebrated or observed in the places of public worship, although occasionally the confessions of men are heard and the marriage ceremony is performed in the house of the priest. There, too, the financial accounts of the parish are kept, records of marriages, baptisms, interments, and confirmations. The house is used as a place of instruction for converts, and for children preparing for their first communion, and sometimes school-children are taught there. To these houses committees of the church and schools may resort, and they are used as places for the distribution of gifts to worthy

poor, regardless of religious belief, their race, and without discrimination. From them the religious, charitable, and educational work of the congregation is directed. Many other services for the church are there rendered, which are enumerated in the above findings. It is not found as a fact that all such services are necessarily rendered at these parish or priests' houses; but no doubt some of them are of that character. But it is clear that such houses are primarily places of residence, as the church building is primarily a place of public worship, and it does not alter the law, as we think, that the increasing demands upon the time and devotion of the priest make it necessary or convenient to perform many of his duties at his place of residence. We have no doubt that the parsonage of the Protestant pastor is used for many services similar in character and purpose. The exemption is not of such houses as may be used for the support of public worship; but of houses used exclusively as places of public worship.

In *Gerke, Treas., et al. v. Purcell*, 25 Ohio St. 229, this rule is expressed in the tenth paragraph of the syllabus, as follows: "A parsonage, although built on ground which might otherwise be exempt as attached to the church edifice, does not come within the exemption. The ground in such case is appropriated to a new and different use. Instead of being used exclusively for public worship, it becomes a place of private residence. The exemption is not of such houses as may be used for the support of public worship, but of houses used exclusively as places of public worship." And in this connection it is well to note the frequency of the use of the word "exclusively" in the several clauses of section 2732, *supra*. It was evidently intended that such word should be given special consideration when the right to exemption of property is presented for decision, and its frequent use by the Legislature we think is significant.

But we are told that we should not now be influenced by the above case, "because a careful examination of that case will show that the court did not consider or pass upon any question presented in this brief; that the parsonages were not considered in any other aspect than as 'houses used exclusively for public worship,' and not as buildings belonging to institutions of purely public charity; that the record in that case did not show the auxiliary or incidental character of the residential features, but, on the contrary, characterized such features as the only use of the priests' houses," etc. This leads us to examine more minutely what was involved and decided in the case referred to; and we find in the statement of the case that Purcell, as archbishop of the Roman Catholic Church for the diocese of Cincinnati, filed a petition in the superior court to enjoin the collection of taxes on various pieces of real property which he claimed were exempt from

taxation. As to part of the property, a perpetual injunction was granted; and, as to the remainder, the petition was dismissed. Gerke, treasurer, prosecuted error on two grounds: (1) That the court erred in enjoining the collection of the taxes levied on the parochial schoolhouses and playgrounds connected therewith; (2) in enjoining the taxes levied on the property used as parsonages. The statement continues as to the parsonages, and says: "They are usually, though not invariably, built on the ground attached to the church edifice, and the grounds are not more extended than they might be, and be exempt from taxation, if used for no other purpose than as connected with the church edifice as a place of worship. These are sometimes separated from the church edifice, and in others directly connected with it. They are the residences of the priests, for which they pay no rent, and from which source the church derives no profit, otherwise than saving the expense of providing such residences elsewhere." From this statement, it is seen that Gerke was insisting on taxing both the parochial schools and playgrounds and the parsonages, and his counsel, in their brief, asserted, in substance, that "In no legal sense are the schools of the Roman Catholic Church public and within the exemptions of the act, nor are they free. Revenue is derived from them, and whether the amount is sufficient to maintain them is immaterial." Again, they say: "The Catholic schools of the defendant in error are purely private and sectarian." Again: "It is clear that the schools of the defendant in error do not fall within the class referred to in these enactments, or within any class of schools legislated for by any act of the Ohio Legislature." The brief, as found in the report of the case, does not discuss the taxation of parsonages. When we look to the brief of the eminent counsel for Purcell we see that they state the issue as follows: "There are four classes of property the taxation of which is in dispute in this case: (1) The Roman Catholic parochial schoolhouses; (2) the playgrounds connected therewith; (3) two vacant lots used in connection with the church edifices; (4) priests' dwellings." Again, in speaking of the exemption of the playgrounds, they say: "It is just as true that the dwellings of the clergy are necessary to the proper occupancy, use, and enjoyment of the churches and schools of the Roman Catholics." Then counsel proceeded in the latter part of their brief, as reported, to discuss the meaning of "public schools," as mentioned in the exempting statute, as compared with the use of the words, "institutions of purely public charity." White, J., on page 244 of 25 Ohio St., in speaking of the schools as institutions of purely public charity, says: "As to the first of these questions, it seems to us the charity is to be regarded as purely public. For the purpose of determining the public nature of the charity, it is not ma-

terial through what particular forms the charity may be administered. If it is established and maintained for the use and benefit of the public, and so conducted that the public can make it available, this is all that is required. But is it competent for the Legislature to treat the buildings and lands connected therewith, used for carrying on the schools, as institutions, or as property belonging to institutions? The term 'institution' is sometimes used as descriptive of the establishment or place where the business or operations of a society or organization is carried on. At other times it is used to designate the organized body. It is used in both senses in the third section of the tax law brought under consideration in this case. It is used in the former sense in the first clause of the section, where it is disclosed that 'all lands connected with public institutions of learning, not used with a view to profit, shall be exempt.' In the sixth clause of the section it is used in the latter sense, and the property referred to is described as belonging to the institutions named." And on page 245 of 25 Ohio St., in speaking of colleges and other high institutions of learning not founded by the state, it is said: "All of these institutions stand, as respects their claim to exemption from taxation under the Constitution, on the ground of their being institutions of purely public charity. * * * After all the careful discrimination in the use of the statutory words touching "houses used exclusively for public worship," and "institutions of a purely public charity," we cannot agree with counsel that the court and counsel in that case overlooked the relation which the priests' houses or parsonages sustained to institutions of "purely public charity." On the other hand, we think all clauses of the exempting statute must have been held up to view and most carefully scrutinized. The scope of argument and decision satisfactorily indicate this. No doubt the heat of the controversy was over the parochial schools and playgrounds; but the construction of statutes to save them from taxation reflected as well on the claim as to the parsonages. We cannot believe that the eminent counsel and the learned court overlooked or lost sight of one of the most prominent clauses of the section. And what conclusion did the court reach as to them? On page 248 of 25 Ohio St., it is said: "But a parsonage, although built on ground which might otherwise be exempt, as attached to the church edifice, does not come within the exemption. The ground in such case is appropriated to a new and different use. Instead of its being used exclusively for public worship, it becomes a place of private residence. Nor does it make any difference that, by the usages of the church, the presence of a priest or pastor is essential to conduct the services of public worship. Other persons are necessary to carry on public worship, as well as a minister to conduct the ser-

vices. There must be a laity or congregation as well as a minister or preacher, and it is equally necessary that they should have places of abode. Yet it would not be claimed that their residences should be exempt. * * * Because the court did not speak of such parsonages as buildings not belonging to "institutions of purely public charity," we must not infer that they were not weighed by that test of the statute.

But, if the question is not foreclosed by *Gerke v. Purcell*, supra, are priests' houses "buildings belonging to institutions of purely public charity" within the meaning of clause six of section 2732? We think not. This section classifies property for the purposes of exemption, as plainly appears in a reading of it. First come all public schoolhouses and houses used exclusively for public worship, etc.; second, cemeteries; third, state and federal property, etc.; fourth, county buildings; fifth, poorhouses, etc.; sixth, all "buildings belonging to institutions of purely public charity," etc. It is evident that the parsonage is not itself an "institution" of such character, for at least one reason, that the parsonage has a mixed use, as we have observed, and would not be a building used for purposes of purely public charity. Then to what "institution" does the parsonage belong? While the legal title is in the bishop in trust, as is true of all church property, the real ownership is in the parish where it is located; in other words, in the Catholic Church, either locally or generally. Is the Catholic Church, locally or generally, an "institution of purely public charity"? Like the word "exclusively," as used in preceding clauses of said section 2732, the word "purely" expresses a kindred limitation, or rather exclusion, in that it means free from mixture or combination, and, as applied in the present connection, the charity must be unalloyed with other purposes and objects. But the Catholic Church, to which the parsonages or priests' houses belong, is not an institution of purely public charity. It teaches and practices charity; but that is not its whole mission in the world. Its character is defined by the third and fourth findings made by the circuit court. There it is said: "The Roman Catholic Church is an institution which has for its chief and primary object and purpose the teaching and extending of its recognized form of religious belief and worship into all parts of the world, and was founded to continue the work of Christ on earth, and to teach, govern, sanctify, and save all men. Charity is included in its teachings, purposes, and practices, as subordinate to its spiritual teaching and purpose, but is an essential part of its general scheme of church work. * * * So it seems that, instead of the church to which the residence of the priest belongs being an "institution of purely public charity," it is a religious institution primarily, and its charity is subordinate to its spiritual teachings, and conse-

quently the exemption claimed is not authorized by the sixth clause of the section. In the first clause, schoolhouses and churches are not dealt with as "institutions of purely public charity," but as what the clause asserts them to be, "public schoolhouses, and houses used exclusively for public worship," etc.; and we think it is not permissible, when the exemption fails under the first clause, to abandon the religious character of the church edifice and organization and their relation to each other, and save the parsonage as a building belonging to an "institution of purely public charity." The use to which the property is devoted determines its right to exemption, under any clause of the section. Again, it is said of the case of *Gerke v. Purcell*, supra: "The record in that case did not show the auxiliary or incidental character of the residential features, but, on the contrary, characterized such features as the only use of the priests' houses." True it is that the record of that case as reported does not develop fully the various religious and charitable services rendered at the parsonage by the priest, as is done in the case at bar. But his duties, we venture to assume, are common to the priesthood of both Cincinnati and Columbus, but they may vary in number and degree. In both jurisdictions the priests are celibates, without families, of course, and are boarded and lodged in the parsonage, where ordinary domestic services are required. And the calls of charity and other duties to be answered at and from the parsonage we presume are common to both cities, if not universal in that church. Therefore we are not able to perceive a line of distinction between the two which shakes our confidence in the judgment in *Gerke v. Purcell*, supra. Our views as to the exemption statute are not in conflict with the holdings in *Humphries, Auditor, et al. v. Little Sisters of the Poor*, 29 Ohio St. 201. Indeed, we think our consideration of the terms, "buildings belonging to institutions of purely public character," is fully authorized by the doctrine of that case. Nor is the case of *Little, Treas., v. U. P. Theological Seminary*, 72 Ohio St. 417, 74 N. E. 193, an obstacle in our pathway when its foundation principle is once discovered and understood. The case of *Davis, Auditor, v. Cincinnati Camp Meeting Ass'n*, 57 Ohio St. 257, 49 N. E. 401, is also relied on to support the contention of plaintiff in error. The facts of that case as reported by the court are somewhat extended, while the opinion of the court is brief, as is usual in a per curiam. We think that the court in that case traveled toward the extreme of liberal statutory construction, and we cannot apply its logic to the facts of the case in hand.

As to the cross-petition in error, we need only say that we have not been convinced that error was committed by the circuit court on any of the grounds assigned therein. We

are unanimous in adhering to our former judgment.

Former judgment adhered to.

SHAUCK, C. J., and CREW, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(77 Ohio St. 84)

STATE v. DICKERSON.

(Supreme Court of Ohio. Oct. 22, 1907.)

1. CRIMINAL LAW—VENUE—PROOF.

In the prosecution of a criminal case, it is not essential that the venue of the crime be proven in express terms, provided it be established by all the facts and circumstances in the case, beyond a reasonable doubt, that the crime was committed in the county and state as alleged in the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1277-1279.]

2. HOMICIDE—EVIDENCE OF CHARACTER.

A person on trial for homicide, as a part of his defense, may introduce evidence of competent witnesses that prior to the date of the crime alleged in the indictment his character as a quiet and peaceable citizen was good; and he is not limited to proving what people may have said about him, as to his being or not being a quiet and peaceable person. *Gandolfo v. State*, 11 Ohio St. 114, approved and followed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 810, 811.]

3. WITNESSES—CROSS-EXAMINATION.

It is not competent for the state, in cross-examination of such witnesses as to the good character of the accused, to prove thereby that prior to the commission of the alleged crime they had heard rumors or reports in the community where he resided that he had committed certain other crimes of various character, and to permit such latitude in cross-examination of such witnesses is error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1139, 1140, 1159, 1160.]

4. CRIMINAL LAW—PROOF OF OTHER CRIMES.

While it is not competent for the state, in making out its case in chief, to introduce evidence of other and prior crimes, for the purpose of supporting the charge made in the indictment, or of reflecting on the character of the accused, yet the commission of a prior crime may be shown for the purpose of furnishing a motive for the commission of the crime charged in the indictment, provided such prior crime is so related to the latter as to have a logical connection therewith and reasonably to disclose a motive for its commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 830-832.]

5. SAME—EVIDENCE—CONDUCT OF BLOOD-BOUNDS—FOLLOWING TRAIL.

In order to make competent evidence of the conduct of bloodhounds in trailing or following the tracks of one accused of crime, it is necessary that a preliminary foundation be laid therefor, by showing by some one or more having personal knowledge of the facts that the particular dog so used had been trained and tested in trailing human beings, and by experience had been found reliable in such cases, and that the dog so trained and tested was, in the instance involved, laid on the trail, whether it was visible or invisible, at a point where the circumstances tended to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 708.]

(Syllabus by the Court.)

Error to Circuit Court, Coshocton County.

Benjamin Dickerson was convicted of murder, and from reversal in circuit court, the state brings error. Affirmed.

See 76 N. E. 864.

The defendant in error was indicted by the grand jury of Coshocton county at the January term of the court of common pleas for the year 1906 for killing Katherine Hughes, a neighbor, and wife of Simon Hughes. The indictment contains three counts, to which the accused pleaded not guilty, and he was tried on the issue joined as to each count. The first count charges the killing through deliberate and premeditated malice; that he assaulted the deceased with a certain blunt instrument, which he held with his two hands; that he unlawfully, purposely, and with deliberate and premeditated malice did strike, beat, and wound the said Katherine Hughes with said instrument, prostrating her thereby; and that with like malice and purpose he then and there choked and suffocated the deceased, by forcing her neck between two saplings which were so close to each other that their pressure towards each other choked and strangled her. The methods of accomplishing the death are minutely described in this part of the indictment, which alleges that the crime was committed in Coshocton county, Ohio, on the 28th day of June, 1905. The second count charges the killing by same acts of violence, while the accused was perpetrating a rape on the said deceased. This crime, it is alleged, was committed on the 28th day of June, 1905, in said Coshocton county, state of Ohio. The third count charges the killing of Mrs. Hughes on the same day and in said county by means of the same instrumentalities, while the accused was engaged in an attempt to perpetrate a rape. The trial on these counts resulted in a verdict of guilty as charged in the third count of the indictment, and a sentence of death was pronounced by the trial court.

A motion for new trial, containing many grounds, was overruled, and the case taken on error to the circuit court, which found error in the following particulars, as shown by the judgment entry: "This cause came on for hearing upon the petition in error, the transcript, bill of exceptions, and the original papers and pleadings from the court of common pleas of Coshocton county, Ohio, and was argued by counsel. On consideration whereof the court find that error appears affirmatively upon the face of the record, to the prejudice of the plaintiff in error, in this: In cross-examination of witnesses offered by the defendant Dickerson as to character; error in permitting witness Trego to testify as to what Mrs. Hughes told him; error in permitting witness Elijah Thomas to testify that Mrs. Hughes told him about Dickerson hiding in the bushes; and error in giving fifth and tenth requests of the state to the jury. It is therefore considered by the court

that the judgment aforesaid be reversed and held for naught, and said cause is hereby remanded to said court of common pleas for such further action as is provided by law." The following exceptions are noted in the entry: "To all of said findings, orders, and judgments the defendant in error, by James Glenn, prosecuting attorney, excepts. And James Glenn, the prosecuting attorney representing the state, excepts. Also comes the plaintiff in error, Benjamin Dickerson, and excepts to the failure of the court in not passing on and in not sustaining each and every of the errors assigned for the reversal of said judgment as the same are set forth in his petition in error in said circuit court, and in failing to find and to sustain other errors set forth in said petition in error, and other errors apparent in the record other than the errors specifically found and set forth in its finding, order, and judgment of reversal of said cause."

The petition in error filed in the circuit court by Dickerson contained many assignments of error not mentioned in the said entry, some of which will be noticed in the opinion. The state prosecutes error to the judgment of the circuit court, and asks its reversal and the affirmance of the judgment of the court of common pleas. The important questions raised in the record are stated and discussed more fully in the opinion.

Joseph L. McDowell, Pros. Atty., James Glenn, and T. H. Wheeler, for the State. R. M. Voorhees, J. C. Adams, and J. C. Daugherty, for defendant in error.

PRICE, J. (after stating the facts as above). The record made in this case is very voluminous, only a small part thereof being printed, and its examination is attended with corresponding labor in order to present the various subjects of complaint by the parties. In oral argument and in briefs counsel have aided us in eliminating the immaterial and nonessential matters put in controversy in the trial court, and our aim now is to settle the substantial questions found in the record, the proper disposition of which will answer all the purposes of this review. As in all cases, where several weeks have been consumed in the trial of an important case, irregularities, inaccuracies in rulings of the court, and even slight errors of judgment committed during a heated contest can be found; but if they have been cured by the court in later rulings, or if they are innocent of any controlling influence on the main issue, they should not be seriously regarded by a reviewing court. And so with the record before us. The circuit court found but few errors in the record, and has stated them, and we must assume from the entry that they decline to reverse the judgment of the court of common pleas for any others assigned in that court. The state urges that the circuit court erred in finding error as it states on the record, and that its judgment

should be reversed, and that of the common pleas affirmed and enforced. On the other hand, Dickerson urges that the circuit court should have found error in a number of other particulars, and that, if it was mistaken as to the grounds sustained, there are many other grounds of reversal upon which the judgment may be predicated. These grounds the defendant in error has pointed out to us, and they will be considered in their proper order.

We will first notice the grounds of reversal found by the circuit court. It concluded that the trial court erred in permitting witness Trego to testify as to what Mrs. Hughes (the deceased) told him. An examination of the evidence of Mr. Trego shows that for some time before the homicide he was a justice of the peace in that township, and that Dickerson went to the residence of Trego and inquired if Mrs. Hughes had been to see him (the justice) "for law." Trego informed him that he was not at home when she was there, and Dickerson remarked: "You need not give her law on what she was after." Mr. Trego did not testify to any conversation with Mrs. Hughes, for he had none, being from home when she called. We surmise that Dickerson had heard in some way that Mrs. Hughes would consult Justice Trego about his conduct towards her, or that she had consulted him on the subject. Hence the visit of Dickerson to ascertain what she had done. We see no impropriety in permitting the justice to tell of this visit and what Dickerson said while there. This was but an item of evidence which might be considered, with other conduct and statements of the accused, relating to any trouble or hostile feeling between them.

Again, the circuit court held that the common pleas erred in "permitting Elijah Thomas to testify that Mrs. Hughes told him about Dickerson hiding in the bushes." The residence of Mrs. Hughes was not far from that of Dickerson and his family, and Mr. Thomas was the father of Mrs. Hughes and lived with her and her husband. It is intimated that, some time prior to the homicide, Dickerson had annoyed Mrs. Hughes with improper solicitations, or attentions, which were resented by her. On the occasion referred to the witness Elijah Thomas, in answer to an inquiry, stated what Mrs. Hughes said about seeing Dickerson hiding in the bushes near the Hughes residence. But, as we read the record, the court promptly and distinctly ruled that part of the answer from the jury and gave mandatory instruction that such evidence must not be considered. On page 66 of the portion of record printed, the trial court said to witness Thomas: "What Kate (Mrs. Hughes) told you is stricken out, and also that 'Dickerson was down hid in the brier patch.' That is struck out—what the witness said about that—and the jury will disregard those statements that I have struck out." The court intervened as soon as prac-

ticable to prevent the incompetent answer being made, and, after it was made, promptly exercised the right to strike it from the consideration of the jury. These two particular instances of alleged incompetent testimony are not well grounded and were not sufficient to justify the reversing judgment.

The lower court also found error in the latitude allowed the state in the cross-examination of defendant's character witnesses. Many witnesses were examined and cross-examined on this subject, and a large part of the vast record is taken up with the questions and answers. We can only select some fair samples from the record, which will be sufficient to show the general field of controversy: G. F. McConnel, perhaps the first character witness called by the accused, testified to an acquaintance with Dickerson of 25 years; that he had frequently met him, sometimes in public gatherings and places. Objections to several questions propounded to this witness were sustained, because of either the form of the question or a lack of sufficient knowledge to answer as to character of the accused. Efforts to qualify witness were pursued, and finally the following question was permitted and answered: "Q. During the last 15 years and prior to June 28, 1905, have you been at places, gatherings, or in company with Benjamin Dickerson, or not? (Objection overruled and exception.) A. I have. Q. From your own knowledge of Benjamin Dickerson, gained by means of associating and seeing him, as you have answered in your former answers, what, so far as your knowledge, is his general character prior to June 28, 1905, for peace and quietness? A. Well, it is good. Q. Good as men in general? A. Yes, sir; I believe it is." The witness was then taken on cross-examination as to the extent of the acquaintance, and the state asked witness about certain reports in the neighborhood concerning evil things that the defendant had done. Here is an instance: "Q. You know A. L. Reed? A. Yes, sir. Q. You heard that he gave away a bird dog to keep Ben from stealing the dog, did you not, prior to June 28th? A. I have no knowledge of ever hearing of it—of Al. Reed giving a dog to keep him from stealing it. Q. You heard prior to June 28, 1905, that Ben Dickerson and his brother Josh were accused of killing some sheep and injuring some sheep of John Dickerson about 20 years ago, didn't you? A. No, sir. Q. Didn't you hear that Ben and Josh were both blamed with that prior to June 28th, and arrested—brought into town? A. No, sir. Q. Did you hear that—did you ever hear prior to June 28th that—Ben was accused along with his brother Josh, or accused along by himself, of putting arsenic or strychnine in a crock of milk, and that when it was churned by John Dickerson and given to some hogs that it killed several hogs when they gave them the buttermilk? A. No, sir."

These inquiries were followed up by others

of like nature, and all were objected to by the accused, and the court allowed them to go on as before. The witness was also interrogated about hearing of the defendant injuring a sawmill of Frank Hardesty, or throwing away some of its tools. Other witnesses for defendant, who gave him a good character, were asked about reports of the misdeeds of defendant above referred to and neighborhood rumors about Dickerson's conduct. Some of these witnesses had heard of the suggested rumors of misconduct, and they were plied with questions as to whether they took them into consideration in making their answers to the general good character of the defendant for peace and quietness, and whether such rumors would affect their testimony concerning his character. These rumors mentioned by counsel for the state were of various kinds and did not embrace in most instances the trait of character involved in a trial for homicide. We have not space for more extended quotation from the several cross-examinations of the so-called character witnesses. It will be observed that the defense did not introduce evidence of his general reputation for peace and a quiet disposition, and counsel for the state seems to think that that was the only proper course of inquiry, and seeks to justify the cross-examinations by applying them to the course of inquiry which the defense should have adopted, namely, to establish general reputation. This brings up the question: May the accused, under a charge of homicide, introduce evidence of his good character as to the trait involved in the charge?

There is no doubt that counsel and even courts have sometimes forgetfully treated character and reputation as synonymous, and a want of a clear knowledge or recollection of the difference between the two often leads to mistake in applying correct rules to regulate the admission of evidence of one or the other. Character of a person is that which he really is, rather than what he is reputed to be; and we think the accused is not confined to his reputation for a certain trait of character involved in the charge, but may, by those most intimate with him during a course of years, spread before the jury his real self, touching the quality of conduct involved in the issue. Such familiar and intimate acquaintance may enable his neighbors to read him as they would a familiar book. If we look to the text-books, we see the right of introducing proof of good character recognized. See section 25, 3 Greenleaf on Evidence. There it is said: "Upon the admissibility of evidence of character, whether of the prisoner or of the party on whom the crime is alleged to have been committed, there has been some fluctuation of opinion. Evidence of the prisoner's good character was formerly held to be admissible, in *favorem vitæ*, in all cases of treason and felony; but this reason is now no longer given, the true question being whether the character is in

issue. 'I cannot, in principle,' said Mr. Justice Patterson, 'make any distinction between evidence of facts and evidence of character. The latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty. The object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged,' etc. See, also, section 3039, Elliott on Evidence, where it is said: "It is the general rule that the defendant's good character or reputation for peace and quiet is admissible in his favor. But the evidence must be confined, in general, to the trait involved in the crime charged," etc. Also section 2721 from the same authority. Further citations to text-books is not necessary, for this court has long ago considered and passed upon the question. In *Gandolfo v. State*, 11 Ohio St. 114, we have the following as the third section of the syllabus: "A defendant who, by the nature of the issue, is entitled to give evidence of his character for peace and quietness, is not limited to proving what people may have said of him, as to his being or not being a quiet and peaceable man, but is entitled to inquire as to his character from those acquainted with him, and they are authorized to speak from his general peaceable and quiet conduct, and from not having known or heard anything to the contrary." See, also, *Griffin v. State*, 14 Ohio St. 55, 56.

It seems, from the nature and form of the questions propounded by the defendant to his character witnesses, that he followed the light of the above case, and the trial court should have recognized it much earlier in the progress of the trial. But the cross-examinations were conducted as if these witnesses had been testifying to the general reputation of the accused, and they were asked concerning alleged rumors and reports in the community about this and that misconduct or criminal act of the accused. This course of procedure was strenuously objected to at every step. Then what followed? The state having thrust these rumored offenses into the cross-examination to the extent of page after page, the accused or his counsel thought it necessary to refute the insinuations, and he was called to the stand and interrogated as to the truth or falsity of all of these various rumors. Thus was the record expanded with immaterial and incompetent testimony, which could only tend to cloud the real issue and confuse the jury. The circuit court correctly held against such lines of cross-examination, and that the error in this regard was ground of reversal.

It is urged by defendant in error that the circuit court should have found further grounds of reversal in addition to those stated in the entry, and he had his exceptions to not so finding entered of record. As one of the additional grounds, it is said there was no proof of the venue of the crime, and what is claimed to be the only evidence on the sub-

ject is copied in one of the briefs for defendant in error. In answer to direct questions, the coroner testified for the state that he found the dead body in a certain township and that the township is in Coshocton county. But he was not asked to state, nor did he say, that Coshocton county is in the state of Ohio. We are not disposed to encourage the lax method of establishing the venue adopted in this case; but from the evidence set out, and the main facts as to location and description contained in other parts of the record, we think the point is not well taken. It clearly appears from all the evidence that the criminal transaction occurred in the state of Ohio. The venue need not be proved in express terms, where the evidence is such in the state's case that no other inference can be reasonably drawn by the jury. *Tinney v. State*, 111 Ala. 74, 20 South. 597.

Another complaint of the trial court relates to the admission of evidence that about two weeks before the death of Mrs. Hughes the house in which she was residing was burned, and that evidence was admitted tending to prove that it was set on fire by Dickerson. The fire occurred in the forenoon, when all the family were absent. Mrs. Hughes had gone with one of her children to the house or spring of a neighbor to get water. Her father was in sight of the house, and so, perhaps, was Mrs. Hughes. Their attention was called to the fact that their house was on fire. Dickerson was not seen at or about the house; but one or more testified to seeing him coming from that direction, and looking back as he crossed a fence. The fact was also introduced that he did not go to the fire after its discovery and assist in trying to save the building and its contents, as did other neighbors. On the evidence in the record it would be difficult to convict Dickerson of the incendiary act; but the court admitted it on the theory, it is supposed, that the fire might have furnished a motive for committing the homicide. The house did not belong to Mrs. Hughes, but belonged to her father, Elijah Thomas, although occupied by both families; and the question is, should the state be permitted to introduce the evidence tending to prove the arson on the issue joined on either count of the indictment? It is argued that the evidence was competent under the first count, wherein it is charged the killing was done with a blunt instrument and other violent means, and that the acts which produced death were accompanied with deliberate and premeditated malice and purpose to kill. It is not seriously claimed that such evidence was competent under the second or third counts, inasmuch as the killing is alleged to have occurred while perpetrating or attempting to perpetrate a rape. Was the evidence competent under the first count? If not, it could not be under either of the others. To justify its admission to show or reflect on the question of motive, it

has been intimated that Dickerson knew that Mrs. Hughes saw him set the fire, or that he was near by when it was discovered, or that he in some way heard that she saw him in close proximity to the fire, and that in either case it became an object for him to destroy her evidence by destroying her. We find nothing in the record to establish by competent evidence that Dickerson knew that Mrs. Hughes saw him in guilty connection with the firing of the house. Whatever evidence there is relates as forcibly to Thomas and several others, who saw as much as she did; and there appears no good reason why the motive to suppress or destroy testimony should apply to her more particularly than to the others, who knew fully as much. On a retrial the state may be able to clear up this situation; but it is not satisfactory to us as the record now stands.

The state cannot give evidence to prove other crimes in support of the charge in the indictment, nor in chief, as reflecting on the character of the prisoner. In *Barton v. State*, 18 Ohio, 221, it is held that on the trial of one for larceny it is error to admit evidence for the purpose of proving that, just before the defendant committed the act for which he is being tried, he committed another larceny. The reasons for the holding have some weight on the question here. To the same effect is *Coble v. State*, 31 Ohio St. 100. True, the former assaults introduced in the last case had not been made upon the person who was the victim of the assault under investigation; but they were claimed to be crimes of like character, but the court held their proof was inadmissible. There are some offenses in which scelerity or guilty knowledge may be material, such as passing forged paper or counterfeit money. In such case it is competent, for the purpose of proving guilty knowledge, to show that the person had in his possession other spurious money or paper, or had recently passed similar spurious money. In such case the former acts are pertinent to guilty knowledge, and are of the same class. But here the burning of the house and the killing of Mrs. Hughes are crimes not of the same class or category, and until a better preliminary foundation is furnished than appears in this record—one that connects the murder with the burning of the house as its motive—the evidence of the latter should not be admitted. There should be some logical connection between the two crimes.

But it is said that the jury did not convict on the first count, and therefore the evidence was not regarded by the jury as material, and the prisoner was not prejudiced. It is true the verdict of guilty was rendered on the third count, which is a charge of killing by certain acts of violence while attempting to perpetrate a rape. Nevertheless the evidence was admitted generally, and the court in passing on its competency did not restrict its application to the first count; nor did

he limit it in any instruction during the trial, or in the charge to the jury. It was admitted and remained in the case until the last. The admission of this evidence on the foundation laid in this record was error for which the judgment might have been reversed.

It is further claimed that the judgment should have been reversed because of the admission of what counsel denominate "bloodhound testimony." The day after the body of deceased was found a Mr. Woodward brought from Dayton, Ohio, to the scene of the crime, two dogs, and they were taken to the two saplings between which the neck of the deceased had been found compressed, and given a scent from them, and their conduct is described in relation thereto, and then they were given the scent of a limb or branch that had been by some one broken from one of these saplings, as evidenced by fitting it to the stub from which it had been broken. The dog, or dogs, were to some extent controlled by Mr. Woodward by means of a leash attached to the collar or harness on the dog. Immediately after the scent of the branch the dog started on his course, which was of a devious character, and finally went to the house of Dickerson, entered, and went to a room upstairs. He was not at home, but was not far away. The conduct of the dogs, from the giving of the scent to the entrance of the Dickerson home, was submitted to the jury on his trial. It was admitted over his objection, and the very important question is made that the evidence was not competent. The history and experience of these animals is given by Mr. Woodward, who operated them on this occasion, and their conduct and acts are described by him and Mr. Wilson, who claimed to have been present. They are contradicted in material respects by a Mr. Daugherty, who also claimed to have been present on the course. This class of evidence is somewhat new to the courts, and but few cases involving it have reached courts of last resort. It enters this court now for the first time. Other courts of final resort disagree upon the question, and we are obliged to settle it according to the best light of reason and authority at our command.

The instance is not one of a dog testifying; but it is his actions and conduct when given the start of a track, or more especially the trail of a human being who at a recent date was at the beginning of the trail, or, as claimed here, was at the scene of the crime. It seems true that, the day before these dogs arrived, very many people, young and old, had trodden upon and over this scene, and some had experimented with the pressure of the two saplings by placing their own necks where, as supposed, the neck of Mrs. Hughes had been found. This fact goes to the weight of such evidence, rather than its competency, if it be otherwise competent. Counsel for Dickerson not only urge that such evidence is not competent and violates constitutional guaranties in favor of one accused of crime,

but also, if that point is not well taken, that a sufficient foundation or qualification had not been shown to make the conduct of the dogs admissible. As to the constitutional question, it is sufficient to say that the dogs were not witnesses whom the accused had a right to confront at the trial, in any different sense than the tracks of a man accused may be described as to form, size, or any other characteristic by which he may be identified. It is like the use of a yardstick in measuring goods. The witness is he who uses the stick to make the measure, and it is a mere instrumentality. So runs the theory of the state.

The older text-books furnish us no light on this subject, for the reason that this class of evidence is of modern origin. In section 1253 of Elliott on Evidence we have the views of the author stated as follows: "Although the subject does not fall strictly within the province of this chapter, yet the question of the admissibility of evidence of the actions of bloodhounds in following the track of a supposed criminal is not entirely foreign to the general subject under consideration, and this seems a convenient place in which to treat it. There is no certainty in such evidence. It is really the dog that is the witness, and the evidence would seem to be hearsay in this view; and one court has vigorously maintained in a very recent case (*Brott v. State*, 70 Neb. 395, 97 N. W. 593, 63 L. R. A. 789) that such evidence is not admissible. But other courts have agreed that it is admissible under, and only under, substantially the following conditions: Even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be shown by preliminary evidence that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings; and it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him"—citing *Pedigo v. Commonwealth*, 103 Ky. 41, 44 S. W. 143, 82 Am. St. Rep. 566; *Davis v. State*, 46 Fla. 137, 35 South. 76; *Hodge v. State*, 98 Ala. 10, 13 South. 385, 39 Am. St. Rep. 17; *State v. Hall*, 4 Ohio S. & C. P. Dec. 147; *Simpson v. State*, 111 Ala. 6, 20 South. 572.

We will give attention to the cases which recognize the class of evidence under consideration. The case of *Pedigo v. Commonwealth*, 103 Ky. 41, 44 S. W. 143, 82 Am. St. Rep. 566, was decided in 1898 by a divided court; one of the seven judges composing the court dissenting in a very vigorous opinion. The majority of the court sanctioned the admissibility of testimony as to trailing

by bloodhounds, but circumscribed its admissibility so that its use may be very limited. The proposition is that "testimony as to trailing by bloodhounds of one charged with crime may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the defendant with the crime, when it is shown by some one having personal knowledge of the fact that the dog in question is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, is itself possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at the point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicate to have been made by him." The court, on page 50 of 103 Ky., page 145 of 44 S. W. (82 Am. St. Rep. 566), after stating the above rule, said: "When not so indicated, the trial court should exclude the entire testimony in that regard from the jury." The case sets out the evidence upon which the commonwealth relied to show that the accused had been at the scene of the crime and at the point where the dog was given the scent, and the reasons why this species of dog is selected to trail a man are fully stated in the majority opinion in that case, and we will not repeat them here.

The case quoted from followed the reasoning of *Hodge v. State*, 98 Ala. 11, 13 South. 385, 39 Am. St. Rep. 17, except that the preliminary qualification of the dog in the latter case is somewhat less stringent. The court states the rule of qualification as follows: "When a dog trained to follow human tracks is, a short time after the commission of a homicide, put upon the trail of a person suspected of the crime, and follows it to the house of the defendant, this fact may be given in evidence, along with the evidence of several witnesses that the tracks found at the scene of the homicide were followed and identified along the precise route traced by the dog up to the house of the defendant, where he was shown to have been that night after the killing, as a circumstance, along with all the other evidence, tending to connect the defendant with the crime." The court says in the opinion the evidence showed that the dog thus trained was within a very short time after the homicide put upon the tracks of the person toward whom all the circumstances strongly pointed as the guilty agent, and that the dog, as if following these tracks or trailing, went to the house of the defendant.

In the year 1903 this question was before the Supreme Court of Florida in *Davis v. State*, 46 Fla. 137, 35 South. 76. The third paragraph of the syllabus, which was prepared by the court, reads: "Testimony as to the

action of dogs in following the trail of a supposed criminal from the scene of a crime is admissible in evidence, provided such preliminary proof be given of the qualities and training of the dogs as to show that reliance may reasonably be placed upon their accuracy in following the trail of a human being." In the opinion of the court, by Cockrell, J., it is said: "There should first be testimony from some person who has personal knowledge of the fact that the dog used has an acuteness of scent and power of discrimination which have been tested in the tracking of human beings. The intelligence, training, and purity of breed are all proper matters for consideration in determining the admissibility of such evidence, as is also the behavior of the dog in following the track pointed out. In the record before us there is no proof of the breed of the dogs, and, while there is proof that they had been trained for six months, there is no proof that they were trained in the tracking of human beings. It is questionable whether this is sufficient." But, as the case had to be reversed on other grounds, the admission of the evidence referred to was not made a ground of reversal.

In 1904 a similar question was before the court of Criminal Appeals of Texas in the case of *Parker v. State*, 46 Tex. Cr. R. 461, 80 S. W. 1008, 108 Am. St. Rep. 1021. The rule there laid down is differently worded, but not much different in substance. It is: "Where the track assumed to be that of the murderer, and which the circumstances in evidence tend to show was his track, was pointed out to a dog of the hound species, who was trained in trailing tracks of human beings, and the dog trailed this track from where it was pointed out to him to the residence of the defendant, some mile and a half, and the course of his pursuit of the track was followed by witnesses who testified in the case, and showed that the dog followed this track which they saw upon the ground and described, such character of testimony was held to be admissible." The facts entering into the preliminary proof in the latter case vary from those appearing in either of the former cases; but the court was passing on the sufficiency of the preliminary proof in that case, rather than endeavoring to formulate a general rule.

It is argued that there are cases holding a contrary doctrine, namely, *State v. Moore*, 129 N. C. 494, 39 S. E. 626, 55 L. R. A. 96, *McClurg v. Brenton*, 123 Iowa, 368, 98 N. W. 881, 65 L. R. A. 519, 101 Am. St. Rep. 323, and *Brott v. State*, 70 Neb. 395, 97 N. W. 593, 63 L. R. A. 789. But an examination of two of those cases, and particularly the facts upon which they rest, dispels the claimed antagonism. In *State v. Moore*, supra, the third branch of the syllabus is that "the evidence in this case of the trailing by a bloodhound should not have been admitted." But what was the evidence in this case? The conduct of the dog itself showed that his

trailing was unreliable, and that he did not possess the live and acute instinct so necessary to reliably trail human beings. After reviewing the evidence upon the character of the dog and his conduct, the court sums up on page 502 of 129 N. C., page 629 of 39 S. E. (55 L. R. A. 96), as follows: "In this case there is no evidence to connect the circumstance of the baying of the two defendants, or either of them, with the making of the tracks at the time the larceny was committed; nor is there any evidence that the dog scented any that were made by either of the defendants; nor is there any way to ascertain that fact. The evidence failing to become a circumstance to connect the defendants with the crime, * * * there was error in admitting it." It seems clear that the court so ruled because the defective preliminary proof of qualification of the dog and his conduct on the trail and at its close lead to the opinion that the evidence of the trailing should not have been admitted.

McClurg v. Brenton, supra, is a case where an action was commenced to recover damages for an unlawful search of plaintiff's premises. The search was made without warrant for the discovery of alleged stolen property, but by an officer of the law. The court say in branch 3 of the syllabus: "Evidence in an action for wrongful search as to conduct of hounds used to track the thief is only admissible on the question of malice, in mitigation of damages." And in the fourth clause it is said: "In an action for an unlawful search aided by the use of hounds, evidence as to the breeding and training of the dogs, letters indorsing their usefulness, and stories concerning their ability are inadmissible." Why? The court says on page 371, 372 of 123 Iowa, page 882 of 98 N. W. (65 L. R. A. 519, 101 Am. St. Rep. 323): "The mere fact that a man is an officer, whether of high or low degree, gives him no more right than is possessed by the ordinary private citizen to break in upon the privacy of a home and subject its occupants to the indignity of a search for the evidence of crime, without a legal warrant procured for that purpose. No amount of incriminating evidence, whatever its source, will supply the place of such warrant. At the closed door of the home, be it palace or hovel, even bloodhounds must wait till the law, by authoritative process, bids it open. * * * In another part of the opinion it is said: "But in an action for an unlawful search it is no defense whatever to say that plaintiff was a thief, or did in fact have stolen property on the premises. The fact may be admitted, but the right of action remains." It is quite easy to see why the court held against the evidence offered.

Brott v. State, supra, as we read the case, is against the admission of the conduct of bloodhounds, and perhaps under any circumstances. According to the opinion in that case the court as then constituted had no

faith in such evidence and regarded its admission as dangerous to the rights of an accused party. It must be admitted that some reasons advanced for the conclusion reached are forcible and calculated to excite great caution, if not entire distrust, although they are couched in language of unsparing sarcasm. But we think that, from a comparison of the views expressed by the different courts from whom we have quoted, there may be deduced a rule which, until shown untrustworthy, may be followed in cases where this class of evidence is offered. It is apparent that, before the acts and conduct of the dog can be shown, a proper preliminary foundation must be laid, and to establish such foundation it must be shown that the particular dog used was trained and tested in tracking human beings, and by experience had been found reliable in such cases; that the dog so trained was laid on the trail, whether it was visible or invisible, at a point where the circumstances tended clearly to show that the guilty party had been, or upon a track which the circumstances indicated to have been made by him. In addition to this, the reliability of the dog must be proved by a person or persons having personal knowledge thereof. This foundation may be strengthened by proof of pedigree, purity of blood, or the exalted standing of his breed in the performance of such peculiar work.

The charge of the court upon this subject seems to have been full and fair, and is not seriously complained of. After all, it is the human testimony that makes the trailing done by the animal competent, and its actions are described by human testimony, just as it would describe the operations of a piece of intricate machinery. When the above foundation, or one similar in effect and efficiency is laid, the acts of the animal may be described. But the court, when such evidence is admitted, should explain its purpose and limitations to the jury, in order that they may not be unduly impressed thereby. There was some evidence in this case as to the training of the dog and of his acuteness, and tending to prove that Dickerson had been seen in

the bushes close to where the body was found; of tracks leading from the scene, which were followed by witnesses contemporaneously with the trailing by the dog. We do not think it necessary or proper to comment upon its sufficiency now, but content ourselves with submitting the best rule we can formulate, which should govern when the case is retried.

The circuit court was of the opinion that requests 5 and 10 made by the state and given to the jury should not have been given. If the objection to them consists in their being mere abstract propositions of law, it may be well taken, for such is their character; but giving one or more abstract propositions is not always error. The balance of the charge may cure the fault.

The court was less fortunate in the use of language we find in the general charge on page 438 of the printed part of the record. "In a civilized state like this, it is absolutely essential to the preservation of social order that the law should be enforced, and especially in cases where acts of violence have been done. The laws must be obeyed, violators of the law must be punished, and you as jurors would be faithless to your trust if you should return a verdict of acquittal in this case when the facts demand a conviction of the prisoner. It is equally important that innocence should not be punished. You were impaneled, not for vengeance, but to subserve the ends of public justice; and you would be disloyal to your obligations if you should find the prisoner guilty when the evidence required his acquittal." The wording of these statements may have been a mere inadvertence; but, coming from the court so near the close of the charge, it is more than probable that they had a prejudicial influence.

Other errors in the record have been pressed, but we do not regard them as material.

The judgment of the circuit court is affirmed.

SHAUCK, C. J., and SUMMERS and DAVIS, JJ., concur.

(40 Ind. App. 689)

COLUMBUS ST. RY. & LIGHT CO. v. REAP. (No. 8,121.)

(Appellate Court of Indiana, Division No. 2. Dec. 19, 1907.)

1. STREET RAILROADS—OPERATION—NEGLIGENCE.

The placing of an inexperienced motorman in charge of a car, accompanied by a skilled motorman to teach him the work, and to see that no harm will come from his inexperience, is not negligence on the part of the street railway company.

2. SAME—COLLISIONS—NEGLIGENCE.

In an action for injuries in a collision between a street car and a wagon, evidence held insufficient to show negligence of the street railway company proximately causing the collision:

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 246.]

3. SAME.

A motorman seeing a horse and wagon standing beside the track, and out of danger, may assume that he can safely pass without slackening the speed of his car, and that either the horse is properly secured or that it will not be frightened at the car.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 195-203.]

Appeal from Circuit Court, Bartholomew County; Marshall Hacker, Judge.

Action by Philip H. Reap, by next friend, against the Columbus Street Railway & Light Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

F. T. Hord and Jas. F. Cox, for appellant. C. E. Custer, for appellee.

RABB, J. The appellee sued the appellant to recover damages for injuries alleged to have been sustained by him, resulting from a collision between appellant's electric street car, while the same was passing over its line on Chestnut street, in the city of Columbus, and a delivery wagon in which the appellee was sitting, and which at the time of the collision was temporarily standing in said street, which collision is alleged to have occurred through the negligence of appellant's servants in charge of the car. The cause was put at issue, tried by jury, verdict returned in favor of the appellee, appellant's motion for a new trial overruled, and judgment rendered against it on the verdict. The overruling of appellant's motion for a new trial is assigned as error in this court. One of the grounds of the motion for a new trial is the insufficiency of the evidence to sustain the verdict.

The complaint charged that at the place where the accident occurred the space between the street car rail and the gutter was about the width of an ordinary carriage. The proof showed that it was 14 feet. The complaint charged that the street car was running at the rate of 15 miles per hour, a high and unreasonable rate of speed. The evidence most favorable to appellee showed that the car was running at a speed of six or seven miles per hour; and that that was the speed at which it ordinarily ran. The

complaint charged that the car was in charge of an incompetent and inexperienced motorman, who had never operated a motor car prior to the day of the accident. The evidence showed that the motorman who had control of the motor at the time of the accident was a new employe of the appellant, just learning the business, that the day of the happening of the accident was his third day of trial as a motorman, and that the company sent with him a competent and experienced motorman to teach him how to operate the motor, and he was present with him, standing within two feet and a half of him at the time the accident happened. The complaint charged that the horse attached to the delivery wagon became frightened and unmanageable, and backed the wagon onto the track when the street car was a distance of 400 feet away, and that the horse and wagon were in plain view of the motorman for the entire distance, and that those in charge of the car could and did see that the horse was frightened and unmanageable, and that the appellee was powerless to control the horse or to prevent a collision; that the motorman saw appellee's peril in time to have avoided the accident. The evidence most favorable to appellee showed that the appellee, a boy of 10 years, got into the delivery wagon to ride with another boy of 13 years of age, who was in charge of the wagon, delivering groceries for his employer; that the boy in charge of the wagon drove the wagon up by the side of the gutter, fastened the lines in some way to the wagon, and left it about 4½ feet from the car track, and went upstairs to deliver goods, leaving the appellee in the wagon alone; that he did not tie the horse; that it was a gentle animal, and had been used on the streets of Columbus, and driven to a delivery wagon by this same boy who then had charge of it for four months last past; that, while the delivery boy was gone, the street car turned the corner, and came into Chestnut street, 2½ blocks away; that the horse gave no manifestations of fright that were observable by the two motormen on the appellant's car until the street car passed Fifteenth street, when the horse suddenly began to shy and back. The accident happened about 40 feet south of Fifteenth street.

Appellee's witness Elmer Brisben, who was seated on the sidewalk immediately in front of the horse, testifies that he did not notice the horse until the car arrived this side of Fifteenth street; that the motorman was ringing the bell for Fifteenth street. The horse started to back, and the witness jumped over the railing to catch it, but the car hit the wagon before he could reach the horse. The delivery wagon had a top, and was standing in such a position that the motorman was unable to see the boy seated in the wagon. Mr. Brisben testified that, when he observed the wagon, the wheel was

within about one foot of the track. Mr. McPeak, another of appellee's witnesses, who was standing on the sidewalk opposite the spot where the accident occurred, testified that, when the car was within 20 or 30 feet of the wagon, it stood about 4 feet from the track; that the horse shied and the collision occurred. The new motorman, Shoemaker, testified that he saw the horse and wagon standing at the side of the street when he was a block and a half away, and kept them under observation until the collision; that from the position of the wagon he could not see the boy; that he observed nothing unusual about the horse until just as the car got to it, when it shied and backed the wagon against the car; that he turned on the brake at once, and stopped the car as soon as it could be done. Walter Chitty, the old motorman who was with Shoemaker, testified that he was on the car with Shoemaker, teaching him the business; stood in the door of the vestibule, where he could see; saw the horse and wagon while the car was more than a block away. When he first observed the wagon, it stood four feet from the track, and the horse showed no signs of fright until nearly to it, when it suddenly shied and backed the wagon against the car. There is no substantial conflict in the testimony of these witnesses, and it is perfectly plain from their evidence that there was nothing about the horse's appearance or conduct that would naturally lead the motorman to anticipate that he might not safely pass it, until he was almost opposite to the horse, and too late to avoid the collision.

The evidence without contradiction shows that the collision did not occur between the wagon and the front end of the car, but with the car step, indicating clearly that the wagon was backed against the car while it was passing. The facts testified to by appellee's witness Brisben illustrates the suddenness of the whole affair, and showed with more clearness than the mere guess of witnesses in reference to the distance the car was from the horse when it first manifested fright. Brisben says that he was sitting on the sidewalk just in front of the horse. The instant he noticed the danger, he leaped over the railing to catch the horse, but, before he could reach it, the collision occurred. While it is true that the motorman in charge of the motor on the car in this instance was inexperienced, that fact of itself does not constitute negligence on the part of the street car company. It is necessary that men learn the business. The operation of motor cars is not a natural gift, and we can conceive of no other way in which the business can be learned than the one that was employed in this case by the company. They had taken the precaution to provide a skilled and experienced motorman to accompany the novice, to teach him the art, and presumably to see that no harm came from his inexperience, and this man was present with

him at the time the accident occurred, and it is not manifest from the evidence that, if the experienced motorman had hold of the motor at the time, the accident would not have happened just as it did. The evidence fails to show any negligence upon the part of the motorman, inexperienced though he was, that proximately caused the collision. The negligence bringing about the accident was the negligence of the delivery boy in leaving the horse unsecured alongside the street car track. The motorman had the right to assume, when he saw the horse and wagon standing beside the track, and out of danger, that he could safely pass without slackening the speed of his car; that either the horse was properly secured, or that it would not frighten at the car. *Citizens' St. Ry. Co. v. Lowe*, 12 Ind. App. 47, 39 N. E. 165; *Kessler v. Citizens' St. Ry. Co.*, 20 Ind. App. 428, 50 N. E. 891; 27 A. & E. Ency. of Law (2d Ed.) 71, and cases cited.

The evidence in this case was not sufficient to sustain the verdict of the jury, and appellant's motion for a new trial should have been sustained.

Cause reversed, and a new trial ordered.

(40 Ind. App. 615)

VANDALIA R. CO. v. FETTERS.

(No. 5,999.)

(Appellate Court of Indiana, Division No. 2
Dec. 11, 1907.)

1. PLEADING—ACTION ON WRITTEN INSTRUMENT—FILING—NECESSITY.

Under *Burns' Ann. St. 1901*, §§ 5323-5325, authorizing an abutting owner to repair a railway right of way fence, after giving 30 days' notice, and providing that he shall present an itemized statement of the expenses and may recover the same, etc., the itemized statement furnished by an abutting owner repairing a railway right of way fence is not the foundation of an action for the expenses, within section 365, providing that when a pleading is founded on a written instrument the original or a copy thereof must be filed with the pleading, but the labor done and materials furnished which have inured to the benefit of the company constitute the foundation of the action.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 39, Pleading, § 936.]

2. SAME.

Where a written instrument is not the basis of the action or defense, but only referred to as one among other facts material to the pleading, a copy or exhibit need not be filed with or made a part of the pleading, notwithstanding *Burns' Ann. St. 1901*, § 365, providing that where a pleading is founded on a written instrument the original or copy thereof must be filed with it, etc.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 39, Pleading, § 936.]

3. RAILROADS—RIGHT OF WAY FENCE—ERECTED BY ABUTTING OWNER—COST—RECOVERY FROM COMPANY—COMPLAINT.

Under *Burns' Ann. St. 1901*, §§ 5323-5325, declaring that when a railroad fails to repair its right of way fence within 30 days after notice, the abutting owner may make the repairs and recover the cost thereof after furnishing to the railroad an itemized statement of the expense, a complaint in an action by an abutting owner for the cost of repairing a railway right of way fence, which alleges the reasonable value

of the fence, followed by an itemized statement of the materials used and labor performed, and that after the completion of the fence an itemized statement of the expense was furnished, sufficiently embodies the itemized statement.

4. SAME.

Under Burns' Ann. St. 1901, §§ 5323-5325, requiring a railroad to fence its right of way except where the same runs over unimproved and uninclosed lands, and to maintain the same in repair, and authorizing an abutting owner to repair after 30 days' notice, an abutting owner may rebuild a right of way fence on giving the 30 days' notice, though the fence between his land and his neighbor's is out of repair.

Appeal from Circuit Court, Marshall County; Harry Bernetha, Judge.

Action by David Feters against the Vandalia Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

John G. Williams and Saml. Parker, for appellant. H. A. Logan, for appellee.

COMSTOCK, J. Appellee recovered judgment against appellant for rebuilding a fence, built by him on the appellant's right of way, where his farm land abutted upon the same. The complaint alleges, in substance, that appellee's lands, being agricultural lands, abut upon the right of way of appellant's railroad, and that the original right of way fence along the said lands, on April 12, 1905, had decayed so that at that time it would not turn stock of any kind; that at said time his said lands were fenced, except along said right of way; that on said day he caused to be prepared and served upon the appellant's nearest freight agent a written notice, notifying it that he owned said lands, that the fence was out of repair, the probable cost of putting in repair, and that unless appellant rebuilt or repaired the fence within 30 days he would enter upon the right of way and rebuild or repair it himself; that, the fence not having been rebuilt or repaired pursuant to said notice, he, on May 15, 1905, built and constructed a good, woven-wire fence along the edge of the right of way next to his said lands at a cost of \$106.67, and that on May 22, 1905, he prepared an itemized statement of the cost of said fence and verified the same, and delivered a duplicate copy thereof to appellant's agent, being the same agent upon whom he served said notice; that appellant failed to pay or tender the amount shown to be due by said statement within 60 days, and that said sum, together with an attorney's fee of \$50, is due and unpaid. A demurrer to the complaint for want of facts was overruled, and the cause put at issue by general denial. The cause was tried by the court. Upon proper request the court made a special finding of facts, and stated one conclusion of law thereon, to the effect that appellee was entitled to recover the reasonable value of the fence constructed by him, in the sum of \$99.95, and his attorney's fee of \$25 and costs. Judgment was rendered in accordance with the conclusion of law. In this appeal it is contended in behalf of appellant that

the court erred, first, in overruling its demurrer to the complaint, and second, in the conclusion of law.

In support of the first specification of error, appellant claims that the complaint is insufficient, because the itemized account is not made a part thereof as an exhibit or otherwise. The statute aims in three special sections to secure and maintain the fencing of a railroad's right of way, to keep all domestic animals from its tracks. Sections 5323, 5324, 5325, Burns' Ann. St. 1901. Section 5323, *supra*, states the duty and the manner of its discharge. Section 5324 fixes the time limit after the completion of the road for the construction of the first fence, and the landlord's right upon default; and section 5325, the duty to maintain, and the landowner's right upon the company's failure to keep up, the fence according to the original standard. *Terre Haute, etc., R. Co. v. Erdel*, 163 Ind. 348, 71 N. E. 960. The proceeding in the case at bar was under section 5325, *supra*. Said section provides that, after the landowner has taken the steps provided for in the statute, he may recover the "reasonable value of said repairs from such railroad," etc. The itemized statement to be furnished the railroad company is not the foundation of the action. "The work and labor done and materials furnished, which have inured to the benefit of the company, is the foundation of the cause of action. When a written instrument is not the basis of the action or defense, but is only referred to as one among other facts material to the pleading, a copy or exhibit need not be filed with or made a part of the pleading." Counsel for appellant cites section 365, Burns' Ann. St. 1901, and numerous cases from the Supreme and Appellate Courts, but they do not apply to the question before us for the reason above stated.

The complaint alleges "that said fence is worth, and the reasonable value thereof is, \$106.67, itemized as follows." Then follows an itemized statement of the material used and labor performed. "Total cost of rebuilding and replacing fence, \$106.67. * * * And plaintiff says that after the completion of said fence he did, on the 22d day of May, 1905, present for payment to the freight receiving and shipping agent employed by defendant at its station, La Paz Junction, Indiana, said station being the nearest shipping station of the defendant railroad to the land so described as fenced, an itemized statement, verified by affidavit, of this plaintiff, of the expense of the construction of such fence so built by plaintiff at a cost of \$106.67. That said verified itemized statement was presented to John M. Montgomery, who was said agent at La Paz Junction, Indiana, at his office in said station, and a duplicate copy of such sworn statement was furnished and delivered to him at said time." So that, while the itemized account is not the foundation of this action, it substantially appears to have

been embodied in the complaint. It appears from the only part of the special findings which appellant questions that the appellee's lands abutting on the right of way where he repaired or rebuilt the fence were divided into two fields, the one on the south containing about 20 acres and the one on the north about 40 acres. The north part of the right of way fence built by appellee along the south field was approximately 60 rods, and along the north field 93½ rods. That at the time when the 30 days' notice was served, and when the fence was built by appellee, his fence along the side of the south field and next to the public highway "was insufficient, without repair to permanently restrain horses, cattle, mules, sheep, hogs and other stock." And that the fence along the north side of the 40 acres or north field was a partition fence, and that the east part thereof, being the part belonging to the adjoining landowner, "consists of two or three wires strung on posts, and was not at said time sufficient to turn hogs and sheep." Upon these facts it is claimed that appellee was not in a position to demand and require that appellant build or repair its right of way fence along the fields.

In behalf of appellant it is insisted that the statute means that the landowner, before he can require a railroad company to construct and maintain what may be called a lawful fence along the right of way next to his land, must have his land inclosed on its other sides with a lawful fence. The liability of appellant referred to is that defined in section 5323, *supra*; that is, the duty to fence and the manner of its discharge—a duty conditioned upon the construction of a lawful fence on three sides of the lands of the landlord. It is found that soon after the completion of the road the then owner caused a right of way fence to be built along the west side of the right of way where the same abuts upon plaintiff's described lands. The duty under said section was thus discharged. It has been held in *Terre Haute, etc., R. Co. v. Erdel*, *supra*, and in *Terre Haute, etc., R. Co. v. Salmon*, 34 Ind. App. 564, 73 N. E. 268, that, for a failure to maintain a fence constructed under the provisions of sections 5323 and 5324, the landlord must proceed under section 5325, *supra*. This has been done in the case at bar. If the fences between appellee and his neighbors were in want of repair, that fact would not relieve appellant from the statutory liability for its failure to discharge its duty. *Missouri Pacific R. Co. v. Youngstrom*, 47 Kan. 349, 27 Pac. 982, is cited by appellant. The decision is founded upon a Kansas statute (chapter 154, p. 256, Sess. Laws 1885), being "An act to compel railroad companies to fence their roads by and through lands enclosed with a lawful fence." It contains no provisions equivalent to those of section 5325 of the Indiana statute.

Judgment affirmed.

(40 Ind. App. 663)

VANDALIA R. CO. v. SELTENRIGHT et al.
(No. 6,000.)

(Appellate Court of Indiana, Division No. 2.
Dec. 13, 1907.)

1. RAILROADS—RIGHT OF WAY FENCE—EREC-
TION BY ABUTTING OWNER—COST—LIABILI-
TY OF COMPANY.

Under Burns' Ann. St. 1901, §§ 5324, 5325, requiring railroads to fence their tracks and keep the same in repair, and declaring that on the failure to make repairs within 30 days after notice the abutting owner may make repairs and recover the cost from the company, an abutting owner has the right, on giving the statutory notice, to build a new fence on finding that the materials of which the original fence was constructed were rotten, and to cast aside materials which might have been used in repairing the original fence.

2. SAME.

An abutting owner building a new railroad right of way fence on the railroad failing to repair the same within 30 days after notice prescribed by Burns' Ann. St. 1901, § 5325, may recover the cost of the same though he built the fence on the right of way from six to eight inches within the line of the original fence and on a line designated by a representative of the railroad.

Appeal from Circuit Court, Marshall County; Harry Bernetha, Judge.

Action by Charles E. Seldenright and others against the Vandalla Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jno. G. Williams and Saml. Parker, for appellant. H. A. Logan, for appellees.

COMSTOCK, J. Appellees sued appellant to recover the value of a fence constructed by them along appellant's right of way abutting upon the same. Steps were taken by appellees leading up to the construction of the fence by them and to the bringing of the action, under the third section of the act of July 18, 1885 (being section 5325, Burns' Ann. St. 1901), and the action was brought under the provision of that section. The complaint is in one paragraph. A demurrer for want of facts was overruled. The answer was a general denial.

The trial was by the court, without a jury, and upon the written request of appellant a special finding of facts was made and one conclusion of law stated thereon. In substance, the conclusion of law was that the appellees were entitled to recover the reasonable value of the fence constructed by them, being \$72.24, and their attorney's fee, being \$25, and costs. Judgment was rendered against appellant for \$97.24 and costs on the finding and conclusion of law. The errors relied upon for reversal are, first, that the court erred in overruling the demurrer to the complaint, and, second, error in its conclusion of law upon the facts found.

The third and fourth points made and discussed by appellant are as follows: Third: A landowner has no right, under section 5325, Burns' Ann. St. 1901, to cast aside materials that are fit for use and with which

and other materials the fence might be properly repaired, and construct an entirely new fence. The fourth: A landowner who constructs a new or repairs an old fence, under sections 5324 and 5325, Burns' Ann. St. 1901, must locate the fence at the extreme edge of the right of way next to his land.

That part of the special finding pertaining to said third point is as follows: "The old right of way fence at said time, and when the thirty days' notice was served upon the defendant, had been constructed of posts set in the ground and wires strung thereon, and one board nailed to the tops of the posts. In many places along the plaintiffs' said lands the posts were down, and those standing were rotted and decayed, the boards were off the posts and down, and some of the wires were rusted and all the wires were old. The wires not broken might have been used, as might, also, some of the posts, in repairing the old fence, which repairing might have been done at much less expense than was required to make a new fence, and the fence so repaired would have served for from two to four years, and the same could have been made, by the use of such part of the old wires as was fit for use, and other wires, a fence that would have turned horses, cattle, mules, sheep, hogs and other stock." Under the facts found it was for the appellees to use their judgment, subject to review by the court, appellant having refused to do the work. Upon this question the Supreme Court in *Terre Haute, etc., R. Co. v. Erdel*, 163 Ind., at page 351, 71 N. E., at page 961, say: "This discharged the company's obligation under section 5324, supra, and the new duty of keeping it up, or 'in good repair and sufficient to answer the purpose for which it was constructed,' arose under section 5325, supra. This latter duty was not performed, and, appellant having failed to repair after notice that the fence had become decayed and dilapidated, appellee had the right to enter and restore the fence. In doing so, if he found, as he did, the fence broken and down, and the materials of which it had been constructed rotten and unfit to be used in the formation of a proper fence, a substitution of all new and suitable materials in the reconstruction was permissible within the meaning of section 5325, supra, and precisely the thing he should have done."

As to said fourth point, the court found: "Shortly before plaintiffs commenced the construction of the fence built by them, as herein found, Charles E. Seltenright, one of the plaintiffs, and Solomon Miller, one of defendant's section foremen, acting under instructions from Mr. Bowen, defendant's supervisor, measured off a line * * * and set three stakes. * * * The plaintiffs built their said fence practically on the line of said stakes. The fence so built by them was set and built from six inches to eight inches within and towards the track from the line

of the old fence that had been built by the defendant's predecessor in the ownership of said railroad in the spring of 1885. This old fence had divided the lands of the plaintiffs from the right of way from the time it was built to the time the plaintiffs took it down immediately before and preparatory to their building the new fence, and the line of said old fence had been recognized and treated during all said times as the line dividing plaintiffs' said land from the right of way. That at the time said stakes were set said Solomon Miller stated to said plaintiff that 'that is the line on which to build your fence.'" The court also found (finding No. 6) that "on the 26th day of May, 1906, the plaintiffs entered upon the lands and right of way of the defendant where the same abuts plaintiffs' described lands, and after removing the material and debris of the old right of way fence, and after depositing the same on the right of way, proceeded to and did build and erect a good and sufficient woven-wire fence along the right of way on the west side thereof, where same abuts plaintiffs' lands," etc. The findings show that the fence was built by appellees, after appellant had refused to repair or rebuild the same, upon a line within from six to eight inches of the line of the original fence, which line was designated by the representative of appellants. After the fence was, under such conditions, located, constructed, and used, with the knowledge of appellant, a mislocation of a few inches, while not concluding appellant as a boundary line, cannot be set up as a defense for money expended under the statute, in replacing a fence practically worn out, for the benefit of appellant.

The other questions discussed are presented and considered in *Vandalia, etc., R. Co. v. Fetter* (No. 5,999, Ind. App. Nov. Term, 1907) 82 N. E. 978.

Judgment affirmed.

UNITED STATES CEMENT CO. v. COOPER. (No. 3,189.)¹

(Appellate Court of Indiana, Division No. 2.
Dec. 12, 1907.)

1. APPEAL—RULINGS ON DEMURRERS—HARMLESS ERROR.

Where the verdict is based on the second and third paragraphs of the complaint, the error, if any, in overruling a demurrer to the first paragraph, is harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4099.]

2. MASTER AND SERVANT—GUARDING MACHINERY—NEGLIGENCE.

The duty of the operator of a manufacturing establishment to guard dangerous machinery, as specified in the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), providing that all vats, cogs, belting, shafting, and machinery of every description shall be guarded, is imperative; and a violation thereof is negligence per se.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 177, 228-231.]

¹ Rehearing denied. Superseded by opinion in Supreme Court, 88 N. E. 69. Rehearing denied.

3. SAME—ASSUMPTION OF RISK.

The doctrine of assumed risk does not apply where the negligence consists in violating the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), providing that machinery shall be guarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 544, 545.]

4. SAME—INJURIES TO EMPLOYEES—ACTIONS—COMPLAINT.

A complaint in an action for injuries to an employé, based on the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), providing that machinery shall be guarded, must show that the machinery alleged to have been unguarded is of the kind required to be guarded, and that it is practicable to guard it without rendering it useless.

5. SAME—GUARDING MACHINERY—STATUTES—CONSTRUCTION.

A conveyor, consisting of a long, cylindrical, rotating rod, to which flanges are attached, is a shafting or machinery, within the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), providing that all shafting and machinery shall be guarded.

6. SAME—INJURIES TO SERVANT—VIOLATION OF FACTORY ACT—COMPLAINT.

A complaint which alleges that a conveyer, consisting of a long, cylindrical rotating rod, to which flanges were attached, was dangerous to employes working with and about it, and that it could be guarded without interference with the proper use thereof, sufficiently shows that the machine was within the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), requiring guards for machinery, and that it was practicable to guard the same.

7. TRIAL—GENERAL VERDICT—EFFECT.

Where the complaint alleged that an injury to an employé was caused by the failure of the employer to properly guard a shaft, a general verdict in favor of the employé implies a finding in his favor on the issue whether the shaft was properly guarded.

8. NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

The question of proximate cause is primarily one of fact.

9. MASTER AND SERVANT—UNGUARDED MACHINERY—INJURY TO SERVANT.

An employé injured by contact with machinery, which should have been guarded, as required by the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), may recover, though the jury specifically find that he was injured by reason of his foot slipping, where the injury would not have occurred if the machinery had been guarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 152, 257, 258.]

10. SAME—CONTRIBUTORY NEGLIGENCE.

The fact that an employé continues to work with or about a machine which is not guarded as required by the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), does not charge him with contributory negligence, and whether while so doing he used ordinary care is a question of fact.

11. NEGLIGENCE—SPECIAL VERDICT—GENERAL VERDICT—INCONSISTENCIES.

Where the answers to interrogatories, on the issue of contributory negligence, exhibit a part only of the circumstances bearing on the question, they are insufficient to overthrow a general verdict finding the nonexistence of contributory negligence.

12. APPEAL—HARMLESS ERROR—ARGUMENT OF COUNSEL.

Argument of counsel for an employé suing his employer for personal injuries that the employé was not rich, that he did not have millions like the employer, made from the labor of

other men, was reversible error, where the court refused to withdraw the remarks from the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4135; vol. 46, Trial, §§ 305, 306.]

Appeal from Circuit Court, Lawrence County; Jas. B. Wilson, Judge.

Action by Spencer E. Cooper, a minor, against the United States Cement Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

W. H. Martin and Duncan & Batman, for appellant. J. E. Boruff and R. B. Boruff for appellee.

ROBY, C. J. Action by appellee. Complaint in three paragraphs, to each of which a demurrer was overruled, trial by jury, verdict for \$500, with answers to interrogatories. Appellant's motion for judgment on such answers notwithstanding the general verdict was overruled, as was its motion for a new trial, and judgment was rendered upon the verdict. The answers to interrogatories show that the verdict is based upon the second and third paragraphs of the complaint, so that the sufficiency of the first paragraph need not be determined; the error, if any, in overruling it, being harmless. Taylor et al. v. Wootan, 1 Ind. App. 188, 27 N. E. 502, 50 Am. St. Rep. 200; Nickey et al. v. Dongan, 34 Ind. App. 601, 73 N. E. 288; B. & O. S. W. R. R. Co. v. Hunsucker, 33 Ind. App. 27, 70 N. E. 556; Carr, Adm'r, v. Hays, 110 Ind. 408, 11 N. E. 25; L. E. & W. R. Co. v. McFall, 165 Ind. 574, 76 N. E. 400. It is averred in the second paragraph that the defendant was on July 7, 1905, a duly organized corporation operating a large cement plant, for the manufacture of cement, in Lawrence county; that appellee was a stout able-bodied boy about 17 years old, who was ignorant of machinery, and who had been at work for appellant about two days; that there was a piece of machinery in said plant called a "screw conveyer," about 90 feet in length; that said conveyer was made to turn rapidly by machinery, and was used for the purpose of pushing stone along in an iron-lined wooden box; that it consisted of a central iron rod, attached to which were pieces of steel called "flanges"; that appellee's work compelled him to pass over said conveyer, which extended up from the floor about two feet, and was open and exposed without guard; that the unguarded and unprotected screw conveyer was dangerous to employes who were required to work with and about it; that it could have been guarded at small cost, without interference with the proper use thereof, and that the failure to so guard the same caused the injury complained of. He further avers that while in the line of his duty and doing work which he had been directed to do, and while he was stepping over said conveyer, he lost his balance, and, falling, his right foot and leg were caught in said conveyer, and "torn,

lacerated, bruised, and crushed," wherefore, etc. The third paragraph of complaint sets up that, while stooping down to avoid electric wires just above the conveyer, his foot became entangled, etc.

The sufficiency of this pleading must be determined by reference to the factory act, which is in part as follows: " * * * All vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be guarded. * * * " Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 70871. The duty of the owner and operator of a manufacturing establishment to guard dangerous machinery, as specified in said act, is an imperative one, and its violation is negligence per se. Tuck-er & Dorsey Mfg. Co. v. Staley, 39 Ind. App. —, 80 N. E. 975; Monteith v. Kokomo, etc., Co., 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944; Davis v. Mercer Lumber Co., 164 Ind. 413, 73 N. E. 899; Huey Co. v. Johnston, 164 Ind. 489, 73 N. E. 996; Robertson v. Ford, 164 Ind. 538, 74 N. E. 1. The doctrine of assumed risk does not apply when the negligence complained of consists in a violation of this imperative statute. Am. Car & F. Co. v. Clark, 32 Ind. App. 644, 70 N. E. 828; Davis Coal Co. v. Polland, 158 Ind. 607, 62 N. E. 492; Island Coal Co. v. Swaggerty, 159 Ind. 664, 65 N. E. 1026; Monteith v. Kokomo, etc., Co., 159 Ind. 149, 64 N. E. 610. The complaint must show that the machine which is alleged to have been unguarded is one of "the particularly enumerated or designated pieces of machinery or appliances required to be properly guarded." Foster v. Bemis Indpls. Bag Co., 163 Ind. 351, 71 N. E. 953; Nickey v. Dougan, 34 Ind. App. 605, 73 N. E. 288; U. S. Furniture Co. v. Taschner (Ind. App.) 81 N. E. 736. It must also be averred that it is practicable to guard such machine without rendering it useless for the purpose for which it is intended to be used. Laporte Carriage Co. v. Sullender, 165 Ind. 290, 75 N. E. 277; Nat. Fire Pr. v. Roper, 38 Ind. App. 600, 77 N. E. 370; Kintz v. Johnson, 39 Ind. App. —, 79 N. E. 533.

Appellant insists that its shaft and conveyer box was in effect "a large augur turning slowly in a wooden box," and is therefore not such a machine as is mentioned among the kinds or classes of machines that shall be guarded. The description of the conveyer contained in the complaint shows it to have consisted of a long, cylindrical, rotating rod, to which flanges were attached. This is a description of a piece of shafting, as the word is used in the statute. But, if it were not a shaft, the general terms of the statute are sufficiently broad to include it as a machine. It having been averred that the same was dangerous to employes who were required to work with and about it, and that it could be guarded without interference with the proper use thereof, the complaint was in this respect sufficient. Appellant's motion for judgment on the answers to in-

terrogatories was correctly overruled. The description of the screw conveyer therein contained is more explicit with regard to the construction thereof than are the averments of the complaint; but it is in no wise inconsistent therewith. It is averred that appellee's injury was caused by the failure to properly guard said shaft, and the general verdict carries with it a finding in favor of appellee upon this issue. The question of proximate cause is primarily one of fact. Chicago, etc., R. Co. v. Martin, 81 Ind. App. 308, 65 N. E. 591; Terre Haute, etc., Co. v. Kieley, 35 Ind. App. 180, 72 N. E. 658; I. & I. R. Co. v. Bundy, 152 Ind. 590, 53 N. E. 175; Ft. Wayne v. Christie, Adm'r, 156 Ind. 172, 59 N. E. 385; Diezi v. Hammond Co., 156 Ind. 583, 60 N. E. 353; Davis v. Mercer Lumber Co., supra.

The thirty-fourth and thirty-eighth interrogatories, and their answers, were as follows: "(34) Was the plaintiff injured by reason of his foot slipping in attempting to cross over the conveyer box at a point where the conveyer was not carried? Ans. Yes. (35) Do you find that the plaintiff's injuries mentioned in his complaint, and for which he brings this suit, was caused by defendant's failure to properly guard said screw conveyer? Ans. Yes." It is contended that the answer to No. 34 affirmatively shows that the proximate cause of the injury was the slipping and falling of appellee. The purpose of the Legislature in the enactment of this statute was to protect and prevent injury to those brought in proximity to dangerous machinery. Had a cover been placed over the conveyer, no combination of accident or mistake could have resulted in such an injury as the one complained of. Judicial knowledge may quite reasonably be extended to embrace the fact that persons meeting with neither accident nor misadventure and in the exercise of ordinary care do not put their feet into conveyer boxes, their hands into cogwheels, or their bodies against buzz saws; and, knowing this, a declaration that the statute affords no protection to the employé whose feet stumble or whose hands slip would be to attribute an absurd intention to the Legislature, and destroy any utility which the act may otherwise possess. The limbs and lives of men who slip may be worth saving, and the failure of the employer to observe the requirements of a mandatory statute which would save them constitutes actionable negligence, negligence which is proximate. Espenlaub v. Ellis, 34 Ind. App. 163, 72 N. E. 527; Davis v. Mercer Lumber Co., supra; U. S. Furniture Co. v. Taschner, supra.

It is also contended that the answers to interrogatories show appellee to have been contributorily negligent. It is shown that he knew the location of the conveyer, its manner of operation, and that it was running when he attempted to go across. The fact that the employé continues to work with

or about a machine which is required by the act to be, but which is not, guarded, does not charge him with contributory negligence; and whether while so doing he used ordinary care and prudence are questions of fact, to be determined from a consideration of all the relevant facts and circumstances, among which are the absence of a guard and his knowledge thereof. The answers to interrogatories exhibit a part only of those circumstances, and are therefore insufficient to overthrow the general verdict. *B. & O. S. W. R. Co. v. Cavanaugh*, 35 Ind. App. 32, 71 N. E. 239; *Buehner Chair Co. v. Feulner*, 164 Ind. 368, 73 N. E. 816; *Monteith v. Kokomo, etc., Co.*, supra; *Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996.

There are many reasons urged in support of the assignment that the court erred in overruling appellant's motion for a new trial. It is only necessary to consider one of them. Appellee's counsel in his closing argument to the jury used the following language: "The plaintiff is not rich. He was not born with a silver spoon in his mouth. He cannot sit in a richly adorned chair with silver and gold piled about his place. He cannot ride in fine chariots. He does not have millions, like the defendant, made from the labor of other men." The appellant in the presence of the jury objected to the language at the time and moved the court to withdraw the same from the jury, which motion the court overruled and refused to withdraw the language from the jury and the appellant excepted. The plaintiff thereupon moved the court to withdraw the case from the jury and set aside the submission, which motion the court overruled, to which ruling the appellant at the time excepted. This language was not directed to any issue or legitimate evidence in the case and was prejudicial. There could have been no justification for its use, and it cannot now be said that it did not affect the result.

Judgment reversed, and the cause remanded, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent herewith.

CRAWFORD & McCRIMMON CO. v. GOSE. (No. 6,087.)¹

(Appellate Court of Indiana, Division No. 2.
Dec. 12, 1907.)

1. MASTER AND SERVANT—DUTY OF MASTER—GUARDING MACHINERY—"MACHINE."

A crane used to lift molten metal in a manufacturing establishment, and operated by hand, is a machine within the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), requiring the operator of a manufacturing establishment to guard vats, cogs, belting, etc., or machinery; the word "machine" including every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4263-4267; vol. 8, pp. 7711-7712.]

2. SAME—"MANUFACTURING ESTABLISHMENT."

A concern engaged in the business of manufacturing engines, pumps, fans, and the like is a manufacturing establishment within the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), requiring operators of manufacturing establishments to guard machinery.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4346-4358; vol. 8, p. 7716.]

3. SAME—INJURY TO EMPLOYEES—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to an employé in consequence of his hand being caught in cogwheels not guarded, as required by the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), proof that the employé's hand slipped and was caught in the cogs is not proof as a matter of law of contributory negligence.

4. SAME—BURDEN OF PROOF.

In an action against an employer for injuries to an employé, the burden of proving contributory negligence rests on the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 907, 908.]

5. SAME—NEGLIGENCE—QUESTIONS FOR JURY.

Where, in an action against an employer for injuries to an employé, there is room for different conclusions by reasonable men on the issue of the employer's negligence, the question of negligence is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1017.]

6. SAME—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Where an employé is subjected to constant danger on account of the master's violation of the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), requiring the operator of a manufacturing establishment to guard machinery, the question of the employé's contributory negligence is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1106-1132.]

7. SAME—GUARDING MACHINERY—QUESTIONS FOR JURY.

Whether cogwheels in a machine could have been guarded as required by the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), requiring the operator of a manufacturing establishment to guard machinery whenever possible, is a question of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1017.]

8. SAME—PROXIMATE CAUSE.

Where the failure of an employer to guard cogwheels in a machine was a violation of the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), and the jury found that the violation was responsible for the injury to an employé whose hand was caught in the cogwheels, the employer was liable, though, if the employé's hand had not slipped, the accident would not have occurred; that being an intervening agency which might have been reasonably foreseen by the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 162, 257-263.]

9. SAME—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

Whether the conduct of an employé is under all the circumstances negligent and a bar to his recovery for a personal injury is distinct from the question of the proximate cause of the injury, and the fact that the employé's hand slipped and was caught in unguarded cogwheels which should have been guarded as required by the factory act (Acts 1899, p. 234, c. 142, § 9; Burns' Ann. St. 1901, § 7087i), is proper for consideration on the question of contributory negligence only.

¹ On rehearing, 87 N. E. 709. Superseded by opinion in Supreme Court, 87 N. E. 711.

Appeal from Circuit Court, Clay County; P. A. Colliver, Judge.

Action by John W. Gose against the Crawford & McCrimmon Company. From a judgment for plaintiff, defendant appeals. Affirmed.

McNutt & Shattuck, for appellant. Geo. A. Knight and A. W. Knight, for appellee.

ROBY, C. J. Action by appellee. His complaint was in one paragraph, a demurrer for want of facts was overruled, and a general denial filed. The issue was submitted to a jury which found a verdict for appellee in the sum of \$345. Appellant made a motion for a new trial, which was overruled, and judgment rendered on the verdict.

Appellant was a corporation operating a foundry and machine plant in Brazil, Ind. Appellee was in its employment in the capacity of a moulder's helper. The basis of liability asserted is that appellant negligently failed to guard certain cogwheels, in violation of the provisions of the factory act. Acts 1899, p. 234, c. 142, § 9; section 70671, Burns' Ann. St. 1901. It is averred and proven that said wheels were a part of a crane used to hoist molten metal and operated by a crank the handle of which was in close proximity to them. While turning said crank, appellee's hand slipped, and was caught in the cogs. It is contended for reversal that the crane in question was not a machine within the meaning of the statute; that it is in the nature of a tool, portable and capable of being operated outside of appellant's shop; and that it was used to lift heavy objects, operated by hand, and not by power. The standard definition of the word "machine" is made in *Corning v. Burden* (1853) 15 How. (U. S.) 252, 14 L. Ed. 683, and followed in *Green v. Am. Car & Foundry Co.*, 168 Ind. 135, 71 N. E. 268, and numerous other cases: "The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result." The article in question is within the definition, and it is not necessary that a machine be incapable of use outside of a shop or factory in order to make the statute applicable, when it is, in fact, used therein. Appellant also asserts that it is not a manufacturing concern within the meaning of the act, but its president, in answer to the question "what is the business" of the Crawford McCrimmon Company, answered: "Manufacture engines, pumps, fans, and such as that." See *B. & O. S. W. R. Co. v. Cavanaugh*, 35 Ind. App. 32, 71 N. E. 239.

The argument in support of a new trial is that the appellant was contributorily negligent. The mere fact that his hand slipped is not in itself sufficient to justify the declaration of such negligence as a matter of law. The burden of this issue rested upon the appellant. Where there is any dispute

as to the controlling facts, and room for different conclusions by reasonable men, the question of the defendant's negligence is for the jury, and, where the servant is subjected to a constant danger on account of the master's violation of the factory act, the question of the servant's negligence is likewise one for the jury. *U. S. Cement Co. v. Cooper* (Ind. App.) No. 6,189, 82 N. E. 981; *Buehner Chair Co. v. Feulner*, 164 Ind. 368, 73 N. E. 816. Whether the cogs could have been guarded is also a question of fact. *B. & O. S. W. R. Co. v. Cavanaugh*, supra; *Blanchard-Hamilton Furniture Co. v. Colvin*, 32 Ind. App. 308, 69 N. E. 1032. There is evidence supporting the verdict upon both of these questions.

It is also insisted that the absence of a guard was not the proximate cause of the injury; that such cause is found in the fact that the appellee's hand slipped. "In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time." *M. & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256; *Cleveland, etc., R. Co. v. Patterson*, 37 Ind. App. 619, 623, 75 N. E. 857; *Chi., etc., R. Co. v. Martin, Adm'r*, 31 Ind. App. 308, 65 N. E. 591; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535. The failure of the employer to guard the cogwheels was a violation of the statute. Had it been observed, appellee could not have been injured as he was. The jury find that the appellant's negligence in failing to conform to the statute was responsible for his injury. The insistence is that, notwithstanding such finding, it affirmatively appears that such negligence had ceased to be proximate because an independent agency intervened—I. e., the slipping of appellee's hand—and thereby rendered the original negligence remote. This leaves out of view the fact that, where the intervening agency is one whose intervention might have been reasonably foreseen by the wrongdoer, it does not operate to relieve him from liability. *Cleveland, etc., R. Co. v. Patterson*, supra; *Huntington Light, etc., Co. v. Beaver*, 37 Ind. App. 4, 73 N. E. 1002; *Indianapolis St. Ry. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 603, 72 N. E. 478; *Huey Co. v. Johnson*, 164 Ind. 489, 73 N. E. 996; *Flint & Walling v. Beckett*, 167 Ind. 491, 79 N. E. 503. And it also leaves out of view the fact that there may be more than one direct cause. The likelihood that employe's working with and about unguarded cogwheels would be caught thereby was so well known that the Legislature took cognizance of it, and enacted a statute for the protection of such persons. The owner of a factory

who fails to conform to the requirements of such law cannot very well escape liability by a denial of the fact because of which the act was passed, nor can this court deny the conclusion announced by the jury in its verdict that the slipping of appellee's hand was or should have been foreseen by the appellant. Whether the conduct of the employé was under all the circumstances negligent and a bar to his recovery for that reason is a matter entirely aside from the question of proximate cause. The fact that his hand slipped is a fact to be considered upon the question of contributory negligence, together with other circumstances and conditions, but the distinction between contributory negligence and proximate cause is too clearly drawn to be confused or ignored.

Counsel's suggestions that this appeal is vexatious is entirely unwarranted.

Judgment affirmed.

(40 Ind. App. 693)

CLEVELAND, C. & ST. L. RY. CO. v.
WUEST. (No. 6,210).¹

(Appellate Court of Indiana. Dec. 19, 1907.)

1. APPEAL—FAILURE OF APPELLEE TO FILE BRIEF—EFFECT.

A judgment may be reversed for the failure of appellee to file a brief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3110.]

2. SAME.

Where the attorney for the appellee did not file a brief, and a letter on file in the case signed by him stated that he did not desire to file any brief as the record showed no error, the court instead of reversing the judgment will order the appellee to file a brief on the merits within a specified time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3105-3107.]

Appeal from Circuit Court, Ripley County; Willard Neu, Judge.

Action by William Wuest, by next friend, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Appellee directed to file brief on the merits.

L. J. Hackney, Jno. O. Cravens, and Thos. S. Cravens, for appellant. J. H. Connelly, for appellee.

PER CURIAM. The transcript herein contains 555 typewritten pages. Appellant has filed a printed brief of 53 pages. The attorney who acted for appellee in the trial court appears for him in this court. No brief has been filed for appellee, and the judgment might be reversed under the rule declared in *Hanrahan v. Knickerbocker*, 35 Ind. App. 138, 72 N. E. 1137; *McAfee v. Bending*, 36 Ind. App. 628, 76 N. E. 412.

An attorney is an officer of court. He possesses as such officer certain privileges, and is protected by the court in the discharge of his duties. He owes a corresponding duty both to the court and to his clients. There

¹ See 83 N. E. 620.

is a letter on file in this case, signed by the attorney for appellee, stating that he "does not desire to file any brief," "as the record shows no error and the causes may be distributed at any time." To accept this as a confession of error may result in hardship to the client because of the failure of the attorney to discharge his duty; and in the exercise of the inherent discretion relative to such matters the order made herein will not be for the attorney to show cause, as it well might be, but will be directed to the appellee.

It is therefore ordered that the appellee file a brief upon the merits of this appeal within 60 days from this date, and the clerk is directed to cause a certified copy of this order to be served upon the appellee personally, and all costs caused hereby are taxed to appellee.

(41 Ind. App. 520)

INDIANAPOLIS TRACTION & TERMINAL
CO. v. HOLTSCLAW. (No. 6,001).²

(Appellate Court of Indiana, Division No. 2
Dec. 11, 1907.)

1. MASTER AND SERVANT—ACTION BY SERVANT FOR INJURIES—SUFFICIENCY OF COMPLAINT.

In an action by a street railway conductor for injuries received by colliding with a telephone pole near the track, an averment that at the time plaintiff was injured he had no knowledge of the dangerous proximity of the telephone pole to the street car track carries with it the necessary implication that the peril could not have been discovered by the exercise of ordinary care on plaintiff's part, and is sufficient on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 846.]

2. TRIAL—VERDICT—SPECIAL FINDINGS CONTROLLING GENERAL VERDICT.

Special findings or answers to interrogatories returned by a jury with their general verdict can override the general verdict only when both cannot stand, and the antagonism must be apparent on the face of the record beyond possibility of removal by admissible evidence; and it is only when the answers to interrogatories find that facts necessary to support the general verdict do not exist, or that a fact which defeats plaintiff's recovery does exist, that they will override the general verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 857-860.]

3. SAME—PRESUMPTIONS.

No presumptions or intendments can be indulged in favor of answers to interrogatories, but all reasonable presumptions are indulged in favor of the general verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 857.]

4. MASTER AND SERVANT—INJURY TO SERVANT—DUTY OF MASTER—SAFE PLACE AND APPLIANCES.

A master must exercise reasonable care and diligence to provide his servants with a safe place to work and safe appliances to work with.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173, 178-180.]

5. SAME—ASSUMPTION OF RISKS—NATURE OF RISKS ASSUMED.

A servant, in accepting employment, assumes all hazards and dangers necessarily incident to the service, whether known or not, and all risks and hazards of the service that are

Rehearing denied. Transfer to Supreme Court denied.

open and apparent, whether necessarily incident to the service or not, and this assumption includes not only those that are known to him, but such as he could discover by the exercise of reasonable care and diligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 538-543, 550, 610-624.]

G. NEGLIGENCE—QUESTIONS FOR JURY.

If the facts on the question of negligence are such as to leave but one inference for men of reasonable minds, it is a question for the court; but if they are such that reasonable men might differ as to the proper inference to be drawn regarding negligence, it is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279, 282, 283.]

7. MASTER AND SERVANT — ASSUMPTION OF RISK—"OPEN AND APPARENT" HAZARDS.

A hazard is open and apparent which can be discovered by the exercise of ordinary care by the party charged with the duty of exercising such care.

8. SAME—KNOWLEDGE BY SERVANT OF DANGER.

A trainman has a right to assume that his master has performed his duty in respect to exercising reasonable care to make the place of employment safe, and he is not bound to know from such observation as could be caught in passing whether or not objects in plain view along the line of the road are in dangerous proximity to the track.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 547-549.]

9. SAME—ACTIONS FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

In an action against a street railway company by a conductor for injuries received by colliding with a telephone pole near the track, whether plaintiff was guilty of contributory negligence in failing to observe the pole and the danger to be apprehended, *held* for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

10. SAME—SUFFICIENCY OF EVIDENCE.

In an action by a street railway conductor for injuries received by colliding with a telephone pole while standing on the running board of the car collecting fares, evidence *held* to sustain a verdict for plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 954-977.]

11. SAME — INSTRUCTIONS — KNOWLEDGE OF DANGER.

In an action against a street railway company by a conductor for injuries received by colliding with a telephone pole while on the running board of the car collecting fares, instructing that if plaintiff did not know and by the exercise of reasonable care and diligence on his part could not have known that the pole was in such close proximity to the track as to be dangerous and likely to injure him, etc., then plaintiff was entitled to recover, instead of instructing that if by the exercise of ordinary care plaintiff could have discovered that there was a probability or possibility of danger from the situation he could not recover, is not error, since the question is not as to a probability or possibility of danger, but as to the probability of injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1175.]

12. SAME—RISKS ASSUMED.

A servant assumes only the risks that are reasonably and fairly incident to the service which he undertakes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 538, 550.]

13. TRIAL — INSTRUCTIONS — MANDATORY INSTRUCTIONS.

An instruction that before plaintiff is entitled to recover he must establish, by a fair preponderance of the evidence, that he received the injuries or some part thereof as charged in his complaint, and that the carelessness of defendant, as charged in the complaint, was the direct and proximate cause of the injury, *held* not a mandatory instruction, and not subject to the rules applying to mandatory instructions, but to be construed with other instructions.

14. MASTER AND SERVANT—INJURY TO SERVANT—ACTIONS—ADMISSION OF EVIDENCE.

In an action against a street railway company by a conductor for injuries received by colliding with a telephone pole near the track, rejection of a question as to whether the north side of a bridge was nearer the running board of the car than the telephone pole, *held* not error.

Appeal from Superior Court, Marion County; Jas. M. Leathers, Judge.

Action by Newton F. Holtsclaw against the Indianapolis Traction & Terminal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. Winter and W. H. Latta, for appellant. Cassius C. Hadley, for appellee.

RABB, J. The appellee was in the employ of the appellant as a conductor on a street car running over its West Michigan street line in the city of Indianapolis. His employment began some time in the month of June, 1903, and continued until the 3d day of August of that year. Appellant's West Michigan street line, over which the appellee's car operated, extended from Blake street, in said city, to Haughville, a distance of perhaps two miles, and crossing White river. The street car line approaching the bridge over White river is laid for a considerable distance upon a high embankment 60 feet wide. Over this embankment, prior to the construction of the appellant's road, the Central Union Telephone Company had erected a line of poles. These poles were 30 feet high and 14 inches in diameter, and supported the telephone wires. The street car used by appellant over this line in charge of the appellee at this time was a large, open car, with the seats extending crosswise the full width of the car, and no means provided for passage up and down the length of the car inside of the body of the car. A running board extended along the outside of the car its full length. This running board was about 6 inches wide, was located about 18 inches below the floor of the car, and extended outside of the body of the car 10½ inches. There were stanchions about 4 inches square, extending from the floor of the car to the roof, at the end of each seat, and on the outside of these stanchions were metal hand holds extending up and down the stanchion a distance of about 3 feet, and out from the face of the stanchion about 7 inches. The running board was intended to accommodate the conductor in passing from one end of the car to the other, collecting fares, and in the performance of other duties appertaining to

his place as conductor. His position upon the car, when not engaged otherwise, was on the rear platform where he controlled the operation of the car by means of signals to the motorman who occupied the front platform. A bar extended from the front to the rear of the platform, just below the roof of the car, to which were attached handles, by means of which a register of fares located at the front end of the car was operated by the conductor. In operating this attachment the conductor was compelled to reach above his head to take hold of those handles, and pull them to register the fares. The running board was also designed to accommodate passengers when the car would be so crowded as that there would not be seats within the car for all desiring to use it. In constructing the appellant's road they had so laid the track that it came within 3 feet of one of the poles along this embankment located about 300 feet west from Caldwell street, said street being the last street on the appellant's line going west before reaching the bridge over White river. In passing this telephone pole the running board of the street car came within 12 or 13 inches of the pole. It was usual for appellant's street car passing over this line to run at a high rate of speed over the space intervening between Caldwell street and the first street on the opposite side of the river, there being no points intervening along the line at which passengers would ordinarily desire to get on or off the car. About half past 6 o'clock, in the morning of August 3d, while appellant's car in charge of the appellee was passing at a rapid rate of speed over this grade, and while appellee was passing along the side of the car on said running board, in the discharge of his duties as conductor, collecting and registering fares, his body collided with this telephone pole, and he was knocked from the car and very severely injured. To recover damages for this injury he instituted this action against the appellant and the telephone company.

The complaint was in two paragraphs. In the first he charged the telephone company with negligence in erecting their poles in such proximity to the street car tracks as to endanger the employes of the appellant company in the performance of their work on the cars, and charged both defendants with negligence in maintaining the poles in such dangerous proximity to the street car line. The second paragraph of the complaint was precisely the same in this respect, except that it charged the appellant with constructing its car lines in dangerous proximity to the telephone pole. Appellant's demurrer for want of facts to the first paragraph of the complaint was overruled. No demurrer was filed to the second. The case was put at issue, a jury trial had, resulting in a general verdict in favor of the telephone company against appellee, and a general verdict in favor of appellee against the appellant, and with the general verdict

answers to certain interrogatories propounded were returned by the jury. Motion was made in the court below by appellant for a judgment in its favor on the answers to the interrogatories, which was overruled, as was also appellant's motion for a new trial. The rulings of the court on the demurrer to the first paragraph of the complaint, on the motion for a judgment in favor of appellant on the answers to the interrogatories, and on appellant's motion for a new trial, are assigned as error here. The sufficiency of the second paragraph of the complaint is also tested by an assignment of error. It is urged against the sufficiency of either paragraph of the complaint that their averments fail to negative the ability of the appellee to have discovered the danger of collision with the telephone pole by the exercise of reasonable care and diligence on his part. In each paragraph of the complaint it is substantially averred that at the time appellee was injured he had no knowledge of the dangerous proximity of the telephone pole to the street car track. These allegations carry with them the necessary implication that the peril could not have been discovered by the exercise of ordinary care on appellee's part, and was sufficient on demurrer. Consolidated Stone Co. v. Summit, 152 Ind. 297, 53 N. E. 235; Evansville, etc., Co. v. Duel, 134 Ind. 160, 33 N. E. 355. The answers to interrogatories returned by the jury with their verdict show that appellee continuously served as conductor on appellant's street car running over West Michigan street during the month of July, and up to August 3, 1902; that during that time he made 205 trips over said line, 137 of them on car No. 525, and that the trips were generally made in the daytime; that on the 3d day of August he suffered the injuries described in his complaint by coming in contact with pole No. 38 of the Central Union Telephone Company which stood on the north side of the street car track, while he was engaged in his duties as conductor in charge of car No. 525; that the appellee was possessed of good eyesight during all of said time, and that the pole with which he collided stood in the same position all the time appellee was passing over the road, and was visible to him in a general way as he passed; that appellee did not know and could not, by the exercise of ordinary care, have known of the position of the telephone pole with reference to the running board of the car. It is earnestly insisted by appellant that these answers show a state of facts that are antagonistic to the general verdict, and that are in irreconcilable conflict with it, and that for this reason its motion for judgment on the answers to interrogatories should have been sustained.

The special findings or answers to interrogatories returned by a jury with their general verdict can only override the general verdict when both cannot stand, and the antagonism must be apparent on the face of

the record beyond possibility of being removed by evidence admissible under the issues before judgment can be given against the general verdict, and no presumptions or intendments can be indulged in favor of the answers to interrogatories, but all reasonable presumptions are indulged in favor of the general verdict. It is only when the answers to the interrogatories find that facts which are necessary to support the general verdict do not exist, or that some fact which would defeat the plaintiff's recovery does exist, that the answers to interrogatories will override the general verdict. *Wright v. Chicago, etc., Co.*, 160 Ind. 583, 66 N. E. 454; *Consolidated Stone Co. v. Summit, supra*; *Citizens' St. Ry. Co. v. Hoop*, 22 Ind. App. 78, 53 N. E. 244; *Diamond Plate Glass Co. v. Dehority*, 143 Ind. 381, 40 N. E. 681; *Hill v. Indianapolis Ry. Co.*, 31 Ind. App. 98, 67 N. E. 276. Recognizing these rules the appellant still insists that the finding by the jury of the fact that the telephone pole, with which appellee collided, was plainly visible in daylight, that the appellee had good eyesight, that he passed the pole over 200 times upon his car, conclusively shows that the appellee, by the exercise of ordinary care, could have discovered the danger from collision with the pole; and that the further finding by the jury that the appellee could not, by the exercise of ordinary care, have discovered the proximity of the pole to the running board of the car is not the finding of a fact, but a conclusion made by the jury, which must be ignored in considering the question. If the appellant is correct in its theory that the existence of the fact that the telephone pole was an object plain to be seen from the car, and the disclosure of the opportunities the appellee had to observe its proximity to the railway track, are such facts as not only warrant the inference, but compel the conclusion, that by the exercise of appellee's sense of sight he could have determined the dangerous proximity of the pole to the car on which he was riding, then we think appellant is correct in claiming that it was an error to overrule its motion for judgment on the answers to the interrogatories. But if appellant is in error in this theory, and the facts thus disclosed do not compel the conclusion that the appellee could, by the exercise of ordinary care and diligence, have known of the danger from the collision with the pole, then the action of the court was right in overruling its motion, and the whole theory of appellant's case, not only with reference to the ruling of the court upon the motion for judgment in its favor on the answers to the interrogatories, but also on its motion for a new trial on the ground that the evidence was not sufficient to sustain the verdict of the jury, must fall to the ground, as they both depend upon the same hypothesis to support them.

It is a well-established rule governing the

relation of master and servant that the master must exercise reasonable care and diligence to provide his servants with a safe place to work and safe appliances to work with. This rule is so well settled and so well recognized that it is unnecessary to cite authorities that declare it; and this rule is appealed to by the appellee to sustain his cause of action. He claims that this rule was violated by the appellant in constructing its road in such dangerous proximity to the telephone pole that its servants, though exercising reasonable care, were liable, in the discharge of the duties of their employment, to collide with the pole and be injured. It is also a well-established rule governing this relation that a servant in accepting employment from his master assumes all hazards and dangers necessarily incident to the service, whether known to him or not, and that he assumes all risks and hazards of the service that are open and apparent to him, whether they are necessarily incident to the service or otherwise, and this assumption includes not only risks and hazards that are known to him, but such as he could, by the exercise of reasonable diligence and care, discover. These rules are so well settled and recognized that it is unnecessary to refer to the countless authorities by which they are expressed. These rules are appealed to by appellant as sustaining its contention. There is no difficulty whatever about the rules of law that govern the rights and duties of master and servant. The difficulty all arises in the application of the rules to the facts. In this case the telephone pole with which the appellee collided was plainly visible. The means and opportunities of the appellee for discovering its proximity to the appellant's track, and the danger to be apprehended from collision with the pole while thus passing along the running board of the car in passing the pole, were such as came to him in riding upon his car, passing over the line at this point, and none other. And the question is, was he bound to know, from observation thus obtained, of the danger? If these facts charged him with knowledge of the peril, then it was a question of law for the court to decide. If, however, they were mere evidentiary facts, from which the inference of the appellee's knowledge of the peril might or might not be drawn by reasonable men, then it was a question of fact for the jury. The question in this respect is precisely analogous to the question of negligence. If the facts are such that there is room for men of reasonable minds to draw but one inference from them, then it is a question for the court; but if they are of such character that reasonable men might differ as to the proper inference to be drawn from them, regarding the question of negligence, then it is a question for the jury. The question must largely depend on what is meant by the terms open and apparent. That is open and apparent which, by the

exercise of ordinary care on the part of the party charged with the duty to exercise such care, can be discovered. The only care and the only diligence that could be required of appellee in this case was that of observing this telephone pole as he passed it on his car. Would such observation disclose to him the dangerous proximity of the pole to the track? Could it be said as a matter of law that such observation would lead a reasonable man to suppose, over the presumption that he had a right to indulge in, that the company had performed its duty, that the pole was so close to the track as to endanger him in the discharge of his duties in a reasonable and careful manner while passing along the running board? Men's powers of estimating distances vary greatly, dependent somewhat on natural ability, and more upon practice. Mechanics and others whose business it is to make estimates, and to make measurements, naturally can estimate with greater accuracy the distance between points than those who are not mechanics, or not in the habit of making such measurements and estimates. If two inexperienced and unskilled men in the ordinary occupations of life, and of ordinary intelligence, were called upon to make a careful observation of the distance between the telephone pole in this case and the track, after a careful examination of the location of each, with the railroad track and the telephone pole in their eye and mind, and with the thought of correctly estimating the distance between the two, it is not probable that they would agree upon the exact distance, and it is not improbable that either one of them making such estimate would miss the correct distance by as much as six inches or a foot. And how could it reasonably be contended that this conductor, passing this pole at a rapid rate of speed, should be able to determine accurately the distance from the running board upon which he passed to the pole, whether it was one foot or two? The line of demarkation between safety and danger was a very narrow margin. Had the pole been six inches farther away it would have been probably entirely safe, and the accident to appellee would not have occurred. Can it be said, as a matter of law, that he was bound to know that the pole was six inches closer to the track than it really was? We do not think so.

Two cases are called to the attention of the court by appellant that in some measure tend to sustain its contention. In one of them (*New York, etc., Co. v. Ostman*, 146 Ind. 452, 45 N. E. 651), the appellee's intestate, a fireman upon the appellant's road, had been killed by his head coming in collision with a cattle chute placed within 13 inches of the cab, while the fireman, in the discharge of his duties, was looking for signals. There was a special verdict in the case. The special verdict disclosed that the fireman had been in the employ of the defendant for 18 months

prior to his death, and that during that period, in the discharge of his duties, passed the station where the accident occurred twice each week, and did switching work at the station. The jury found that the appellee's intestate did not know, and could not know, of the hazard to which he would be subjected in passing the chute in the manner he did at the time of his fatal injury. The case was decided by a divided court, and it was there held that the special verdict failed to support the judgment of the court. The court, in passing upon the case, say: "The fact that the jury found that he (the fireman) did not know and could not know of the hazard to which he would be subjected in passing the chute in the manner he did, at the time of his fatal injury, has no bearing upon the question of care upon his part. It is a finding which is antagonized by the specific facts disclosed by the evidence, and we must accept them as controlling, under such circumstances." And again the court say: "It is urged by appellee that the facts show that her decedent did not know what distance the part of the chute which struck him was from the passing engine. In answer to this it may be said that the means of knowing by ordinary care is evidence of knowledge. * * * We are of opinion that, under the facts as they are disclosed by the finding in this case, knowledge of the hazard or danger to which it is claimed by the appellee that her intestate was subjected and exposed by reason of the location of the cattle chute and the manner in which it was maintained must be imputed to him. It is not made to appear by any reasonable inference that may be drawn from the specific facts found that there was freedom from contributory negligence upon the part of the deceased at the time of the accident. The special verdict does not support the judgment." The court in that case had under consideration a special verdict, in which, to sustain a judgment, every fact necessary must be made to affirmatively appear, not by way of recital, not by the statement of conclusions of law, but from the facts. No inferences are indulged in favor of the party having the affirmative of the issue, and it was made at a time when the law required that in actions of this character it was incumbent upon the plaintiff in the case to affirmatively show that he himself was free from negligence contributing to his injury. It was upon the ground that the special verdict failed to affirmatively show that the appellant was free from contributory negligence that the judgment of the court was based.

Another case cited by counsel is that of *Pennsylvania Co. v. Finney*, 145 Ind. 551, 42 N. E. 816. In that case the appellee, a brakeman, was knocked from the ladder of a freight car coming in collision with a water plug along the defendant's track and killed. It was held by the court that the evidence was not sufficient to sustain a verdict in favor of the plaintiff, the point decided being

that the evidence failed to show that the brakeman was free from negligence contributing to his injury. The evidence disclosed that at about 11 o'clock on April 5, 1890, the brakeman was engaged in the discharge of his duties on top of the train, while passing the station of Columbia City, the train running at the rate of about 15 miles an hour, and that, under the rules of the company, after the appellee had passed a station he was at liberty to return to the caboose at the end of the train; that the plug with which the deceased collided was erected and maintained at its Columbia City station; that deceased had passed the plug in daylight and had opportunity of seeing the same for six or seven months immediately prior to his death; that it was plainly visible for a distance of half a mile; that in going to the ladder to climb down the appellee had his back to the crane; that he did not look for it at the time of the accident, or make use of any effort to ascertain its presence; that by looking he could have seen it, but that he neglected to do so; and that in climbing down from the car at the time he did he did so of his own volition. It was not shown that any duty called him to go to the caboose. The court say, in deciding the case: "We are unable to discover any evidence in the record from which a reasonable inference can fairly arise that the appellee's decedent was in the exercise of due and ordinary care at the time of the fatal accident, and the jury is not authorized to infer the absence of contributory negligence."

Since that case was decided the rule of evidence on the question of contributory negligence has been changed by the statute, and since those cases were decided the Supreme Court of this state has decided the case of *Baltimore, etc., Co. v. Roberts*, 161 Ind. 1, 67 N. E. 530, in which the appellee, a switchman, was injured while in the performance of his duties as a switchman in the appellant's yards, and while riding upon one of appellant's freight cars, standing in the stirrup at the side of the car, and holding onto the hand holds, which was the necessary and proper way for him to ride and to be while upon his work, coming in collision with a car upon an adjacent side track in appellant's yard. Appellee had been in the employ of the appellant about six weeks, and had passed over the switchyard a number of times, but had never seen cars standing opposite each other upon the two side tracks at the point where he was injured. The ground of the action was negligence of the defendant in constructing its side tracks in the switchyard so close together that danger was to be reasonably apprehended of injury to employes riding, as the appellee was doing, by their coming in collision with cars upon adjacent side tracks. It was contended that the evidence affirmatively showed that the danger to be apprehended was one of the risks assumed, and that the appellee could see the

proximity of the side tracks and was chargeable with notice of the danger. The court, in passing upon the question, say: "Appellant's contention that appellee is shown by the evidence to have assumed the hazard due to appellant's negligence is not sustained, neither is the claim that the facts established that he was guilty of contributory negligence"; and among the cases cited by the court and quoted from as sustaining the decision of the court is the case of *Johnson v. Oregon, etc., R. Co.*, 23 Or. 94, 31 Pac. 283, in which the Supreme Court of Oregon is quoted as saying: "The servant is expected to observe such objects only, in the absence of notice, as would in an instant convince him of their danger. It is not expected of a switchman that he should carefully measure the distance between a switch target and the rail. This is the duty of the master, and the servant has the right to assume that the target or other obstruction is at a reasonably safe distance, in the absence of anything to excite special apprehension of danger (*Whalen v. R. R. Co.*, 16 Ill. App. 323); and if he knew that the target was but four feet from the track, he might then not be aware of the imminent danger. 'One may know the facts and yet not understand the risk.'" And, continuing, the Supreme Court say: "So it may be said in regard to appellee; for, in the absence of knowledge to the contrary, he was not in duty bound to go upon a search and ascertain by measurements or otherwise whether the tracks in controversy were so close to each other as to render them unsafe for the operation of cars by the servants of appellant thereover. He had the right, unless admonished to the contrary, to assume that the tracks were a reasonably safe distance from each other and to act upon that assumption."

In the case of *Pittsburgh, etc., Co. v. Parish*, 28 Ind. App. 189, 62 N. E. 514; 91 Am. St. Rep. 120, the appellee's intestate, a conductor upon a freight train on appellant's road, was killed, while in the discharge of his duties in passing over the top of appellant's freight cars, by coming in contact with the limbs of a tree standing on appellant's right of way and overhanging the switch-track. The evidence disclosed that appellee had been in the employ of appellant as a conductor for eight or nine years, and that when he was injured he had his lantern with him and was in a proper place. It was argued that the nature of the obstruction with which decedent collided was such that in the exercise of ordinary care he must necessarily have seen it. It was open and obvious. The court say, in passing upon this case: "Decedent may have passed over the side track a number of times in the performance of his duties as conductor, and yet never have seen the overhanging branches. He may have seen the tree and its branches while passing along the main track, and yet the danger from them would not necessarily have been apparent. It was not an obstruction always

dangerous to employes passing over the switch, but was dangerous only to a person on top of a car; and, unless the tree and its branches were seen with reference to a car, their dangerous character might not be apparent. So that knowledge of the existence of the tree and its branches, and knowledge of the danger from them, are not necessarily one and the same. It was admitted that he had been given no actual notice of the obstruction. * * * When all the evidence in the case is considered, it must be concluded that whether decedent assumed the risk, or was charged with notice of the danger to which he was exposed, was a question for the jury."

In the case of *Charlton v. St. Louis, etc., Co.*, 200 Mo. 413, 98 S. W. 529, a fireman was killed in collision with a water crane, which he had passed, and in passing had opportunity to observe many times. The court say, in holding that the question of assumed risk and of contributory negligence under the circumstances shown by the evidence was one for the jury: "No evidence here that Charlton knew how close this water crane and rod were to defendant's track, nor had he such means of knowledge as would be equivalent to knowledge. No one told him the distance. The knowledge, if any he had, under the facts in proof, was such only as might come to him while he was attending to and absorbed in his duties as a trainman running through Paoli, possibly for water, at the wooden tank. We are not willing to say as a matter of law that he should be held to know the distance of the crane and rod from the track, that is, the danger therefrom."

In the case of *Huffmeier v. Kansas City, etc.*, 68 Kan. 831, 75 Pac. 1117, the appellant, a conductor on appellee's street car, constructed precisely as the street car upon which the appellee in this case was acting as conductor, was knocked from the running board of the car, as was the appellee in this case, by colliding with a pole erected by the company alongside of the road for the purpose of conducting the electric current by which the car was operated. A demurrer was sustained by the trial court to the plaintiff's evidence. The court say in reversing the case: "The plaintiff, upon entering the defendant's service, accepted no risk arising from its negligence. He had the right to assume that the company had not set him to toil in the midst of danger. He had the right to assume that the road was built with ordinary care and consideration for the safety of men who were to operate it, and he was not obliged to make any independent investigation for hazards resulting from a disregard of such care. Without actual knowledge of his peril, or a patency so ample as to exclude ignorance, the plaintiff assumed no risk in continuing to work under the conditions surrounding him. The evidence on behalf of the plaintiff is such that the jury might say he stood acquitted of any knowl-

edge of the jeopardy occasioned by the particular pole which caused his injury, and of any culpable carelessness in failing to observe it, and his conduct at the time of his injury was that of a reasonably prudent man. Other elements essential to a recovery were admittedly established. Therefore the jury should have been permitted to weigh the testimony and to approve or condemn the plaintiff's conduct as they saw fit."

In the case of *Galveston v. Mortson*, from the Court of Civil Appeals of Texas, and reported in 31 Tex. Civ. App. 142, 71 S. W. 770, the plaintiff, a brakeman on appellant's line, was injured by being knocked from a ladder on the side of a freight car, by coming in collision with a warehouse alongside of one of appellant's side tracks. The accident happened in the daytime, and the plaintiff testified that he had seen the warehouse, but did not know its position and had not been warned about its nearness to the track. Judgment in favor of the plaintiff was affirmed by the higher court, the court holding that it was the duty of the appellant to have warned appellee of the proximity of the warehouse to the track; that the employe was under no obligation to make any investigation to ascertain for himself its degree of proximity; that he had a right to rely upon the plaintiff doing its duty in respect to informing him about objects that were dangerously near the track, of which he would not know.

In the case of *Galveston, etc., R. Co. v. Brown*, 33 Tex. Civ. App. 589, 77 S. W. 832, a brakeman was injured by striking a post in dangerous proximity to the track, while he was riding on the side of a freight car in the course of his employment. It was held by the court that the brakeman owed no duty to inspect the premises.

In the case of *Texas & Pac. Co. v. Swearingen*, 196 U. S. 51, 25 Sup. Ct. 164, 49 L. Ed. 382, the appellee was a switchman in the employ of the appellant. While performing his duties as switchman, and riding on the side of a car, his body collided with a scale box in proximity to the car, and he was knocked from the ladder and injured. The space between the ladder on the side of the freight car when moving on the track, and the scale box in question, was 19½ inches. It was contended that the danger of collision with the scale box was one of the assumed risks of the employment. At the time appellee was struck and injured he was on the ladder looking in the opposite direction from which the car upon which he was riding was moving, watching for signals from the yard master, as it was his duty to do. The appellee had worked in the switch yards and had opportunity to observe the scales, but testified that he had never used this particular switch near the scales, never saw the car on the track opposite the scales, and never had his attention called to the distance between the track and the scale box, and never measured it or approximated the distance to

it, and nothing ever occurred to attract his attention to it. He knew he had to pass the scale box at the time he was hurt, but was not thinking about it, and did not see it when they passed going out after the cars. The accident happened after night. The appellee had a lantern, and the switch engine had a headlight at both ends, and the appellee was on the foot board of the engine when they were backing up past the scale box after the cars. He testified that he knew the location of the scale before he was hurt, but did not know anything with reference to its proximity to the track over which he was riding at the time of his injury. He did not know it was dangerously close, and was never warned about the danger. The appellant asked that certain instructions be given to the jury by the trial court. It is said by the court, in deciding the case: "The right to have the jury instructed to find for the company was based upon the following conditions: (b) Because plaintiff testified he knew of the location of the track scale box and the location of track No. 2 with reference to said track scale box, on which track No. 2 he was riding at the time he was hurt, and because the undisputed evidence shows that the track scale box and the danger of the same was open and obvious to the view of the plaintiff. The plaintiff was presumed to know the danger and to have assumed the risk thereof. The motion was properly overruled. So far from it being the fact, as asserted, that the evidence established undisputably the existence of the grounds upon which the motion was based, the record shows that there was evidence tending to establish that the track scale box was not erected in a reasonably safe place, and that, although the plaintiff knew that the scale box was situated adjacent to track No. 2, he did not know that it was so near that it could not be passed, in the performance of his duties as a switchman, without danger. * * * The Court of Appeals was of opinion, and rightly, we think, that the dangerous contiguity of the scale box to track No. 2, and the extra hazard to switchmen resulting therefrom, was not so open and obvious on other than a close inspection as to justify taking from the jury the determination of the question whether there had been an assumption of the risk. The plaintiff was entitled to assume that the defendant company had used due care to provide a reasonably safe place for the doing by him of the work for which he had been employed, and as the fact that the defendant company might not have performed such duty in respect to the scale box in question was not so patent as to be readily observable the court could not declare, in view of the testimony of the plaintiff as to his actual knowledge of the danger, that he had assumed the hazard incident to the actual situation—citing *Choctaw v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96." The judgment was affirmed.

A great many more adjudicated cases might be cited of the same general character, involving facts of similar nature, and holding to the same view, and not a few cases may be found supporting the contention of appellee. The cases are not altogether harmonious upon the question, and we will not undertake to reconcile the adjudications on the subject, but content ourselves with adopting the views expressed by the later decisions of our Supreme Court and those of the United States Supreme Court, and other cases harmonizing with them. We think they express a mere just and reasonable rule than the class of cases holding that trainmen are bound to know from such observation as they catch in passing whether or not objects in plain view along the line of the road are in dangerous proximity to the track. An object might look to a trainman, in passing over the road, the car in motion, to be at a perfectly safe distance away from the line, when, in fact, it was much nearer than it appeared to him to be. He has a right to assume that his master has performed his duty in respect to exercising reasonable care to make his place of employment safe.

In this case the master constructed this road, and it knew exactly the distance from this telephone pole to its track. It knew what kind of cars would be run over the track. It knew what kind of service his employé operating the car would have to perform. It knew that in operating the summer cars the conductor would be required to pass along the running board to take up the fares, and that while passing along the running board his attention would necessarily be drawn to the passengers on the inside of the car; and it knew, too, and was bound to know, that the conductor would be required to move his body in various positions, that he would be required to reach into the car to get fares and to withdraw his body to an upright position, that he would be required to lean back to reach up over his head to take hold of the appliance by which the fares were registered; and it was bound to know, too, that at times, when the cars would be crowded, and passengers would be standing upon the running board, that the conductor, in passing back and forth along the running board, would be compelled to go around the body of each passenger; and it was its duty to so construct its road with reference to objects along the line, where it was reasonably practical to be done, to leave ample room for the movement of its employés and of the passengers who might be expected to ride upon the running board. If the circumstances were different, if the object with which the appellee had collided was some character of structure that could not have been avoided, and to which it was necessary the road should run in close proximity, it would be different; but here the object was a telephone pole which, from its very nature, could easily have been moved a distance of one or two feet. We

hold that the question as to whether or not the danger of collision with this telephone pole was a danger that was so open and apparent that the appellee was bound to know of it, and therefore to assume the risk, was properly submitted to the jury, and that it was not, under the circumstances shown in the evidence, a question of law. For the same reason that the danger was not an assumed risk, the question of whether or not the appellee was guilty of contributory negligence in failing to observe the pole, and the danger that was to be apprehended from it, was a question for the jury. If the circumstances were such that the appellee was bound to have observed the pole and its dangerous proximity to the track, then it was an assumed risk. While there is an essential difference between the doctrine of assumed risk and the question of contributory negligence, yet, in this case the evidence that would show an assumption of risk would also show contributory negligence, and evidence that would exonerate the appellee from contributory negligence would exclude the assumption by him of the risk. The evidence in the case was sufficient to support the verdict of the jury, and there is no conflict between the general verdict and the answers to the interrogatories.

Appellant's motion for a new trial also raises the question as to the correctness of numerous instructions given by the court to the jury. We have examined the instructions with care, and we think they fairly state the law of the case to the jury.

Appellant criticises the twelfth instruction given by the court to the jury. The only ground of criticism is that the court instructed the jury that, if the plaintiff did not know, and could not have known by the exercise of reasonable care and diligence on his part, that the pole that struck and injured him was in such close proximity to said defendant's track as to be dangerous and likely to injure him, etc., then the plaintiff is entitled to recover. This, it is claimed, was not enough. That the court should have instructed the jury further, and told them that if, by the exercise of ordinary care on the part of the appellee, he could have discovered that there was a probability or a possibility of danger from the situation, then he would not be entitled to recover. We think the instruction given by the court to the jury was correct, and that it did not require that the evidence should disclose that the appellee, if he could have discovered by the exercise of diligence a bare possibility of injury, that he could not recover, either that such fact would cast the risk upon him as one of the assumed burdens of his employment, or prove him guilty of contributory negligence in incurring it. The question was not, was there a probability or a possibility of danger, but, was there a probability of injury, and from the probability of injury came the danger; and that was the thing, the knowledge of which

would exclude the appellee from recovery. The instruction given to the jury clearly and plainly put the question before their mind, and it could not have been misunderstood.

Instruction No. 11 is criticised for the reason that the instruction, in defining what risks are assumed, uses the terms "which is not reasonably and fairly incident to and within the ordinary risks of the service which the servant has undertaken." We think that this criticism is without merit or reason, and that it is only the risks that are reasonably and fairly incident to the service which the servant assumes. He does not assume risks that would be unreasonable to claim were incident to the service, and we think the instruction could not have misled the jury.

Instruction No. 6 is also subject to criticism. The instruction was as follows: "Before the plaintiff was entitled to recover in this case, he must establish by a fair preponderance of the evidence, first, that he received the injuries or some part thereof, as urged in his complaint; and, second, that the carelessness of the defendant, as charged in the complaint, was the direct and proximate cause of such injury." Appellant discusses this instruction as though it were a mandatory instruction, but it is not so, and subject to none of the rules that apply to a mandatory instruction. It is to be construed along with all the other instructions given by the court in the case, and taking them all together they fairly and clearly present the law of the case to the jury.

Objection is made to the sustaining of an objection to appellant's question to appellee, on cross-examination: "Was the north side of the bridge nearer the running board as you passed through it than the telephone pole on the north side would be as you passed them?" We cannot see the relevancy of this question, or how it could have been material. It is not made clear how any kind of an answer that the witness would have made to this question could have tended to prove either that the risk of a collision with a telephone pole was so open and apparent that appellee should have known it, or that he was guilty of contributory negligence. He had a right to assume that neither was near enough to the track to cause him injury in the performance of his duty.

A point is made over the alleged sustaining of an objection to a question claimed to have been propounded to the appellee upon his cross-examination. We find no such question in the record, nor do we find any error in the record that would justify a reversal of this cause.

The serious question, and the only one that is a serious one, presented by the record, is whether or not the facts presented in the evidence were such as to render the question of the assumption of the risk by appellee of injury, from collision with the telephone pole, one of law for the determination of the court. While recognizing the fact that there

is a conflict of authority upon this question, we have concluded that the soundest reason and weight of judicial decision in this country, and in this state, is with the appellee.

The judgment of the court below is affirmed.

HADLEY, P. J., not participating.

ROBY, C. J. I concur in the result and in most of the reasoning of the opinion, but do not understand that assumed risk and contributory negligence depend on the same facts. I do not think that the defect complained of was, in any view of the case, a risk incident to the employment, negligence upon the part of the master not being a legitimate part of any business. If the risk was assumed, it was because it was an obvious and open one. The subject has been fully and recently considered by both the Supreme and Appellate Courts. The cases below cited cover the question. *Avery v. Nordyke & Marmion Co.*, 34 Ind. App. 541, 553, 70 N. E. 888; *Wright v. Chicago, etc., R. Co.*, 160 Ind. 583, 590, 66 N. E. 454; *Davis Coal Co. v. Pollard*, 158 Ind. 607, 618, 62 N. E. 492, 92 Am. St. Rep. 319 (2), and authorities cited.

AMERICAN STEEL DREDGE WORKS v. BOARD OF COM'RS OF PUTNAM COUNTY. (No. 6,605.)¹

(Appellate Court of Indiana, Division No. 2.
Dec. 17, 1907.)

1. APPEAL — HARMLESS ERROR — OVERRULING DEMURRER.

Any error in overruling a demurrer to a paragraph of a complaint becomes harmless on a finding in defendant's favor on the paragraph.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4105.]

2. JUDGMENT—CONCLUSIVENESS.

The final adjudication of a matter by a competent tribunal is conclusive, not only as to facts actually determined, but every other fact which might have been litigated in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1234—1241.]

3. DRAINS — PROCEEDINGS — COLLATERAL ATTACK.

Where plaintiff seeks to attack drainage proceedings collaterally for lack of notice to it, the complaint is insufficient if it fails to show what, if anything, is shown by the record in such proceedings respecting such notice.

4. INJUNCTION—INJURY TO BRIDGES IN CONSTRUCTING DRAIN—OTHER REMEDY.

Injunction will not lie at the instance of county commissioners to prevent the removal or destruction of bridges in the construction of a drainage ditch; the acts being alleged to be outside the circuit court's order in the drainage proceeding, and the commissioners having an adequate remedy in a direct application to the circuit court to secure proper execution of the work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 15.]

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by the board of commissioners of Putnam county against the American Steel

Dredge Works. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions.

Milhon, Hanna & Hathaway and Renner & McNutt, for appellant. John H. James, Thos. T. Moore, and James P. Hughes, for appellee.

ROBY, C. J. The appellee brought this action to obtain an injunction against the appellants. The amended complaint was in two paragraphs. A demurrer for want of facts was addressed to each paragraph, and was overruled. Trial was had, and a finding made for the plaintiff on the first, and for the defendant on the second paragraph. Any error in overruling the demurrer to the second paragraph of complaint was rendered harmless by the finding thereon in favor of the defendant. The first paragraph alleges ownership and exclusive control by the plaintiff over certain county bridges described, and charges that the defendants were threatening to tear down and remove said bridges, claiming a right to do so, but alleged that the plaintiff had never been notified of any drainage proceedings, nor been named in any complaint or petition in which it was asked as against them to do the things which defendants are now threatening to do as alleged in the complaint. The prayer was for an injunction, and a perpetual injunction against such acts was decreed. The appellants by answer set up the detail of a ditch proceeding in the Morgan circuit court, in which said court ordered a ditch established and constructed. In accordance therewith, the commissioner of construction let a contract for doing said work to certain of the appellants, by whom the same was assigned and sublet to certain others of them. They allege that to construct said ditch, in accordance with the order of court and contract therefor, it will be necessary to temporarily remove the bridges and cut across the highways mentioned in the complaint; but that the defendants never contemplated nor threatened to disturb, and will not disturb, any of said bridges, except to the extent necessary to carry out their contract and the orders of said court, and that the construction of said ditch in accordance with the order of said court will not destroy any of the bridges or highways mentioned in the complaint. The second paragraph of amended answer, in addition to the facts stated in the first, contains averments to the effect: That the appellee, with full knowledge of all facts, stood by without objection, and permitted appellants to expend \$24,000 in building dredges and doing other work in the carrying out of their contract, and that the commissioner of construction prior thereto filed with the auditor of Putnam county his certified statement of the cost of said ditch, together with the amount of damages awarded, an estimate of other expenses, and a complete statement of apportionment to the different tracts of

¹ Rehearing denied, 84 N. E. 19. Superseded by opinion in Supreme Court, 86 N. E. 1.

land and highways in Putnam county; the same being the highways mentioned in the complaint. That said statements were duly laid before the board of commissioners of Putnam county in regular session, and that said board found and adjudged that such statements had been made according to law, were correct, and should be paid, and ordered the auditor to make collection of the several assessments, which was thereafter done. Wherefore they say that plaintiff is estopped to deny the authority of the appellants herein.

The determination of the appeal depends upon the effect which is given to the order of the Morgan circuit court in establishing said drain. The doctrine first expressed in this state, in *Fischli v. Fischli*, 1 Blackf. 360, 12 Am. Dec. 251, that, when a matter is adjudicated and finally determined by a competent tribunal, it is considered forever at rest, is one of universal application. This principle not only embraces what actually was determined, but also extends to every other fact which might have been litigated in the case. *Fischli v. Fischli*, supra; *State ex rel. v. Thompson, Trustee*, 109 Ind. 533, 534, 10 N. E. 305. The plaintiff attacks these proceedings collaterally, and undertakes in its first paragraph of complaint to deny jurisdiction of its person by the Morgan circuit court. Where it is sought to impeach the proceeding of a court of competent jurisdiction for lack of notice, the complaint must contain averments as to what, if anything, is shown by the record in such proceeding in relation to such notice. *B. & O. & Chi. R. Co. v. North*, 103 Ind. 486, 492, 3 N. E. 144; *Exchange Bank v. Ault et al.*, 102 Ind. 322, 1 N. E. 562; *Brooks v. Morgan*, 36 Ind. App. 672, 76 N. E. 831. The pleading under consideration contains no such showing, and the demurrer to it should have been sustained.

The position assumed by appellee at this time is that the complaint is good without regard to its averments as to notice, and that the acts enjoined, i. e., the removing or destroying the bridges specified, are acts wholly outside the order of the Morgan circuit court, and that the construction of the proposed drainage does not necessitate interference with said bridges. The proposition is not enunciated in the complaint. The basis of the right therein asserted is the lack of notice to the county; but, if it were conceded that the proposition is within the issue tendered, the right to an injunction would not follow. The proceeding in which judgment has been rendered for the construction of the ditch remains on the docket of the Morgan circuit court, while the ditch is in process of construction. Section 5628, *Burns' Ann. St.* 1901; *Perkins v. Hayward*, 132 Ind. 99, 81 N. E. 670; *Hoefgen v. Harness*, 148 Ind. 224, 47 N. E. 470; *Carter v. Buller*, 159 Ind. 52, 64 N. E. 667; *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933.

The omissions and departures which are relied upon relate to the construction of the ditch, and not to the proceeding for its establishment. The work is done under the control and direction of the court. Appellee's remedy is therefore to apply to the Morgan circuit court, and through its order and intervention secure the due execution of the work. If the commissioner is proceeding contrary to the method prescribed, or in any other manner neglecting his duty, a direct application to the court will secure full, complete, and adequate relief. *Indianapolis & Cumberland Gravel Road Company v. State*, etc., 105 Ind. 37, 4 N. E. 316; *Racer v. State*, 131 Ind. 393, 31 N. E. 81. The remedy thus afforded is as practical and efficient to the ends of justice and its proper administration as the remedy in equity, and an injunction will not therefore lie. *Chappell v. Jasper Co.*, 31 Ind. App. 170, 66 N. E. 515; *Pomeroy on Equity*, § 1357. Any other holding would create confusion and uncertainty, thereby seriously interfering with the construction of this class of public improvements.

The judgment is reversed, and the cause remanded, with instructions to sustain appellant's demurrer to the first paragraph of complaint.

(41 Ind. App. 447)

BARKER et al. v. TOWN OF PETERSBURG. (No. 6388.)¹

(Appellate Court of Indiana, Division No. 2, Dec. 18, 1907.)

1. WILLS — CONSTRUCTION — RESIDUARY CLAUSE—REAL PROPERTY.

A residuary clause, "I will and bequeath," will be construed, in order to give effect to the intention of the testator, to include both real and personal property; a partial intestacy never being presumed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 964, 1282.]

2. SAME.

"Residue" meaning that which remains, no particular mode of expression is necessary to constitute a residuary clause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1279, 1282.]

3. CHARITIES—GIFTS BY WILL—CERTAINTY—EDUCATION — MUNICIPALITY FOR SCHOOL PURPOSES.

A gift by will of a residue, for the erection of a public school, to a town, is valid, in view of *Burns' Ann. St.* 1901, § 5914, making the town a distinct municipality for school purposes, *Burns' Ann. St.* 1901, § 4357, subd. 17, Id. section 3797, subd. 19, and *Burns' Ann. St.* 1905, giving it power to erect and provide such schoolhouses as may be necessary for the use of the schools of the town, since the gift is a charitable one, and for the benefit of school children who could be ascertained by a reference to the rules prescribed by the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, § 48.]

4. SAME.

Courts uphold gifts for charitable purposes, although the beneficiaries are somewhat indefinite.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, §§ 44-50.]

¹ Rehearing denied.

Appeal from Circuit Court, Pike County; E. A. Ely, Judge.

Action by Joseph D. Barker and others against the town of Petersburg to quiet title to realty. From a judgment for defendant, plaintiffs appeal. Transferred from Supreme Court. Affirmed.

E. P. Richardson, H. Taylor, J. W. Wilson, and F. B. Posey, for appellants. Greene & Ely and W. D. Cuill, for appellee.

ROBY, C. J. This suit involves the title as between appellants and appellee to certain described real estate. The case was submitted to the trial court upon an agreed statement of facts, which was, in substance, as follows: Emeline Thornton departed life at Pike county on December 8, 1903, leaving no descendant, husband, parent, brother, or sister, but leaving as her heirs at law the appellants, whose relationship is set out. She died the owner and in possession of the real estate in controversy. In addition to said real estate, she left \$42,000 worth of personal property and no debts. On December 15, 1900, she executed her last will and testament, which is set out in extenso. After her death, and before the institution of this action, said will was duly probated. The instrument consists of 22 items or clauses, in 13 of which she makes bequests of money to 16 different persons and corporations aggregating \$20,600, and in six of which she disposes of specifically described personal property; the language used in each of said items being: "I will and bequeath." The twentieth item is as follows: "After all bequests have been paid and all indebtedness of my estate settled, I will and bequeath to Petersburg, Indiana, the residue for the erection of a public school building in said town." The testatrix was, at her decease, and had been for more than 50 years prior thereto, a resident of the town of Petersburg. She was, and had been for 18 years, a widow. In her lifetime she deeded a lot in said town to Pike county, and erected thereon a building known as the "Thornton's Orphans' Home." Two years before her death, she gave \$25,000 to the James Millikin University. Prior to the making of said will, she gave to the board of trustees of said church six acres of land near Evansville, together with buildings thereon to be known as the "Thornton Home for Superannuated Ministers and Their Families of the Cumberland Presbyterian Church"; the cost thereof being about \$3,000. At the time said will was made, the town of Petersburg, which is a duly incorporated town situated in Pike county, Ind., was in need of an additional school building, and was indebted to the full constitutional limit, which facts were generally known. The court found for appellee that it was the owner in fee simple of the land described, and quieted its title thereto.

The questions of law involved in this ap-

peal are simple and elemental: (1) Can a residuary clause, "I will and bequeath to Petersburg * * * the residue for the erection of a public school, * * *" dispose of real estate; and (2) is a gift by will to a municipal corporation for school purposes valid? Appellants claim that item 20 of the will disposes only of personal property, that the operative words "will and bequeath" are technical, conveying only personalty, and that, as no real property is specified, deceased is intestate as to her real estate. Unfortunately, laymen, as well as members of the legal profession, and sometimes even the courts, have, through ignorance or carelessness, used the words "bequeath" and "devise" interchangeably. That the words are so used is a well recognized fact, and, since the primary rule in the construction of wills is to give effect to the intention of the testator, her intention will be given effect, even though the wrong word was used. *Roundtree v. Pursell*, 11 Ind. App. 522, 530, 531, 39 N. E. 747; *Mills v. Franklin*, 128 Ind. 444, 447, 28 N. E. 60; *Borgner v. Brown*, 133 Ind. 391, 397, 33 N. E. 92; *Rood on Wills*, § 45. The word "will" is, moreover, strictly applicable to the disposition of real property. *Mills v. Franklin*, supra. "Residue" means that which remains, and no particular mode of expression is necessary to constitute a residuary clause. Words in a residuary clause are given the widest possible scope, because it is presumed that the testator by will intended to dispose of his whole estate. A partial intestacy is never presumed, unless the language used compels such construction. *Carroll v. Swift*, 10 Ind. App. 170, 37 N. E. 1061; *Tobin v. Tobin*, 163 Ind. 240, 69 N. E. 440; *Pate v. Bushong*, 161 Ind. 533, 69 N. E. 291, 63 L. R. A. 593, 100 Am. St. Rep. 287; *Korf v. Gerichs*, 145 Ind. 134, 44 N. E. 24; *Groves v. Culph*, 132 Ind. 186, 31 N. E. 569; *Mills v. Franklin*, 128 Ind. 444, 28 N. E. 60; *Rood on Wills*, § 496. The language here used does not compel that construction. The testatrix, in her will, remembered most, if not all, of her relatives. The agreed statement of facts shows that she had no immediate relatives, and that during her life time she made various large gifts to charities. They further show that she knew of the need of the town of Petersburg for better school accommodations and its inability to provide them. In her will she gave several thousands of dollars for the support of the Thornton Home and the Cumberland Presbyterian Church. Looking at these facts, and at the will as a whole, no other conclusion can be reached than that the testatrix intended that the real estate should pass to the town of Petersburg.

Appellants admit that the town "can take as a trustee," but say that under this will the trust is void for indefiniteness; that there is no means given in the will by which the beneficiaries of the trust can be ascertained; and that "there is nothing in the

will indicating that the school children of Petersburg are meant, or that the schoolhouse was meant for the children of the town." The town is a distinct municipal corporation for school purposes. Section 5914, Burns' Ann. St. 1901. And has power to erect and provide such schoolhouses as may be necessary for the use of the schools of the town. Section 4357, subd. 17, 2 Burns' Ann. St. 1901; Section 3797, subd. 19, Burns' Ann. St. 1905. The testatrix, in making a gift to the town "for the erection of a public school building in said town," could have had in mind only the children entitled under the law to the benefits of its public schools, and they are not only ascertainable, but ascertainable by reference to rules prescribed by the Legislature. The use to be made of a public school building is likewise established, and no element of uncertainty in the respect indicated exists. The gift was for a charitable use, and the courts uphold such gifts, although the beneficiaries and objects are somewhat indefinite. *Vidal v. Girard's Ex'r*, 2 How. (U. S.) 127, 11 L. Ed. 205, is a leading and interesting case upon the subject, and its doctrine has been repeatedly decided in Indiana. *Board of Com'rs v. Dinwiddie*, 139 Ind. 140, 37 N. E. 795; *Board of Com'rs v. Rogers*, 55 Ind. 302; *Grimes' Ex'rs v. Harmon*, 35 Ind. 230, 9 Am. Rep. 690; *Sweeney v. Sampson*, 5 Ind. 476; *McCord, Ex'r, v. Ochiltree*, 8 Blackf. 20.

The testatrix, in disposing of her large estate, was evidently actuated throughout by a spirit of lofty and enlightened benevolence. It was her estate, and the residuary clause under consideration must stand as her last unselfish charity.

Affirmed.

PITTSBURGH, C. C. & ST. L. RY. CO. v. SCHEPMAN. (No. 6,043.)¹

(Appellate Court of Indiana. Dec. 19, 1907.)

1. CARRIERS—INJURIES TO PASSENGERS—MAKING UP TRAINS—UNVESTIBULATED CARS.

Burns' Ann. St. 1901, § 5191, provides that, in forming a passenger train, baggage, freight, merchandise, or lumber cars shall not be placed in rear of passenger cars. A combination smoking and baggage car, with one end not vestibuled, and designed to be placed next to the engine, was placed behind a passenger coach, and plaintiff, in passing through the train, fell or was thrown overboard through the unprotected space. *Held*, that such a car was within the prohibition, and the company in disregarding the statute was guilty of negligence.

2. SAME—PASSENGER PASSING THROUGH VESTIBULATED TRAIN—CONTRIBUTORY NEGLIGENCE.

Vestibules on passenger cars are designed to make it safe for passengers to pass from one car to another, and a passenger so doing is not as a matter of law negligent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1384.]

3. APPEAL—REVIEW—QUESTIONS OF FACT—VERDICT—CONCLUSIVENESS.

A general verdict for plaintiff, a passenger, injured by falling or being thrown from the

platform of an unvestibuled car, carries with it a finding that he did not see or understand that the platform was unprotected, which is conclusive on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3912.]

Appeal from Circuit Court, Henry County; Jno. M. Morris, Judge.

Action by George W. Schepman against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff and defendant appeals. Affirmed.

John L. Rupe, for appellant. Shiveley & Shiveley, for appellee.

PER CURIAM. The appellee fell from one of appellant's passenger trains, and received injuries which resulted in the amputation of his leg. At the time he was passing from a day passenger coach to a combination smoking and baggage car immediately behind the passenger coach. The cars on said train were all vestibuled, except the front end of said combination car, which did not have any steps. Its platform projected 19 inches beyond the car; such unprotected space being increased to 23 inches when the "slack" was out. The other end of the car was provided with a platform and vestibule. Appellee fell, or was thrown, out of the opening described. It was after night, and except for this unprotected and evidently unexpected opening he was perfectly safe in going from car to car.

It is charged, and evidence was introduced tending to support the charge, that the train was advertised and held out to be a vestibuled train, and that in leaving the opening referred to appellant was guilty of negligence; and, also, that it was guilty of negligence in disregarding the following statute: "In forming a passenger train, baggage, freight, merchandise, or lumber cars shall not be placed in rear of passenger cars; and if they or any of them shall be so placed, and any accident shall happen to life or limb, the officer or agent who so directed or knowingly suffered such arrangement, and the conductor or engineer of the train shall each and all be held guilty of intentionally causing the injury and be punished accordingly." Section 5191, Burns' Rev. St. 1901. The construction of the smoking and baggage car justifies the finding that it was designed to be attached to the engine, and it was within the terms of the foregoing statute. Appellant's negligence is therefore for the purpose of this appeal established. Passing over a vestibuled platform from one car to another is not as a matter of law negligence on the part of passengers. Vestibules are designed, among other things, to make it safe for them to do so. Otherwise the conveniences furnished for use by the passengers upon the train would be inaccessible, a result which could not have been intended.

Neither can it be said that appellee knew of the absence of a vestibule. He boarded

¹ Superseded by opinion in Supreme Court, 84 N. E. 968. Rehearing denied.

the forward car, coming from the front of the train, and therefore, not walking by the unprotected car, he might see it, and he might not see it. The general verdict in his favor carries with it a finding that he did not see or understand the condition, and the finding is conclusive.

Other errors discussed do not furnish ground for reversal.

Judgment affirmed.

(40 Ind. App. 682)

VANDALIA R. CO. v. SHADLE. (No. 6,008.)
(Appellate Court of Indiana, Division No. 2.
Dec. 17, 1907.)

RAILROADS—RECOVERY FROM RAILROAD COMPANY OF COMPENSATION FOR FENCING — COMPLAINT.

An action against a railroad, in which the complaint showed that defendant's fence on the line between its right of way and plaintiff's land had long been out of repair, so that it would not keep stock from off the right of way, that plaintiff properly requested defendant to rebuild the fence, which it failed to do, and that then plaintiff made such repairs and furnished defendant's agent with an itemized statement of the cost thereof, which defendant refused to pay, was based on Burns' Ann. St. 1901, § 5323, which provides that an owner of land adjoining a railroad's right of way, after the latter's refusal, upon notice, to properly repair its fence between the right of way and such land, may rebuild such fence and charge the railroad with the expense thereof, and not upon section 5323, which requires a railroad to maintain fences along its right of way, except in certain specified places; and hence the complaint was not defective in failing to negative the exceptions provided for in the latter section.

Appeal from Circuit Court, Fulton County;
A. C. Capron, Judge.

Action by Charles W. Shadle against the Vandalla Railroad Company. From a judgment overruling defendant's demurrer to the complaint, it appeals. Affirmed.

Saml. Parker, Jno. G. Williams, and Enoch Myers, for appellant. Holman & Stephenson, for appellee.

COMSTOCK, J. Appellee, plaintiff below, recovered judgment against appellant for \$81.45, for building a fence along the appellant's right of way, on his land, and for attorney fees. The only error relied upon is the overruling of the demurrer for want of facts, of the Terre Haute & Logansport Railway Company, to the complaint. The action was prosecuted to final judgment against the Terre Haute & Logansport Railway Company, but, while the action was pending, that company and four other railroad companies were consolidated under the laws of the state of Indiana, and became one company, under the name of the "Vandalla Railroad Company." This last-named company, making appropriate averments showing the consolidation and its succession to the rights and duties of the Terre Haute & Logansport Railway Company, assigns errors on the record of this cause and is the appellant in this appeal. The complaint, in substance, avers that

the plaintiff is now, and for more than 10 years last past has been, the owner of a certain piece of real estate (describing the same) in Fulton county, Ind., lying west of the defendant's railroad right of way; that said land lies about a mile south of De Long Station; that said station is maintained by the defendant company and the nearest to plaintiff's said land where freight is shipped and received; that defendant maintained an agent at said station; that the plaintiff's east line of said tract of land is the west line of the defendant's right of way; that the defendant railroad was constructed, and its right of way along the plaintiff's said line fenced, prior to the year 1885; that for some time previous to the 31st day of October, 1900, said fence became so out of repair as that it would not turn stock of any kind, and it became necessary to build substantially a new fence; that prior to the 31st day of October, 1900, plaintiff called defendant's attention to said fence, and requested that it be rebuilt; that the defendant failed and refused to rebuild the same or to repair it; that thereafter, to wit, on the 1st day of November, 1900, the plaintiff served notice upon Charles Apt, the company's agent at said station of De Long, both by reading and by leaving with him a true copy of the notice, notifying the company that said fence was out of repair and would not turn stock, describing and giving the line of the fence, being the fence along the west side of the company's railroad track, and further notifying the company that, if the same was not put in repair so as to turn stock as required by law, within the time fixed in the law, that the plaintiff would make the repairs and charge the expense thereof to the defendant, as fixed by statute; that the defendant failed and refused to rebuild or repair said fence, or to offer to do so; that the plaintiff, in accordance with said notice and his authority under the law of November 5, 1901, commenced the construction of said fence, and completed the same on April, 11, 1901, building the same on the extreme west edge of the company's right of way; that the material and labor therefor cost in the aggregate \$41.55, setting out the items for material and labor aggregating said amount; that on the 22d day of April, 1901, plaintiff furnished to said Apt, as the agent of said company, an itemized statement of said material and labor as above itemized as aforesaid, which itemized statement was sworn to by the plaintiff on said 22d day of April, 1901, the receipt of which statement was duly acknowledged by Apt on said day; and that said company failed and refused to pay said sum—wherefore the plaintiff demands judgment, etc.

The objection made to the complaint is that it does not negative, or attempt to negative, the exceptions contained in section 5323, Burns' Ann. St. 1901. The objection is not well taken, because the action is based upon

section 5325, *supra*, as appears from the complaint. It is an action to recover for the rebuilding of a fence which for years had been permitted by the defendant to be and remain out of repair, and which the defendant railroad company had refused to rebuild or to repair. This is manifest from the complaint and the notice under which the appellee proceeded. Said section contains no exceptions that should be negatived.

No other objection being pointed out to the complaint, the judgment is affirmed.

Judgment affirmed.

(41 Ind. App. 320)

STEWART v. GWYNN. (No. 5,996.)¹

(Appellate Court of Indiana, Division No. 2
Dec. 18, 1907.)

1. INSURANCE—ASSIGNMENT OF POLICY—DELIVERY.

An insurance policy is a chose in action, and may be transferred by delivery without writing; but where by its terms mere delivery will not give any right as against the beneficiary named therein, the presumptions from mere possession are rebutted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Insurance, §§ 478, 480, 484.]

2. SAME—RIGHT TO POSSESSION OF POLICY.

Where an insurance policy, payable to the executors, administrators, and assigns of the insured, shows on its face that there has been no change of beneficiary or assignment of the policy under the requirements of the policy, and there is no showing of any waiver of the company's rules as to such change or assignment, or any facts showing an excuse for not complying with the rules, an administrator of the estate of insured is entitled to the possession of the policy as against one claiming ownership thereof.

3. APPEAL—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where the questions presented on a motion for new trial depend on the evidence, which is not contained in the record, they cannot be considered on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2947.]

Appeal from Circuit Court, Henry County; Jno. M. Morris, Judge.

Replevin by Lorenzo D. Gwynn, administrator, against Eliza M. Stewart, for possession of an insurance policy. From a judgment for plaintiff, defendant appeals. Affirmed.

Brissey & Ethell, for appellant. C. W. Kinnan and Bingham & Long, for appellee.

COMSTOCK, J. Appellee, plaintiff below, brought this action in replevin against appellant to recover the possession of a certain life insurance policy, issued by the New York Life Insurance Company, on the life of one John J. Stock, deceased. The complaint is in one paragraph, and alleges that one John J. Stock departed this life on the 31st day of March, 1904, intestate; that appellee was duly appointed administrator of his estate; that said Stock was the owner of a policy of life insurance for the sum of \$1,000, payable to the executors, administrators, or assigns of

said decedent; that the beneficiaries in said policy were never changed, or ordered changed, by said decedent, nor did said decedent ever assign said policy to any person; that the plaintiff is the legal owner of said policy, and is entitled to its possession, but the same is wrongfully and unlawfully detained from the plaintiff by the defendant, who has taken possession thereof without right; and that on the 14th day of April, 1904, plaintiff demanded the possession of said policy from the defendant, which the defendant then and there refused. A demurrer for want of facts was overruled, and the cause put at issue by general denial. The complaint was filed in the Delaware circuit court, and on change of venue was tried in the Henry circuit court. The cause was tried by the court without the intervention of a jury, special findings of fact made, conclusions of law stated thereon, and judgment rendered that the plaintiff recover from the defendant the life insurance policy in question; that said policy is of the value of \$1,000; that the plaintiff is entitled to the possession of the same; and that the plaintiff recover of and from the defendant his costs and charges herein laid out and expended. The errors assigned and discussed are that the court erred in its conclusions of law numbered 1, 2, and 3, respectively, and in overruling appellant's motions for a venire de novo and for a new trial. The court stated three conclusions of law: First, that the defendant, Eliza M. Stewart, has no right, title, or interest in the policy of life insurance on the life of John J. Stock, deceased, described in the complaint, and is not entitled to the possession thereof; second, that the plaintiff, Lorenzo D. Gwynn, as administrator of the estate of John J. Stock, deceased, is the owner of and entitled to the possession of said policy of life insurance No. 3-488,531, and was entitled to the possession thereof at the time of the commencement of this action; and, third, that plaintiff is entitled to judgment against the defendant for the possession of said policy and the costs of this action.

By the special findings of the court, it is shown, in substance: That Eliza M. Stewart, the defendant, is a resident of Delaware county, Ind.; that said John J. Stock departed this life intestate on the 31st day of March, 1904. That at the time of his death he was a resident of Blackford county, Ind. That on the 4th day of April, 1904, the plaintiff, Lorenzo D. Gwynn, was appointed administrator of the estate of said decedent by the circuit court of Blackford county, Ind. He was duly qualified, and has been and still is acting as administrator of the estate of said decedent. That on the 2d day of October, 1903, the New York Life Insurance Company of the city and state of New York issued and delivered to said John J. Stock a policy of insurance on the life of said stock, being policy No. 3,488,538, for the sum of \$1,000. That said policy was payable to the

¹ Rehearing denied, 83 N. E. 753.

executors, administrators, or assigns of said John J. Stock, and the same was in full force and effect at the time of his death, and was the contract and agreement between said company and said Stock at the time of the latter's death, as aforesaid. It sets out a verbatim copy of the policy. That on the 31st day of March, 1904, and continuously to the date of the finding, said policy was, and ever since has been, and is now, of the value of \$1,000. That there has been no assignment of any description of said policy, legal or equitable, to the defendant, or to any one for her, and there has been no change of beneficiary and no designation or declaration of absolute beneficiary in or under said policy. That on said 31st day of March said policy was in the possession of the defendant, Eliza M. Stewart, in Delaware county, and continued in her possession until the 28th day of April, 1904. That on the 11th day of April, 1904, the plaintiff made demand on the defendant for possession of said life insurance policy, and said defendant refused to surrender same to him. The court also finds the filing of the plaintiff's complaint in the Delaware circuit court; the issuing and delivery to the sheriff of said county of the writ of replevin, directing the sheriff to seize said policy and deliver the same to the plaintiff; the seizure by the sheriff of said policy of insurance, and its timely delivery to the plaintiff as provided by statute; the plaintiff has continued to hold possession thereof since its said delivery on the 30th day of April, 1904, at 9 o'clock. Also: That claims have been filed in the office of the clerk of the circuit court of Blackford county against the estate of said John J. Stock, aggregating the sum of \$1,857.64. That the estate of said Stock is now indebted to sundry parties, and said indebtedness was incurred and existed on and prior to March 16, 1904, except as to funeral expenses set out. That said policy contained, among other things, the following provisions, to wit: "No designation or change of beneficiary or declaration of an absolute beneficiary shall take effect until indorsed on this policy at the home office. No notice of change of beneficiary or declaration of the absolute beneficiary shall take effect until indorsed upon this policy at the home office. Any assignment of this policy must be in duplicate and both sent to the home office, one to be retained by the company and the other to be returned. The company has no responsibility for the validity of any assignment." That the policy described in the complaint is the same policy issued by said insurance company to said decedent, Stock, and demanded by the plaintiff from the defendant and taken by the sheriff under the writ of replevin and delivered by said sheriff to the plaintiff as heretofore set out.

The ultimate facts necessary to warrant a recovery by appellee are: Is the right to possession of the policy in the plaintiff, and, if defendant's possession was unlawful, the

demand therefor. The demand is found. The facts found show that the policy was issued with the executors, administrators, or assigns of the said Stock as beneficiaries; that no change had been made in the beneficiaries; that no change could be made, except in the way set out in the policy; that no assignment of the policy was ever made therein, or any notice given to the insurance company. These facts make a prima facie case in favor of appellee. Upon the face of the policy, appellant was not entitled to the proceeds thereof. An insurance policy is a chose in action and may be transferred by delivery without writing. *State ex rel. Wright, Adm'r, v. Tomlinson et al.*, 16 Ind. App. 676, 45 N. E. 1116, 59 Am. St. Rep. 335; *Marcus v. State Life Mutual Insurance Company*, 68 N. Y. 625. But where by the terms of the policy it appears that mere delivery will not give any right as against the beneficiary named therein, the presumptions which arise from bare possession are rebutted, and the burden shifts. The policy providing that the transfer or change of beneficiary should be made as found in the special findings, the burden was upon appellant to show why the provisions of the policy should be disregarded. An insurance company may forfeit a strict observance of its own rules. It may be beyond the power of the insured to comply literally with the requirement of the contract. The insured may have done all in his power to change the beneficiary, but death or other intervening acts have prevented the change or transfer. Under such facts, a court of equity will decree that as done which ought to have been done. *Supreme Conclave, etc., v. Cappela (C. C.)* 41 Fed. 1. The existence of neither of these exceptions to the general rule is found. While there are conclusions of law and evidentiary facts stated in the findings of facts which we have not set out, and which we must disregard, there are facts sufficient to justify the conclusions of law, and the judgment was properly rendered thereon.

The motion for the venire de novo was properly overruled. The questions presented by the motion for a new trial depend for their solution upon the evidence, and no attempt is made to make it a part of the record.

Judgment affirmed.

(41 Ind. App. 329)

HUNTINGTON FUEL CO. et al. v. McILWAIN. (No. 6,018.)¹

(Appellate Court of Indiana, Division No. 2, Dec. 19, 1907.)

1. APPEAL—REVIEW—HARMLESS ERROR—MOTION TO MAKE COMPLAINT MORE SPECIFIC.

Where the court finds for plaintiff on only one of several items in his complaint, the overruling of defendant's motion to make the complaint more specific as to the items claimed is not prejudicial error as to the items upon which plaintiff did not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4077.]

² Rehearing denied. Transfer to Supreme Court denied.

2. PLEADING—COMPLAINT—DEFINITENESS AND CERTAINTY.

A complaint alleging that defendant owed plaintiff "for work and labor for three months, June 7, 1904, to September 7, 1904, the total of \$300, * * *" and that it was agreed and understood that plaintiff was to act as defendant's manager at a salary of \$100 per month, etc., is sufficient to enable a person of common understanding to know what is intended; and it is not reversible error to overrule a motion to make it more definite and a demurrer for want of facts.

3. CORPORATIONS—CONTRACTS OF EMPLOYMENT—STOCKHOLDER.

Where plaintiff, a stockholder and manager performs manual labor for a corporation at the instance of a director and majority stockholder in control thereof, and the corporation receives the benefit of it, plaintiff may recover its value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1615.]

4. SAME—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for the value of services performed on the order of a director and majority stockholder in control of a corporation and accepted by the corporation, evidence as to what talk plaintiff had with the director as to compensation is competent to show that the work was done under the director's authority, and as tending to show whether the services were performed under circumstances from which compensation could reasonably be expected.

Appeal from Circuit Court, Huntington County; Jas. C. Branyan, Judge.

Action by Thomas O. McIlwaine against the Huntington Fuel Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Kenner, Lucas & Kenner, for appellants.
C. W. Watkins, for appellee.

COMSTOCK, J. The second amended complaint upon which the cause was tried alleges, in substance that the defendant is a corporation under the laws of the State of Illinois and doing business in this state, with a capital stock of \$10,000, and that plaintiff (appellee) owns \$4,500 and J. S. Jones and others own \$5,000; that said company, until about the ——— day of December, 1904, was doing a prosperous business, and that there are undivided profits that should be paid to the stockholders and this plaintiff's share is reasonably worth \$205; that the said corporation owes him for work and labor for three months, June 7, 1904, to September 7, 1904, a total of \$300; that it also owes him for a certain lease for grounds, building sheds, and other appurtenances of a coalyard, and certain rights and privileges belonging to said lease; that said lease and privileges were duly transferred to said corporation by the plaintiff and accepted for the sum of \$1,400, and that the same have been continuously used by the defendant, and that the same was reasonably worth \$1,400; further, that for a considerable time and now the corporation is making no money and is insolvent; that it was agreed and understood that this plaintiff was to act as manager of said company at Huntington, and he was to receive therefor a salary of \$100 per month,

and that, after said corporation was organized and entered upon business, the plaintiff was installed as manager of said company, and that the company had no other business than that of a coalyard; that, as soon as the same was put upon a paying basis and in operation, the said J. S. Jones, for the purpose of wronging and defrauding the plaintiff, having then a control of the majority of the stock, procured the dismissal of this plaintiff as manager of said corporation, and by the passage of a resolution deprived plaintiff of his position and his salary; that said corporation, through the manipulations of said Jones, have excluded plaintiff from any participation in the affairs of the corporation, and that he has had no access or control or actual knowledge of the papers, books, etc., wherefore he asks for the appointment of a receiver and for all proper relief. Appellant Huntington Fuel Company, by its motion, asked that the plaintiff be required to make said second amended complaint more specific as to the three items charged. The motion was overruled, as was also a demurrer for want of facts to said amended complaint. Upon his own petition, appellant Jones was made a party to the cause, and a separate and several answer in two paragraphs was filed by said Jones and appellant Huntington Fuel Company—the first a general denial, the second setting up affirmative matter. No question is presented on said second paragraph, and no further reference is made thereto. To said second paragraph appellee replied by general denial, and so the issues were formed. Upon timely request the court made a special finding of facts, stated conclusions of law, and rendered judgment against the appellant Huntington Fuel Company for \$250.30.

The court finds for the plaintiff only for services rendered the corporation from the 28th of June to the 1st day of September, 1904, less \$36.70 due from him to the corporation for coal and against him as to all other claims, so that the appellants were not, under any view, harmed by the action of the trial court in overruling the motion to make more specific the items of the complaint other than that for labor. The specification for work and labor is in the following language: "And he says that said corporation owes him for work and labor for three months, June 7, 1904, to September 7, 1904, the total of \$300. * * * And he further says that it was agreed and understood that this plaintiff was to act as manager of said company at Huntington, and he was to receive therefor a salary of \$100 a month, and that, after said corporation was organized and entered upon business, this plaintiff was duly installed as manager of said company, and that, as soon as the same was put on a paying basis, he was deprived of his position." The motion might properly have been sustained, but the contrary ruling was not reversible error, because

the foregoing quotation from the complaint shows that the compensation for services was claimed for three months beginning June 7, 1904, and ending September 7, 1904, and because it is sufficient, using the language of the statute, "to enable a person of common understanding to know what is intended." For the same reason, there was no error in overruling the demurrer.

Special findings 5 and 6 sustain appellee's claim for services. One of the reasons for a new trial is that the evidence is not sufficient to support said findings. Upon said claim there is evidence to the following effect: That prior to the 4th day of September, 1904, appellee was running the business with assistance from the Chicago office; that he left the service of said appellant company December 7, 1904; that prior to September 4, 1904, he had complete control; that in the organization of the corporation J. S. Jones subscribed for 55 shares and the appellee 45 shares of the capital stock, there being 100 shares of \$100 each; that, when the same was incorporated, three other persons owned 1 share each; that said Jones instructed appellee to manage the concern and take care of the business; that appellee bought coal and helped to unload it during the months of June, July, and August; that his work was worth \$100 a month; that in July, 1904, said J. S. Jones stated to appellee that things were still in an embryonic state, and that, as soon as they were running, salaries would be arranged for, and he (appellee) would be reimbursed for his time—so that there was evidence that, under the direction of J. S. Jones, appellant, an incorporator, director, and owner of the majority of the shares of the capital stock of appellant, appellee did manual labor for the appellant corporation, and that it was reasonably worth \$100 a month. The fact that all the work he did was not necessarily within the duties of an officer of the corporation, and though the employment doubtless came to him because he was a stockholder, yet these facts would not deprive him of his right to compensation for the performance of common labor, nor would it be necessary to call a meeting of the board of directors to engage the services of any one for such labor as the testimony shows appellee to have performed. The corporation received the benefit of his services rendered at the instance of the majority stockholder under whose control it was and should be required to pay for it.

While appellee was testifying in his own behalf, and after having stated that his work was worth \$100 per month, he was asked the following question: "Q. You may state what talk you had with Mr. Jones about your pay for the time from June until September." Objection was made to the question, upon the ground that Jones was only a director of the corporation, and that any agreement he made as to compensation for his services would not bind appellant, which objection

was overruled. As before stated, the work was performed by the direction of Jones, accepted by the corporation, and it was proper to show that it was done by his authority. It tended to throw light upon the question of whether it was rendered under such circumstances as tended to show that compensation was reasonably expected. The right of a director to fix his own salary or the salary of an officer or agent of a corporation are not controlling in the case at bar. It is only a question of compensation for labor rendered at the instance of a director and majority stockholder, and the results of which the corporation have accepted and enjoyed. For so much the complaint is sufficient, and there is evidence to sustain the finding and judgment of the court.

Affirmed.

(40 Ind. App. 685)

ELWOOD STATE BANK et al. v. MOCK.
(No. 6,006.)

(Appellate Court of Indiana, Division No. 2.
Dec. 19, 1907.)

1. APPEAL—PLEADING—SUFFICIENCY.

A complaint which is sufficient to bar any subsequent action for the same cause is good as against the objection first made on appeal that it does not state facts sufficient to constitute a cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1226-1240.]

2. SAME—PARTIES.

Under Burns' Ann. St. 1901, § 647, the parties to a judgment appealed from are necessary parties to a vacation appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1814.]

3. SAME.

A defendant who filed a disclaimer of interest in the subject-matter of the suit was neither a necessary nor a proper party to a vacation appeal from a judgment neither for nor against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1814, 1815.]

4. MECHANICS' LIENS—WAIVER.

A seller of machinery does not waive the right to take and hold a mechanic's lien by stipulating in the contract of sale that the title shall remain in him until the price is paid.

5. TRIAL—FINDINGS—SPECIAL FINDINGS—REQUISITES.

A special finding must contain all the facts necessary to entitle the party having the burden of proof to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 846-856.]

6. SALES—CONDITIONAL SALES—WAIVER OF TITLE.

A seller suing for the price of goods sold and for the foreclosure of his statutory lien elects to waive the right secured by the contract of sale stipulating that the title shall remain in him until the price is paid.

7. TRIAL—SPECIAL FINDINGS—SUFFICIENCY.

One suing to foreclose a mechanic's lien for goods sold under contract stipulating that the title shall remain in him until the price is paid is entitled to recover, though special findings do not state that he elected to treat the sale as absolute.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

Action by James F. Mock against John F. Rodefer, in which a receiver of the property of defendant was appointed, and in which the Elwood State Bank and others filed intervening petitions. From a judgment for plaintiff, the Elwood State Bank and others appeal. Affirmed.

O. A. Armfield, for appellants. Griffin & Broadbent, for appellee.

ROBY, O. J. The amended complaint filed by John F. Mock set up an indebtedness to him by John F. Rodefer, and averred that said defendant was the owner of certain real estate; that he owned and operated a manufacturing establishment; that said indebtedness was incurred for machinery sold to be used, and which was used, in the improvement of said factory; that Rodefer is insolvent; that he is indebted to various persons in large amounts who claim liens on his real estate, and said persons are made defendant to answer to their respective interests; and that the plaintiff duly filed notice of his intention to hold a lien upon a described portion of the defendant Rodefer's real estate for said sums so due him. The relief demanded was judgment for the said amount owing to him, for a foreclosure of his lien, and for the appointment of a receiver to take charge of and preserve the property of said Rodefer. The pleading is an extended one, and the foregoing summary is not designed to more than indicate its general character. No demurrer was addressed to this pleading. The objection is first made by the appellant by assignment of error that it does not state facts sufficient to constitute a cause of action. The facts therein stated are sufficient to bar any subsequent action for the same cause, and therefore the assignment cannot be sustained. *Efroymsen et al. v. Smith*, 29 Ind. App. 451, 454, 63 N. E. 328; *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 572, 47 N. E. 147. It would also have been sufficient as against a demurrer. The court appointed a receiver, who took charge of the business and property of said defendant. Subsequently a number of intervening petitions were filed by other creditors. The issues formed upon the appellee's complaint were tried by the court, and upon request of the parties a special finding of facts was made and conclusions of law stated thereon. In accordance with such conclusions judgment was rendered in favor of appellee for \$3,616.68 and costs, foreclosing his lien for said sum and declaring its priority. From this judgment the Elwood State Bank, holding Rodefer's notes for \$4,000, secured by mortgage upon the real estate covered by appellee's lien, appeals; it having filed an intervening petition asking judgment upon its notes and foreclosure of its mortgage.

Appellee has seasonably moved to dismiss said appeal for lack of parties. The First National Bank of Elwood, after the appoint-

ment of the receiver as aforesaid, filed its petition seeking to foreclose a mortgage held by it upon said real estate. This petition, that of the Elwood State Bank, and the complaint of Mock were consolidated and tried together; the priorities of the respective lines being directly involved. In the petition of the First National Bank the Taylor Belting Company was named as a defendant. It does not appear that summons was served upon it, or an appearance entered. Its name is contained in the caption of the special finding, but no fact is found in any wise affecting it. This is a vacation appeal, and parties to the judgment are necessary parties to the appeal. Section 647, Burns' Ann. St. 1901. *Ewbanks' Manual*, § 144. The Taylor Belting Company was not before the court, and was not a party to the judgment. The Aurora Fire Clay Company was also named as a defendant in the petition of the First National Bank, and filed a disclaimer of interest in the subject thereof. There was not judgment for or against said company, and it is neither a necessary nor proper party to the appeal. *Clear Creek Township v. Rittger*, 12 Ind. App. 355, 39 N. E. 1052. The same considerations apply to the motion to dismiss, in so far as it is based upon the absence of Gilchrist. He is not a party to the judgment appealed from. Appellee's motion to dismiss the appeal is therefore overruled. The substantial questions upon which the disposition of this cause depends arise upon the facts found in the special finding of the court. Those questions can be most clearly stated in the form of abstract propositions; such propositions being deduced from and inclusive of the facts thus found.

The first question is whether a vendor of machinery by stipulating in the contract of sale that the title to such machinery remains in him until the full payment of the purchase price is made does thereby waive the right to take and hold a mechanic's lien. The holding is that he does not thereby waive such right. The reasons for such holding are stated with much particularity in the cases hereafter cited, and nothing would be gained by a repetition of them here. *Case Mfg. Co. v. Smith et al.*, 40 Fed. 339, 5 L. R. A. 231; *Chi. & A. R. R. Co. & Ins. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 720, 3 Sup. Ct. 594, 27 L. Ed. 1087; *Hooven, etc., Co. v. Featherstone (C. C.)*, 99 Fed. 181, 111 Fed. 82, 49 O. C. A. 229; *Warner Mfg. Co. v. Bldg. & Loan Ass'n*, 127 Mich. 323, 86 N. W. 828, 89 Am. St. Rep. 473; *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32, 16 N. W. 759.

The second question is whether a special finding, which does not state that the vendor elected to treat the sale as absolute, will sustain conclusions of law under which he is entitled to a judgment foreclosing a mechanic's lien on account of machinery purchased under such a contract? The answer

to this is in the affirmative. The rule that a special finding must contain a finding upon all facts necessary to entitle a party having the burden to recover is unquestionable, but the bringing of an action to recover the purchase price of the machinery from the vendee and for the foreclosure of his statutory lien is in itself an election to waive the right secured by contract. *Gaar, Scott & Co. v. Fleshman*, 38 Ind. App. 490, 77 N. E. 744, 78 N. E. 348; *Turk v. Carnahan*, 25 Ind. App. 125, 57 N. E. 729, 81 Am. St. Rep. 85; *Smith et al. v. Barber*, 153 Ind. 322, 53 N. E. 1014. A statement in the special finding that he has brought such suit could add nothing to the knowledge already possessed by the court. The record is conclusive of the fact. It became fixed by a definite act at a precise time, and no question concerning it can arise. 1 *Pomeroy's Equity*, § 514.

Other points made relate to the sufficiency of the findings and evidence.

They are not well taken; and the judgment is therefore affirmed.

NEW v. GERMANIA FIRE INS. CO. et al.
(No. 5,991.)¹

(Appellate Court of Indiana, Division No. 2.
Dec. 13, 1907.)

1. INSURANCE—POLICY—DELIVERY—QUESTION OF FACT.

Delivery of an insurance policy is ordinarily a question of fact.

2. SAME.

To constitute a delivery of an insurance policy there must be an intention to part with control over the instrument and to place it under the power of the grantee or some one for his use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 220.]

3. SAME—ACCEPTANCE.

An insurance company sent a renewal policy to a mortgagor, which he promptly returned, whereupon the insurance company left it with the mortgagee's agents, where it remained for several days; the mortgagee being entitled to procure insurance at the expense of the mortgagor in case he failed to do so. Payment of premium being demanded of the mortgagee's agents, they professed ignorance of the delivery of the policy to them, and requested time to communicate with the mortgagor, which was granted, and pursuant to their letter the mortgagor wrote to his own agent directing him to accept the policy and pay the premium, but before this was done the property was destroyed. *Held*, that the policy was delivered and accepted so as to make it a binding insurance contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 223.]

4. SAME—RIGHTS OF MORTGAGEES.

Where a mortgagee, when he took out insurance on the mortgaged property, had the authority to do so, the fact that the mortgage debt was subsequently paid did not affect the insurance contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1444-1447.]

5. APPEAL—DISPOSITION OF CAUSE—REVERSAL—NEW TRIAL—NECESSITY.

Where a special finding exhibits facts necessary to the announcement of a judgment, the cause will be remanded with instructions to restate the conclusions of law, where they were

erroneously stated; but, if the necessary facts do not appear, the case will be remanded for retrial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4597-4603.]

Rabb, J., dissenting.

On rehearing. Former opinion reversed, and new trial granted.

For former opinion, see 81 N. E. 217.

ROBY, C. J. Come now the parties, by counsel, and the court being fully advised in the premises, on the 13th day of December, 1907, being the 17th judicial day of the November term, 1907, grants the petition for a rehearing heretofore filed by the appellant on July 10, 1907, with an opinion by ROBY, C. J., COMSTOCK, MYERS, WATSON, JJ., concurring, HADLEY, J., concurring with an opinion, and RABB, J., dissenting with an opinion, all as follows, to wit: Suit by appellant upon a policy of fire insurance. A special finding of facts was made. The finding, summarized, is as follows: On June 17, 1904, appellant's testate held a policy of \$1,000 upon a building in Indianapolis, owned by Gelsel, appellant's testate, which policy expired on June 25, 1904. On June 17th, without any express request or authorization, appellee's agents made out and countersigned the policy sued upon covering said property for said sum for the term of one year from June 25th, and mailed the same with a bill for the premium thereon to Gelsel at Vernon. He received said policy and bill June 18th, remailed them to said agents at Indianapolis, refusing to accept the policy. The defendant Jennings was the owner of a mortgage upon said real estate, which mortgage provided that Gelsel should keep the buildings insured in the sum of \$1,000 for her benefit, and that, in event he failed to do so, she might take out such insurance, pay the premium, and oblige Gelsel to repay her with 8 per cent. interest. Said mortgagee was a nonresident, and was represented by a firm named, who, as her agents, were empowered to accept and pay for a policy as aforesaid, and who had said mortgage and all other papers relating to said loan in their possession. That on July 25th appellee's agent left said policy, with a mortgage clause attached, with the said agents of the mortgagee. The policy was received by their clerk, whose duty it was to take charge of such papers, and who placed it with the mortgage and other papers aforesaid. On July 28th appellant, through its agents, presented a bill for the premium to the mortgagee, who, through her said agents, requested time to communicate with Gelsel in order to collect the amount from him if possible. Said request was granted, and the mortgagee's agents wrote to Gelsel, inclosing the bill requesting him to pay it, and stating that, if he did not pay, the mortgagee would be compelled to pay it and charge him with the amount thereof with interest as aforesaid. The insurance

¹ Superseded by opinion, 85 N. E. 706.

policy contained a mortgage clause by which the mortgagee agreed to pay the premium to the appellee. Geisel on said day inclosed said bill in a letter to the persons who collected rents for him in Indianapolis, and directed them to pay the same for him at once. Said letter was received by said agents on July 29th, but they failed to comply with said direction until August 2d, when they offered to pay the agents of the insurance company, who refused to accept the same, stating that the building had previously burned. Said building had in fact been partially or wholly destroyed by fire on July 30th. Neither Geisel nor his representatives had knowledge of such fact until informed thereof as aforesaid. The findings also show that the policy in suit was not expressly ordered by said mortgagee, and that the latter's agents did not expressly state that they would take the policy. Upon these facts, the court concluded, as matters of law, that the policy in suit was never delivered by the insurance company, was never accepted by Geisel, nor by the mortgagee, and that the plaintiff was not entitled to recover thereon.

The mortgagee, Jennings, disclaimed interest in the subject of the controversy. The decisive question in the case arises on appellant's several exceptions to the conclusions of law. Delivery is ordinarily a question of fact. *Indiana Trust Co. v. Byram*, 36 Ind. App. 6, 10, 72 N. E. 670, 73 N. E. 1094; *Fifer v. Rachels*, 37 Ind. App. 275, 277, 76 N. E. 186; *Corr v. Martin*, 37 Ind. App. 639, 77 N. E. 870. There is no finding in this case that the policy was delivered or executed. Do the facts found leave room for difference of opinion among reasonable men upon that subject? So far as the insurance company is concerned, it has left nothing undone necessary to a delivery of the policy by it. It parted with possession of the instrument, delivered it bodily to a person authorized to receive it for the owner of the property, and rendered its bill for the amount of the premium, once to him directly, and once to him through the mortgagee, extending time for the latter to communicate with Geisel, before making the payment for him, payment which she was authorized to make, and which she informed him she would make, if he did not. To constitute delivery, there must be an intention to part with control over the instrument, and to place it under the power of the grantee, or some one for his use. *Corr v. Martin*, supra; *St. Clair et al. v. Marquell et al.* (1903) 161 Ind. 56, 67 N. E. 693. Geisel refused to accept the policy when it was mailed to him, and returned the same. Had the transaction then ended, there could neither have been liability for premium, on the one hand, nor for the loss, on the other. *Ohio Farmers' Insurance Co. v. Hunter* (1905) 38 Ind. App. 11, 77 N. E. 951. But Geisel's mortgagee had been expressly given authority by him, not only to take out an insurance policy in event that he failed to do so, but

to pay therefor, and add the amount so paid to the mortgage debt. When the policy was delivered to this party, it was not rejected, but accepted and kept. Had the premium been then paid, there could have been no possible doubt upon the subject either of delivery or acceptance. Instead of at once paying the premium, the mortgagee requested an extension of time, within which to communicate with the owner and collect from him if possible. He was notified, if he did not pay the premium, the mortgagee would pay it for him. These facts are entirely inconsistent with an intention not to accept the policy. If the insurance company were suing to recover the premium, it would have a good case. The fact that the interest of the mortgagee had ceased in no way affects the question. If the policy was accepted by her or her agents, for Geisel, they having authority at the time to act in the premises for him, its status as a complete contract was fixed, and the subsequent payment of the mortgage debt can have nothing to do with the question.

It is not insisted that the insurance agents did not have power to extend the time within which the premium might be paid, or that the payment was not offered within a reasonable time. The building having burned, the company's agents were as reluctant to receive the premium as they had theretofore been active to collect it. The facts are inconsistent with nondelivery or nonacceptance. The court therefore erred in the conclusions of law stated. If the special finding exhibited facts necessary to the pronouncement of a judgment, the cause would be remanded with instructions to restate the conclusions of law, but all facts necessary to plaintiff's recovery do not appear in the finding. It will therefore be necessary to retry the case. The conclusion which is here stated would also follow from a consideration of the evidence, the sufficiency of which is duly presented.

Judgment reversed, and the cause remanded, with instructions to sustain appellant's motion for a new trial and for further proceedings consistent herewith.

COMSTOCK, MYERS, and WATSON, JJ., concur. HADLEY, J., concurs with opinion. RABB, J., dissents with opinion.

HADLEY, J. I concur in the result reached in the majority opinion, but cannot concur in the reasons given therefor. Under the special finding of facts, it is not clear that Stanton & Stanton had on June 25th the full authority to procure the insurance, or that they accepted the same unconditionally, since it might be concluded therefrom that they accepted the same tentatively. By item 8 the court found that Stanton & Stanton did not expressly agree to pay the premium upon the policy so deposited with them. This we do not think is supported by sufficient

evidence. By the terms of the mortgage, it was expressly agreed by the mortgagor that he would "keep an insurance in a reliable insurance company or companies, to the satisfaction of said mortgagee to the amount of \$1,000 during the existence of the debt, on the buildings for the benefit of the mortgagee, and to deliver the policies when this loan is made and the renewals thereof before said policies expire, and on their default the mortgagee may pay such insurance and collect the amount thereof with interest." The finding shows that the existing policy expired at noon on June 25, 1904. On that day, the mortgagor not having complied with the terms of the mortgage by delivering a renewal thereof to the mortgagee, she was authorized by the terms of the mortgage to effectuate such insurance on that day. Appellee, through its agents, delivered the policy sued on to the clerk of the agents of the mortgagee. This policy had attached to it a mortgage clause, which contained the provision that, "in case the mortgagor or owner neglects or refuses to pay any premium due under this policy, then on demand the mortgagee or trustee shall pay the same." On June 25th Stanton & Stanton were authorized by the terms of the mortgage to contract for the insurance without any further notice from the mortgagor. The policy in question was delivered to and received by their clerk on said date. It carried with it an express written promise of the mortgagee to pay the premium on demand, if the mortgagor failed to do so. It is, however, contended that it is not shown that the clerk had authority to receive the policy. We pass that as immaterial. He did take possession of it and placed it with the other papers of the mortgagee. Afterwards, on June 28th, a member of the firm of Stanton & Stanton had actual knowledge of the action of the clerk, and clearly ratified the same in the presence of the agent of appellee, by retaining the policy and asking for and obtaining extension of time for the payment of the premium until he could communicate with the mortgagor and get payment from him, if possible. Retaining the policy with the mortgage clause attached containing the promise to pay the premium, without objection, was tantamount to an express promise to pay according to the terms thereof. When the agent of appellee left the office of Stanton & Stanton, he left the policy with one authorized at that time to receive it and pay the premium, and with the written promise of the mortgagee to pay it on demand if the mortgagor did not. No demand was made upon the mortgagee to pay the premium at that time, but it was expressly waived by granting an extension of time in which to pay it. We do not know what more could be shown to prove an acceptance. But these facts are not shown in the finding. The finding does not show that the mortgagee had the authority absolutely on June 25th or 28th

to receive the policy and agree to pay for it unconditionally. It shows that there was no express promise to pay the premium on the part of the mortgagee when, as we have shown, there was such a promise. The decision was not sustained by sufficient evidence. This was one of the grounds for a new trial. Therefore the motion for a new trial should have been sustained.

Judgment reversed.

RABB, J. (dissenting). I am unable to concur with the opinion of the majority of the court in this case. I do not think the facts set forth in the special finding are sufficient to show either that Stanton & Stanton were the agents of Henry Geisel in the transaction, or that there was an acceptance by them of the policy of insurance, either for their client or Henry Geisel, the owner of the property. Nor does the evidence show a relation of principal and agent existing between Stanton & Stanton and Geisel.

(40 Ind. App. 726)

SANDUSKY PORTLAND CEMENT CO. v. RICE. (No. 5,889.)

(Appellate Court of Indiana, Division No. 1.
Dec. 20, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN.

Where a servant is injured through the negligence of a foreman acting at the time in the master's stead and performing his duties, the foreman's negligence is the negligence of the master, who is liable at common law and independent of statute.

2. SAME — ACTIONS — INSTRUCTIONS—FELLOW SERVANTS—VICE PRINCIPAL.

In an action by a servant for injuries, whether a foreman was a fellow servant or vice principal is for the jury under proper instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1062.]

3. SAME — ASSUMPTION OF RISK — SERVANT'S KNOWLEDGE OF DANGER.

Where a servant working around dangerous machinery with a foreman knows and appreciates the danger as well as the foreman does, he assumes the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-624.]

4. APPEAL—DISPOSITION OF CASE—REVERSAL—NECESSITY FOR NEW TRIAL.

Though ordinarily on appeal from a judgment on a general verdict, where answers to interrogatories are in irreconcilable conflict with the general verdict, judgment should be ordered on the answers, yet where the case was tried on an erroneous theory, and it is impossible to tell how far it affected the introduction of evidence, a new trial should be granted.

Appeal from Circuit Court, Kosciusko County; Lemuel W. Royse, Judge pro tem.

Action by Lambert Rice against the Sandusky Portland Cement Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See 81 N. E. 213.

Frazer, Biggs & Frazer, for appellant. Bertram Shane, A. G. Wood, and F. E. Bowser, for appellee.

HADLEY, P. J. Action by appellee against appellant for damages alleged to have been sustained while working as an employé in a cement plant of appellant. The complaint is in two paragraphs. The first based upon negligence of a foreman under subdivision 2, § 7083, Burns' Ann. St. 1901. The second paragraph counted upon the common-law liability of the master for failure to provide a safe place for his servants to work. There was a general verdict for appellee, together with answers to 51 interrogatories. Appellant moved the court for judgment upon the interrogatories, which motion was overruled, and motion for a new trial overruled. These rulings are assigned as error. The court instructed the jury that the evidence did not warrant a finding for appellee upon the second paragraph of the complaint, and the same was withdrawn from their consideration.

It is earnestly insisted that while the first paragraph of the complaint is based upon the second subdivision of section 1 of the employer's liability act, which has since been declared unconstitutional (*Bedford Quarries Co. v. Bough* [Ind. Sup.] 80 N. E. 529, and *Perry-Mathews & Buskirk Stone Co. v. Fletcher* [Ind. Sup.] 80 N. E. 970), yet the averments of the complaint are sufficient to show a common-law liability. Upon a careful examination of this paragraph of the complaint, we are of the opinion that this contention is correct. By the averments of the complaint it appears that the liability of appellant is based upon the negligence of a foreman, who, the allegations show, was acting in the place and performing the duties of the master at the time of the injury. This makes the negligence of the foreman the negligence of the master, and fixes the liability without regard to the statute above referred to. The complaint in other respects is sufficient.

Appellee also insists that the evidence is sufficient to sustain the verdict on the common-law theory. It is apparent from the record that, although the second paragraph of the complaint based upon a common-law liability formed part of the pleadings, yet the case was tried upon the first paragraph; and, when the court ruled that the evidence was insufficient to sustain the second paragraph, no exception was taken to this ruling. Under this ruling, the jury were not permitted to pass upon the question whether the foreman was in the place of the master at the time of the injury, and whether his negligence was the negligence of the master. This was an element essential to appellee's right to recovery. The evidence discloses that the foreman and appellee were working together repairing a piece of machinery at the time of the injury. Whether he was a fellow servant or a vice principal was a question that should have been given to the jury under proper in-

structions. The answers to the interrogatories show that appellee had worked for appellant in and about the factory for several months; that he was a machinist, whose duty it was to repair machinery of appellant. The machinery to be repaired at the time of the injury was a mix pan, which was operated by a line shaft when connected therewith by a friction clutch. The line shaft could be connected by clutches with other mix pans and other machinery. The line shaft was propelled by a motor. Appellee knew that, if the mix pan was connected with the line shaft and the line shaft was in motion, the mix pan was a highly dangerous place in which to be. He also knew that, if the mix pan was detached from the line shaft, it was a safe place in which to be. He also knew that it was customary for the different employes about the factory to start the line shaft whenever they desired to perform any work with the different machines. Just previous to the injury, the line shaft was motionless. Appellee threw in the clutch connecting the mix pan with the line shaft in order to move the mix pan into the right position by pulling on a belt over a pulley on the line shaft. Then, without detaching the clutch or disconnecting the mix pan, in company with appellant's foreman, he climbed into the mix pan, and commenced his work. While thus engaged, another employé started the motor, and appellee was injured. Other answers to the interrogatories show that the foreman had reason to believe that the clutch was in when he and appellee went into the mix pan. There is no averment in the complaint and no answer to an interrogatory showing that the foreman knew or had reason to believe that the machinery would be or was liable to be started while he and appellee were in the mix pan. It is shown by these answers that appellee knew and appreciated the dangers he was incurring to the same extent as the foreman who went into the mix pan with him. If he knew and appreciated the danger, he is held to have assumed the risk. *Chicago, etc., R. Co. v. Tackett*, 33 Ind. App. 379, 71 N. E. 524; *Staldter v. City of Huntington*, 153 Ind. 354, 55 N. E. 88; *Wabash R. Co. v. Ray, Adm'r*, 152 Ind. 392, 51 N. E. 920; *Southern, etc., R. Co. v. Moore*, 34 Ind. App. 154, 72 N. E. 479. The answers to the interrogatories are in irreconcilable conflict with the general verdict. Ordinarily, in such a case, we should properly order a judgment for the appellant upon the answers to interrogatories. In this case, however, as we have shown, the cause was tried throughout upon an erroneous theory. We cannot say how far this affected the introduction of evidence. In our opinion justice requires that a new trial be granted.

Judgment reversed, cause remanded for a new trial.

(41 Ind. App. 501)

NEW YORK, C. & ST. L. RY. CO. v. FLYNN.
(No. 6,003.)⁴(Appellate Court of Indiana, Division No. 1.
Dec. 19, 1907.)**APPEAL—RECORD—CONCLUSIVENESS.**

Where the record is plain, and certain testimony appeared in the regular order of the examination of the witness, and there is nothing to show that the jury had withdrawn, the court cannot say that the testimony did not go to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2850-2852.]

Watson, J., dissenting.

On petition for rehearing. Petition denied.
For former opinion, see 81 N. E. 741.

HADLEY, P. J. In their petition for rehearing, counsel for appellee insist that the record shows that the testimony of Dr. Shanklin, referred to in the opinion, did not go to the jury. The record is plain, and the testimony appears in the regular order of the examination of the witness; the last preceding question being in regard to the fees of the physician. Then follow the questions, objections, and answers in regular order, with no intimation in the record that the jury had been withdrawn. The ambiguous remark of the court, "Well, it has not been read to the jury yet," cannot be held to contradict the showing on the face of the record. As suggested by appellant, the remark could not refer to the testimony of Dr. Shanklin, since his testimony was not being read. He was present and testifying orally.

It is also insisted by appellant's counsel that the evidence was competent, and some Missouri cases are cited, and the statement made that the statute is like the statute of Indiana. The Missouri statute, upon which the decisions cited are based, is essentially different from ours. Section 3596 of the practice act of Missouri (Rev. St. 1879, p. 615), after providing for the reading of the affidavit for continuance in evidence, provides: "And the opposite party may disprove the facts disclosed, or prove contradictory statements made by such absent witness in relation to the matter in issue and on trial." Under this statute, the decisions cited are correct; but it will be seen that they would not be authority under our statute.

Rehearing denied.

ROBY, C. J., and COMSTOCK, MYERS, and RABB, JJ., concur. **WATSON, J., dissents.**

(42 Ind. App. 127)

CINCINNATI, H. & D. RY. CO. et al. v.
ACREA. (No. 6,163.)⁵(Appellate Court of Indiana, Division No. 2.
Dec. 20, 1907.)**1. RAILROADS — OPERATION — INTERSECTING
ROADS — COLLISION — LIABILITY FOR INJURIES.**

Burns' Ann. St. 1901, § 2293, makes it an offense for an engineer to run his locomotive across or upon the tracks of any railroad upon

82 N.E.—64

¹ Transfer denied.

which passengers may be transported, until first coming to a full stop, etc. By the failure of intersecting railroads to observe the statute, a passenger in a waiting room of one of the roads was injured. *Held*, that the other railroad company was liable to the person so injured, though there was no relation of carrier and passenger between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 930.]

2. SAME—COMPLAINT—SUFFICIENCY.

A complaint in an action for a personal injury from collision of two trains at a crossing charged that defendant approached said crossing with its train without first stopping or listening or ascertaining whether or not an engine or a train was approaching said crossing on the intersecting track. *Held*, that this was sufficient, without alleging further that those in charge of the train by the exercise of reasonable care could have ascertained that another train was approaching, since it is sufficient, after showing the existence of a duty, to allege negligence in general terms.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 944-953.]

3. NEGLIGENCE—PROXIMATE CAUSE OF INJURY.

In determining proximate cause, the inquiry is directed to the responsible cause without reference to whether it is first or last in the succession of events that results in the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 69.]

**4. RAILROADS — OPERATION — COLLISION —
CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCIES.**

A passenger in a station partly demolished by the collision of two trains at an intersection near the station, though uninjured by the accident itself, is not guilty of contributory negligence in attempting in her excitement to escape from the building, whereby she was injured.

5. NEGLIGENCE—PROXIMATE CAUSE—UNFORESEEN INJURY.

It is not necessary that the particular injury resulting from a negligent act be foreseen to make the negligence the proximate cause of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 72.]

**6. RAILROADS — OPERATION — COLLISION —
PROXIMATE CAUSE OF INJURY.**

While a passenger was waiting for a train on railroad "A," in a station of A., near which railroad B. crossed A. at right angles, a collision occurred between trains on the two roads, in which the engine of B. was carried by that of A. against the station house, and a portion of the building demolished. The passenger was not injured by the accident, but in endeavoring to escape from the station fell or was pushed through a window thereof, and was injured. *Held*, that the negligence of B. in crossing tracks of A. without stopping, as required by Burns' Ann. St. 1901, § 2293, was the proximate cause of the injury to the passenger of A.

7. SAME—INSTRUCTIONS—CONCURRENT NEGLIGENCE.

In an action against two railroad companies for injuries to a passenger of one of them while in its station, caused by the collision of trains of the two roads at an intersecting crossing near by, an instruction that if the jury found that the company of which plaintiff was not a passenger was guilty of any negligence as charged against it, which proximately contributed to the negligence of the other defendant as charged in the complaint, to produce plaintiff's injury, without her fault, then they should find such other company liable, is not erroneous as exacting the highest degree of care towards a person not a passenger, since it is to be understood as dealing only with the subject of concurrent negligence.

² Rehearing denied. Transfer denied.

8. SAME—PROXIMATE CAUSE.

In an action for injuries to a passenger in attempting to escape from a station after a collision between trains partly demolishing the station, an instruction that when by the negligence of one another is suddenly put in peril, if the person so imperiled seeks to escape and suffers injury from another source, the author of the original peril is answerable for all the consequences which ensue, is not erroneous as withdrawing the defense of intervening cause, where the evidence shows that plaintiff was injured by being pushed or thrown by other excited passengers.

9. SAME—STATUTORY REQUIREMENTS.

In an action for injuries caused by the collision of two trains at an intersecting crossing, an instruction that it was the statutory duty of a railroad company, where no interlocking fixtures are maintained, to come to a full stop before entering upon the crossing of another track, and to first ascertain that there is no other train, etc., in sight approaching the crossing, and that the duty is mandatory, and that the engineer must stop the engine at a point from which he can see the crossing and can by reasonable diligence ascertain that there is no other train, etc., is not erroneous as requiring infallibility of those operating a train.

10. SAME—QUESTIONS FOR JURY.

In an action by a passenger for injuries sustained by contact with other persons in attempting to escape from a station partly demolished by a collision between trains, the questions of contributory negligence, and whether the independent force by which plaintiff was injured would or would not have been applied, *held*, under the evidence, for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 949.]

11. SAME—COLLISION—JOINT LIABILITY.

Where a passenger in a station is injured by the joint negligence of two railroads resulting from a collision between their trains at an intersecting crossing, both companies are liable for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 854-858.]

Appeal from Circuit Court, Marion County; W. W. Thornton, Judge pro tem.

Action by Katherine D. Acree against the Cincinnati, Hamilton & Dayton Railway Company and the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company for personal injuries. From a judgment for plaintiff, defendants appeal. Appeal of the Cincinnati, Hamilton & Dayton Railway Company dismissed. Affirmed.

See 81 N. E. 213.

Instruction No. 3: "When, by negligence or misconduct of one, another is suddenly put in peril, if the person so imperiled, which, under the impulse of an apparently well-grounded fear, seeks to escape, and suffers injury from another source, the author of the original peril is answerable for all the consequences which ensue, provided, that in attempting to make his escape the injured person exhibited such conduct as might reasonably have been expected from an ordinarily prudent person under similar circumstances."

Saml. O. Pickens, Owen Pickens, R. F. Davidson, Jno. B. Elam, and Jas. W. Fessler, for appellant. Wymond J. Beckett, for appellee.

COMSTOCK, J. Appellee, plaintiff below, recovered judgment against appellants, defendants below, for damages for personal injuries sustained by her at the passenger station of the appellant Cincinnati, Hamilton & Dayton Railway Company, at Rushville, Ind., at the time of a collision between a train of that company and a train of the appellant Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. The complaint was in one paragraph, and alleges that the appellants were on the 14th day of August each duly organized corporations and doing business as common carriers for hire; that the city of Rushville is a station upon the lines of said appellants; that said defendant roads within the city of Rushville intersect and cross each other nearly at right angles; that there is no interlocking switch at said crossing; that near the point of intersection, and immediately east of the point of intersection a few feet, the said Cincinnati, Hamilton & Dayton Railway Company has its station building erected and maintained and used for the accommodation of its passengers and their baggage; that said station house has waiting rooms provided for passengers awaiting the arrival of trains upon which they desire to take passage for points east and west of said city of Rushville. And plaintiff says that she took her baggage to said depot or station on the said 15th day of August, 1905, and intended to take passage upon the first-named defendant's train, and that she was waiting in the waiting room of the first-named defendant, provided for its passengers, as aforesaid, for the arrival of the first-named defendant's train, upon which she desired to take passage as aforesaid; that while thus waiting in said baggage room of said passenger depot or station, as aforesaid, the said Cincinnati, Hamilton & Dayton Railway Company, defendant, negligently, with one of its locomotives, ran toward said crossing at a high and dangerous rate of speed, to wit, 45 miles an hour, without first stopping and ascertaining whether or not a train was approaching or about to pass over said crossing on the second-named defendant's track, and ran against said Pittsburg, Cincinnati, Chicago & St. Louis Railway Company's locomotive and shoved and carried the same over and against said building and crushed the same; that at said time many passengers were in said waiting room of said depot building with plaintiff, and when she discovered that said engine, as aforesaid, had come against said depot building and about to destroy the same she attempted to get out of said waiting room. That she believed that she was about to be killed; and that in her efforts to get out of said room and building she was crushed and bruised and hurt by the other passengers and persons in their efforts to leave said building at the same time, all to her great damage, etc. And plaintiff says that the Pittsburg, Cincinnati, Chicago & St. Louis

Railway Company was guilty of negligence which was the proximate cause of the plaintiff's injuries as aforesaid, in this, to wit, charging the circumstances of the collision and the acts of negligence with the resulting injuries to appellee as alleged against the Cincinnati Hamilton & Dayton Railway Company, except as to the rate of speed of the engine and the time and direction of the roads and moving engines. The cause was put at issue by general denial. The trial was by jury, and a general verdict returned against both appellants in favor of appellee. With the general verdict answers were returned to interrogatories. The appeal of the Cincinnati, Hamilton & Dayton Railway Company was, upon motion of appellee, dismissed.

The assignment of errors questions the action of the court in overruling appellant's demurrer to the complaint, in overruling the motion for judgment on the answers to interrogatories, and in overruling the motion for a new trial. Against the complaint it is argued that there was no relation of any kind existing between appellee and appellant imposing any duty upon appellant so as to make it liable to her for negligence. *Burns' Ann. St. 1901, § 2293*, makes it an offense, punishable by fine and imprisonment, for the engineer of any locomotive to run his locomotive across or upon the track of any railroad, upon or over which passengers are or may be transported, until first coming to a full stop before crossing such other track, and without first ascertaining that there is no other train or locomotive in sight approaching and about to pass over such other track. The observance of this statute is a duty of appellant. Appellee was rightfully in the passenger station of the Cincinnati, Hamilton & Dayton Railway Company, a proper place for her to be under the facts alleged.

It is further insisted that the charge that the appellant approached said crossing with its train without first stopping or listening or ascertaining whether or not an engine or a train was approaching said crossing upon said first-named defendant's track, from either direction, does not charge negligence sufficient to be the basis of a cause of action; that to charge negligence in such a case it should contain an allegation that those in charge of the train, by the exercise of reasonable care, could have ascertained that another train was approaching. "It is a general rule, both in this state and elsewhere, that in complaints or declarations for negligence it is competent, after showing the existence of said duty by appropriate allegations, to predicate negligence, charged in general terms upon any act or omission whereby it is claimed that that duty was violated." *B. & O. S. W. R. Co. v. Slaughter (Ind.) 79 N. E. 188, 7 L. R. A. (N. S.) 597*. It was the duty of appellant to attempt to ascertain if a train was approaching before going upon the crossing. It is charged with negligently failing,

before going upon said crossing, to stop and listen for an approaching train, and that such negligence was the proximate cause of plaintiff's injuries, and this is the substance of the complaint.

It is argued that the special finding of facts shows that the proximate cause of the appellee's injury was the action of others not induced by any negligence of this appellant, and which could not reasonably have been anticipated. In support of this position it is pointed out that the answers to interrogatories show that appellee was not injured by the collision; that the waiting room of the station in which she was sitting was not damaged to any serious extent; that after all the damage had been done to the station appellee was still unharmed; that she was not injured at all until she fell from a window to the platform outside. Upon this finding it is insisted that a reasonable construction of the jury's answer can lead only to the conclusion that this fall was caused by "forcible contact" with others whose conduct, in the light of the situation, as disclosed by the special findings, must have been rash and inconsiderate; that such other persons sustained no relations with appellant, were not under its control, nor were their actions induced by any negligence of the appellant, nor could they have been reasonably anticipated by those in charge of appellant's train. For these reasons it is contended that the intervening cause must be held to be the proximate cause of appellee's injury. Stated more particularly, the jury found specially that appellee at the time of the collision was in the ladies' waiting room at the passenger station of the Cincinnati, Hamilton & Dayton Railway Company, waiting to take a train of said company. Interrogatory 32 was as follows: Was the serious injury, of which plaintiff now complains, due wholly to her falling upon the platform or pavement outside of the window while getting out through it hastily? A. We are convinced that the seriousness of her injury is entirely due to the fall. 33. Did any person throw her upon the pavement? A. Contact with others caused her to fall. 34. If so, what person? A. Unknown to us. And they found that she was so injured because of a collision as charged in the complaint.

In determining proximate cause, the inquiry is directed to the responsible cause, without reference to whether it is the first or last in the succession of events that resulted in the plaintiff's injury. *L. E. & W. R. Co. v. Charman, 161 Ind. 103, 67 N. E. 923*. Proximate cause has been further defined to be the efficient cause to one that necessarily sets the other causes in operation. *Pennsylvania Co. v. Congdon, 134 Ind. 230, 33 N. E. 795, 39 Am. St. Rep. 251*. The injuries received were caused while appellee was attempting to escape from the building. There were others in the room. They all escaped but the appellee without serious in-

jury. She was manifestly moved by the impulse of fear, caused by the collision and consequent confusion and excitement. The collision was the dominant, reasonable cause of appellee's injury. It set the other causes in motion. The struggle to get out of the building, which immediately followed the collision, between the frightened passengers, with the attending violence of which appellee proved to be the victim, were only incidents and not responsible intervening agencies. Appellee's attempt to get away from apparent danger was not contributory negligence. It is not necessary that a particular injury be foreseen. 1 Sutherland on Damages, §§ 47, 48; Horton on Negligence, §§ 16, 17, 21, 76. If the act be wrong, it is not necessary that any injury be foreseen. Sellick v. L. S. & M. S. R. Co., 93 Mich. 375, 53 N. W. 556, 18 L. R. A. 154, and cases cited; Brown v. Chicago, etc., R. Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; Ehr Gott v. N. Y., etc., R. Co., 96 N. Y. 264, 48 Am. Rep. 622; 1 Shearman & Redfield, Negligence, § 28. Certainly serious consequences might have been reasonably anticipated from the negligent acts under the conditions set out in the complaint. There is no irreconcilable conflict between the answers to interrogatories and the general verdict, and the latter must therefore stand.

Appellant complains of the giving of the second, third, and fifth instructions to the jury. Said second instruction stated that if the jury found that the defendant was guilty of any negligence as charged against it, which proximately contributed to the negligence of the other defendant as charged in the complaint to produce the plaintiff's injury, if any, without her fault, then they should find that defendant liable with the other defendant. Appellants object to the above as improperly requiring the highest degree of care when there was no relation of passenger and carrier existing between appellee and appellant. We understand the instruction to deal only with the subject of concurring negligence. It does not define negligence by the degree of negligence concurrent with the negligence of another negligent defendant.

Said third instruction is objected to as withdrawing from the consideration of the jury appellant's defense of any intervening acts. For illustration this case is put: "Suppose 'another source' were an enemy who deliberately threw the appellant to the pavement and inflicted the injury complained of." Such an instruction would undoubtedly be wrong under evidence which might be supposed, but instructions must be considered with reference to the evidence of the case. The only and all the evidence shows that appellee was injured by being pushed or thrown by the excited passengers, and the answers to interrogatories show that she was injured in this way. The instruction could not have misled the jury. Woolery, Adm'r, v. L. N. A.

& O. R. Co., 107 Ind. 381, 8 N. E. 226, 57 Am. Rep. 114.

Said instruction 5 stated that it was the statutory duty of any railroad company, where no interlocking works or fixtures are maintained, to come to a full stop before entering upon the crossing of another track, and to first ascertain that there is no other train, locomotive, or car in sight approaching said crossing; that this duty was mandatory; and that the engineer must stop the engine at a point from which he can see the crossing of said railroad, and from which point he can, by reasonable diligence, ascertain that there is no other train, locomotive, or car in sight, and to pass over said track, etc. It is claimed that this instruction requires infallibility on the part of those operating a train at a crossing, and is therefore erroneous. We think this claim is not supported. It only requires that the engineer should stop and listen for an approaching train at a point where he can see the crossing of said railroad, and from which he can, by reasonable diligence, ascertain whether another train is approaching, and if his view of the crossing is obstructed, he must move his engine and train to a point beyond said obstruction, from which a view of the crossing and approaching train may be had.

It is insisted that the verdict is not sustained by the law and the evidence; that appellee's injury is not the result of any negligence of appellant, but resulted from an independent cause. The following are among the facts shown by the evidence: The collision occurred between the engines of the Cincinnati, Hamilton & Dayton Railway and the Pittsburg, Cincinnati, Chicago & St. Louis Railway at 10 o'clock in the morning of a clear day. There was no interlocking switch at the crossing. The station or depot building in question was a one-story frame structure, on the south side of the Cincinnati, Hamilton & Dayton tracks, and on the east side of the Pittsburg, Cincinnati, Chicago & St. Louis tracks, consisting of four rooms. The east was the ladies' waiting room, in which there were 15 ladies at the time of the accident, next to that the ticket office and train dispatcher's office, west of that the gents' waiting room, and still west of that the baggage room. The ladies' waiting room was about 15 feet square, the gents' about the same size, the ticket office 10 by 15, and the baggage room about 10 feet square. Just as the boiler of the engine of the Pittsburg, Cincinnati, Chicago & St. Louis came across the tracks of the Cincinnati, Hamilton & Dayton, the engine of the latter struck it. The Cincinnati, Hamilton & Dayton engine was running at a rate variously estimated at 25 to 40 miles an hour; the Pittsburg, Cincinnati, Chicago & St. Louis engine at 8 miles an hour. By the collision the boiler of the Pittsburg, Cincinnati, Chicago & St. Louis engine was thrown through the baggage room into the men's waiting room, and

demolished that end of the building. There were several gentlemen in the waiting room. The gents' waiting room was utterly demolished, but the men in that room all escaped without serious hurt. The ticket agent was not hurt. The ladies' room was moved about six inches from its foundations, and the women were very much excited, one fainted, and all made haste to get out of the building as soon as the steam escaped. The noise of the demolished building and the escaping steam terrified the ladies, and every one made haste to leave the building. The ladies' waiting room extended from the north to the south side of the building. There were two doors, one on the south and one on the north. There were four windows, two on the east, one on the north, and one on the south. The wreck was "right" at the north door. The plaintiff describes the situation substantially as follows: "The passengers began to go out to get their train, and they had no more than started out than they turned around and ran back, said there was a wreck, and the thought struck me of course that we would all be killed right there. I heard the crash, and the people hollering, and that the boiler was going to explode. And the house was full of steam, and I thought it was on fire, and I was so frightened. I saw people began to rush for the window, some trying to get in and some trying to get out, and of course I made for the window, but I was pushed and shoved around there, and I got out some way, but I hardly know how, but I was pushed down. I got out of the ladies' waiting room through the window. As I was trying to get out through the window everybody was excited to death. They were pushing and shoving, and everybody was trying to get out first."

Whether appellee was guilty of contributory negligence, and whether the independent force would or would not have been applied, were questions for the jury, and have been answered against appellant. The joint negligence of the appellants caused appellee's injury, and both are liable to her.

Judgment affirmed.

FIRST NAT. BANK OF PEORIA et al. v. FARMERS' & MERCHANTS' NAT. BANK OF WABASH et al. (No. 5,765.)¹

(Appellate Court of Indiana, Division No. 1. Dec. 20, 1907.)

1. APPEAL—VACATION OF APPEALS—PARTIES—“CO-PARTIES.”

Appellate tribunals, in vacation appeals, acquire jurisdiction to determine a cause on its merits only when all the parties against whom judgment is rendered are made appellants, and all parties in whose favor judgment is rendered are made appellees; "co-parties," under Burns' Ann. St. 1901, § 647, meaning parties to the judgment, and not parties plaintiff or defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1814-1835.

For other definitions, see Words and Phrases, vol. 2, p. 1593.]

2. SAME.

A judgment adjudicated only the question of priority as between an attachment lien and a judgment in the attachment proceedings and a mortgage. The judgment was against the parties prosecuting a vacation appeal as appellants, and in favor of those made appellees. *Held*, that the parties on appeal were proper parties, giving the court jurisdiction.

3. MORTGAGES—MORTGAGEE AS BONA FIDE PURCHASER—ACTUAL NOTICE.

In a suit involving priority as between an attachment lien and a judgment in the attachment proceedings and a mortgage executed subsequent to the levy of the attachment and prior to the recording of a copy as *lis pendens*, evidence *held* to show that the mortgagee had no actual knowledge of the attachment proceedings at the time of or before the execution of the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 348-353.]

4. STATUTES—CONSTRUCTION—LEGISLATIVE INTENT—LANGUAGE—PUNCTUATION.

In determining the legislative intent and purpose of an enactment, its language and punctuation, exactly as passed, are controlling, and, if therefrom the intent and purpose is clear, there is no room for construction, and, unless otherwise defective, the courts must apply and enforce it as written.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 266-280.]

5. ATTACHMENT—ACTIONS—NECESSITY.

Without the commencement of an action there can be no writ of attachment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 659-663.]

6. LIS PENDENS—OBJECT.

The object of a *lis pendens* notice is to warn persons and to put them on their guard in their dealings with defendants regarding the subject-matter of a pending action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, *Lis Pendens*, § 1.]

7. SAME—NECESSITY OF NOTICE.

Under Burns' Ann. St. 1901, § 934, providing that an order of attachment binds defendant's property in the county subject to execution, and becomes a lien thereon from the time of its delivery to the sheriff in the same manner as an execution, when considered in connection with sections 327, 328, 333, relating to notice and filing by sheriffs on levy of attachments, etc., issuing from counties other than that in which the officer resides, the issuance of an attachment to the sheriff of the county in which the suit is pending is constructive notice thereof, without the filing of a *lis pendens* notice, and one subsequently taking a mortgage on lands in the same county takes subject to the attachment lien.

Appeal from Circuit Court, Starke County; Geo. Burson, Special Judge.

Action by the Burlington Savings Bank of Burlington, Vt., against Charles A. Jamison and others, in which the First National Bank of Wabash and others, defendants, filed a cross-complaint against plaintiff and co-defendants the First National Bank of Peoria, Ill., and others. From a judgment adjudging the rights of the parties, the First National Bank of Peoria, Ill., and others appeal. Affirmed.

F. L. Dukes, C. H. Peters, R. D. Peters, and R. W. McBride, for appellants. Henry R. Robbins, W. C. Pentecost, L. D. Boyd, and Geo. W. Julian, for appellees.

¹ Transferred to Supreme Court, 84 N. E. 1077. Superseded by opinion, 86 N. E. 417. Rehearing denied.

MYERS, J. On May 9, 1904, the Burlington Savings Bank of Burlington, Vt., in the Starke circuit court, commenced an action against Charles A. Jamison and a number of other defendants, among whom were appellants and the First National Bank of Wabash, Ind., the Farmers' & Merchants' National Bank of Wabash, Ind., the Citizens' National Bank of Huntington, Ind., Thomas F. Payne, John M. Curtner, and A. T. Bowen & Co., to foreclose a mortgage on certain real estate in Starke county, and to foreclose the equity of redemption of all said defendants. Plaintiff, in stating its cause of action, refers to the defendants other than Jamison and Ellingson as claiming some interest in or lien on said mortgaged premises, or some part thereof, which interest or lien, if any, has accrued subsequent to the lien of said mortgage, and demanding that such interest be forever barred and foreclosed of all right, claim, lien, and equity of redemption. On June 17, 1904, the court found that all of the defendants were in court, and such proceedings were then had that judgment was entered foreclosing its mortgage, and the sale of the land ordered. As a part of these proceedings, the First National Bank of Wabash, Ind., John M. Curtner, the Farmers' & Merchants' National Bank of Wabash, Ind., the Citizens' State Bank of Huntington, Ind., Thomas F. Payne, and A. T. Bowen & Company filed a cross-complaint against the plaintiff and their codefendants, Charles R. Wheeler, personally, Charles R. Wheeler, as trustee of the First National Bank of Peoria, Ill., Hjalmar A. Ellingson, Seth W. Freeman, individually and as trustee, Daniel E. Potter, sheriff of Peoria county, Ill., successor in trust, Nathan O. Tate, Alice I. Tate, Dever Morse, and ——— Morse, and alleging that in May, 1904, they recovered judgments in the Pulaski circuit court against said Charles A. Jamison personally, and obtained an order for the sale of the land levied upon under the attachment proceedings brought in this (Starke circuit) court, where the writ of attachment was issued on August 10, 1903, to the sheriff of Starke county, who levied the same upon all of Jamison's land in Starke county, including the land described in plaintiff's complaint; that on June 16, 1904, the transcript of said judgments was recorded in the office of the clerk of the Starke circuit court; that after the levy of said writ, and while the same remained in full force, said Jamison and wife, on December 12, 1903, executed to said Wheeler, as trustee for the First National Bank of Peoria, Ill., his mortgage or trust deed, by which they conveyed to Wheeler, as trustee, the Starke county land, describing it, and which real estate was then covered by said writ of attachment, and which mortgage secured the payment of \$64,500, represented by promissory notes, all of which had become due long before the execution of said mortgage; and that said mortgage and the debt thereby

secured was subsequent and a junior lien to the attachment and the judgments and decree recovered by said cross-complainants. On January 19, 1905, said cross-complaint being undisposed of, the said Charles R. Wheeler, trustee of the First National Bank of Peoria, Ill., answered said cross-complaint by general denial, and also filed a cross-complaint against all of his codefendants, including appellees, alleging that said Jamison and his wife had executed to him, as trustee, a mortgage covering all the lands then owned by them in Starke county; that the mortgage was recorded January 8, 1904; that the lands covered by said mortgage were the same lands levied upon in the attachment proceedings, and which mortgage was a senior and prior lien to that of the attachment, judgment, and decree recovered by cross-complainants, the Farmers' & Merchants' National Bank et al., and asking that the lien of said attachment proceedings be declared junior to that of the mortgage. To said cross-complaint of Wheeler, trustee, the cross-complainants, the Farmers' & Merchants' National Bank et al., filed answer in general denial. The issues thus presented on the two cross-complaints were submitted to the court, resulting in a judgment declaring the lien of the attachment and judgments of the cross-complainants, the Farmers' & Merchants' National Bank et al., to be a senior and prior lien to that of the mortgage to Wheeler, trustee, or the First National Bank of Peoria, Ill., on the land ordered sold in the attachment proceedings, and that the lien of the mortgage was junior to the lien acquired by the attachment proceedings. Appellants' motion for a new trial, assigning reasons (1) that the decision of the court was not sustained by sufficient evidence, and (2) that the decision of the court was contrary to law, was overruled, and this ruling is the only error assigned.

Appellees have moved to dismiss this appeal on the ground that appellants have failed to make their codefendants co-appellants on appeal. This is a vacation appeal. The rule is that appellate tribunals in vacation appeals acquire jurisdiction to determine a case on its merits only when all the parties against whom judgment is rendered are made co-appellants, and all parties in whose favor judgment is rendered are made appellees. *Brown v. Brown* (Ind. Sup.) 80 N. E. 535; *Moore v. Ferguson*, 163 Ind. 395, 72 N. E. 126; *Rich Grove Twp. v. Emmett*, 163 Ind. 560, 72 N. E. 543; *Haymaker v. Schneek*, 160 Ind. 443, 67 N. E. 181; *Smith v. Fairfield*, 157 Ind. 491, 61 N. E. 560; *Burns v. Trustees of Huntertown, etc.*, Church, 31 Ind. App. 640, 68 N. E. 915. "Co-parties," under section 647, *Burns' Ann. St. 1901*, means parties to the judgment, and not parties plaintiff or defendant. *Hildebrand v. Sattley Mfg. Co.*, 25 Ind. App. 218, 57 N. E. 594; *Thorn-ton's Civ. Code*, § 440. The judgment from which this appeal is taken was an adjudica-

tion only of the question of priority as between the attachment lien and judgment in that proceeding, and the mortgage held by Wheeler as trustee for the First National Bank of Peoria. The judgment from which this appeal was taken was against the parties prosecuting this appeal as appellants, and in favor of the cross-complainants, the Farmers' & Merchants' National Bank et al., and in this court they are made appellees. Applying the rule above stated, the motion to dismiss must be overruled.

Appellants earnestly affirm two propositions: (1) That the record does not disclose any evidence showing that appellants had actual knowledge of the attachment proceedings at the time of or prior to the execution of the mortgage; and (2) that, as the mortgage was executed to appellants before the *lis pendens* notice was given, they had no constructive notice of the attachment proceedings, although the writ of attachment had been issued and levied upon the real estate in question prior to the execution of the mortgage. The record in this case shows that the parties agreed that a levy was made under a writ of attachment issued by the clerk of the Starke circuit court to the sheriff of Starke county upon affidavits, bonds, and filing of a complaint by the First National Bank of Wabash, Ind., August 3, 1903; that the levy was made by the sheriff on August 6, 1903, upon the lands of Jamison described in that levy, a copy of which was recorded in his *pendens* record No. 1, p. 51, February 20, 1904; that the mortgage or trust deed was executed to appellants by Jamison on December 12, 1903, for a bona fide indebtedness; that the mortgage was recorded in Starke county, Ind., on January 8, 1904. The undisputed evidence also shows that on May 9, 1904, judgments in said attachment proceedings were entered in the Pulaski circuit court in favor of appellees, and the real estate in Starke county levied upon under the writ of attachment ordered sold to satisfy said judgments. On June 16, 1904, a transcript of such judgments and order of sale was filed in the office of the clerk of the Starke circuit court. The record also contains the mortgage from Jamison to Wheeler, trustee, which mortgage contains the provision following: "The consideration for the making of this deed of trust is the notes aforesaid, and an agreement upon the part of the said First National Bank of Peoria to extend the time for the payment of said several notes for a period of one year from the maturity of them severally, with an agreement on the part of the makers of said notes to pay the interest thereon during said period of extension quarterly in advance." Nelson J. Hunter and Charles R. Wheeler were the only witnesses who testified, and, in substance, the former testified to a conversation with Wheeler at the First National Bank of Peoria on January 23, 1905, regarding a plan of settlement between Jamison's

creditors, and in the course of the conversation the fact was mentioned that Jamison had executed a bill of sale covering certain personal property to one Danielson. In this connection, Hunter says he said to Wheeler: "Upon the discovery of this bill of sale, we commenced our attachment proceedings and attached all the land and property in August which he owned." To which he (Wheeler) said: "Yes, and at the time we took that deed of trust we thought that we were getting a good title to the land and would not be responsible for anything except the judgments of record." Wheeler testified that he was vice president and director of the First National Bank of Peoria at the time of the execution of said mortgage, and had no knowledge of any attachment proceedings in the Starke circuit court prior to June or July, 1904. He knew Jamison a good many years, had business dealings with him, and knew he was largely engaged in the ranch business in Starke county; that the Peoria Bank held \$64,000 in notes, all past due, some overdue several months, and the mortgage was taken to secure them; that he supposed Jamison's title to the land was good, made some investigation as to part of it, but did not recollect of investigating the title to the lands in Starke county, took Jamison's statement as to the title, and made no inquiry at the clerk's office or sheriff's office regarding it, and did not expect the mortgage was a first mortgage on the land. He did not know that any suits were pending against Jamison, and made no inquiry on that subject. Jamison made us a statement of his indebtedness, but said nothing about the attachment suits, and said nothing about what he owed to appellees, and denied that Hunter used the word "attachment" in the conversation mentioned by him. The evidence in the record fails to show actual knowledge on the part of appellants of the attachment proceedings at the time or before the execution of the mortgage, and appellant's first proposition is affirmed.

As to the second proposition, appellants insist that as the mortgage was given to secure a bona fide debt, and the consideration for the execution of the mortgage was in part an extension of time for the payment of the several notes secured thereby, the transaction was one which had the effect of making appellants bona fide purchasers or incumbrancers of the land for a valuable consideration, and, in the absence of a *lis pendens* notice of the attachment proceedings, the seizure of the real estate under the attachment did not operate to charge appellants with constructive notice thereof. Appellants' insistence is based upon their construction of various provisions found in our Civil Code, and certain decisions, principally *Pennington v. Martin*, 146 Ind. 635, 45 N. E. 1111, and *United States, etc., Invst. Co. v. Harris*, 142 Ind. 236, 40 N. E. 1070, 41 N. E. 451. In the first case, the gist of the action was to enforce a vendor's lien, and in the second case

the principal therein announced and relied upon by appellant is that under section 3350, Burns' Ann. St. 1901 (Acts 1875, p. 94, c. 62), a mortgage on real estate must be recorded within 45 days after its execution, or it will be void as against subsequent bona fide purchasers for value of the mortgaged premises, and that a mortgagee who takes a mortgage to secure a pre-existing debt, in consideration of an extension thereby made of the time of payment, is a purchaser for a valuable consideration. Appellants argue that the doctrine of the cases to which we have just referred by analogy applies to section 206 of the Civil Code (Acts 1881, p. 276, c. 38; section 934, Burns' Ann. St. 1901), when read in connection with section 74 (Acts 1881, p. 253, c. 38; section 328, Burns' Ann. St. 1901), and section 79 (Acts 1881, p. 254, c. 38; section 333, Burns' Ann. St. 1901). The facts show that the writ of attachment was issued upon proceedings brought in the Starke circuit court; that the land upon which the writ was levied was situate in Starke county, and was ordered sold to satisfy a judgment rendered in such proceeding. Section 206, supra, provides that "an order of attachment binds the defendant's property in the county subject to execution, and becomes a lien thereon from the time of its delivery to the sheriff, in the same manner as an execution." Section 74, supra, provides that, "whenever any sheriff or coroner of any county in this state, shall seize upon any real estate or interest therein, by virtue of any writ of attachment, or shall levy upon any such real estate or interest therein, by virtue of any execution issued to him from any court other than the court of the county in which he is sheriff or coroner, he shall, at the time of making the seizure or levy, file with the clerk of the circuit court of his county, a written notice, * * * and such sheriff or coroner shall state in his return to the attachment or execution that such notice has been filed," etc. Section 79, supra, provides that "until the proper notices required by this act have been filed with the proper clerk, the bringing of suits for the purpose mentioned in the second section (section 73) and the seizure of real estate under attachments, and the levy thereon under execution, in the cases mentioned in the third section (section 74) shall not operate as constructive notice of the pendency of such suits, or of the seizure of or levy upon such real estate, nor have any force or effect as against bona fide purchasers or encumbrancers of the same." It cannot be seriously contended that section 206, supra, under the facts in this case, did not give a lien upon all the lands of Jamison in Starke county from the time the writ of attachment was placed in the hands of the sheriff of that county, and the lien became perfected upon the rendition of final judgment. *Thomas v. Johnson*, 137 Ind. 244, 36 N. E. 893. In *First National Bank v. Stanley*, 4 Ind. App. 213, 219, 30 N. E. 799, it is held that "the

levy under the writ placed the property in the custody of the court and prevented its seizure under other writs." There is no other statute or provision of the Code, to our knowledge, which would change the force of this section, unless said section 74 is to be construed as applying generally to all seizures of real estate under a writ of attachment. In the Burns Revision of the Code (section 328, supra), there is a semicolon after the word "attachment" and before the word "or"; but in the acts as published under the supervision of the Secretary of State, and the enrolled act in the office of the Secretary of State, the punctuation mentioned is a comma, instead of a semicolon. Therefore, in determining the legislative intent and purpose of an enactment, its language and punctuation, exactly as passed by the General Assembly, is controlling, and if therefrom the intent and purpose is clear, there is no room for construction, and, unless otherwise defective, it is the duty of the courts to apply and enforce it as written. Reading section 74 as actually enacted, the word "attachment" and the word "execution," being separated by a comma only, must both be held to be qualified and limited to writs of attachment and executions issuing from counties other than the one in which the officer levying the writ resides.

Without the commencement of an action there can be no writ of attachment. The object of a *lis pendens* notice is to warn persons and put them on their guard in their dealings with defendants regarding the subject-matter of a pending action. In the county of the court issuing the writ of attachment there is the record of its issue and of the entire proceedings on file, and of record in the clerk's office. As to foreign writs of attachment, the law requires no record to be kept other than that kept in the county where issued. The action of such foreign sheriff in executing such writ in accordance with section 933, Burns' Ann. St. 1901, with the order of attachment, is returned to the court making such order. He is also required, in making his return to the attachment, to state that he has filed with the clerk of the circuit court of his county a written notice setting forth the facts required by said section 74, and a failure to file such notice of the seizure of real estate under attachment shall not operate as constructive notice, etc., as provided in section 79, supra. Thus the reason will readily appear for the filing of a *lis pendens* notice in cases of foreign attachments of real estate, as well as the absence of a reason for giving notice of the levy made on lands in the county where the order of attachment is issued. Under our theory of the several Code provisions to which we have referred, appellants had constructive notice of the attachment proceedings, and took the mortgage subject to the attachment lien. *Grigg v. Banks*, 59 Ala. 311; *Drake on Attachments* (7th Ed.) §§ 222, 223, 224, 230a, 239. Returning to the

case of *Pennington v. Martin*, it clearly appears that that action was one within the provision of section 327, Burns' Ann. St. 1901, requiring a lis pendens notice in order to defeat the right of a bona fide purchaser, and is distinguishable from the case at bar.

Judgment affirmed.

(40 Ind. App. 696)

GRAND TRUNK WESTERN RY. CO. v. STATE. (No. 5,925.)

(Appellate Court of Indiana, Division No. 1.
Dec. 19, 1907.)

1. RAILROADS — STATUTORY REGULATION — HIGHWAY CROSSINGS — FLAGMEN — STATUTE — VALIDITY.

Acts 1891, p. 364, c. 150, § 1, providing that "all railroads owned or operated in the state having more than two tracks across any public highway or road, and used for switching purposes exclusively or regularly, or if only one track, and used for switching purposes, said railroad corporation shall, upon the order of the county commissioners in which said railroad is located, place a flagman at said crossing and maintain the same at their expense from six o'clock a. m. to eight o'clock p. m. of each and every day, or so long as said commissioners deem it necessary," is not void for indefiniteness, in that the words "said railroad corporation" lack any antecedent, nor because of the use of the phrase, "the order of the county commissioners in which said railroad is located," nor because the railroad may run through several counties, nor because it speaks of "their" rather than "its" expense; the legislative intent being plain, so that defects in grammatical construction may be disregarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 754, 757.]

2. SAME—PENALTIES—RECOVERY—COMPLAINT—SUFFICIENCY.

In an action against a railroad to recover a penalty for failure to obey an order of the county commissioners directing the employment of a watchman at a certain crossing, an objection that the complaint does not allege that defendant owned or operated tracks on the date when it was ordered by the board of commissioners to employ the watchman cannot be sustained, where the order stating that defendant owned and operated the tracks at that date was made a part of the complaint.

3. SAME.

In an action against a railroad to recover a penalty for failure to employ a watchman at a crossing, an allegation in the complaint that the four tracks were used "exclusively or regularly" for switching purposes is not objectionable under the rule that allegations shall be direct and certain, and not in the alternative, since either alternative furnished a basis of liability.

4. EVIDENCE—CONCLUSION OF WITNESS.

An objection to a question whether a certain track was regularly used for switching was properly sustained as calling for a conclusion by the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2149-2185.]

5. RAILROADS — STATUTORY REGULATION — HIGHWAY CROSSINGS — STATUTES — CONSTRUCTION—"REGULARLY."

"Regularly," as used in Acts 1891, p. 364, c. 150, § 1, providing "that all railroads * * * having more than two tracks across any public highway * * * and used for switching purposes exclusively or regularly * * * shall, upon the order of the county commissioners * * * place a flagman at said crossing,

* * *," means in conformity with the established mode, and as a part of the routine business done at that point, slight variations in the intervals between particular acts of switching being immaterial, and does not mean at certain times or intervals of time according to some certain uniform and well-established practice.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6040.]

6. SAME—PENALTY—RECOVERY—EVIDENCE.

In an action against a railroad company to recover a penalty for failure to obey an order of the county commissioners requiring the company to keep a flagman at a highway crossing, evidence held sufficient to sustain judgment against the defendant.

Appeal from Circuit Court, La Porte County; John C. Richter, Judge.

Action by the state against the Grand Trunk Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The following instructions were requested by defendant: "(5) The term 'regularly,' as used in this statute, means using the track at various periods of time with equal lengths of interim or in other words, 'at regular intervals of time, as, once an hour or in two hours, or once a day; or the words 'regularly' might mean a continuous use of the tracks for switching. If, therefore, you find from the evidence that the south track was at certain periods used for switching every day, and then again it was not used for several days, and then again not used, there being no regular intervening period of time between the several uses of the track, this would not be a regular use of the track for switching. And the same rule of construction would apply to each of the other tracks. (6) So also as to the north track. If you should find from the evidence that that track was generally used for storing cars, that some switching was done on it, but that the intervals of time between using the track for switching were of different durations, that the track was used one day, say for switching, and then again for several days together it was not used, and then again used for a day or two days, and that then such use ceased, this was not a regular use of the crossing, and you should find for the defendant on the question as to whether such track was used regularly for switching."

Anderson, Du Shane & Crabill, for appellant. Ohas. W. Miller, W. C. Geake, C. C. Hadley, Henry Dowling, and J. B. Collins, Pros. Atty., for the State.

WATSON, J. This action was brought to recover a penalty incurred by appellant in refusing to place a flagman at a certain highway crossing in La Porte county, contrary to the order of the commissioners of said county. Such an order is authorized by statute (2 Burns' Ann. St. 1901, §§ 5174, 5175; Acts 1891, p. 364, c. 150). Appellant's demurrer to the complaint was overruled, and the case tried before a jury. A verdict was rendered against the company in the sum of \$250.

The errors assigned are (1) the overruling of the demurrer; (2) the overruling of the motion for a new trial.

The first contention of appellant is that said act is void for uncertainty; that the rule of strict construction applies, and, when so applied, relieves appellant of any liability thereunder. The act is in terms as follows: "That all railroads owned or operated in the state having more than two tracks across any public highway or road, and used for switching purposes exclusively, or regularly, or if only one track, and used for switching purposes, said railroad corporation shall, upon the order of the county commissioners in which said railroad is located, place a flagman at said crossing and maintain the same at their expense from six o'clock a. m. to eight o'clock p. m., of each and every day, or so long as said commissioners deem it necessary." The act provides for the employment of watchmen at highways which are crossed by railroad tracks as therein described, and used regularly or exclusively for switching purposes. It is well settled in this state that the courts will ascertain and carry out, if possible, the legislative intent, and "where the legislative sense is plain, the exact grammatical construction and propriety of language may be disregarded." *Abbott v. Inman*, 35 Ind. App. 262, 266, 72 N. E. 284; *Hoffmeyer v. State*, 37 Ind. App. 526, 532, 77 N. E. 372; *State v. Myers*, 146 Ind. 36, 44 N. E. 801; *State Board, etc., v. Holliday*, 150 Ind. 216, 232, 49 N. E. 14, 42 L. R. A. 284; *Maxwell, Interpretation of Statutes* (2d Ed.) § 333. Some of the language used is not well chosen. Aside from such fault, there is nothing in the act which in any way renders it uncertain as applied to the facts of this case. "That all railroads owned or operated in the state having more than two tracks across any public highway or road (and) used for switching purposes (exclusively or regularly) or (if only) one track (and) used for switching purposes, said railroad corporation (i. e. the corporation owning or operating such tracks) shall upon order of," etc. It is alleged in the complaint that the appellant is a corporation operating a steam railroad for the carrying of freight and passengers through the county of La Porte and through a specified quarter section thereof. If the attempt was to apply the statute to a person or partnership operating a railroad, the suggestions made along that line might be relevant. The legislative intention to describe a corporation of the class, which appellant is alleged to be, is perfectly obvious.

It is also urged that the railroad described is located "in the county commissioners." This phrase is used in designating the board which may make an order relative to the subject-matter of the section. That it was intended thereby to designate the board of commissioners of the county in which said railroad is located is apparent. But counsel say: "Even if we so correct it, what then?

The question will then arise what county? Some roads run through ten counties. Appellant's road runs through four, each having a board of commissioners. What board, let us ask, would have jurisdiction?" It cannot be presumed that the Legislature intended to confer extraterritorial jurisdiction upon any board of county commissioners by this act; and, unless such presumption is indulged in, there is no uncertainty which board of commissioners has the authority to make such an order. Some roads run through several states. Does it follow that such roads are not located in any of said states? It is undoubtedly true that the entire road is not situated in any one state, or in any one county, but it is located in each county and each state. When the board of commissioners of some county other than La Porte shall make orders relative to the crossing in La Porte county, appellant will have cause to complain. The antecedent of "said railroad corporation" is necessarily implied as above stated, and "their" expense means the expense of such corporation quite as clearly as though the pronoun "its," more correctly applied to a corporation, had been used. The statute is not void. It is defective in its grammatical construction, but it is not so deficient that the court cannot determine therefrom the legislative intent. Therefore the court will construe and apply it in accordance with such intent.

Two defects are urged as rendering the complaint bad on demurrer: (1) That it does not allege that appellant owned or operated said tracks on the date when the board of county commissioners ordered a flagman to be placed at the crossing; (2) that the facts are pleaded in the alternative. The following are, in substance, the facts set out in the complaint. Appellant, a corporation, operates a steam railroad passing through a certain described quarter section in La Porte county, Ind. The line of railroad consists of at least four parallel and adjacent tracks. Said tracks "are used exclusively or regularly" for switching trains and cars. There is, and has been for the last 10 years, a public highway passing through the said section, which is near the village of Stillwell, and in Pleasant township, in said county. Said highway is called the "Yellow River Road," and is crossed at grade by said tracks. At a regular meeting of the board of commissioners of said county March 7, 1905, said board found that said crossing was dangerous to the lives and limbs of those using the same, and ordered appellant to place a flagman thereat from 6 o'clock a. m. to 8 o'clock p. m. of each day. A certified copy of the order was served upon appellant, but said company has refused to comply therewith. It is alleged in the complaint, which was filed on May 15, 1905, that the appellant is a corporation operating a line of railroad, etc. In the order of the board, made a part of the complaint, it is stated that appellant, at the date of said or-

der, March 7, 1905, owned and operated the railroad described. There is not, therefore, any basis for the objection to the complaint that so far as the allegations show appellant's railroad was not built when the order was made.

The further allegation discussed is as follows: "That the line of railroad as aforesaid consists of at least four (4) parallel and adjacent tracks. That the said tracks are used exclusively or regularly by the said company for the switching of cars and trains." The rule that allegations in pleadings shall be direct and certain, and not ambiguous or in the alternative is well known. *Wheeler v. Thayer*, 121 Ind. 64, 67, 22 N. E. 972. It is conceded that it would have been sufficient to have alleged that the tracks were used regularly and exclusively for switching purposes. This is what the allegation amounts to. Some of the tracks may have been used regularly and some of them exclusively for such purposes. If there was any uncertainty in the allegations, it was upon the face of the pleading, and should have been pointed out by a motion to make the complaint more specific. *Mulky v. Karsell*, 31 Ind. App. 595, 68 N. E. 689; *Smelser v. Pugh*, 29 Ind. App. 614, 618, 64 N. E. 943; *City of Hammond v. Meyers*, 23 Ind. App. 235, 55 N. E. 102; *Cleveland, etc., R. Co. v. Wynant*, 119 Ind. 539, 20 N. E. 730; *Starkey v. Starkey*, 136 Ind. 349, 354, 36 N. E. 287. In all those cases cited in which allegations in the alternative were held to make a pleading bad one or the other of the alternatives failed to furnish any basis of support to the action. These cases do not apply to the question here presented, because either alternative furnished a basis of liability.

The objection to appellant's question as to whether the south track was regularly used for switching was properly sustained. The question called for a conclusion by the witness. *Pope v. Branch Co. Savings Bank*, 23 Ind. App. 210, 217, 54 N. E. 835; *Chicago, etc., R. Co. v. Cummings*, 24 Ind. App. 192, 205, 53 N. E. 1026; *Insurance Co. v. Osborn*, 26 Ind. App. 88, 92, 59 N. E. 181. The refusal to give instructions 5 and 6, requested by appellant, is given as a further reason for granting a new trial. These instructions lay down a definition of the word "regularly," and may be considered together. In appellant's brief it is said: "'Regularly' obviously means in this connection at certain times or certain intervals of time, according to some certain, uniform, and well-established practice." The meaning of general words will be adapted to the subject-matter in reference to which they are used. *Ross v. State*, 9 Ind. App. 35, 36 N. E. 167; *Woods v. State*, 134 Ind. 35, 33 N. E. 901; *City of Evansville v. Summers*, 108 Ind. 189, 9 N. E. 81, *Maxwell v. Collins*, 8 Ind. 38; *Endlich, Interpretation of Statutes*, § 86. It is a matter of common knowledge that switching is done

only as necessity arises in the course of transacting the railroad business. From the very nature of such business it cannot be limited to certain intervals of time. If the switching is done whenever it becomes necessary in conformity with the established mode, and is a part of the routine business conducted at that point, it is within the meaning and intent of the statute, and slight variations in the length of the intervals between the particular acts of switching will not exempt appellant from the operation of the statute. There was no error in refusing the instructions.

The final ground assigned for a new trial is that the evidence does not support the verdict. The evidence discloses the fact that four parallel tracks cross the highway known as the "Yellow River Road." The two tracks to the south are called the "main line"; it being a double-track system. The third track from the south is called a "passing" track. It connects at each end with the north main track. The fourth track from the south is called a "storage" track, and is connected with the passing track. Extending from the south main track and connecting it with the Lake Erie & Western Railroad is a Y, but the Y does not cross said highway. Projecting from the Y, and parallel to and along the south main track, is a spur or track called the "grain" track. It is used for cars which are being loaded with grain for shipment on the lines of appellant company. The main tracks are connected by crossovers. The storage track is connected with the Lake Erie & Western by a double Y. The coal dock track is a continuation of the storage. The evidence shows that, while cars are stored on the fourth track, they are very frequently moved, often crossing the highway. Twice each day, except Sunday, the local freights, one from each direction, put coal upon the coal dock. To do this the west-bound freight switches onto the passing track, and then the engine puts up the coal, often crossing said highway in so doing. The east-bound freight switches from the south main track across the north main track onto the passing track, and then puts up coal. When cars consigned to eastern points are received from the Lake Erie & Western, the engine from the east-bound train must switch across all the tracks to the north Y, where such cars are delivered. When two trains from the same direction are to pass, one must switch onto the passing track, generally crossing said highway. Cars from the east, consigned to the Lake Erie & Western, must be switched over to the south main track, and then onto the south Y, generally having to cross said highway. Likewise, in taking cars from the grain track, the highway must frequently be crossed. The verdict is fully sustained by the evidence.

Judgment affirmed.

HADLEY, P. J., not participating.

(40 Ind. App. 681)

DENNEY v. DENNEY. (No. 5,965.)
(Appellate Court of Indiana, Division No. 1.
Dec. 17, 1907.)

APPEAL—PRESERVATION OF GROUNDS OF REVIEW.

Under Acts Gen. Assem. 1879, Sp. Sess., p. 113, c. 35, § 7 [Burns' Ann. St. 1901, § 1023], providing that in cases of direct contempt, defendant, if found guilty, may move for a new trial and rescission of the judgment, and if the court overrules his motion he may except and file a bill of exceptions as in other criminal actions, and in all cases an appeal shall lie thereupon to the Supreme Court, and section 9, p. 115 [Burns' Ann. St. 1901, § 1025], providing that in cases of indirect contempt the defendant, having appeared, may except, file a bill of exceptions, and appeal to the Supreme Court in the same manner as in cases of direct contempt, where, in an action for indirect contempt, no objections were made by the accused to the form or matter of the affidavit filed setting up the conduct constituting the contempt, and no exceptions taken to any part of the proceedings except the judgment, and no motion for a new trial or other motion was made assailing the judgment or rulings of the court, no question was presented for determination on appeal. [Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Contempt, § 229.]

Appeal from Circuit Court, Huntington County; Jas. C. Branyan, Judge.

Action by Anna W. Denney against George E. Denney for indirect contempt. From a judgment for plaintiff, defendant appeals. Affirmed.

C. W. Watkins, for appellant.

HADLEY, P. J. This was an action instituted against appellant for indirect contempt on account of the violation of orders of the court theretofore made in a divorce proceeding. An affidavit was filed setting up the violation of the orders, and asking that appellant be brought before the court and adjudged guilty of contempt. Appellant was brought before the court by the sheriff, accompanied by his attorney, whereupon he was put on oath and examined by the court, at the conclusion of which examination he was adjudged guilty of contempt. No objections were made by appellant or his attorney to the form or matter of the affidavit, or proceedings, and no exceptions taken to any part thereof, except the judgment. No motion for a new trial or other motion was made assailing the judgment or rulings of the court.

In this state of the record, no question is presented here on appeal. Section 1023, Burns' Ann. St. 1901, being section 7 [chapter 35, p. 113] of an act of the General Assembly of 1879, special session, provides that in cases of direct contempt the defendant, if found guilty, may move the court for a new trial and rescission of its judgment against him; and if the court shall thereupon overrule such motion, the defendant may except and file a bill of exceptions, as in other criminal actions, and in all cases an appeal shall lie thereupon to the Supreme Court. Section 9 (page 115) of said act, being sec-

tion 1025, Burns' Ann. St. 1901, provides that in cases of indirect contempt the defendant, having appeared, "may except, file a bill of exceptions and appeal to the Supreme Court in the same manner as in cases of direct contempt." All of the errors assigned are properly grounds for a new trial, and not properly assignable in this court.

For the foregoing reasons, judgment is affirmed.

(40 Ind. App. 678)

DIVEN et al. v. BURLINGTON SAVINGS BANK. (No. 5,963.)

(Appellate Court of Indiana, Division No. 1.
Dec. 17, 1907.)

1. PLEADING—DEMURRER—WAIVER.

Where defendants, after the court sustained their demurrer to the complaint, pleaded a general denial without insisting upon judgment on demurrer, they waived their right under the court's ruling.

2. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR BENEFITS—STATUTORY PROVISIONS.

Proceedings were had under the Barrett law (Act March 8, 1889) as amended March 6, 1891 (Acts 1889, p. 237, c. 118), and Acts 1891, p. 323, c. 118 (Burns' Ann. St. 1901, §§ 4290-4298, inclusive), relating to the making of street improvements and the assessments for the cost thereof, and the property abutting on the improvements was duly assessed therefor. Defendants owned back-lying property within 150 feet of the street improved. The improvements did not increase the value of such property, and defendants had no notice of any lien, except such notices as were required to be published under the law in such proceedings. The abutting landowners signed a waiver of illegalities, and the city issued bonds. *Held*, that it was competent for the Legislature to make special assessments on back-lying property for street improvements beyond the actual benefits to the property.

3. SAME—LOCATION OF PROPERTY LIABLE—BACK-LYING PROPERTY—WAIVER OF DEFECTS BY ABUTTING OWNERS—EFFECT.

Under the Barrett law (Burns' Ann. St. §§ 4290-4298, inclusive), relating to street improvements and assessments for the cost thereof, the owner of a bond issued by the city for such improvements in case of the default of the abutting lot owner may foreclose against back-lying lots not mentioned in the proceedings, but within 150 feet of the improvements, even though the owner of the abutting land signed a waiver of illegalities by which he promised to pay the assessment, and is not limited, therefore, to the assessment upon the abutting land as actually made and fixed by the common council.

Appeal from Superior Court, Madison County; Henry C. Ryan, Judge.

Action by the Burlington Savings Bank against Laura M. Diven and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Kittinger & Diven, for appellants. C. B. Masslich and Eugene Dupee, for appellee.

MYERS, J. Appellee, as the owner of a bond issued by the city of Anderson for the improvement of Locust street in said city, sued to foreclose the lien of certain unpaid assessments against various lots abutting upon said improvement, and also upon back-lying lots and lands within 150 feet of the

improvement. Special findings of fact were submitted and conclusions of law stated thereon, and judgment in favor of appellee foreclosing the assessment lien against the back-lying lands of appellants, and that the same be sold to pay any balance unpaid after applying the proceeds from the sale of the abutting lots.

1. The record shows that the demurrer of appellants Diven & Diven to the complaint was sustained, but no judgment was asked or rendered thereon. Thereafter, and without reference to the former ruling on the Diven demurrer, the trial court made a general ruling that all demurrers to the complaint were overruled, and defendants reserved an exception. Appellants then filed separate answers, each pleading the general denial. Appellant Laura M. Diven filed two affirmative paragraphs of answer, to each of which a reply in denial was filed. Upon this state of the record appellants Diven & Diven insist that the findings of fact to sustain the complaint against them were without the issues, and the conclusions of law thereon will not support a judgment against them. The facts as disclosed by the record in this case, under the ruling of the court in *Gordon v. Culbertson*, 51 Ind. 384, warrant the conclusion that the Divens, by their failure to insist upon a judgment on the ruling of the court in sustaining their demurrer to the complaint and by filing answers to the complaint, waived their right under such ruling. In the case cited it is said "the appellant, after the court has sustained its demurrers to the complaint, having pleaded to the complaint, without insisting upon judgment on demurrer, must be held to have waived the demurrer."

2. The special findings of fact show that under the act of March 8, 1889, as amended March 6, 1891 (Acts 1889, p. 237, c. 118), and Acts 1891, p. 323, c. 118, and known as the "Barrett Law," such proceedings were had that Locust street, in the city of Anderson, was improved, and the property abutting such improvement was duly assessed for the cost thereof; that appellants owned back-lying property which is within 150 feet of the street thus improved; that the owner of the abutting property so assessed and described in the assessment roll filed a waiver as provided by law; that bonds were issued, one of which appellee, as owner, is seeking to have paid out of the proceeds from the sale of abutting lots and back-lying lands within 150 feet of said improvement. The findings also show that the back-lying property sought to be sold was not increased in value by reason of said improvement, and that the owners thereof had no notice of any lien on their property, except such notices as were required to be published under the law in such proceedings. Upon these facts it is argued that the Legislature does not have power, nor can it vest any tribunal with power, to make special assessments for street improvement outside of

the actual benefits to the property shown by the enhanced value thereof on account of such improvement. *McKee v. Town of Pendleton*, 154 Ind. 652, 57 N. E. 532; *Adams v. City of Shelbyville*, 154 Ind. 487, 57 N. E. 114, 49 L. R. A. 797, 77 Am. St. Rep. 484. And where lots and tracts of land abutting upon a street improved under the Barrett Law, and which are assessed for benefits by the action of the city engineer and the common council, and the owner of a lot so assessed for benefits, having signed a waiver, by which he promises to pay the assessment, and the city issued bonds, and the lot owner defaults, the holder of the bond can only foreclose the assessment actually made and fixed by the common council, and cannot foreclose against back-lying lands, not mentioned in any of the proceedings nor the assessment, although within 150 feet of the improvement. Sections 4290-4298, Burns' Ann. St. 1901.

Appellants earnestly and forcibly urge both propositions as decisive of this case in their favor. The facts in the case at bar are so nearly like those in the case of *Voris v. Pittsburg Plate Glass Co.*, 163 Ind. 599, 70 N. E. 249, and *Cleveland, etc., Ry. Co. v. Porter*, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179, and the law as announced in the *Voris* Case, being reaffirmed on petition to transfer the Porter Case, so fully settles the controlling question in this case, that it would be useless for us to take the time and space to express our views on the law applicable to the facts found.

Judgment affirmed.

MASTERSON v. SOUTHERN RY. CO. et al.
(No. 6,018.)¹

(Appellate Court of Indiana, Division No. 2.
Dec. 20, 1907.)

1. JUDGMENT—ENTRY—STATUTORY PROVISIONS—VERDICT.

Under the direct provisions of Burns' Ann. St. 1901, § 573, it is the duty of the court to render judgment in conformity with the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 446.]

2. SAME—SPECIAL FINDING.

Under the direct provisions of Burns' Ann. St. 1901, § 574, it is the duty of the court to render proper judgment where there has been special findings on particular questions of fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 447.]

3. APPEAL—EXCEPTIONS IN LOWER COURT—MOTIONS FOR JUDGMENT.

Where in an action the jury render a general verdict and answer interrogatories, it is proper practice for each party to move for judgment, and an exception by one party to the overruling of his motion or to the sustaining of his adversary's motion equally presents the question on appeal.

4. COURTS—RECORD—LOSS OF EXCEPTION.

A party in an action, who makes a seasonable motion for judgment on the verdict rendered, cannot be deprived of his exception by delay in making a record of such fact.

¹ Superseded by opinion, 84 N. E. 505.

5. APPEAL — RECORD — TRANSCRIPT — PRESUMPTIONS.

Where the transcript on appeal presents the rulings on motion in an order which would seem to call for a ruling on the motion before the filing of the motion, it will be presumed that the various acts shown by the transcript occurred in the ordinary and regular order.

6. RECORDS—FILE MARKS—EVIDENCE.

The filing of a paper is the delivery of it to the officer at his office, to be kept by him as a paper on file, and the file mark of the officer is evidence of filing, but it is not the essential element of the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Records, § 6.]

7. CLERKS OF COURTS—FILING PAPERS.

Under the direct provisions of Burns' Ann. St. 1901, § 6519, it is the duty of a clerk of court to file each paper in a cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Clerks of Courts, § 97.]

8. APPEAL — RECORD — SUFFICIENCY — QUESTIONS PRESENTED.

In a personal injury action in which the jury found a general verdict for plaintiff, and also answered interrogatories of defendant, where the record showed that a motion for judgment on the special findings was filed and thereafter granted on January 26, 1905, and further recited that the plaintiff "now" moves the court for judgment on the general verdict, the refusal of which motion was excepted to, and showing also that the motion of plaintiff was indorsed on the back, "Filed January 23, 1905," it would be considered on appeal that the failure to make the record entry of the date of filing was a clerical error to be deemed corrected, and that plaintiff's motion was made in due time, before the judgment on the special findings, and hence could be reviewed on appeal.

9. MASTER AND SERVANT—PERSONAL INJURIES—LOOK AND LISTEN RULE.

In an action by a railroad employé for injuries received in the discharge of his duty, the look and listen rule is not in its strictness applicable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 739, 740.]

10. SAME—QUESTIONS FOR JURY.

The mere fact that a trainman, while coupling cars in the line of his duty on the track, omits to look and listen for the approach of a car which he thought securely braked, does not render him guilty of contributory negligence as a matter of law, but the question whether such omission is negligence is for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

11. TRIAL—SPECIAL FINDINGS—RECITALS.

Statements in a special finding that a car was forced upgrade, and ran back downgrade, are merely recitals as to the grade of the track at that point, and not equivalent to a direct finding of the fact on the question whether an employé injured knew that the track was not level.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 846, 848.]

12. SAME—PRESUMPTIONS.

There is no presumption in favor of special findings of a jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 872.]

13. MASTER AND SERVANT—PERSONAL INJURIES—CARE REQUIRED OF EMPLOYÉ.

An employé of a railroad has the right to go about his business obeying the ordinances and rules established for the safety of all on the assumption that others will do likewise, and it is only when, on a particular occasion, he learns,

or by the exercise of reasonable diligence might have learned, of the negligent conduct of others then threatening, that he is required to exercise reasonable care to avoid injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 723, 724.]

14. APPEAL — REVIEW — PRESUMPTIONS — VERDICT.

It will be presumed that the jury, in arriving at its verdict, considered all the facts before it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3755.]

15. MASTER AND SERVANT—PERSONAL INJURIES—QUESTIONS FOR JURY.

In an action against a master for injuries sustained by a servant in being struck by a moving car while in the act of coupling, the fact that plaintiff, though he knew that the car which struck him was upgrade from him, was absorbed in the work he was doing, was a fact to be considered by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

16. TRIAL—VERDICT—CONFLICT WITH SPECIAL FINDINGS.

In an action against a master for injuries to a servant, the jury rendered a general verdict for plaintiff, and also answered interrogatories of defendant. The answers to the interrogatories showed that the servant, a brakeman, was killed while in the employment of the defendant. He was on the end of the train which was being pushed on a single track upgrade for most of the way, and picking up cars as they came to them. The train struck one car, which was pushed upgrade 8 to 15 feet by the impact, and then ran down against the train. The automatic couplers not working, decedent got down, gave the signal to back away from the car, then stepped between the end of the train and the car and became absorbed in hammering and shaking the coupler in an attempt to fix it, and was struck and killed by the car coming downgrade and striking him. *Held*, that the facts shown by the special findings were insufficient to overcome the general verdict, with its attendant presumptions.

Appeal from Circuit Court, Dubois County; E. A. Ely, Judge.

Action by Ruth Masterson, administratrix, against the Southern Railway Company and others. From an order refusing plaintiff's motion for judgment notwithstanding the verdict, she appeals. Reversed.

See 81 N. E. 730.

Cox & Armstrong, for appellant. A. P. Humphrey, Jno. D. Welman, and M. W. Fields, for appellees.

ROBY, C. J. Appellant, administratrix, brought this action to recover damages on account of the death of her husband, alleged to have been caused by the negligence of the appellee. The jury returned a verdict in her favor for \$3,500, together with answers to interrogatories. The court sustained appellee's motion for judgment notwithstanding the general verdict. Appellant failed to reserve an exception to such action.

The first question for decision is whether, upon the record, the propriety of such action can be considered. The verdict was returned November 3, 1904. The defendants on same date filed written motions for judgment upon the answers to interrogatories. These mo-

tions were taken under advisement "until the next term." On the 18th day of January, 1905 (the fifteenth of the term), motions for a new trial, filed by the defendants at the prior term, were withdrawn. On January 26th, the court sustained appellee's motions and entered judgment for them. The entry is, in part, as follows: "And that the defendants recover of the plaintiffs their costs and charges herein laid out and expended, and the plaintiff now moves the court for judgment on the general verdict herein, which motion is overruled, to which ruling the plaintiff at the time excepts, which said motion made by plaintiff for judgment on the general verdict herein is in words and figures as follows, to wit: '* * * The plaintiff in the above-entitled cause moves the court to render judgment herein on the general verdict rendered in this cause, * * *'—which said motion was indorsed on the back, as follows, to wit: 'Filed January 23, 1905. John P. Huther, Clerk Circuit Court. * * *' It is the duty of the court to render judgment in conformity with the verdict (section 573, Burns' Ann. St. 1901), and it is also the duty of the court to render proper judgment where there has been a special finding on particular questions of fact (section 574, Burns' Ann. St. 1901). It was proper practice for each party to move for judgment, and an exception by one party to the overruling of his motion or to the sustaining of his adversary's motion equally presents the question on appeal. *Austin et al. v. Earhart, Ex.*, 88 Ind. 182; *Branson v. Studabaker*, 133 Ind. 147, 161, 33 N. E. 98. Motion for judgment upon the general verdict, made after judgment rendered upon answers to interrogatories, comes too late to present any question. It is also true that a party who makes a seasonable motion for judgment cannot be deprived of his exception by delay in making a record of such fact. The method pursued by the clerk in making up this transcript is uniform throughout. The ruling is first set out, following this the motion, whatever it is, and following the body of the motion, the indorsement and file mark of the clerk, showing the date when the motion was presented. If the sequence in which the proceeding was had is to be taken as conforming to the order of entry, the result would be that the court would be convicted of the absurdity of ruling upon each motion before it was filed. This, of course, would be an impossible deduction, and the various acts shown by the transcript should therefore be presumed to have occurred in ordinary and regular order. *Helms v. Wagner*, 102 Ind. 385, 386, 1 N. E. 730. This presumption, in connection with the peculiar make-up of the transcript, leads to the conclusion that the appellant did not wait until judgment had been rendered against her before moving for judgment herself. It is not necessary to rely upon any presumption, however, for the reason that it affirmatively ap-

pears that the motion was filed three days before any judgment was rendered. The duty of a clerk is to file each paper in a cause (section 6519, Burns' Ann. St. 1901). The filing of a paper is the "delivery of it to the officer at his office to be kept by him as a paper on file." *Engleman v. State*, 2 Ind. 91, 52 Am. Dec. 494; *Johnson et al. v. C. F. K. & Ft. W. R. Co.*, 11 Ind. 280, 284; *Bouvier's Law Dict.* tit. "File." The file mark of the officer is evidence of filing, but it is not the essential element of the act. *State ex rel. v. Foulkes*, 94 Ind. 493, 496; *Hull v. Louth, etc.*, 109 Ind. 315, 10 N. E. 270, 58 Am. Rep. 405. The record entry above quoted does not conflict with the evidence furnished by the file mark as to the time when appellant's motion was actually filed. *State v. Matthews*, 129 Ind. 281, 28 N. E. 703; *Peterson v. Taylor*, 15 Ga. 483, 60 Am. Dec. 705; *Board Com'rs v. O'Connor*, 137 Ind. 622, 35 N. E. 1006, 37 N. E. 16; *L. v. N. A. & Chi. R. Co. v. Terrell*, 12 Ind. App. 328, 39 N. E. 295; *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305; 8 *Encyc. Plead. & Practice*, p. 927. And the failure to make a record entry of the time of filing was a mere omission, which the court might have corrected (*Security Co. v. Arbuckle, et al.*, 123 Ind. 518, 521, 24 N. E. 329), and which will be deemed corrected (section 670, Burns' Ann. St. 1901). It is therefore held that the appellant's exception to the overruling of her motion presents for review the correctness of the ruling thereon.

The final disposition of the cause depends upon whether the facts found in the answer to interrogatories are sufficient to overcome the general verdict, with its attendant presumptions. The facts so found are to the effect that decedent was killed July 18, 1903, on the Hartwell switch of the Southern Railway Company, consisting of a single track five miles long. He was in the employment of said railway company, and in its service, at the time of his death, since February 19, 1903, and had been a brakeman on a coal train between Princeton and Huntington for about five days before his death, and passed over said switch once each day during such five days. Said switch was upgrade from the main track. A locomotive going from the main track south would have to push all cars upon the switch ahead of it. On the day decedent was killed, appellee's locomotive left the main track pushing in front of it four cars. Masterson was on the south end of said cars. He coupled said south car to another car or cars standing on said switch some distance south of the main track. He then rode south on the south car some distance to the next car standing further south. He made three or four couplings before he was killed. When riding on said cars and making said couplings, he was in the line of his duty as a brakeman. The cars were equipped with automatic couplers, which had a lever by which the coupling

could be made without going between the cars when said couplings were in good order and repair. Decedent was on the south end of a coal car loaded with ties, as he approached the car to be coupled on. This last car was a coal car, and had been standing on the switch several days. It had been handled and moved by the crew of which decedent was a member each day for four or five days before he was killed. It was equipped with the usual brakes. It had been in a collision a day or so previous. Said collision shifted the load so as to interfere with the brake wheel. It was held in place by pieces of railroad ties placed in front of its north wheels. The brake was not in good repair before the collision. Decedent gave a slow-up signal just before he got down to make the coupling. After the train struck the coal car, he shook his head, indicating that the coupling had not been made. The coal car was forced upgrade 8 to 15 feet. The train stopped. The coal car then ran downgrade against the south end of the train. Decedent, after the coal ran north against the south end of the train, gave back-up or slack signal to the conductor, and the engineer backed away from the coal car. When the south end of the train moved north, he stepped in between the train and the coal car and between the rails. The coal car began to move north as soon as the train backed north. Decedent did not look toward the coal car previous to his injury. If he had looked at the coal car after he went between the rails, he could have seen it moving toward him.

The general verdict establishes each act on the part of the appellee which is charged in the complaint, and the answers to interrogatories do not controvert the verdict upon those issues. They show that the decedent could have seen the train moving down upon him had he looked at it. The general verdict finds, in accordance with the averments of the complaint, that, after the unsuccessful attempt to couple, decedent followed up the rear end of the train "shaking and hammering and trying to make said coupler do the work," and that he was at the end of the car on account of a defect in the coupler. If the failure to look is as a matter of law contributory negligence, then the facts disclosed by the answers to interrogatories would be in conflict with the general verdict, but the look and listen rule is not applicable, in its strictness, to an employé in the discharge of his duty. *Pittsburgh, etc., R. Co. v. Martin*, 157 Ind. 216, 223, 61 N. E. 229; *Pittsburgh, etc., R. Co. v. Lighthelser*, 163 Ind. 347, 71 N. E. 218, 660; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Chicago, etc., R. Co. v. Stephenson*, 33 Ind. App. 95, 101, 69 N. E. 270. "Such omission may or may not be negligence under the particular circumstances of a case, but of this fact the jury must be the judge."

Baltimore, etc., R. Co. v. Peterson, 156 Ind. 374, 59 N. E. 1044. So that the mere fact that he could have seen that the car was moving down upon him is not sufficient in itself to establish contributory negligence. There is no finding that he did see it.

Do the circumstances exhibited by the answers compel the conclusion that he was negligent? Such answers are much more noticeable for what they do not show of the attendant circumstances and of the facts necessary to the determination of the question, than they are for what they do show. It is not found, as stated before, that he did see the car move. It is not found that he knew that the brakes on the coal car were out of order, or that they were not set. Had there been a proper brake, properly set, it must be presumed that pushing the car a few feet north would not have caused it to run south, but that the force of the brake, sufficient to hold it in place in the first instance, would continue to operate. It is not found that he knew or saw, or should have seen, that the wheels were blocked. It does not appear that he knew that the track was on a descending grade at the point of the accident. The finding is "it was upgrade most of the distance from its main track to its southern end." Other answers show that the engine had proceeded quite a way from the main track, and whether the place where the coal car stood was within the "distance" named in said answer is not stated. It is true that the thirty-first interrogatory, asking whether the coal car was not forced upgrade, was answered in the affirmative, and that a subsequent answer was that the car ran downgrade; but the reference in such interrogatories is a mere recital so far as it relates to the grade of the track, and recitals are not sufficient in complaints to show a fact and of course far less sufficient when contained in special findings. *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Wabash Railroad Co. v. Young*, 162 Ind. 102, 60 N. E. 1003, 4 L. R. A. (N. S.) 1091; *La Porte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277. It might be presumed that the track was downgrade, but "nothing is presumed in favor of special findings, and the courts can consider only the special facts found." *Louisville R. R. Co. v. Summers*, 131 Ind. 241, 30 N. E. 873; *Consolidated Co. v. Summit*, 152 Ind. 297, 53 N. E. 235; *Southern R. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722; *Moreford v. Chicago Ry. Co.*, 158 Ind. 494, 63 N. E. 857; *Johnson v. Gebhauer*, 159 Ind. 271, 64 N. E. 855. It does not find but that he was engaged in and absorbed in his work, and such fact, if it existed, was a circumstance to be considered by the jury. *Cincinnati, etc., R. Co. v. Long*, 112 Ind. 166, 171, 13 N. E. 659; *Republic Iron & Steel Co. v. Jones*, 32 Ind. App. 189, 69 N. E. 191. The mere fact that he was on the track does not tend to establish his negli-

gence. It may have been necessary for him to be upon the track in order to fix the coupler. "He has the right to go about his business, obeying the ordinances and rules established for the safety of all, on the assumption that others will do likewise; and it is only when on the particular occasion he learns, or by the exercise of reasonable diligence under the circumstances he might have learned, of the negligent conduct of others, then threatening, that he is required to exercise reasonable care to avoid injury." Pittsburgh, etc., R. Co. v. Martin, 157 Ind. 223, 61 N. E. 229. His knowledge as to all these conditions and others which might be suggested were facts for the jury in determining the issue of contributory negligence, and must therefore be presumed to have been considered by it. He was not required to anticipate negligence on the part of his employer either in the operation of its trains or in the furnishing of the equipment of its cars. Contributory negligence is a question of conduct. Davis Coal Co. v. Pollard, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319. The conduct of men must be measured and determined by the conditions under which they act. The jury are by Constitution and statute intrusted with the determination of such questions.

These considerations lead to a reversal of the judgment.

The majority of the court are of the opinion that the justice of the cause requires a new trial. While I do not agree to this conclusion the matter is one which it is not necessary to discuss, and the judgment is therefore reversed, and the cause remanded, with directions to retry the same.

(40 Ind. App. 731)

CLEVELAND, C. C. & ST. L. RY. CO. v. HADLEY. (No. 6,056.)¹

(Appellate Court of Indiana. Nov. 1, 1907.)

Appeal from Circuit Court, Putnam County; Pressley O. Colliver, Judge.

Action by Vivian Hadley, by her next friend, Oscar Hadley, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Case transferred to Supreme Court.

Jas. L. Clark, Tarwin C. Grooms, Gus. A. Knight, and L. J. Hackney, for appellant. T. S. Adams and S. A. Hays, for appellee.

PER CURIAM. This cause being submitted for determination to the entire court, and four judges not concurring in the result, the case is hereby transferred to the Supreme Court, under section 15 of the act approved March 12, 1901. Acts 1901, p. 569, c. 247.

HADLEY, J., did not participate.

82 N.E.—65

¹ Transferred to Supreme Court, 82 N. E. 1025. Rehearing denied, 84 N. E. 12.

² Rehearing denied, 84 N. E. 12.

(170 Ind. 204)

CLEVELAND, C. C. & ST. L. RY. CO. v. HADLEY. (No. 21,142.)²

(Supreme Court of Indiana. Dec. 20, 1907.)

1. CARRIERS—PASSENGERS' DUTY FOR OWN SAFETY.

A passenger is required to exercise only ordinary care for his safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1348.]

2. NEGLIGENCE—CONTRIBUTORY—QUESTION FOR JURY.

In a personal injury action, the question of contributory negligence is usually for the jury, and it is only where the facts are undisputed, and but one reasonable inference can be drawn therefrom, that a verdict may be directed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 291, 333-346.]

3. CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action against a carrier for injury to a passenger caused by a car window sash falling, whether she was guilty of contributory negligence *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1346, 1402.]

4. SAME—INSTRUCTION.

In an action against a carrier for injury to a passenger caused by a car window sash falling, an instruction that, if she raised the sash for reasonable cause until it was latched, and the sash fell and injured her, because of a defective lock, the carrier was liable, was not objectionable as binding the carrier for breaks of the most recent occurrence, as well as latent defects, where the carrier did not defend on such ground, nor offer evidence of an inspection of the car or its appliances before the accident, but insisted upon the trial that the window catch was in good condition.

5. SAME—NEGLIGENCE—PRIMA FACIE CASE.

Where a passenger raised a window sash with due care until it was latched, and it fell through a defective condition of the catch, and injured her, the case is within the rule that a passenger injured without his fault by a defective appliance of the carrier's is prima facie entitled to recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1283, 1290.]

6. SAME—INSTRUCTION—BURDEN OF PROOF.

An instruction that the happening of an injury to a passenger because of defective appliances creates a prima facie case of negligence, "or, in other words, the company has the burden of proving, in order to rebut the presumption of negligence, under the circumstances, that the accident could not have been avoided by exercising the highest degree of practical care and diligence," was not objectionable as placing the burden of disproving the negligence charged by plaintiff upon the carrier.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1334.]

7. SAME—BURDEN OF PROOF.

Where, in an action against a carrier for injury to a passenger caused by a car window sash falling, plaintiff made out a prima facie case, the carrier had the burden of showing all the collateral facts necessary to explain the cause of the accident, and of showing proper diligence in maintaining the car and appliances in a safe condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1283, 1290.]

8. EVIDENCE—PERSONAL INJURY—ADMISSIBILITY.

In an action for personal injury to an arm, it was proper to permit plaintiff's mother to state what effect medical treatment had upon the arm, where the mother had witnessed the treatment and observed the visible effects; the question not being objectionable as calling for a conclusion.

9. SAME—OPINION—ELOCUATORY ABILITY.

In a personal injury action, it was proper to show plaintiff's elocutionary ability by her father; he being prima facie qualified to give an opinion thereon.

[Ed. Note.—For cases in point, see Cent. D.g. vol. 20, Evidence, § 2196.]

10. SAME—PHYSICAL CONDITION.

In a personal injury action, it was proper to ask plaintiff's father whether her injured arm was better or worse than it was six months before, where he had testified as to her condition at the times covered by the question, and it was important to determine whether the injury was permanent.

[Ed. Note.—For cases in point, see Cent. D.g. vol. 20, Evidence, §§ 2237-2241.]

11. WITNESSES—CROSS-EXAMINATION.

The extent to which cross-examination may be carried being largely within the trial court's discretion, in a personal injury action against a carrier, it was not manifestly improper to permit the carrier's conductor to be asked on cross-examination what salary he received, since anything tending to affect his credibility might be shown.

[Ed. Note.—For cases in point, see Cent. D.g. vol. 50, Witnesses, §§ 931-948.]

12. APPEAL—EXCEPTION TO RULING—NECESSITY FOR RESERVING.

A ruling admitting evidence cannot be reviewed, where no exception thereto was saved.

[Ed. Note.—For cases in point, see Cent. D.g. vol. 2, Appeal and Error, § 1503.]

13. SAME — FINDINGS — CONCLUSIVENESS — MISCONDUCT OF COUNSEL.

Where the facts as to misconduct of counsel alleged as a ground for new trial are within the trial judge's personal knowledge, and the evidence is conflicting, his determination of the issue is conclusive on appeal.

14. SAME—OBJECTION MADE TOO LATE.

An objection to the propriety of counsel's argument may not be made for the first time after verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1424, 1500.]

15. SAME.

Where no charge of misconduct of the prevailing party was made in the motion for a new trial, misconduct of counsel will not be reviewed from that standpoint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1674-1676.]

16. DAMAGES—PERSONAL INJURIES—VERDICT NOT EXCESSIVE.

\$10,000 is not an excessive recovery, where, when injured, plaintiff was 20 years old, was strong, healthy, active, skilled in household work, fond of driving and athletics, and well educated; where the injury was on the elbow joint, affecting chiefly the ulnar nerve, and was very painful, necessitating opiates, and was still painful at the trial, resulting in a numb feeling in the arm and fingers; where the muscles of the arm became and remained soft, flabby, and shrunken in size, and the power to grip and hold anything in the left hand is lost, so that she cannot make her own toilet, cannot help at housework, or play the piano, and was compelled to abandon elocutionary and Delsartian exercises; where she was nervous, and often sleepless, having little appetite, and was somewhat reduced in flesh; where a year's medical treatment had no

perceptible effect, and her condition was rather worse than better; and where the outlook for her recovery was unfavorable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372, 373, 379.]

17. APPEAL—REVIEW—EXCESSIVE DAMAGES.

The Supreme Court will not disturb a ruling refusing a new trial on the ground of excessive damages, unless at first blush the damages appear to be outrageous and excessive, or it appears that some improper element was considered by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3873.]

18. SAME.

The determination of the extent of a personal injury complained of, and the proper compensation, is peculiarly within the province of the trial jury, and not subject to review when its judgment has been fairly obtained and has been confirmed by the presiding judge, in the absence of clear abuse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3944-3947.]

Appeal from Circuit Court, Putnam County; P. O. Collier, Judge.

Personal injury action by Vivian Hadley, by next friend, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

James L. Clark, F. C. Grooms, G. A. Knight, and L. J. Hackney, for appellant. T. A. Adams and S. A. Hays, for appellee.

MONTGOMERY, J. Appellee, suing by next friend, recovered judgment for a personal injury received while a passenger on appellant's train, from the falling of a window sash upon her arm.

The only error assigned is the overruling of appellant's motion for a new trial. The motion for a new trial alleged that the verdict was not sustained by sufficient evidence, and was contrary to law, and the damages excessive; that the court erred in refusing to give, and in giving, certain instructions; and that other specified errors of law occurred upon the trial, which will be set out and considered in this opinion.

The first sentence of the eighth instruction tendered by appellant, and refused, was as follows: "A common carrier of passengers must exercise the highest degree of care in providing safe appliances and cars for the transportation of its passengers, and passengers upon the cars or carriages of a common carrier must also exercise an equally high degree of care to protect themselves from injury." The latter clause of this statement was manifestly incorrect, since a passenger is only required to exercise ordinary care for his safety. 4 Elliott on Railroads, § 1642; Jeffersonville, etc., R. Co. v. Hendricks, 26 Ind. 228; Keokuk, etc., Packet Co. v. True, 88 Ill. 608; Waterbury v. Chicago, etc., R. Co., 104 Iowa, 32, 73 N. W. 341; Missouri, etc., Ry. Co. v. Miller, 8 Tex. Civ. App. 241, 27 S. W. 905; Conroy v. Chicago, etc., Ry. Co., 96 Wis. 243, 70 N. W. 496, 38 L. R. A. 419.

Appellant requested the court to charge the jury, by its ninth instruction, that if appellee, while in a rapidly moving car, raised the window, protruded her arm, and while in the act of withdrawing the same the window fell, inflicting the injury complained of, she was guilty of contributory negligence, and could not recover. The question of contributory negligence is usually to be determined by the jury, and it is only in a case where the facts are undisputed, and but one reasonable inference can be drawn therefrom, that the court may venture to direct a verdict. It is very clear, upon the facts assumed in this instruction, that the court was not warranted in saying, as a matter of law, that appellee was guilty of contributory negligence. *Schneider v. New Orleans, etc., R. Co. (C. C.)* 54 Fed. 466; *New Orleans, etc., R. Co. v. Schneider*, 60 Fed. 210, 8 C. C. A. 571; *Farlow v. Kelley*, 108 U. S. 288, 2 Sup. Ct. 555, 27 L. Ed. 726; *Moakler v. Willamette, etc., Co.*, 18 Or. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717; *Summers v. Crescent City R. R. Co.*, 34 La. Ann. 139, 44 Am. Rep. 419; *Miller v. St. Louis, etc., R. Co.*, 5 Mo. App. 471.

The third instruction given at the request of appellee advised the jury that, if appellee was a passenger on appellant's car, and, for the purpose of throwing out fruit parings or other reasonable cause, raised the window until the same was locked or caught, and such window, on account of the broken, weak, or defective lock or catch thereon, fell and injured appellee's arm, without fault or negligence on her part, appellant would be liable. The objection is that this instruction blinds appellant for breaks of the most recent occurrence, as well as latent defects. The instruction was not given as an abstract proposition of law, but as an application of a legal principle to the concrete case before the court. Appellant did not found its defense upon the ground of this objection, or offer any evidence of an inspection of the car or its appliances previous to the accident, but insisted upon the trial that the window catch or lock was suitable and proper and in good condition. If the window catch or lock was in fact broken, weak, or defective, and for that reason the window fell, then, under the evidence, appellant had made no effort to discover or repair such defect, and a prima facie case was established entitling appellee to recover. *Breen v. New York C. & H. R. R. Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236; *Winters v. Hannibal, etc., R. Co.*, 39 Mo. 470.

The fourth instruction given of which complaint is made is in principle the same as the third, and no error was committed in giving the same.

The eighth instruction, given at the request of appellee, declared the law to be that, if an injury is suffered by a passenger on account of the weak, broken, or defective

condition of the car in which such passenger is riding, or any of the equipments and appliances connected therewith, the mere happening of such accident and injury is prima facie evidence of the negligence of the company owning, controlling, and using such car, and it will be incumbent upon the company to produce evidence which will excuse the prima facie failure of duty on its part. This instruction literally embodies the language of this court in the case of *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74, 95, 56 N. E. 434, and the legal principle declared is supported by numerous decisions of this state, and is in accord with the conclusions of all approved authorities. Appellant's learned counsel insist, however, that the doctrine *res ipsa loquitur* does not apply where there was any action on the part of the passenger, which might have contributed to produce the injury. It must be conceded that a well-recognized exception, substantially as stated, exists to the general rule. In the case of *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874, this court held that a passenger who voluntarily left his seat and alighted upon the station platform while the train was in motion, and in so doing sustained injury, was not in a position to claim the benefit of a presumption that the carrier was guilty of negligence. The Appellate Court, upon similar facts, has announced the same holding. *Dresslar v. Citizens' St. Ry. Co.*, 19 Ind. App. 383, 47 N. E. 651; *Pittsburg, etc., R. Co. v. Aldridge*, 27 Ind. App. 498, 61 N. E. 741. A mere statement of the circumstances attending the accident clearly and broadly distinguishes those cases from the one at bar. In the cases cited, the controversy was as to what was the negligent act proximately causing the injury, and no claim of defective cars, equipment, or appliances was fairly or properly presented; while in this case the real dispute is, not whether appellee was guilty of contributory negligence, but whether the window catch was in fact weak, broken, or defective. There could be no question of appellee's right to hoist the window without any imputation of negligence, and the fact is shown, without conflict, in the evidence, that she raised the sash with due care, to the full height, and until it was latched. It does not therefore appear from a mere recital of the incident, or upon the whole case, that the question of appellee's contributory negligence was so involved as to take this case out of the general rule that a passenger injured without his fault, by a defective appliance of the carrier's, has a prima facie right of recovery. Our conclusion is that the instruction was applicable to the case made out by the evidence, and was in form and substance proper.

This instruction states the general proposition that the happening of an injury to a passenger because of defective appliances creates a prima facie case of failure in the performance of duty on the part of the car-

rier, as shown above, and concludes as follows: "Or, in other words, the company has the burden of proving, in order to rebut the presumption of negligence, under the circumstances, that the accident could not have been avoided by the exercise of the highest degree of practical care and diligence." Objection is made to the use of the word "burden" in this connection, and it is correctly argued that appellant, under the answer of general denial, did not at any stage of the trial have the burden of disproving the negligence charged by appellee in the complaint. It is clear upon principle that appellee, having alleged actionable negligence, must assume and bear throughout the proceeding the burden of establishing the charge preferred. In this action she made a prima facie case by the aid of the legal presumption arising from the doctrine *res ipsa loquitur*. In finally determining the issue as to appellant's negligence, the jury must weigh presumptions, testimony, and proofs of every character in the light of the principle that the burden of proof was upon appellee, and if, on the whole, the scale did not preponderate in favor of the presumption and against all countervailing evidence, appellee must fail. *Pittsburgh, etc., R. Co. v. Higgs*, 165 Ind. 694, 708, 76 N. E. 299, 4 L. R. A. (N. S.) 1081; *Terre Haute, etc., R. Co. v. Sheeks*, 155 Ind. 74, 94, 56 N. E. 434; *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 274, 3 N. E. 836, 54 Am. Rep. 312; *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751. Reading the instruction under consideration as an entirety, it is plain that the word "burden" was used in this instance in the sense of duty, or obligation, and, when so read, the instruction is not subject to criticism. We are not to be understood as condemning this part of the instruction, in any event. It is the law, as already stated, that when appellee showed that she was injured, without her fault, from a defective appliance of the car in which she was being transported, as a passenger, a presumption of negligence arose against appellant, and remained for her benefit until negatived and overthrown by proof of other facts. In addition to disputing the evidence which appellee offered, appellant might relieve itself of this presumption of negligence by producing evidence of collateral facts explaining the immediate cause of the accident, and showing that in the conduct of its business it had used the highest practical skill, prudence, and circumspection; but, notwithstanding, the cause of the accident was such that it was not, and could not, reasonably have been discovered and obviated. A prima facie case having been made out by the aid of the legal presumption of negligence, appellant had the burden of establishing the existence of all the separate collateral facts, which might be necessary to explain the cause of the accident and to demonstrate the use of proper diligence and care in the maintenance of its cars and appliances in a condi-

tion of safety. *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264, 273, 3 N. E. 836, 54 Am. Rep. 312; *Thompson, Carriers*, p. 210, 211.

The tenth instruction given related to the consideration to be given to the opinions of expert witnesses, and was clothed in the language of instructions considered and approved in the following cases: *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Goodwin v. State*, 96 Ind. 550. There was evidence making such instruction appropriate, and no error was committed in giving the same.

Emma Hadley, appellee's mother, was asked: "What effect the treatment had upon her arm, if any?" Appellant objected, upon the ground that the question called for a conclusion, and not for facts. This objection was clearly untenable, and the witness was rightly permitted to answer the question. She had witnessed the treatment and observed the visible effects, if any resulted, and might properly state to the jury such facts as were within her knowledge. *Stamets v. Mitchenor*, 165 Ind. 672, 677, 75 N. E. 579; *Boyle v. State*, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218.

Appellant objected to the following question propounded to appellee's father: "What was her ability in the line of teaching in the profession of elocution or giving elocutionary entertainments?" It is urged that this question calls for an opinion, where an opinion is not competent evidence, and that the witness was not shown to be qualified to express such an opinion. The ability of a neophyte or of a professor in elocutionary work may be shown by the opinions of those qualified to testify, and the father is prima facie qualified to pass an opinion upon the elocutionary ability of his own daughter. The jury are the ultimate judges of the weight to be given such evidence, and will take into account the primary facts upon which the opinion is based, as well as the relationship of the parties.

The last witness was permitted to answer the following question, "Tell the jury whether the condition of your daughter's arm is better or worse at this time than it was six months ago." This witness had testified to the condition of appellee at the times covered by the question. The important fact to be determined was whether the injury was permanent or curable, and it was not error to allow him to answer this question. *Swygart v. Willard et al.*, 166 Ind. 25, 76 N. E. 753; *Louisville, etc., Ry. Co. v. Wood*, 113 Ind. 544, 553, 14 N. E. 572, 16 N. E. 197; *Cleveland, etc., Ry. Co. v. Gray*, 148 Ind. 266, 277, 46 N. E. 675; *Carthage, etc., Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; *Louisville, etc., Ry. Co. v. Holsapple*, 12 Ind. App. 301, 38 N. E. 1107.

Appellant complains because appellee was permitted, on cross-examination, to inquire as to the amount of monthly salary received by appellant's conductor. Anything tending to affect the credibility of a witness may be

shown, and this inquiry cannot be said to be so remote or irrelevant as to be manifestly improper. The extent to which cross-examination may be carried is largely in the discretion of the trial court, and must be determined by the relation and apparent character and bearing of the witness under examination, and the circumstances attending the particular case on trial. We are unable to say that the discretion of the court was abused in this instance. *Swygart v. Willard*, 166 Ind. 25, 32, 76 N. E. 755; *Shields v. State*, 149 Ind. 395, 402, 49 N. E. 351; *McDonald v. McDonald*, 142 Ind. 55, 72, 41 N. E. 336; *Pennsylvania Company v. Newmeyer*, 129 Ind. 401, 405, 29 N. E. 860; *White Sewing Machine Co. v. Gordon*, 124 Ind. 495, 496, 24 N. E. 1053, 19 Am. St. Rep. 109; *Hinchcliffe v. Koontz*, 121 Ind. 422, 425, 23 N. E. 271, 16 Am. St. Rep. 403; *Besette v. State*, 101 Ind. 85, 88; *Wachstetter v. State*, 99 Ind. 290, 295, 50 Am. Rep. 94; *Ledford v. Ledford*, 95 Ind. 283, 285.

The court permitted appellant's car inspector to state, over objection, that if he pushed the window up, and it remained, he would be satisfied that the stop had caught; but no exception was saved to the ruling, and hence no question is presented for our decision. *Adams v. Board, etc.*, 164 Ind. 108, 72 N. E. 1029.

It is alleged in the motion for a new trial that the court erred in permitting counsel for appellee, in argument to the jury, to make certain specified statements, and this ground of the motion is supported by the affidavits of appellant's counsel. Counter affidavits were filed reciting the language used. It must also be remembered that the facts were within the personal knowledge of the trial judge, and, having determined the issue respecting the real occurrence upon conflicting evidence, we cannot disturb his conclusion. *Pittsburgh, etc., Ry. Co. v. Collins* (Ind.) 80 N. E. 415. Conceding that, in the most favorable view, the language used was improper, it appears, further, that appellant's counsel were personally present, and at the time made no objection to the same. The rule is firmly established that a party feeling aggrieved by any incident in the progress of a trial must make his objection known at the earliest opportunity, so that the error, if any, may be promptly cured. Silence, when there is an opportunity to speak, operates as a waiver of objections to irregularities and abuses, which, if seasonably made and presented, might be regarded as prejudicial. This alleged error is effectually disposed of by the holding in *Southern Indiana Ry. Co. v. Fine*, 163 Ind. 617, 623, 72 N. E. 589, where it is said that, in such circumstances as here shown, a duty devolved upon appellant's counsel to bring the matter directly to the attention of the court to state the ground of objection specifically, if reasonably required, and, if the wrong be not incurable, to request the court to admonish the jury to disregard the objectionable

language. If, then, the court refuse to sustain a proper motion respecting such improper argument, an exception must be reserved to the action or nonaction of the court. A failure of the court to admonish the jury at the time was, under the facts shown, as much the fault of appellant's counsel as of the court, and an objection made for the first time after verdict cannot avail appellant. *Morrison et al. v. State*, 76 Ind. 335, 338; *Henning v. State*, 106 Ind. 386, 393, 6 N. E. 803, 55 Am. Rep. 756; *Coleman v. State*, 111 Ind. 563, 567, 13 N. E. 100; *Grubb v. State*, 117 Ind. 277, 283, 20 N. E. 257, 725; *Staser et al. v. Hogan*, 120 Ind. 207, 222, 21 N. E. 911, 22 N. E. 990; *White v. Gregory*, 126 Ind. 95, 98, 25 N. E. 806; *Drew v. State*, 124 Ind. 9, 12, 23 N. E. 1098; *Reed v. State*, 141 Ind. 116, 119, 40 N. E. 525; *Lingquist v. State*, 153 Ind. 542, 545, 55 N. E. 426; *Copenhaver v. State*, 160 Ind. 540, 548, 67 N. E. 453.

No charge of misconduct of the prevailing party was made in the motion for a new trial, and we are not called upon to view the matter from that standpoint. *Choen v. State*, 85 Ind. 209, 213.

The jury awarded appellee \$10,000 damages, and this is claimed to be excessive. Appellee was 20 years of age at the time of the accident, strong, healthy, and active, skilled in household work, fond of driving and athletic games, well educated, competent to perform upon the piano, and specially trained in elocution and qualified to teach and give elocutionary and Delsarte entertainments, and had just commenced teaching a small class in elocution. The injury was upon the elbow joint affecting chiefly the ulnar nerve, it was extremely painful, necessitating the use of opiates to produce sleep, and was still painful at the time of the trial. The injury resulted in a sleepy, numb, feeling in the arm, little and ring fingers, which still remains. The muscles of the arm became and remained soft, flabby, and shrunken in size, and the power to grip and hold anything securely in the left hand was lost, so that appellee cannot comb her hair or make her own toilet. Appellee cannot help at housework, or play the piano, and was compelled to abandon elocutionary and Delsartian exercises. She is nervous, often sleepless, has little appetite, and is somewhat reduced in flesh. The accident occurred on September 24, 1904, and the trial was held September 22, 1905. The medical treatment of the injury had no perceptible effect, and there was no improvement, but conditions were rather worse than better, and physicians could not foretell or promise when, if ever, recovery would occur, but regarded the outlook as unfavorable. The general principle is well established that this court will not reverse the judgment of the court below in refusing to grant a new trial on the ground of excessive damages, unless, at first blush, the damages assessed appear to be outrageous and excessive, or it is apparent

that some improper element was taken into account by the jury in determining the amount. *City of Michigan City v. Phillips*, 163 Ind. 449, 71 N. E. 205; *Indianapolis St. Ry. Co. v. Schmidt*, 163 Ind. 300, 71 N. E. 201; *Illinois, etc., Ry. Co. v. Cheek*, 152 Ind. 663, 53 N. E. 641; *Ohio, etc., Ry. Co. v. Judy*, 120 Ind. 398, 22 N. E. 252; *Louisville, etc., Ry. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Evansville, etc., R. Co. v. Talbot*, 131 Ind. 221, 29 N. E. 1134; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; *Farman v. Lauman*, 73 Ind. 568; *Town of Westerville v. Freeman*, 66 Ind. 255; *Yater v. Mullen*, 23 Ind. 562; *Picquet v. McKay*, 2 Blackf. 465. The determination of the extent of the injury complained of, and the proper compensation therefor, was peculiarly within the province and power of the trial jury, and when its judgment has been fairly obtained, and, in the light of all the incidents of the trial, confirmed by the presiding judge, an abuse of this right and power must be clearly manifest to warrant an appellate court in disturbing the judgment on the ground of excessive damages. *Hudelson v. Hudelson*, 164 Ind. 694, 74 N. E. 504; *Creamery, etc., Co. v. Hotsenpiller*, 159 Ind. 99, 64 N. E. 600; *Mead v. Burk*, 156 Ind. 577, 60 N. E. 338; *Lee v. State*, 156 Ind. 541, 60 N. E. 209. A more grievous misfortune could scarcely be presented than an accident to a cultured young woman, in perfect health, and of joyous and hopeful disposition, just entering upon an independent career of usefulness and honor, by which she is in a moment deprived of the use of her attainments for profit or pleasure, her ambition is destroyed, her disposition changed, her countenance rendered haggard, and her temperament nervous and irritable, and she is left a dependent invalid to bear a burden of pain by night and by day, with no assurance of cessation, except by death. It is clear that we are without warrant for disturbing the judgment on the ground of excessive damages. *Pittsburgh, etc., Ry. Co. v. Simons* (Ind. App.) 76 N. E. 884; *Cleveland, etc., R. Co. v. Miller*, 165 Ind. 381, 74 N. E. 509; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653; *City of Michigan City v. Phillips*, 163 Ind. 449, 71 N. E. 205.

There was abundant evidence from which the jury might find that the window fell on account of an insufficient and defective catch, as alleged, and no evidence that appellant had made any effort prior to the accident to discover or repair such defect. The verdict was sustained by sufficient evidence, and was not contrary to law, and no error was committed in overruling appellant's motion for a new trial.

The judgment is affirmed.

HADLEY, J., did not participate in this decision.

(100 Ind. 445)

INDIANAPOLIS UNION RY. CO. et al. v. WADDINGTON. (No. 21,106.)

(Supreme Court of Indiana. Dec. 11, 1907.)

1. STATUTES — CONSTRUCTION — REPEALING CLAUSE.

A repealing clause is subject to construction, the same as any other provision of statute, and even an express declaration of a repeal will not be given that effect when it is apparent that the Legislature did not so intend.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 313.]

2. COURTS—SUPREME COURT—APPELLATE JURISDICTION—STATUTORY PROVISIONS — CONSTRUCTION.

Act March 9, 1907 (Acts 1907, p. 237, c. 148), § 1, relates to cases which may be appealed directly to the Supreme Court, clause 14 giving the court jurisdiction in cases "wherein the amount of money in controversy, exclusive of interest and costs on the judgment of the trial court, exceeds \$6,000." Section 2 provides that the clerk shall, on the taking effect of the act, docket in the Supreme Court all cases pending in the Appellate Court, not ready for distribution, the jurisdiction of which is by said act conferred on the Supreme Court. Then follows the proviso that "all cases other than those herein mentioned shall remain in the Appellate Court and be heard and finally determined by said Appellate Court as though this act had not passed." *Held*, that the act should not be construed as absolutely repealing Act 1901, § 10, subd. 3, so as to deprive the Supreme Court of jurisdiction of an appeal from the Appellate Court pending at the time of the passage of the act of 1907.

3. STREET RAILROADS—COLLISIONS WITH VEHICLES—NEGLIGENCE OF SERVANTS—PLEADING.

In an action against a street railway company for wrongful death through a collision between the locomotive on which decedent was riding and defendant's street car, a paragraph of the complaint directly charging defendant with negligence, and charging that decedent met his death by reason of the negligence of defendant as therein alleged, was sufficient, though it did not allege that defendant's servants were at the time in the line of their duty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 224.]

4. SAME — PROXIMATE CAUSE OF INJURY — PLEADING.

In an action for wrongful death, the complaint alleged that while one of defendant railroad company's locomotives, on which decedent, an employe, was riding westerly, was approaching a street crossing, defendant street railway company, whose tracks crossed the railroad tracks, negligently ran its car upon the crossing without sending its conductor ahead as required by a city ordinance to ascertain whether locomotives or cars were approaching; that a collision ensued, and, to escape injury, decedent jumped from the locomotive; that at the same time another of defendant railroad company's locomotives, which was running easterly on a parallel track at a speed in violation of a city ordinance, struck the street car, and decedent was killed. *Held*, that these averments did not show that the first collision was a remote, rather than a proximate, cause of the injury, in view of a direct averment of negligence of the street railway company as the cause of the accident.

5. SAME—PLEADING—CITY ORDINANCE.

In an action for wrongful death of an employe of defendant railroad company, an averment that its locomotive was being run at the time at an unlawful speed, in violation of a city ordinance "which is and was at the time of the injury as follows" (setting it out), suffi-

ciently alleged that the ordinance was in force at the time of the injury.

6. MUNICIPAL CORPORATIONS—ORDINANCES—REPEAL—STATUTORY PROVISIONS.

Act March 6, 1891 (Acts 1891, p. 137, c. 97), governing cities of more than 100,000 inhabitants, gave the right to regulate the speed of cars and locomotives, and also to secure the safety of citizens and others in the running of trains through the city, and provided (Burns' Ann. St. 1901, § 3772) that all ordinances, etc., not inconsistent with the act should remain in force until repealed by the common council, etc. *Held*, that the act did not repeal an ordinance passed in 1866, under authority of Acts Sp. Sess. 1865, p. 3, c. 1, limiting the speed of locomotives and cars.

7. MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK—NEGLIGENCE OF CO-EMPLOYE.

A railroad employé does not assume the risk of injury resulting from the violation by a co-employé of a city ordinance limiting the speed of locomotives and cars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 567-573.]

8. SAME—NEGLIGENCE OF MASTER—OPERATION OF RAILROAD—PLEADING.

In an action against a railroad company for wrongful death of an employé, the complaint alleged that, while a street car was standing across defendant's tracks, one of defendant's engines negligently ran against the car and threw it from the tracks, etc., whereby decedent was injured. *Held*, that the allegation of negligence was sufficient on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 816-836.]

9. SAME—INJURY TO SERVANT—ASSUMPTION OF RISK—EMPLOYER'S LIABILITY ACT—CONSTRUCTION.

Employer's Liability Act, § 1 (Burns' Ann. St. 1901, § 7083), makes every railroad or other corporation liable for personal injury suffered by any employé while in its service "(4) where such injury was caused by the negligence of any person in the service of such corporation who has charge of any * * * locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employé or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employé or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying the order of some superior at the time of such injury, having authority to direct." *Held*, that the doctrine of assumed risk is not applicable to cases arising under such fourth subdivision.

10. RAILROADS—ACCIDENTS AT CROSSINGS—PROXIMATE CAUSE OF INJURY—TRIAL—SPECIAL FINDINGS.

In an action for wrongful death, the complaint alleged that while one of defendant railroad company's locomotives, on which decedent, an employé, was riding westerly, was approaching a street crossing, defendant street railway company whose tracks crossed the railroad tracks negligently ran its car upon the crossing without sending its conductor ahead, as required by a city ordinance, to see whether locomotives or cars were approaching; that a collision ensued between the locomotive and the car, and that, to escape injury, decedent jumped to the ground; that at the same time another of defendant railroad company's locomotives, which was running easterly on a parallel track at a speed, in violation of a city ordinance limiting the speed to four miles an hour, struck the street car, and decedent was killed. It was also alleged that the brake on the street car was defective. The answers of the jury to interroga-

tories stated, in substance, that the first collision was a slight one; that the east-bound locomotive was running at the rate of 12 miles per hour at the time of the first collision; that it was then 250 feet away, and could not have been stopped in time to avoid the collision, though it could have been stopped if running at the rate of four miles per hour; that the brake on the street car did not fail to work; and that the failure of the engineer of the east-bound locomotive to begin to stop his train promptly when he saw the first collision was not the sole and proximate cause of the second collision. In answer to the question: "What, if any, careless or negligent act of any person engaged in running said street car caused, or helped to cause, said first collision?" the jury answered: "The act of the conductor in beckoning the motorman to come on." *Held*, that there was nothing in the answers to show that the negligence of each defendant in approaching the crossing was not a proximate cause of the injury.

11. STREET RAILROADS—COLLISIONS—NEGLIGENCE—EVIDENCE.

In an action against a street railway company and a railroad company for wrongful death from a collision, evidence *held* not to show freedom of street railway from negligence proximately contributing to the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 243, 246.]

12. EVIDENCE—BEST AND SECONDARY—COLLATERAL MATTER.

In an action against a railroad company for wrongful death from an accident at a street crossing, oral evidence that the crossing was within the corporate limits of a city was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 528.]

13. RAILROADS—OPERATION—MUNICIPAL REGULATION—SPEED ORDINANCE—VALIDITY.

A city ordinance limiting the speed for locomotives while passing through the city did not become invalid from a failure to afterwards limit the speed of electric cars; the fact that such cars are more readily controlled than steam cars affording just ground for distinguishing between them in respect to speed.

14. STREET RAILROADS—COLLISIONS—NEGLIGENCE—CROSSING RAILROAD TRACK.

The attempt of those in charge of a south-bound street car to cross a double railroad track when a west-bound train was almost on the car, and an east-bound locomotive was but a few hundred feet away, with the bell ringing and having whistled for the crossing, was gross negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 188, 189.]

15. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where, in an action for injuries through negligence, there was no evidence of contributory negligence, it was not error to refuse to instruct on that subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 365.]

16. STREET RAILROADS—COLLISION—ACTION.

In an action against a street railway company for wrongful death in a collision between a street car and a locomotive at a crossing, plaintiff alleged that defendant's car proceeded to cross the railroad track without sending some one ahead, as required by a city ordinance, to look for approaching trains, and the complaint contained an independent charge that defendant negligently failed to make proper investigation to ascertain whether trains were approaching, and negligently ran its car in front of the locomotive. *Held*, that proof of a violation of the ordinance was not essential to plaintiff's recovery.

Appeal from Circuit Court, Hamilton County; Sam. R. Artman, Special Judge.

Action by Elmer E. Waddington, administrator of John H. Heckman, against the Indianapolis Union Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

See 81 N. E. 1179.

Kane & Kane, Baker & Daniels, F. Winters, W. F. Christian, and W. H. Latta, for appellants. C. F. Remy, J. W. Donaker, and Shirts & Fertig, for appellee.

GILLET, J. Appellee brought this action against the Indianapolis Street Railway Company and the Indianapolis Union Railway Company to recover for the alleged negligent killing of his decedent, John H. Heckman.

The first question for our consideration arises upon the motion of appellee to dismiss the appeal from the Appellate Court to this court, on the ground that the act of March 9, 1907, (Acts 1907, p. 237, c. 148), has deprived us of jurisdiction. Section 1 of that act relates to cases which may be appealed directly to the Supreme Court, and the fourteenth clause of that section gives this court jurisdiction in cases "wherein the amount of money in controversy, exclusive of interest and costs, on the judgment of the trial court, exceeds \$6,000." Section 2 provides that the clerk shall, upon the taking effect of the act, docket in the Supreme Court all cases then pending in the Appellate Court, not ready for distribution, the jurisdiction of which is by said act conferred upon the Supreme Court. Then follows this proviso: "That all cases other than those herein mentioned shall remain in the Appellate Court, and be heard and finally determined by said Appellate Court as though this act had not passed." It may be admitted that it was competent for the General Assembly to cut off this court's jurisdiction on appeal from the Appellate Court. We are of opinion, however, that this is not the effect of said act as applied to cases of the class in question, which were ready for distribution at the time the law took effect. A repealing clause is subject to construction, the same as any other provision of statute. *Arnett v. State ex rel.*, 80 N. E. 153, 8 L. R. A. (N. S.) 1192; 26 Am. & Eng. Ency. of Law, 720. Even an express declaration of a repeal will not be given that effect when it is apparent that the Legislature did not so intend. We observe, in the first place, that as applied to cases in which more than \$6,000 is in controversy upon the judgment the statute continues the legislative policy of this state for many years to give this court final jurisdiction for the purposes of review of this class of cases. What reason could there be, therefore, for permitting certain cases of this class to be conclusively determined by the Appellate Court? A construction is to be preferred which carries out the general policy; thus

leaving all interests unimpaired. 26 Am. & Eng. Ency. of Law (2d Ed.) 758; *Taylor v. Strayer*, 167 Ind. 23, 78 N. E. 236; *State v. Kates*, 149 Ind. 46, 48 N. E. 365. In determining whether it was the legislative purpose by the repealing clause absolutely to repeal subdivision 3 of section 10 of the act of 1901 (page 567, c. 247), the fact must not be lost sight of that section 17 of the latter act provides that, if a cause be appealed to the Supreme Court from the Appellate Court, "the judgment of the division of the Appellate Court is thereby vacated." We would, therefore, have the startling consequence, as applied to cases which had been decided by the Appellate Court and were pending on appeal in this court at the time the act of 1907 took effect, that, if the provision for repeal were literally followed, there would not even remain the judgment of the Appellate Court, so that, whatever might have been the judgment of the latter court, the judgment of the trial court would have to prevail; the fact being that the act of 1907 had deprived us of jurisdiction, while section 17 of the act of 1901 had operated to vacate the judgment of the Appellate Court. It cannot be presumed that such a result was contemplated by the Legislature, when it added the repealing clause to the act of 1907. Therefore we are led seriously to doubt the proposition that said clause should be given an unrestricted operation. But we do not rest our conclusion on the above consideration. The proviso of section 2 provides that distributed cases of the class in question "shall be heard and finally determined by said Appellate Court as though this act had not been passed." Looking at the question from this viewpoint, it appears that, if the situation stood as to such cases as though the act of 1907 had not been passed, that court never did possess the power of final determination. The word "final," therefore, appears to have been used, as it frequently is in reference to judgments, as denoting the essential character of the judgment, and not the mere consequences thereof. 19 Cyc. 532. If the Appellate Court is to hear and determine the case as if the act of 1907 had not been passed, it follows that said court has never had, and therefore is still without, the power to render a judgment which shall be final, using that word in the sense of conclusive. Counsel for appellee find themselves constrained to argue as to the proper construction of the act as one of an ambiguous character, but, in view of the considerations above suggested, we can but regard such implied admission as leading to the conclusion that, so long as it is a matter of construction, such consequences should be avoided. "Statutes will be construed in the most beneficial way which their language will permit to prevent absurdity, hardship, or injustice, to favor public convenience, and to oppose all prejudice to public interest. The considerations of evil and hardship may properly exert influence in giving a construction

to a statute when its language is ambiguous or uncertain and doubtful." Sutherland, Statutory Construction, § 34. The motion to dismiss is overruled.

Heckman came to his death in a collision between a street car of the Indianapolis Street Railway Company and a freight train of the Indianapolis Union Railway Company, which occurred at the intersection of the latter's tracks with East street, in the city of Indianapolis. The street runs north and south, and the steam railway tracks cross it at right angles. On the day in question the street car, which was running north, came into collision with a locomotive (No. 11) attached to several freight cars, which was going west on the north track of the steam railroad. Heckman, who was a brakeman of the Indianapolis Union Railway Company, and as such was riding on said locomotive, jumped therefrom, and was killed, by reason of the fact that the street car was struck by another locomotive (No. 4) which, with a train of cars, was running east on the south track of said company. The case was tried on the ninth and tenth paragraphs of the complaint, and resulted in a verdict and judgment against both of said appellants. We shall not attempt to set out all of the averments of the ninth paragraph of complaint, but only so much thereof as is relevant to the objections which appellants severally urge against it. It is therein charged that the street railway company's servants who were in charge of said street car knew that trains of the Union Railway Company passed over said crossing at frequent intervals, and could by the exercise of reasonable care have seen said locomotives approaching before going upon the tracks; that the street railway company negligently permitted its said car to enter upon said tracks without sending the conductor thereof or any other person in front of said car to ascertain whether locomotives or cars were approaching as required by an ordinance of the city of Indianapolis approved February 9, 1901, and in full force and effect on the 26th day of November, 1902 (the day of the collision). The ordinance referred to is then set out. It is further charged that the Indianapolis Street Railway Company negligently failed to make reasonable or proper investigation in order to ascertain whether locomotives or trains were approaching said crossing, and negligently ran said street car on and upon said tracks and crossing and in front of engine No. 4; that the servants of said street railway company in charge of said car knew, or by the exercise of reasonable care and diligence could have ascertained and known, before attempting to cross said tracks, that the locomotive and train approaching from the east would strike and collide with said car, and that, if said collision occurred, there would be danger of a collision with the train coming from the west; that the brake on said street car was worn out and out of repair, and, when the servants

in charge of said car discovered the approach of said locomotive No. 11, the brake on said car, by reason of its said worn and defective condition as aforesaid, failed to work, and they were unable to stop said car, but negligently ran the said car upon the tracks and crossing of said steam railway, and the said car struck and came into collision with engine No. 11, and the front end of said street car was turned to the west; that at or about the time of said collision Heckman, who was in a position of peril on account of such impending collision, in order to avoid the danger, jumped to the ground on the south side of said locomotive; that at that time, without the knowledge of said decedent, said locomotive No. 4, in charge of an engineer and conductor, the servants of the Indianapolis Union Railway Company, was being run backward at a high and dangerous rate of speed—that is to say, at the rate of more than four miles per hour, to wit, at the rate of eight miles per hour, in violation of an ordinance of said city "approved March 12, 1866, which is, and was at the time of the injury of said decedent as follows" (here the speed ordinance limiting the speed of locomotives and cars to a rate of speed of four miles per hour is set out). It is further alleged that the servants in charge of said locomotive No. 4 saw or could have seen the street car upon the crossing, and might have stopped the locomotive in time to have avoided the collision, if it had not been that they were running at said high and unlawful rate of speed, but, because of that, it was impossible for them so to do after they saw or could have seen the street car and the locomotive in collision; that the servants of the street railway in charge of said car knew, before entering upon said crossing in front of locomotive No. 11, or could have known by the exercise of ordinary care, and by complying with the provision of the aforesaid ordinance, that locomotive No. 4 and the train of cars attached thereto was approaching at such high, dangerous, and unlawful rate of speed, and that, by reason thereof, it would be impossible for the servants of the Indianapolis Union Railway Company to stop said locomotive and train of cars in time to avoid said collision, and that, by reason of the negligence of defendants as herein alleged, and without knowledge of said decedent, he lost his life.

The Indianapolis Street Railway Company has not questioned the sufficiency of the tenth paragraph of complaint. Counsel for said company insist, however, that the ninth paragraph was insufficient, on the ground that it is not alleged that the servants of said company were in the line of their duty. A sufficient answer to this proposition is that said paragraph directly charges the company with negligence, and that it is charged that decedent met his death by reason of the negligence of the defendants as therein alleged.

It is further urged by counsel for the street railway company that the ninth para-

graph affirmatively shows that Heckman was killed as a result of the collision of locomotive No. 4 with the street car, and from this it is argued that the street railway company had no reason to apprehend that the Indianapolis Union Railway Company was violating the speed ordinance, and that, therefore, the prior collision should be regarded as a remote rather than a proximate cause of the injury. Assuming the validity and operation of the speed ordinance as to the steam railway company, we have a case in which the two companies were contemporaneously engaged in the commission of unlawful acts. Each, in violation of law, was proceeding to the point of intersection, where the street car, owing to the nonresponsible act of the engineer of locomotive No. 11, would be brought into collision with locomotive No. 4, thus bringing into conjunction the consequences of the unlawful acts above referred to. Both ordinances had been adopted, as we must presume, for the purpose of increasing the margin of safety at the crossing, and, owing to a mutual disregard of the law on the part of the servants of the two companies, a consequence which the ordinance was designed to guard against happened. The unlawful presence of the street car upon the steam railroad tracks at that particular time, although the car had been stopped by the first collision, was still a continuing factor in the fatal accident which followed. It was not necessary that the servants of the street car company should have been able to apprehend the concrete menace which attended upon their neglect to make out a case of negligence against them. *Chicago, etc., R. Co. v. Pritchard*, 79 N. E. 508, 9 L. R. A. (N. S.) 857; 1 *Street, Foundations of Legal Liability*, 104. It is enough, it appearing that the original act of negligence was reasonably calculated to eventuate in the second collision, that the injury, in the precise manner of its occurrence, now appears to have been such a natural consequence of such negligence as to warrant the conclusion that the street car company was really responsible for the injury. *Chicago, etc., R. Co. v. Pritchard*, supra; *Hill v. Winsor*, 118 Mass. 251; *Hoepper v. Southern Hotel Co.*, 142 Mo. 378, 44 S. W. 257; *Thompson, Com. on Negligence*, § 59. Distinguishing between causes and effects, there was abundant warrant for the conclusion that the case was one of strictly contemporaneous negligence. It appears to us that the action was properly brought against both defendants. *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; *Lane v. Atlantic Works*, 111 Mass. 136; *Village of Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, and note to this case as reported in 16 Am. St. Rep. 248; *Flaherty v. Minneapolis, etc., R. Co.*, 39 Minn. 328, 40 N. W. 160, 1 L. R. A. 680, 12 Am. St. Rep. 654. And see *Louisville, etc., Ferry Co.*

v. Nolan, 135 Ind. 60, 34 N. E. 710. The editor of the American State Reports, in the course of a carefully prepared note on the subject of proximate and remote cause, says that the most frequent exception to the rule that a defendant is not, in general, liable for an independent act of negligence by a third person, "is to be found in that numerous class of cases in which a person by his negligence produces a dangerous condition of things which does not become active for mischief until another person has operated upon it by the commission of another negligent act which might not unreasonably be anticipated to occur. The original act of negligence is then regarded as the proximate cause of the injury which finally results. The principle is that the first act is regarded as being continuous in its operation up to the time of the second, and therefore, for the purposes of fixing the defendant's liability, the two acts are treated as contemporaneous." 36 Am. St. Rep. 845. Besides, the complaint shows that trains of the Union Railway Company passed such crossing, going in both directions at frequent intervals. This court has said that a railway track is in itself a warning of danger, and no traveler is warranted, without any precaution, in venturing thereon, upon the mere assumption that the company has obeyed a municipal regulation. *Mallott v. Hawkins*, 159 Ind. 127, 135, 63 N. E. 308; *Baltimore, etc., R. Co. v. Conoyer*, 149 Ind. 524, 48 N. E. 352, 49 N. E. 452; *Miller v. Terre Haute, etc., R. Co.*, 144 Ind. 323, 43 N. E. 257; 3 *Elliott on Railroads*, § 1171. Here the complaint contains an averment as to the cause of the accident; and we cannot say that the particular averments as to the manner in which the accident occurred are sufficient to overcome such charge. *Bessler v. Laughlin*, 79 N. E. 1033. This court has frequently approved the declaration that courts do not indulge in refinements and subtleties as to causation that would defeat the claims of natural justice. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Bessler v. Laughlin*, supra. The collision between locomotive No. 4 and the street car cannot, as a matter of law, on the facts pleaded, be said to have been a supervening cause, and under the averments of the paragraph of the complaint in question the question of proximate cause should have been submitted to the jury. *Chicago, etc., R. Co. v. Pritchard*, supra; *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899; *Thompson, Com. on Negligence*, §§ 161, 164. As to the speed ordinance pleaded in the ninth paragraph of complaint, we are of opinion that a fair construction of the pleading leads to the conclusion that the ordinance was in force at the time of the injury. *Madison, etc., R. Co. v. Taffe*, 37 Ind. 361. It does not appear to us that said ordinance, which was passed by authority of Acts Sp.

Sess. 1865, p. 3, c. 1, was repealed by the act of March 6, 1891 (Acts 1891, p. 137, c. 97), governing cities of more than 100,000 inhabitants. The latter act gave the right "to regulate the speed of horses, wheeled vehicles, cars and locomotives," and also "to secure the safety of citizens and others in the running of trains in and through said city." This was quite the equivalent in breadth of the act of 1865, and therefore, under the express provision of the latter act, the ordinance was not repealed. See section 3772, Burns' Ann. St. 1901. Decedent did not assume the risk that the engineer upon locomotive No. 4 would violate the law. *Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; *Chicago & Erie R. Co. v. Lawrence* (on rehearing at this term) 82 N. E. 768. The ninth paragraph of complaint sufficiently showed that the negligence of the Indianapolis Union Railway Company was a proximate cause of the injury. We hold that said paragraph is not open to any of the objections which have been urged against it.

It is objected on behalf of the Indianapolis Union Railway Company that the tenth paragraph of the complaint does not charge that locomotive No. 4 was running in excess of the ordinance rate of speed, or that at the time of the collision it was negligently run. It must be admitted that said paragraph does not sufficiently show a violation of said ordinance, but nevertheless we think that it was sufficient on demurrer. It is charged in said paragraph "that at said time, without the knowledge of the decedent, an engine of the defendant Indianapolis Union Railway Company, known as 'engine No. 4,' in charge of an engineer and conductor, employes of the defendant Indianapolis Union Railway Company, approached from the west," and "negligently ran against and collided with the said street car in the position aforesaid, and threw the said street car from the tracks," etc. While the allegation of negligence is very general, yet it was sufficient on demurrer. *Indianapolis, etc., R. Co. v. Taffe*, 11 Ind. 458; *Indianapolis, etc., R. Co. v. Keely*, 23 Ind. 133; *Terre Haute, etc., R. Co. v. Graham*, 46 Ind. 239; *Baltimore, etc., R. Co. v. Reynolds*, 33 Ind. App. 219, 71 N. E. 250; *Railroad v. Davis*, 104 Tenn. 442, 58 S. W. 296; *Chattanooga, etc., Co. v. Walton*, 105 Tenn. 415, 58 S. W. 737; *Davidson v. Chicago, etc., R. Co.*, 98 Mo. App. 142, 71 S. W. 1069; note to *King v. Oregon Short Line R. Co.*, 59 L. R. A. 209. The paragraph predicates negligence on an act, namely, the collision, and the charge shows a direct invasion of the decedent's rights.

It is further asserted by counsel for said company that the negligence charged was the negligence of persons having charge of locomotive engines, under the fourth subdivision of section 1 of the employer's liability act (section 7083, Burns' Ann. St. 1901), and that the doctrine of assumed risk is appli-

cable to cases arising under said fourth subdivision—citing *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460. It is expressly pointed out in that case that the co-servant doctrine is not to be applied in those cases where the statute creates a liability on the part of the master for the delinquency of a particular class of servants, for the reason that such a holding would maintain in full vigor the co-servant rule which the statute was designed to modify. Besides, as shown in connection with the discussion of the sufficiency of the ninth paragraph of complaint, decedent could not, as a co-servant, assume the risk of a violation of law. We cannot hold the paragraph in question bad on account of remote conjectures as to what decedent might have perceived and done to have avoided the consequences of the collision. Counsel for said company do not question that it sufficiently appears that the acts done by those in charge of locomotive No. 4 were done in their capacity as servants of said company, and therefore it may be answered, as respects the claim, that it is not shown that the act of the company was the proximate cause of the injury that the general averment that decedent's death was caused by the negligence alleged, sufficiently shows said fact. *Bessler v. Laughlin*, 79 N. E. 1033. The tenth paragraph of complaint was somewhat inartificially framed; but it can at the least be said that counsel for said company have failed to point out any sufficient reason for sustaining a demurrer to that pleading.

Each of appellants in this case, by respective counsel, severally contend that the answers of the jury to interrogatories were such as to show that such appellant was not guilty of negligence proximately contributing to decedent's death. In substance, the answers state that the first collision was a very slight one; that locomotive No. 4, with cars attached, was running at the rate of 12 miles per hour at the time of the first collision, in violation of said speed ordinance; that at that time said train was 250 feet away, and could not have been stopped in time to have avoided the collision, although it could have been stopped had it been running at the rate of 4 miles per hour; that the cog did not slip out of the ratchet wheel of the brake on the street car, thus letting off the brake, and that the failure of the engineer of locomotive No. 4 to begin to stop his train promptly when he saw the first collision was not the sole and proximate cause of the second collision. Question 38, propounded to the jury by the street railway company, was as follows: "What, if any, careless or negligent act of any person engaged in running said street car caused or helped to cause said first collision?" To this the jury answered: "The act of the conductor in beckoning the motorman to come on." There is certainly nothing in the answer to interrogatories to show that the negligence

of each company in approaching the crossing was not a proximate cause of the injury complained of. The negligence of the steam railway company in running in disregard of the speed ordinance was certainly a proximate cause of the second collision, and with trains coming from both directions, the west-bound train being so near as to bring it and the street car in collision as the latter was passing the crossing, it certainly cannot be said as a matter of law that the servants in charge of the street car were justified in taking the chance that the east-bound train would be under perfect control. Besides, whether we look to the evidence introduced, or act upon such evidence as would have been admissible under the issues—the rule applied to answers, to interrogatories—it may be said that both the conductor and the motorman had abundant opportunity to observe and know the fact that locomotive No. 4 was moving faster than the ordinance authorized. The engineer of said locomotive testified that, when he first saw the street car, he was 400 feet from the crossing, and the street car about 250 feet therefrom; that he then sounded the whistle, and started the bell, which operated automatically, ringing; that, when the street car reached the crossing, the motorman slowed up; that the conductor of the street car ran ahead three or four feet, and that just as the car got on the crossing and stopped it was struck by locomotive No. 11. The latter locomotive, according to the other evidence, was moving very slowly. There was also evidence that from 250 to 350 trains passed over this crossing every day, and that the average speed at which they were operated on the day in question, and for several months theretofore, was about eight or ten miles an hour. In these circumstances there appears to be no basis for the claim that the street car company was not guilty of negligence which proximately contributed to the injury. If its servants had observed the care which is exacted of other travelers at railway crossings, they might have been sufficiently advised of the danger and of the extent thereof. If they perceived, as they should have done, the extreme hazard they were taking of coming into collision with locomotive No. 11, it certainly cannot be said as a matter of law that they were justified in attempting to cross in supine disregard of danger from east-bound trains.

The Indianapolis Union Railway Company complains that the court erred in permitting the introduction of oral evidence that the crossing in question was within the corporate limits of the city of Indianapolis. A fact of this character is not required to be proved by the records where the question arises collaterally. *Shea v. City of Muncie*, 148 Ind. 14, 46 N. E. 138; *Hewitt v. State*, 121 Ind. 245, 23 N. E. 83; *Coonrod v. Madden*, 126 Ind. 197, 25 N. E. 1102.

It cannot be said that the speed ordinance

became invalid from a failure afterwards to limit the speed of electric cars. The fact that such cars are more readily controlled than steam cars affords just ground for distinguishing between them in respect to speed.

A reversal is sought by the Indianapolis Street Railway Company because of a refusal to give its instruction No. 3, relative to the quantum of care required being ordinary. Instruction No. 4, given by the court on its own motion, contained a full exposition of this subject; and, if it was in any wise subject to critical objection, the defect was one which was common to both instructions. We should, however, be compelled to refuse to reverse this case if there had been an omission to give an instruction on the subject of ordinary care. The jury, by its answers to interrogatories, discredited the testimony offered by said appellant that the motorman was unable to stop the car because the brake failed to work; and this left the company without a shred of defense. There remains only the hypothesis that the servants of the street car company attempted to cross the south track when the west-bound train was almost upon the car, and with the east-bound locomotive, on the north track, but a few hundred feet away, with the bell ringing, and having whistled for the crossing. This was the grossest negligence.

Complaint is made by said appellant of a number of instructions following instruction No. 4. These objections are that the court informed the jury that upon proof of the material allegations of the complaint the plaintiff might recover, and afterwards, without explaining that contributory negligence was a matter of defense, proceeded to give a general instruction that, if the jury found that deceased was guilty of negligence, it would defeat the action; that the court instructed in subsequent instructions that upon the finding of certain facts the jury might find for appellee against said appellant, without in that connection calling attention to the subject of contributory negligence, and that the court gave certain instructions relative to a finding for the Indianapolis Union Railway Company in the event that decedent was guilty of such negligence, without in that connection referring to the effect of such negligence as to the Indianapolis Street Railway Company. Without pausing to determine whether the instructions were really misleading on account of the matter stated, we dispose of the questions by the holding that there was no question of contributory negligence in the case so far as the street railway company was concerned. It appears from the evidence and physical circumstances that it suddenly became evident to the crew upon locomotive No. 11 that a collision with the street car was imminent. Decedent, who was standing on the south side of the gangway of said locomotive, jumped to the ground. At least one, if not two, men, were in the opposite gangway, and two or three

men jumped from that side. The north end of the street car was pushed by the first collision until the front end of it was next to the cab of the locomotive. The car was about 40 feet long. A brakeman who had jumped from locomotive No. 4 testified to having seen Heckman pass around the south end of the car just before the second collision. Another witness claimed that Heckman jumped when he was 30 or 40 feet from East street. At any rate, he was caught when locomotive No. 4 ran into the car, as said car was dragged some distance. The burden was on said appellant to show contributory negligence, and it cannot be said that there was any evidence to warrant such a finding. The most that can be said of Heckman's conduct in jumping is that it might have seemed safer to have remained on the locomotive, or that he might have jumped on the other side. But there was sudden peril ahead of him; and time for deliberation was lacking. In these circumstances the party who caused the peril ought not to be heard to say that decedent did not take the course which was most prudent. *Clarke v. Pennsylvania Co.*, 132 Ind. 199, 31 N. E. 808, 17 L. R. A. 811; *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143; *Indianapolis, etc., R. Co. v. Carr*, 35 Ind. 510; *Lake Erie, etc., R. Co. v. McHenry*, 10 Ind. App. 525, 37 N. E. 186. As to the decedent's conduct subsequently, the matter is involved in such entire uncertainty as to afford no possible basis for a conclusion that he was guilty of contributory negligence. Whether he was hurt before the second collision does not appear; whether he knew of the approach of locomotive No. 4 is unknown; whether he fell in jumping, or what was his mental condition while in peril of the second collision, were also matters which were wholly conjectural. If it can be said that the instructions did not clearly place the general doctrine of contributory negligence as a defense before the jury, it is a sufficient answer thereto to say that any other finding on that subject than that which the jury impliedly made by their general verdict would have been wrong upon the evidence.

The verdict was not contrary to law because the ordinance relative to the crossing of steam railroad tracks was not introduced in evidence, as is contended by the street railway company. The ninth paragraph of complaint contained an independent charge that said appellant negligently failed to make reasonable or proper investigation in order to ascertain whether locomotives or trains were approaching and negligently ran its car in front of locomotive No. 11 and locomotive No. 4. It was not necessary, therefore, that appellee should recover on proof of a violation of the ordinance.

A few minor points, made by the Indianapolis Union Railway Company, have not been directly passed on by us, but our general ob-

servations in the course of this opinion suffice to dispose of them. In our opinion the result below was right, and prejudicial error has not intervened.

The judgment of the trial court is affirmed.

(189 Ind. 511)

BARNES et al. v. WAGENER. (No. 21,126.)
(Supreme Court of Indiana. Dec. 17, 1907.)

1. APPEAL—FINAL JUDGMENT—RECORD.

An appeal will be dismissed where the record does not show a final judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 2286.]

2. SAME — DECISIONS REVIEWABLE — FINAL JUDGMENTS.

Under Burns' Ann. St. 1901, § 644, providing that appeals may be taken from the circuit and superior courts to the Supreme Court by either party from all final judgments, etc., a final judgment, within the meaning of the section, is one which makes a final disposition of the main case so far as there is power in the trial court to decide on the questions presented by the issues therein, and a judgment is not final unless it disposes of all of the issues as to all of the parties in the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 426.]

3. SAME.

To an application to the board of county commissioners for a license to retail intoxicating liquors, a remonstrance was filed, raising questions as to the validity of the statutes regulating the retail traffic in intoxicating liquors. The remonstrance was rejected by the board on the ground that it did not state any legal ground therefor. The board then heard evidence in support of the application and granted applicant a license. From this order remonstrators appealed to the circuit court, which sustained a demurrer to the remonstrance, adjudging that remonstrators take nothing, and that applicant recover his costs, etc. *Held*, that since, under the statute, applicant was required to prove in the circuit court that he was not in the habit of becoming intoxicated, and was otherwise a fit person to be intrusted with a license, and the judgment left these matters undetermined, it was not a final judgment within Burns' Ann. St. 1901, § 644, authorizing appeals to the Supreme Court from final judgments.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Application by Michael Wagener for a license to sell intoxicating liquors, to which Thomas C. Barnes and others filed a remonstrance. The remonstrance was rejected, and a license granted, and an appeal taken. From a judgment of the circuit court on appeal sustaining a demurrer to the remonstrance, remonstrators appeal. Appeal dismissed.

Charles F. Holler, for appellants. Hoban & Steis, for appellee.

JORDAN, J. Appellee has moved to dismiss this appeal upon the ground that no such final judgment was rendered by the lower court from which an appeal will lie to the Supreme Court. The facts in the case, so far as they are pertinent to the consideration of the question presented by the motion to

dismiss, appear to be as follows: Appellee applied to the board of commissioners of St. Joseph county, at the May session thereof, 1907, for a license to be granted to him to sell intoxicating liquors in a certain ward in the city of South Bend. This application was made under the laws of this state which authorize the granting of a license by the board of commissioners to retail intoxicating liquors. See section 7278, Burns' Ann. St. 1901, et seq. Appellants filed before the board of commissioners at said session what is denominated a "remonstrance" against the granting of a license to appellee. By this remonstrance they sought to present substantially the same questions as were raised and decided by this court in *Sopher v. State*, 81 N. E. 913, in respect to the invalidity of the laws of this state which regulate and restrict the traffic at retail of intoxicating liquors. Appellee filed a motion requesting the board of commissioners to strike out and reject the remonstrance on the ground that it did not state any cause of remonstrance under the laws of this state. This motion, over the exceptions of the remonstrators, the board sustained, and thereafter proceeded to hear evidence in support of appellee's application, and thereupon granted him a license to retail intoxicating liquors upon the premises described in his petition. From this order of the board said remonstrators appealed to the St. Joseph circuit court. In the latter court, appellee renewed his objections to the remonstrance, by what is termed a "demurrer," alleging therein that it did not state facts sufficient to constitute a cause of remonstrance. This demurrer was sustained by the court, to which ruling the remonstrators separately and severally excepted. The record then recites that "thereupon the remonstrators failed and refused to plead further, and the court renders judgment on the demurrer." This judgment is as follows: "It is therefore considered and adjudged by the court that the remonstrants take nothing by this action, and that defendant recover from the remonstrators his costs and charges in this case laid out and expended, taxed at \$—, to which the remonstrators, at the time, excepted, and 90 days' time is given the remonstrators in which to prepare and file their bill of exceptions herein. Thereupon the remonstrators pray an appeal to the Supreme Court of the state of Indiana, which is granted upon their filing an appeal bond in the sum of \$200 with the clerk of this court, within 30 days from this date, with Frank P. Fields, as surety thereon, which surety is hereby approved by the court." This appeal bond was filed and approved, and a certified transcript was filed in the office of the clerk of this court on September 25, 1907.

The errors assigned relate to the ruling of the court in sustaining the demurrer to the remonstrance. As to whether there was any final judgment whatever in the lower court disposing of the issue raised by appellee's ap-

plication, either by granting or denying him a license to retail intoxicating liquors, is not disclosed by the record in this case. As the authorities affirm, the record on appeal must show a final judgment, or the appeal will be dismissed. Elliott's App. Procedure, § 96, and cases cited. Appeals to this court can only be taken as authorized by statute, and then only, with some exceptions, from a final judgment, as provided by section 644, Burns' Ann. St. 1901. Thornton's Civ. Code, § 437. Exceptions to this general provision will be found in the statute permitting appeals to be taken to the Supreme Court from certain enumerated interlocutory orders, as provided by subdivision 15 of section 9 of an act concerning appeals, etc., as said section was amended by the Legislature of 1907. See Acts 1907, pp. 237, 238, c. 148. This appeal, however, does not come within any of the exceptions provided by this statute. It has been repeatedly held that a final judgment, within the meaning of section 644, supra, is one which makes a final disposition of the main case so far as there is power in the trial court to decide upon the questions presented by the issues therein. *Thomas, Adm'r, v. Chicago, etc., R. Co.*, 139 Ind. 462, 39 N. E. 44, and cases there cited; *Hollingsworth v. Hollingsworth*, 29 Ind. App. 556, 64 N. E. 900, and cases there cited; *Mak-Saw-Ba Club v. Coffin* (Ind. Sup.) 82 N. E. 461. See Elliott's App. Procedure, §§ 81, 82. The general rule is that a judgment in a case is not final, within the meaning of section 644, supra, unless it disposes of all of the issues as to all of the parties in the case. If there remain issues therein undetermined, or if the rights of one or more of the parties in the case are left undecided, there is, generally speaking, no such final judgment as will warrant an appeal. Or, in other words, the case must be disposed of in all of its parts so far as it is, under the issues therein, before the court. Otherwise it will not be regarded as one in which an appeal will lie to this court. Elliott's App. Procedure, §§ 80, 81, 82, 83, 84, 90, 91. Judge Elliott, in section 84, supra, says: "The general rule that appeals lie only from final judgments is so essential to the orderly administration of justice, and has so much to commend it, that it is with reason that statutory provisions creating exceptions are construed with some strictness. The doctrine is that, where a general rule exists, and a party asserts that his case forms an exception to the rule, he must show substantial grounds for his claim, or the case will be brought under the rule. This doctrine is applied with liberality to prevent appeals from intermediate rulings or interlocutory orders, for, in almost every form in which the question has been presented, the courts have exhibited their reluctance to multiply or recognize exceptions to the general rule. One who asserts that his case constitutes an exception to the rule must be prepared to show a solid basis for his

claim, or the general rule will be preferred to the exclusion of his claim."

If, under their singular remonstrance, appellants can be said to have acquired such a standing in the court of the board of commissioners that under the law they were authorized to prosecute an appeal to the circuit court from the order of the board granting a license to appellee, then, and in that case, such appeal, upon reaching the St. Joseph circuit court, stood upon its docket as an original cause therein, to be tried *de novo*, and the appeal would have operated to have suspended or vacated the proceedings and order of the board of commissioners from which it was taken. *Head v. Doehleman*, 148 Ind. 145, 46 N. E. 585, and cases there cited; *State v. Sopher*, 157 Ind. 360, 61 N. E. 785, and cases there cited. Counsel for appellant, however, apparently travel upon the mistaken theory that, by filing the remonstrance in question, a proceeding was instituted independently of that originated by the application of appellee for a license, and that the judgment of the circuit court upon sustaining the demurrer to the remonstrance, by which it was adjudged that the remonstrators take nothing, and that the defendant recover his costs, etc., was such a final judgment in the case that appellants had a right to appeal therefrom to this court. Counsel, in their brief, say: "Our position is, and we stand upon it, that the St. Joseph circuit court, in sustaining the demurrer to the remonstrance, took the remonstrance out of court, and, when appellants failed and refused to plead further, they were out of that court and with no remedy but to appeal to this court." This position is so untenable that the mere mention thereof ought to serve to disclose that fact. If appellants' contention could be sustained, any unfavorable interlocutory or intermediate order or judgment against either the applicant or a remonstrator, in a proceeding to obtain a license to retail intoxicating liquors, would enable the party claiming to be aggrieved by such order or judgment to appeal to this court before the ultimate or final judgment was rendered which decided the issues tendered by the application, and, in the event the latter judgment was adverse to the party so appealing, he might again seek the right to appeal therefrom to this court. This illustration affords a fair sample of appealing a case to this court by piecemeal, which, under a well-settled general rule, is forbidden, in the absence of some statutory exception thereto. See *Mak-Saw-Ba Club v. Coffin* (Ind. Sup.) 82 N. E. 461, and authorities there cited. In this latter case the question as to what constitutes an appealable judgment, under our statute, is fully considered. In *Castle v. Bell*, 145 Ind. 8, 44 N. E. 2, this court said: "When a person becomes a petitioner for a license to sell intoxicating liquors, under the act of 1875, the burden is cast upon him to prove, both before the commissioners

and in the circuit court, in the event of an appeal, that he is not in the habit of becoming intoxicated, and is otherwise, under the law, a fit person to be intrusted with a license to sell such liquors. *Goodwin v. Smith*, 72 Ind. 113, 37 Am. Rep. 144; *List v. Padgett*, 96 Ind. 126. This onus rests upon the applicant, and such proof is required of him before he can obtain a license, without regard to the fact that a remonstrance as to his unfitness has or has not been interposed to the granting thereof."

It is certainly evident that these issues, as involved or tendered by appellee's application in the St. Joseph circuit court, upon appeal by appellants (assuming, without deciding, that they had a standing or right under their remonstrance to prosecute such appeal), were left by the judgment from which they have appealed wholly undetermined or undecided. It therefore follows that this appeal falls fully within the prohibition of the rule affirmed by the authorities hereinbefore cited. Had the lower court, after appellants had appealed from the judgment in question, upon hearing evidence in support of appellee's application, refused to grant him a license, then certainly appellants could not in reason claim that they were aggrieved by such final judgment, and under the circumstances their appeal herein would involve nothing more upon the ruling against the remonstrance than a moot question, which this court would not be authorized to decide or determine.

It follows that the appeal herein is not prosecuted from a final judgment, within the meaning of section 644, *supra*, of our Civil Code, and therefore the motion to dismiss must be sustained.

Appeal dismissed, at the cost of appellants.

(169 Ind. 488)

EACOCK v. STATE. (No. 20,936.)

(Supreme Court of Indiana. Dec. 12, 1907.)

1. STATUTES—CRIMINAL LAW—OFFENSES—RETROACTIVE OPERATION.

A prosecution based on a transaction occurring in 1904 is not covered by the crimes act of 1905, but by the crimes act and Code of Criminal Procedure of 1881, and the amendments in force in 1904.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 342-349.]

2. THREATS—BLACKMAIL—GIFT OF OFFENSE.

The gift of blackmail under Burns' Ann. St. 1901, § 1999, punishing one who accuses another of immoral conduct with intent to extort or gain, etc., is the extortion of things of value from a person by menaces of personal injury, or by threatening to accuse him of crime or any immoral conduct, which, if true, tends to degrade and disgrace him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Threats, § 1.]

3. CONSPIRACY—OFFENSES—PLEADING.

In pleading a conspiracy to commit a felony, the essential elements of the felony intended must be as fully set forth as in an indictment for such felony.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 91.]

4. CRIMINAL LAW—OTHER OFFENSES—EVIDENCE—ADMISSIBILITY.

On a prosecution for a conspiracy to blackmail, evidence of other conspiracies to blackmail by accused is admissible to show guilty knowledge, intent, and motive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 825-829; vol. 10, Conspiracy, § 103.]

5. SAME—INSTRUCTIONS.

Where, on a trial for conspiracy to blackmail, evidence of other conspiracies to blackmail by accused was admitted, a charge that such evidence was not proof that the conspiracy charged was formed, and should only be considered if the jury found from other evidence that the combination charged had been formed, and then only on the issue of intent, was proper.

6. CONSPIRACY—BLACKMAIL—PROOF.

On a trial for conspiracy to blackmail, it is necessary for the state to prove the verbal threats as alleged in the indictment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 90.]

7. SAME.

Where, on a trial for conspiracy to blackmail a third person by charging him with seducing one of the conspirators, there was evidence of a conspiracy to extort money from the third person by threatening him with prosecution for seduction unless he settled therefor, a letter by one of the conspirators to the third person, demanding a settlement, written during the existence of the conspiracy and in furtherance of its object, was admissible as against the conspirators and as showing why the conspirators and the third person subsequently met, and as aiding in construing what was said and done at such meeting.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 101, 102.]

8. CRIMINAL LAW—EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS—ADMISSIBILITY.

Where the connection of individuals in an unlawful enterprise is prima facie established, every act and declaration of each member of the confederacy in pursuance of the original plan and with reference to the common object is the act and declaration of them all, and is original evidence against each of them, and it makes no difference at what time any one of these individuals entered into the conspiracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 989-1001.]

9. SAME—CONDUCT OF ACCUSED—EVIDENCE—ADMISSIBILITY.

Evidence that accused procured, or attempted to procure, the absence of state's witnesses, is admissible against him; and evidence that third persons procured, or attempted to procure, the absence of witnesses, is admissible against accused, where he was privy thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 782.]

10. SAME.

Where the state prima facie showed that accused was privy to what was done by third persons in procuring the absence of a witness for the state, the court properly admitted evidence of what such third persons did.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 782.]

11. SAME.

Where the court admitted proof of what third persons did in procuring the absence of a witness for the state on the theory that accused was privy thereto, the jury must determine whether or not accused was privy thereto, and, unless they find that he was, the evidence cannot be considered.

12. SAME—INSTRUCTIONS.

An instruction that unless the jury found that accused was privy to the removal of a witness for the state, procured by third persons, they should not consider the evidence of the removal, was not objectionable as making the jury the judges of the admissibility of evidence, but properly left to them the credibility of the witnesses, prima facie showing that accused was privy thereto.

13. CONSPIRACY—BLACKMAIL—EVIDENCE—ADMISSIBILITY.

On a trial for conspiracy to blackmail a third person by charging him with seducing one of the conspirators, evidence of the sexual relations between the third person and such conspirator was inadmissible, the offense charged not consisting in threatening to charge an innocent person with crime, but consisting in making such accusation with intent to extort money, etc., from him.

14. WITNESSES—CROSS-EXAMINATION—LIMIT.

It is not error to limit questions on cross-examination of a witness to the subjects of the examination in chief, and if the cross-examining party wishes to examine the witness as to new matter, he can do so by calling him afterwards as his own witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 949-954.]

15. CRIMINAL LAW—APPEAL—DISCRETION OF TRIAL COURT.

The extent of the cross-examination of witnesses in a criminal case rests in the sound discretion of the trial court, and only an abuse thereof will cause a reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3064.]

16. SAME—INSTRUCTIONS.

Instructions in a criminal case must be construed as an entirety, and if, as a whole, they correctly present the law, neither errors in instructions when considered by themselves, nor verbal inaccuracies or technical errors, are ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1990.]

17. SAME—HARMLESS ERROR.

The giving of erroneous instructions is not reversible error where accused was not prejudiced thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3154.]

18. CONSPIRACY—ELEMENTS.

It is not essential to the formation of a conspiracy that there should have been a formal agreement between the parties thereto to do the acts charged, but it is sufficient if the minds of the parties met understandingly so as to bring about a deliberate agreement to do such acts, though such agreement is not manifested by any formal words.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 33.]

19. SAME—EVIDENCE—ADMISSIBILITY.

The concurrence of minds essential to a conspiracy may be proved by direct or circumstantial evidence, or both, and the fact may be inferred where the parties are apparently pursuing the same object, whether acting separately or together by common or different means, all leading to the same unlawful result.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 103.]

20. SAME—PERSONS LIABLE.

Where two or more persons combine to commit a crime, each is criminally responsible for the acts of his confederates committed in the furtherance of the common design, and a person coming into a conspiracy after it is formed, and

assisting in its execution, is a party thereto and is liable therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 76.]

21. SAME—SENTENCE.

Where several persons charged with conspiracy are tried separately, a judgment may be pronounced against one before a conviction of the others.

22. SAME—ISSUES AND PROOF.

One charged with conspiracy with others named may be convicted on proof of a conspiracy with any of such others, without proof of a conspiracy participated in by all of them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, § 90.]

23. SAME—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction on a trial for conspiracy to blackmail, by charging one with seduction with a view to procure money from him, that the statutes on the subject of conspiracy and blackmail should not be construed so as to render one liable to indictment if he in good faith entered into an employment to bring suit for damages for seduction, or demanded satisfaction before the commencement of the suit, and such a charge, if made in good faith, is not extortion, and if the jury believe that accused, in good faith, entered into employment to sue for the seduction, accused must be acquitted, while if he did not enter into the employment in good faith, but to extort money by blackmail, a verdict of guilty should be rendered, was not objectionable as requiring accused to prove that he was acting in good faith.

24. CRIMINAL LAW—INVITING ERROR—RIGHT TO COMPLAIN.

Accused cannot complain of an instruction substantially like one requested by him, and which he claims the court erred in not giving.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3009.]

25. SAME—INSTRUCTIONS.

An instruction that if after considering the evidence, including the proof of good character of accused, the jury entertain a reasonable doubt as to his guilt, they must acquit him, but if the evidence convinces them beyond a reasonable doubt of his guilt they may so find notwithstanding his good character, is not objectionable as depriving accused of the benefit of the evidence of good character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1838-1845.]

26. SAME—PROOF OF GOOD CHARACTER—EFFECT.

Evidence of good character of accused is to be taken into consideration in determining his guilt or innocence, but proof of previous good character does not excuse crime.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 848.]

27. SAME—REQUESTED INSTRUCTIONS—AVAILABLE ERROR.

No available error is committed by the refusal of a requested instruction not signed by accused or his counsel, and delivered to the court before the commencement of the argument, as required by Burns' Ann. St. 1901, § 1892, subd. 6.

28. SAME—REFUSAL OF INSTRUCTIONS COVERED BY THOSE GIVEN.

It is not error to refuse instructions substantially embraced in those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

29. SAME—VERDICT—CONCLUSIVENESS.

The Supreme Court can reverse a criminal case on the ground that the verdict is contrary to law and the evidence, only when there is no

evidence to prove an essential element of the crime charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074-3083.]

30. SAME.

Where the evidence sustained every material allegation in the indictment, and the judge approved the verdict of guilty by overruling a motion for a new trial, the Supreme Court cannot reverse the judgment because of a conflict in the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3063, 3084.]

Appeal from Circuit Court, Tippecanoe County; Henry H. Vintor, Special Judge.

Joseph Eacock was convicted of conspiracy to blackmail, and he appeals. Affirmed.

Haywood & Burnett, for appellant. Danl. P. Flannagan, Pros. Atty., C. W. Miller, Atty. Gen., Geake, Dowling & Hadley, James Bingham, Atty. Gen., and White & Cavins, for the State.

MONKS, C. J. This is a prosecution against appellant and one Lula B. Grimes, charging them with conspiracy to blackmail one Will E. Kessler. A trial of appellant on said charge resulted in a verdict of guilty, and over a motion for a new trial final judgment was rendered against him.

As the transactions upon which this prosecution is based occurred in 1904, the same is not in any respect governed by the crimes act of 1905, but by the crimes act and Code of Criminal Procedure of 1881, and the amendments thereof in force in 1904. Miller v. State, 165 Ind. 566, 570, 571, 78 N. E. 245; Stieler v. State, 166 Ind. 548, 77 N. E. 1083; State v. Thompson, 167 Ind. 96, 78 N. E. 328; State v. Hazzard (Ind.) 80 N. E. 149.

The errors assigned are: (1) The court erred in overruling appellant's motion to quash the indictment. (2) The court erred in overruling appellant's motion for a new trial.

So much of the conspiracy and blackmailing statutes as need be considered reads: "Any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony; * * * shall, upon conviction thereof, be fined * * * and imprisoned in the state prison. * * * " Section 2260, Burns' Ann. St. 1901. "Whoever, either verbally or by any letter or writing or any written or printed communication * * * ; accuses or threatens to accuse * * * any person * * * of any immoral conduct, which, if true, would tend to degrade and disgrace such person, or in any way subject him to ridicule or contempt of society * * * with intent to extort or gain from such person any chattel, money, or valuable security * * * is guilty of blackmailing, and shall, upon conviction thereof, be imprisoned in the state prison. * * * " Section 1909, Burns' Ann. St. 1901. The gist of the felony defined as blackmailing is the extortion of money, chattels, or valuable securities from a person by menaces of personal

injury or by threatening to accuse him of crime or of any immoral conduct, which, if true, would tend to degrade and disgrace such person. In pleading a conspiracy to commit a felony the essential elements of the felony intended must be as fully set forth as in an indictment for such felony. *Gillett*, *Crim. Law* (2d Ed.) § 310; *McKee v. State*, 111 Ind. 378, 12 N. E. 510; *Musgrave v. State*, 133 Ind. 297, 305, 306, 32 N. E. 885. The indictment fully complies with this requirement, and is sufficient under the rule declared in *Motsinger v. State*, 123 Ind. 498, 24 N. E. 342; *Utterback v. State*, 153 Ind. 545, 55 N. E. 420. The court did not err in overruling appellant's motion to quash.

It is claimed by appellant that the court erred in permitting the state to introduce evidence concerning other alleged conspiracies to blackmail by appellant than that set forth in the indictment. Such evidence was properly admitted as tending to show the guilty knowledge, intent, and motive of appellant in doing what is charged in the indictment. *Higgins v. State*, 157 Ind. 57, 60 N. E. 685, and authorities cited; *Sanderson v. State* (Ind.) 82 N. E. 525; *Crum v. State*, 148 Ind. 401, 411-413, 47 N. E. 833; *Strong v. State*, 86 Ind. (dissenting opinion of Elliott, J., on pages 215-219, 44 Am. Rep. 292, which was approved in *Crum v. State*, supra, page 412 of 148 Ind., page 833 of 47 N. E.); *State v. Lewis*, 96 Iowa, 286, 297, 298, 65 N. W. 295; *Gillett*, *Crim. Law* (2d Ed.) § 870; 12 Cyc. pp. 406-411. As was said in *Gillett's Indirect and Collateral Evid.* pp. 79, 80: "Collateral crimes may be shown when they tend to prove malice, guilty knowledge, intent, motive, and the like, if such element enters into the offense charged. Conspiracy cases furnish a common illustration of this doctrine."

The court correctly instructed the jury, in effect, that such testimony was not evidence that the conspiracy charged was formed, but that the same should only be considered by the jury if they found from the other evidence beyond a reasonable doubt that the alleged combination had been formed, and then only to determine the intent and motive of the parties thereto.

The state read in evidence, over the objection of appellant, a letter signed by him to Will E. Kessler, which contained the following: "C. E. Grimes of this city has employed me in the matter wherein he claims that you have alienated the affections of his wife and seduced her. I shall be glad to see you upon this matter forthwith. If immediate attention is not given it, action will be instituted immediately."

It appears from the evidence of Lula B. Grimes, who was jointly indicted with appellant and who was a witness for the state, that she wanted "to get even" with Will E. Kessler, and told Mrs. Grace Brown, an intimate acquaintance, of her trouble with Kessler. At the request of Mrs. Brown, she

went with her to the office of the appellant, an attorney at law, where Mrs. Brown, who knew appellant, introduced her to him.

She gave the following testimony in regard to the conspiracy charged: "My name is Lula Bessie Grimes. My husband's name is Charles E. Grimes. We have been married 11 years last June. Have known the defendant, Joseph Eacock, about 18 months. Am acquainted with Grace Brown, wife of Thomas Brown. I visited the office of Mr. Eacock in August, 1904; called there with Mrs. Grace Brown, who introduced me to Mr. Eacock. Mrs. Brown told him of the purpose of my visit, and that I was an acquaintance of hers and she wanted him to do the right thing by me. He said, 'Grace, I usually do it; I always did it by you.' Told Eacock I had an engagement with Mr. Kessler, and he had stood me up. He said, 'That is all right; I am looking for such fish as that, and I will attend to him.' I said, 'This will not get me in trouble, will it?' He said, 'None in the least; I will attend to that.' I stated to Mr. Eacock what Mrs. Brown had told me, that I was a fool for working the way I had worked for the last few years; there was ways of making money easier than that, and Mr. Eacock was the man that would get it. She persuaded me to go up there with her that afternoon and introduced me to Mr. Eacock. Giving my own self a compliment, he said 'Grace was right;' that I was too good looking a woman to work the way I was working. He said he would fix Will Kessler for that. I had known Kessler almost all my life. On that occasion Eacock asked my husband's name. I told him, and he said that was all he wanted; for me to go on, and he would call me back to the office when he needed me. He asked me if Mr. Grimes had any intention to leave the city for a short time, and, if not, could I arrange any way he would be out of the city? I told him the following week he was going to Louisville. My husband went there to the encampment of K. of P., Uniform Rank. It was about August 12th. He came back about the 19th. I next saw Mr. Eacock with reference to this matter the following Tuesday, or Wednesday, at his office. He called me to his office. When I went up he wanted to know where I had been all this time; that he could not find me in the city. Told him I had been out to Thorntown. He said, 'Well, it was dead easy; I fixed Kessler all right.' He said, 'Here is \$75; you take that and keep your mouth shut.' He said something to me then about what I could do in the future. He told me if I would listen to him and do as he wanted me to do, inside of six months or a year I would be independent rich. He asked me if I would not like to make a good roll of money; I said, 'I guess not, any more.' He said, 'You are foolish.' He said, 'Here is Grace; I have got her \$10,000 within the last few years;' and he said, 'If you go down

and see ——— or ———, I don't know which, and ask him for a loan for fifty dollars—don't forget to put on your best bib and tucker, and be sure and wear a veil—ask him for a loan of fifty dollars, and in return he will ask you for security, and you disremember the security and ask him to call at your house.' He told me when I first went up he got \$250; then when I went again he said \$300 was all he could get, and it was 'dead easy.' He stated to me other persons he had gotten money from in this way with Mrs. Brown, different ones here in the city. At another time there was a business man on Main street mentioned. Mr. Eacock said he would threaten to file suit against Kessler for alienating my affections away from my husband. My husband was not with me on any of these occasions when I visited Mr. Eacock's office. My husband had no knowledge of the transactions between me and Eacock. After the grand jury commenced the investigation last winter Mr. Eacock said I must persuade my husband that he had employed him to protect himself as well as me."

On cross-examination she testified: "Got acquainted with Mrs. Brown previous to the 9th of October, 1903; acquaintance became intimate; were engaged in lodge affairs together; had no acquaintance with Eacock before that. Mrs. Brown accompanied me to Eacock's office. The first conversation with Eacock was in the main room of office; no one in the room other than Eacock, Mrs. Brown, and myself. When Mrs. Brown introduced me to Eacock, Mrs. Brown and Mr. Eacock had a little conversation, and then I talked with Mr. Eacock. Didn't hear all of conversation that Mrs. Brown had with Eacock; don't remember conversation that I heard between Mrs. Brown and Eacock well enough to detail now; can't relate the substance of it any better than I did yesterday. I don't know what Mrs. Brown and Eacock said to each other when they were talking aside from me. I went to Eacock's office to give Mrs. Brown her wishes; I can't say that I had any intention at my first call there. Mrs. Brown introduced me to Eacock, and he accepted the introduction as I did, and she told him I was an acquaintance of hers and she wanted him to do the right thing by me. He said, 'Grace, I usually do it; I always did it by you.' She went away, and Mr. Eacock and I had our little conversation. He said, 'That is all I want to know; I will do the balance.' Mrs. Brown went down the street, I don't know where. Only went there for counsel about the Kessler matter. It was only a purpose to get even, was all I had in mind—to get even with Kessler. Wanted Mr. Eacock to do for me whatever he thought was best; not to cause any trouble. Told him I had an engagement with him and he did not keep it. Did not tell him what kind of engagement I had. He seemed to understand without being told.

It was an engagement to meet Mr. Kessler at Mrs. Porter's. Didn't tell him for what purpose. I said that Kessler had stood me up and I wanted to get even. By his having stood me up, I meant he did not keep his engagement. Think I told him when it was that Kessler had failed to come to time. I answered his questions that he asked. He asked me what date, and I tried to give it to him. I think about the last of July, and I told him the place where Kessler was to meet me. He said he would attend to the balance; that he was after such fish as that. He said if I would do as he wanted me to he would have me independently rich in six months. He said if I would go to different ones and make engagements that he would attend to the rest. He suggested that I go to ———, and he told me of different other ones that would be easy ones. Mr. ——— was another. He said there was different ones. I said, 'I don't want to get in no box, Mr. Eacock.' He said, 'You will not get in no box.' He said, 'If you will do as I say, you will be rich in six months.' He told me I was too good looking a woman to make my living by hard work. He said I could make my living easily by pulling people's legs. Mr. Eacock told me his plans, and the way he proposed to go after Kessler. I was to stay in the background; was not asked to do anything in accomplishing that purpose; I was simply to allow him to manage the thing, and everything that was to be done he was to do it. Mr. Eacock asked me if Kessler owned property. Told him I thought he did, but it was in his wife's name. Don't remember that he stated any amount of money he expected to get out of him. The understanding was that he was to take my case and manage it to the best of his ability and bring Kessler to time for whatever he could."

Charles E. Grimes, the husband of said Lula B. Grimes, testified: "That he never employed appellant in said matter of Kessler, and had no knowledge of it until after it was settled, when some one 'threw it up to him.'"

It appears from the evidence of Will E. Kessler, a witness for the state, that he received said letter in the morning, and at once went to Lafayette and employed a lawyer after which appellant came to the office of Kessler's lawyer, where Kessler at first refused to settle for the amount appellant demanded, and that thereupon appellant said he would bring proceedings before evening. When recalled, Kessler testified that when "I told him (appellant) I would not give them over \$200 he turned his back upon me and said, 'I will bring suit before night if the claim is not settled to-day',—if I didn't give \$250." That this was about 10 or 10:30 in the forenoon. After this about noon Kessler settled with appellant for \$250. He paid \$300—\$250 for appellant, and \$50 for his own lawyer. He testified that he settled and paid the money "to keep down notoriety." Appellant gave receipt for said \$250, "in full of

all demands to date of every kind, character, and description growing out of tort or contract due or claimed to be due to us or either of us, there being a joint and several claim," and signed the same: "Joseph Eacock, Attorney for C. E. Grimes and Bessie Grimes, his wife."

While it was necessary for the state to prove verbal threats as alleged in the indictment, said letter was properly admitted as tending to show why the parties met; and what was said and done at said meeting must be considered in the light thereof. The verbal threats made by appellant, when Kessler refused to settle for the amount demanded, "that he would bring proceedings before evening," or "that he would bring suit before night if the claim is not settled to-day," must be considered in the light of said letter, as well as in the light of what was said at the time of said interview. The letter was a part of the transaction between appellant and Kessler as much as what was said at the interview between them. It was said by this court in *Card v. State*, 109 Ind. 415, at pages 418, 419, 9 N. E. 592: A "foundation must first be laid by proofs sufficient in the opinion of the judge to establish prima facie the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which may afterwards be done by any of the others in furtherance of such design. * * * The acts and declarations thus admitted are those only which were made and done during the pendency of the criminal enterprise and in furtherance of its objects." In this case the alleged conspiracy was still pending when said letter was sent to Kessler by appellant, and, as the same was in furtherance thereof, it was admissible in evidence under said rule, not only as against appellant, but against all the parties thereto. It follows that the court did not err in permitting said letter to be read in evidence.

During the progress of the trial, the court, over the objection of appellant, admitted evidence that Allen Boulds, an attorney for appellant, and one Pauley, had by persuasion and the use of money induced Lula B. Grimes and Charles E. Grimes, her husband, witnesses for the state, to leave this state and go to Oklahoma, and not to appear and testify as witnesses on the trial of the cause. Evidence that an accused has procured or attempted to procure the absence of a witness and there-

by prevent or attempted to prevent his testifying is admissible against him. *Underhill*, *Crim. Evid.* (9th Ed.) § 74, p. 644; *Lawson*, *Pres. Evid.* 622, 624, 625; *Collins v. Com.*, 75 Ky. 271, 272; *State v. Barron*, 37 Vt. 57, 61; *Kirkaldie v. Paige*, 17 Vt. 256; *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488; *Cruikshank v. Gordon*, 118 N. Y. 178, 187, 23 N. E. 457. Evidence that third persons procured or attempted to procure the absence of witnesses is admissible against the accused if he was privy thereto. The evidence given on behalf of the state showed, prima facie at least, that appellant was privy to what was done by Boulds and Pauley, and the court therefore properly admitted said evidence. The court by admitting said evidence did not thereby conclude the jury from determining from the whole evidence, when they came to deliberate upon the verdict, whether or not appellant was privy to procuring or attempting to procure the absence of said witnesses. The rule is the same as in a charge of conspiracy, where, if the court determines that there is sufficient evidence to establish prima facie the fact of the conspiracy, the declarations and acts of each conspirator during the pendency of the criminal enterprise are admitted in evidence against all. But ultimately it is for the jury to determine from the whole evidence whether any conspiracy has been shown, and, if they find none has been established, it is their duty not to consider the acts or declarations of the supposed conspirators which have been admitted. *Whart. Crim. Evid.* (9th Ed.) § 698; 3 *Ency. Evid.* p. 428; 1 *Thomp. Trials*, § 393; *Com. v. Brown*, 14 Gray (Mass.) 419; *Poe v. Stockton*, 39 Mo. App. 550, 557. It was upon this theory that the court below instructed the jury that, unless they found from the evidence that appellant was privy to the removal of said witnesses from the state, they should not consider the evidence given in regard to procuring said removal, but disregard the same. This instruction did not make the jury the judges of the admissibility of the evidence as claimed by appellant, but properly left to the jury the credibility of witnesses and the weight of their evidence. There was no error in admitting in evidence what was said and done by Boulds and Pauley in procuring said witnesses to go beyond the jurisdiction of the court.

Appellant complains of the action of the court in excluding evidence offered by him to show the sexual relations between Kessler and Lula B. Grimes, and the instruction of the court in regard to the same. Whether said Kessler was guilty of the immoral conduct claimed was wholly immaterial, and the court committed no error in so instructing the jury. *Motsinger v. State*, 123 Ind. 498, 501, 24 N. E. 342; *Kessler v. State*, 50 Ind. 229, 233; *People v. Wightman*, 104 N. Y. 598, 599, 11 N. E. 135. It was said by this court in *Kessler v. State*, supra: "The crime charged does not consist in the threatening to

charge an innocent party with crime or with degrading and disgraceful immoral conduct, but consists in making such accusation with the intent to extort or gain from any person his chattels, money, etc. * * * Although a person may have been guilty of crime or immorality, there is no reason why his money or property should be extorted from him by threatening to accuse him thereof. It may be for the interests of society that the guilty shall be brought to trial or punishment, but no public interest could possibly be subserved by allowing accusations to be made, even against the guilty, for the sole purpose of extortion." The court committed no error in excluding said evidence.

It is a settled rule in this state that it is not error for the trial court to limit questions on the cross-examination of a witness to the subject covered or entered upon in the examination in chief. *Hunsinger v. Hofer*, 110 Ind. 390, 394, 11 N. E. 463; *City of Aurora v. Cobb*, 21 Ind. 492, 511, 512; *Patton v. Hamilton*, 12 Ind. 256. If he wishes to examine his opponent's witnesses as to new matter, he can do so by calling them afterwards as his own witnesses. *Patton v. Hamilton*, supra. This disposes of the points made by appellant upon the refusal of the trial court to permit him to propound certain questions on cross-examination to Charles E. Grimes, a witness for the state. The cross-examination of a witness and the extent to which it may be carried rests in the sound discretion of the trial court, and only an abuse of this discretion is a cause for a reversal on appeal. *Smith v. State*, 165 Ind. 180, 183, 74 N. E. 983; *Shields v. State*, 149 Ind. 395, 402, 49 N. E. 351, and cases cited; *Ewbank*, Trial Evid. § 155. There was no abuse by the trial court of this discretion in the cross-examination of said Charles E. Grimes. On the contrary, the court could have limited said cross-examination much more than it did without violating said rule.

Appellant complains of a part of the instructions given by the court to the jury. It is settled law in this state that instructions are considered with reference to each other, and as an entirety, and not separately, or in dissected parts; and if the instructions as a whole correctly and fairly present the law to the jury, even if some particular instruction, or some instruction standing alone, or taken abstractly, and not explained or qualified by others, may be erroneous, it will afford no ground for reversal. *Shields v. State*, 149 Ind. 395, 49 N. E. 351, and cases cited; *Rains v. State*, 152 Ind. 69, 52 N. E. 450. Mere verbal inaccuracies in instructions, or technical errors in the statement of abstract propositions of law, furnish no ground for reversal when they result in no substantial harm to the defendant, or if the instructions, taken as a whole, correctly state the law applicable to the facts of the case; nor is the giving of erroneous instruction reversible error when it appears that the substantial

rights of the defendant have not been prejudiced thereby. *Shields v. State*, supra, pages 406, 408 of 149 Ind., page 351 of 49 N. E., and cases cited; *Harris v. State*, 155 Ind. 265, 58 N. E. 75; *Heyl v. State*, 109 Ind. 589, 593, 10 N. E. 916; *Musser v. State*, 157 Ind. 423, 444, 445, 61 N. E. 1; *Cleveland*, etc., R. Co. v. *Miller*, 165 Ind. 381, 386, 387, 74 N. E. 509; *Knapp v. State* (Ind.) 79 N. E. 1076.

Complaint is made by appellant of certain of the instructions given by the court in regard to the crime of conspiracy and the manner and means of its proof. It is well settled that it is not essential to the formation of a conspiracy that there should have been any formal agreement between the parties to do the acts charged. It is sufficient if the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and commit the offense charged, although such agreement be not manifested by any formal words. Concurrence of sentiment and co-operative conduct in an unlawful and criminal enterprise, and not formality of speech, are the essential ingredients of criminal conspiracy. The concurrence of will which is essential to the offense may be proven by direct or circumstantial evidence, or both; the fact may be inferred where the parties are apparently pursuing the same object, whether acting separately or together, by common or different means, all leading to the same unlawful result. *Gillett*, *Crim. Law*, § 311; 8 *Cyc.* pp. 621, 622; 3 *Greenleaf on Evid.* § 93; 3 *Russell on Crimes* (9th Am. Ed.) 165-168; 2 *Wharton, Crim. Law*, §§ 1398, 1399, 1401; *Wharton, Crim. Evid.* §§ 32, 698; *McKee v. State*, 111 Ind. 378, 383, 12 N. E. 510; *Archer v. State*, 106 Ind. 426, 432, 7 N. E. 225; *Musser v. State*, 157 Ind. 423, 442, 443, 61 N. E. 1, and authorities cited. When two or more persons combine to commit a crime each is criminally responsible for the acts of his confederates committed in the furtherance of the common design. In contemplation of law the act of each is the act of all. A person coming into a conspiracy after it is formed and assisting in its execution is deemed a party thereto, and is liable therefor. The coming in of such person does not destroy the identity of the conspiracy, but it continues the same conspiracy. 2 *Wharton, Crim. Law*, § 1399; 8 *Cyc.* 641-643, 658, note 69; 1 *Greenleaf on Evid.* (15th Ed.) § 111; 3 *Greenleaf on Evid.* (16th Ed.) § 93; *Blain v. State*, 33 Tex. Cr. R. 236, 250, 26 S. W. 663; *Ochs v. People*, 124 Ill. 399, 421, 422, 16 N. E. 662; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *United States v. Nunnemacher*, 7 Biss. (U. S.) 111, 123, Fed. Cas. No. 15,902; *McKee v. State*, 111 Ind. 378, 382, 383, 12 N. E. 510; *Den v. Johnson*, 18 N. J. Law, 87, 89, 90; *State v. Crab*, 121 Mo. 554, 563, 26 S. W. 548.

If several are charged with conspiracy and tried separately, a judgment may be pronounced against one before a conviction of

the others. *Rex v. Kinnersley*, 1 Str. 193; *People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. St. Rep. 716; *Heine v. Com.*, 91 Pa. 145, 149; 3 Chitty, Crim. Law, p. 1141. And one charged with conspiracy with others named may be convicted on proof of a conspiracy with any of the others named, without proof of a conspiracy participated in by all of them. 2 McLain, Crim. Law, § 981; *State v. Adams*, 1 Houst. Cr. Cas. (Del.) 361; *Woodworth v. State*, 20 Tex. App. 375. Said instructions in regard to the crime of conspiracy and the manner and means of proving the same are in harmony with and sustained by the foregoing authorities.

Appellant objects to instruction 22 given by the court, on the ground, stated in his brief, that it "required the appellant to establish the fact that he was acting in good faith," because "under the law he is not required to establish that fact. It is for the state to prove beyond a reasonable doubt that he was not acting in good faith." In said instruction the court informed the jury that the sections of the statute on the subject of conspiracy and blackmail which had been read to them in the instructions should not be so construed as to render a party "liable to indictment for in good faith entering into an employment to bring suit for damages against the person who has alienated the affections of his client's wife or seduced her, or for making in good faith a charge against him and demanding satisfaction before the commencement of a suit. Such a charge, if made in good faith, would not be extortion, but for obtaining just satisfaction, and in this case, if you believe that defendant in good faith entered into such employment with Charles E. Grimes, it is your duty to acquit him, even though Charles E. Grimes was not acting in good faith. But if you find beyond a reasonable doubt from all the evidence in the case that the defendant did not enter into such employment in good faith, but for the purpose of extorting money by blackmail from Will E. Kessler," etc., "as charged in the indictment, you may find him guilty as charged in the indictment." It is evident that this instruction is not open to said objection. Said instruction did not require appellant to prove that he was acting in good faith, but it informed the jury that they could not convict unless they found "from all the evidence beyond a reasonable doubt that he was not acting in good faith," etc. The instruction fully complies with the contention of appellant that "it is for the state to prove beyond a reasonable doubt that he (appellant) was not acting in good faith."

Appellant objects to instruction 23 given by the court for the reason "that it lays the burden of proof upon appellant," etc. We do not think the instruction is justly subject to this criticism, but, if it were, appellant cannot successfully complain, because said instruction is substantially the same as the one which appellant sets out in his brief as

requested by him and which he claims the court erred in refusing to give. *Elliott's App. Proc.* §§ 626, 627; *Ewbank's Manual*, § 255; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Indiana, etc., Co. v. Jacobs*, 167 Ind. 85, 93, 78 N. E. 325.

Complaint is made of instruction 25 on the ground that it deprived appellant of the benefit of the evidence of good character. It may be that the first part of said charge if it stood alone would be subject to criticism, but under the rule that not only the entire instruction, but all the other instructions given in the case, are to be considered as an entirety, it affords no ground for reversal. The last part thereof informed the jury that: "If after consideration of all the evidence, including that bearing upon good character of the defendant, the jury entertain a reasonable doubt as to the defendant's guilt, it is your duty to acquit him; but if the evidence convinces you beyond a reasonable doubt of defendant's guilt, you may so find notwithstanding his good character." It is true that evidence of a good character of one accused of crime is to be taken into consideration in all cases when introduced in determining his guilt or innocence. The instruction so declares in express terms, for the jury are told to acquit appellant if, after considering all the evidence, including the evidence in regard to his character, they have a reasonable doubt of his guilt. *Rollins v. State*, 62 Ind. 46, 54, 55. It will be observed that said instruction says: "That if the evidence convinces the jury beyond a reasonable doubt of defendant's guilt, they must so find notwithstanding his good character." As was said in *Rollins v. State*, 62 Ind., at page 55: "This last proposition must be correct. If the jury, having considered all the evidence, including that in relation to good character, as they were directed to do by the first part of the charge, were satisfied beyond a reasonable doubt of defendant's guilt, it follows that his previous good character could not avail him as a defense or entitle him to an acquittal. Previous good character does not excuse crime."

Although there may be verbal inaccuracies and ambiguities in some of the instructions complained of, yet, when they are read and construed with all the other instructions given, and all are considered and construed together as an entirety as the rule heretofore announced requires, it is clear that the same did not prejudice the substantial rights of appellant.

It is further contended by appellant that the court erred in refusing to give certain instructions requested by him. There is no available error in this, for the reason that the instructions requested do not appear to have been signed by appellant or his counsel and delivered to the court before the commencement of the argument, as required by subdivision 6 of section 1892, *Burns' Ann. St.* 1901 (section 1823, *Rev. St.* 1881, and section

1823, Horner's Ann. St. 1901). Said instructions not being signed and delivered to the court as required by the statute, no available error was committed in refusing to give the same. *Glover v. State*, 109 Ind. 391, 403, 10 N. E. 292; *Surber v. State*, 99 Ind. 71, 73, 74; *Welsh v. State*, 126 Ind. 71, 78, 25 N. E. 883, 9 L. R. A. 664. We have, however, examined the instructions requested by appellant and refused by the court, and find that, in so far as they correctly expressed the law applicable to this case, they were substantially embraced in those given by the court. Such being the case, appellant would have no ground for complaint, even if the instructions requested had been signed and delivered to the court as required by the statute. *Delaney v. State*, 115 Ind. 490, 501, 18 N. E. 49; *Stephenson v. State*, 110 Ind. 358, 374, 11 N. E. 360, 59 Am. Rep. 216, and cases cited; *Siberry v. State*, 149 Ind. 684, 694, 39 N. E. 936.

It is urged by appellant that the verdict is contrary to law and the evidence. The argument in support of said causes for a new trial goes only to the credibility of the witnesses and the weight of their testimony. It is only when there is no evidence to prove some one or more of the essential elements of the crime charged that this court is authorized to reverse a case on the ground that the verdict is contrary to law and the evidence. *Deal v. State*, 140 Ind. 354, 39 N. E. 930. There was evidence given at the trial which fully sustained every material allegation in the indictment, and the learned judge who presided at the trial of this cause, and heard all the evidence, by overruling the motion for a new trial approved the verdict of the jury. In such a case, although there was a conflict in the evidence, we cannot, under the well-established rule, reverse the judgment on the weight of the evidence. *Deiks v. State*, 141 Ind. 23, 27, 40 N. E. 120; *Livingston v. State*, 141 Ind. 131, 132, 133, 40 N. E. 684; *Deal v. State*, 140 Ind. 354, 39 N. E. 930; *Madden v. State*, 148 Ind. 183, 187, 47 N. E. 220, and cases cited; *Hire v. State*, 144 Ind. 359, 361, 43 N. E. 312; *Lankford v. State*, 144 Ind. 423, 434, 43 N. E. 444; *Robb v. State*, 144 Ind. 569, 570, 43 N. E. 642; *Hudson v. State*, 107 Ind. 372, 8 N. E. 273, and cases cited; *Kleespies v. State*, 106 Ind. 383, 385, 7 N. E. 186; *Skaggs v. State*, 108 Ind. 54, 55, 56, 8 N. E. 695; *Ewbank's Manual*, § 46.

Finding no available error, the judgment is affirmed.

(189 Ind. 430)

COOK v. STATE. (No. 20,783.)

(Supreme Court of Indiana. Dec. 10, 1907.)

1. INDICTMENT—ISSUES, PROOF AND VARIANCE—HOMICIDE—EVIDENCE—CONSPIRACY.

On a trial for homicide, where there was prima facie evidence of a conspiracy between defendants to deprive deceased of his property, in furtherance of which the homicide was committed, and the indictment charged defendants

with murder, an allegation charging them with a conspiracy is not essential to admit evidence proving the conspiracy.

2. HOMICIDE—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, where circumstances and evidence tended to prove a preconcerted arrangement on the part of defendant and his codefendants to deprive deceased of his property, and that this led to the murder, the state was entitled to have instructions given to the jury fully presenting its view of the case as shown by the evidence.

3. SAME—CRIMINAL LAW—TRIAL—INSTRUCTIONS—MISLEADING INSTRUCTIONS—REASONABLE DOUBT.

An instruction in a criminal trial that the rule of reasonable doubt "was not intended to shield those who are actually guilty from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime," is not erroneous as leading the jury to believe that the rule applies only where a person is unjustly accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1004-1022.]

4. HOMICIDE—EVIDENCE—SUFFICIENCY TO SUPPORT CONVICTION.

Evidence held sufficient to warrant verdict of murder in the first degree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 523-532.]

5. CRIMINAL LAW—EVIDENCE—ACTS OF CONSPIRATORS.

In a prosecution for homicide, acts of co-conspirators are admissible in evidence only after a prima facie showing of a conspiracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1012.]

6. CONSPIRACY—OFFENSE—CONSPIRACY TO COMMIT CRIME—EVIDENCE.

A conspiracy to commit a crime need not be proven by direct evidence, but may be inferred from circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 103, 106.]

7. CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE—ACTS AND DECLARATIONS OF CONSPIRATORS—ORDER OF PROOF.

To prove a conspiracy in a prosecution for homicide, the order in which the evidence shall be introduced is largely within the discretion of the trial judge, and acts or declarations of one of defendants may be admitted in evidence, before sufficient proof of the conspiracy has been given, upon the prosecutor undertaking to produce such proof subsequently.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1013.]

8. WITNESSES—CREDIBILITY—IMPEACHMENT.

Evidence of statements out of court by a witness in a prosecution for homicide, showing her hostility to the deceased, is admissible to impeach her.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 60, Witnesses, § 1202.]

Appeal from Circuit Court, Wells County;
C. W. Watkins, Special Judge.
William Cook was convicted of murder,
and appeals. Affirmed.

Jay A. Hindman and Elehborn & Matlock,
for appellant. C. W. Miller, William C.
Geake, Cassius C. Hadley, Henry M. Dowling,
James Bingham, Atty. Gen., Ed. M.
White, and Alexander G. Cavins, for the
State.

JORDAN, J. Appellant, William Cook, was, by a grand jury of Blackford county, indicted jointly with Ernest Sanderson, Otto Cook, Samuel Emery, Oille Sanderson, and Clara Smith, with having on October 23, 1904, at the county of Blackford, state of Indiana, feloniously, purposely, and with premeditated malice, killed and murdered one Edward P. Sanderson by shooting him with a certain revolver, then and there loaded, etc. He and each of his codefendants entered a plea of not guilty, and upon their motion the cause was venued to the Wells circuit court. In the latter court appellant was tried before a jury separately from the other defendants, and on March 3, 1905, a verdict was returned finding him guilty of murder in the first degree as charged, and assessing his punishment at imprisonment in the state prison for life. A motion for a new trial, assigning therein many reasons, was denied, and judgment was rendered by the court upon the verdict. From this judgment he has appealed, and assigns as error the overruling of his motion for a new trial. He relies for a reversal upon the giving by the trial court of instructions claimed to be erroneous, and upon the wrongful admission of certain evidence, and, finally, on the ground that the verdict of the jury is not supported by sufficient evidence and is contrary to law.

The case of Ernest Sanderson, a codefendant of appellant, was heard and determined by this court at last term, and his conviction for the same offense and upon the same indictment was affirmed. *Sanderson v. State* (No. 20,952) 82 N. E. 525. The evidence in that appeal is in many respects substantially the same as that involved in the case at bar, as are also some of the rulings of the lower court. The facts as set out in the opinion of the court in that appeal will fully serve to show many of the facts in the case now before us, and also the relationship of appellant to his several codefendants and his and their relation to the deceased, Edward P. Sanderson; also a history of the murder and the concealment of the dead body in the pond hereinafter mentioned. The evidence in this case tending to sustain the conspiracy issue herein is in the main identical with that in the *Sanderson Case*, supra. Therefore, under the circumstances, it is not essential that we again restate or set out all the facts as they appear in this appeal so far as the same are disclosed in the court's opinion in the latter case. The theory of the state in this prosecution is the same as advanced in that case, which is that appellant herein and his several codefendants conspired together for the purpose of unlawfully obtaining or securing possession of the property owned by the deceased, and that the furtherance of such purpose or design led up to or resulted in the murder. Counsel for appellant assail the rulings of the trial court in giving to the jury instructions numbered 42, 43, 45, and 46 on the ground that they were not authorized,

because the indictment does not expressly charge appellant and his codefendants with the conspiracy in controversy, and therefore it is argued that the instructions in dispute were not relevant to any issue in the case. By the charges in question the court advised the jury in regard to the principles of law relating to conspiracy and their application to that question as the same is involved under the evidence in this case. As shown, the indictment charges appellant and his codefendants jointly with having committed the crime of murder. There is an entire absence therein of any express allegation or charge of a conspiracy upon the part of the defendant. Such a charge in the indictment, however, was not necessary in order to authorize the state to introduce evidence upon the issue of conspiracy as raised by it upon its theory of the case, or to permit the court to give instructions relative to such issue. It is true that in a case in which the prosecution is based upon a conspiracy as the real offense or crime committed, then in such a case it is necessary that the conspiracy be expressly charged in the indictment before it can become an issue or question in prosecution. But in the case at bar the real offense or crime for which appellant and his codefendants were indicted and prosecuted was not a conspiracy, but was murder, and the allegations in the indictment showing that this crime was committed jointly by the parties therein named were sufficient to authorize the state to introduce any competent evidence to prove or sustain the conspiracy in controversy which the state claimed or advanced upon its theory, and authorized the court to give to the jury the instructions called in question. *Reed v. State*, 147 Ind. 41, 46 N. E. 135; *Gohns v. State*, 46 Ohio St. 457, 21 N. E. 476; *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *State v. Muncarath*, 78 Iowa, 268, 43 N. W. 211; 3 Ency. of Ev. 420.

Counsel further argue that the instructions were not proper or applicable for the reason that the state had failed by its evidence to show any combination or conspiracy on the part of appellant and his codefendants. It is true that the evidence in the case going to show this issue was mainly circumstantial. There are, however, many circumstances, as well as other evidence, tending to prove that there was a common design or preconcerted arrangement or system on the part of appellant and his co-conspirators to secure possession of the property of the deceased, and that this led up to the commission of the murder. The state, under the evidence, was entitled to maintain or support its theory in the case by any and all competent evidence, and to have the trial court, by proper instructions, fully advise the jury upon the law relative to its theory or view of the case as presented by the evidence. *Banks v. State*, 157 Ind. 190, 203, 204, 60 N. E. 1087. In section 88 of *Hughes on Instructions to Jurors* the author says: "Where there is some evidence,

though slight, tending to prove a conspiracy, that issue should be submitted to the jury by proper instructions."

The court, among its instructions given in respect to the rule of reasonable doubt in a criminal cause, in stating the purpose of this rule, said in charge No. 62: "The rule throws around the defendant the presumption of innocence, and requires the state to establish, beyond a reasonable doubt, every material fact averred in the indictment." Continuing, the court further said that the rule was "not intended to shield those who are actually guilty from just and merited punishment, but is a humane provision of the law which is intended for the protection of the innocent, and to guard, so far as human agencies can, against the conviction of those unjustly accused of crime." Appellant's counsel criticise this charge on the ground that it is misleading; that it gave the jury to understand that it is only in a case in which a person has been unjustly accused of a crime that the rule can be invoked. It is asserted that the jurors must have understood from the instruction that they must first determine whether the defendant was unjustly accused of the crime in question before the presumption of his innocence could have any consideration. Or, in other words, it is claimed they had the right to believe that it is only in a criminal cause, wherein it appears that the party charged with the offense is not actually guilty of its commission, or is unjustly accused, that the presumption of innocence is applicable. The instruction is not open to this criticism. While it cannot be said to be a model, still, when read in connection with the other charges given in the case relative to the rule of reasonable doubt, it cannot be said to be erroneous. In fact, it is substantially the same as the one in *Turner v. State*, 102 Ind. 425, 1 N. E. 869, and *Hauk v. State*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465, each of which was sustained.

As before said, the evidence in this case, with some exceptions, is substantially the same as that given in *Sanderson v. State*, supra. There is, however, some evidence in the latter case which does not appear in the record before us; still there is much additional evidence in the case at bar tending to show the guilt of appellant which does not appear in the *Sanderson Case*. The same assaults, however, made by the parties upon the deceased, and the other acts in obtaining forcible possession of his hay, horses, cattle, and other property, appear in the evidence in this case in like manner as they do in *Sanderson v. State*, supra. The facts in the case at bar disclose that appellant, for several months before the murder, entertained a very revengeful feeling or ill will against the deceased, and that on several occasions he called him vile names and made threats that he would kill him. It is shown that on Friday preceding the murder, which as the evidence

shows was committed on Sunday night, October 23, 1904, appellant, on being informed that the deceased, Edward P. Sanderson, intended to replevy the stock and property which had been taken from him by the parties in question, said: "If Preston" (meaning the deceased) "ever crossed his path he would kill him; that he had whipped him and had paid fines therefor to the amount of \$60;" and further said that he would then "just go back and do up the s— of a b——." Again, on other occasions appellant stated that he had knocked the deceased down and that he would kill him. A short time prior to the murder he, together with two of his codefendants, said that "they would lick the deceased whenever they got a chance."

On Saturday prior to the murder appellant went to the home of his sister, Ollie Sanderson, one of his codefendants, the wife of the deceased, who, however, was at that time living separately and apart from her said husband. Her home was in the immediate vicinity of the home of the deceased. On Sunday, October 23d, the date of the murder, appellant and others of his co-conspirators were together at the house of said Ollie Sanderson, and at times during the day were seen engaged in close consultation with each other. Appellant and Ernest Sanderson appear to have remained at the home of Mrs. Sanderson until Monday morning following the murder. During the following week a thorough search was made by neighbors of the deceased and other persons in an effort to discover the body. On Monday, October 31st, at the time the search was being pursued, but before the body of the deceased was discovered, appellant went to see Mr. Bollener. In the conversation which he had with the latter he said: "What about this Sanderson case?" and further said that he understood that, if they had found Sanderson's body in the woods, "they would have hung us fellows." He also said: "Well, if they find Sanderson's body I would go up and acknowledge I had killed him on account of my brothers and old mother." At the time he made these statements he appeared to be nervous and was pale. On the week preceding the murder appellant had secured a "lay-off" from the work in which he was engaged at a paper mill in Hartford City. He did not resume work again at the mill until on Monday morning following the murder. When he went to work on that morning he complained of feeling bad. After he was arrested on the charge of murder and had been confined in jail, he had a conversation with a party who testified at the trial, in which he said that he "allowed to bear up in the case as long as he could, and when he could not stand it any longer he allowed to save the other two and clear the two boys and take it all upon himself." To a fellow prisoner in the jail with him, who had been convicted of a crime and sentenced to be imprisoned from 2 to 14 years, he said, "You

got off easy," and "if he would get off that easy he would not care."

Mrs. Clara Ayers, a witness at the trial, testified that during the week subsequent to the murder she and her husband saw appellant in the vicinity of Croninger's pond in which the body of the deceased was subsequently found. She stated that he, at the time she saw him, looked pale, and as she and her husband passed him he dismounted from the bicycle upon which he was riding and watched them until they were out of his sight. Another witness testified that on several days during the week preceding the discovery of the body he saw appellant make trips by himself on a bicycle to a point near Croninger's pond. It may be said that there is much other incriminating evidence in the case pointing to the guilt of the accused, but it is unnecessary to refer to it all in detail. It was the province of the jurors to weigh and judge the evidence in the case, and in the light of all the testimony we are of the opinion that they could not have done otherwise than return the verdict in controversy. While we may say generally that we find no reversible error in the admission of the evidence about which appellant complains, nevertheless there are some particular items excepted to by him to which we will especially refer. His counsel complain of the admission of certain acts and declarations of some of his co-conspirators before, as they claim, there was any *prima facie* showing of the conspiracy in controversy. It is true that under the well-established general rule the acts and declarations of a co-conspirator, in furtherance of the common design made in the absence of the co-conspirator against whom they are offered as evidence, are only admissible after a *prima facie* case of conspiracy has been shown by competent evidence. But it is not necessary that the conspiracy be proven by direct evidence; it may be inferred from circumstances proven in the case. *Sanderson v. State*, *supra*, and cases there cited.

The general rule that the prosecution should present a *prima facie* case before the acts and declarations of a co-conspirator are admissible in evidence against another co-conspirator cannot be regarded under all circumstances as a "hard and fast rule," and cannot always, in every case, be strictly enforced. Especially is this true where the proof of the conspiracy depends upon a great amount of circumstantial evidence or a great number of isolated and independent facts, or in any case where the entire evidence given on the trial, when taken together, discloses that the conspiracy actually existed. In such cases, as authorities affirm, it is considered immaterial whether the conspiracy is established before or after the introduction of the acts or declarations of a co-conspirator. As a general rule, the order of proof of the conspiracy is a matter largely within the discretion of the trial judge. Frequent-

ly, for the sake of convenience, the acts or declarations of one co-conspirator are admitted in evidence before sufficient proof is made in respect to the conspiracy. Generally such procedure is permitted upon the condition that the prosecutor will undertake to furnish the proof required at a subsequent stage in the case. 3 *Ency. of Evidence*, pp. 425, 426; *Roscoe's Criminal Evidence* (7th Ed.) 414, 415; 1 *Greenleaf on Evidence* (16th Ed.) § 184a; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *State v. Winner*, 17 Kan. 298.

At the trial of appellant, Ollie Sanderson was introduced as a witness in his behalf. By her testimony, among other things, he sought to prove an alibi on the night of the murder. On cross-examination of this witness by the state she was asked, for the purpose of laying a foundation for impeachment, if she had not prior to the murder in question, in the presence of certain persons named, and at the time mentioned, made certain threats and expressions of ill will against the deceased. She denied that she had made any of the threats or expressions mentioned. On rebuttal, for the purpose of discrediting her by showing her ill will and hostility toward the deceased, the state called the witnesses in whose presence she had made the threats and expressions about which she had been interrogated upon cross-examination. These witnesses, over appellant's objections and exceptions, were by the court permitted to testify that on the occasions in controversy this witness had threatened to kill the deceased, and stated that if she did not kill him "the boys would," and further stated that she wished the house in which he lived would "blow up with him in it." The court, at the time this evidence was offered and introduced by the state, instructed the jury that it should consider it only upon the question of the impeachment of the witness. It is insisted by appellant's counsel that the evidence in question was in respect to matter purely collateral, and therefore the state was bound by the negative answer of the witness. They further argue that it not only contradicted the witness and tended to impeach her testimony in the minds of the jury, but it also tended to show and affect her disposition and character. The state insists that the evidence was competent for the purpose of exhibiting or revealing the ill feeling and hostility which the witness entertained towards the deceased, thereby tending to prove her animus and hostility against the state in the prosecution of appellant for the murder. The general rule is that, when a witness has been cross-examined in regard to a collateral matter, the cross-examiner is bound by his answer, and will not be permitted to contradict him by other evidence. Had the deceased, however, while in life, prosecuted a civil action against appellant for the assault and battery hereinbefore mentioned, and had the witness in ques-

tion in such action testified in favor of appellant, certainly then the plaintiff would have had the right to show her hostility or ill feelings toward him for the purpose of enabling the jury to determine the credibility or estimate they would accord to her testimony. Or, had she been a witness in the case at bar for the state, appellant, upon cross-examination, would certainly have had the right to have inquired of her whether she had expressed feelings of ill will or hostility towards him, and upon her denial she might have been contradicted by competent evidence. 1 Greenleaf on Evidence, § 450. In section 91 of Gillett on Indirect and Collateral Evidence, p. 139, the author says: "It is not, however, regarded as collateral to show prior ill feeling, interest or other matter calculated to show the animus of the witness, and substantive evidence can be introduced on this subject, as it goes to the root of the question as to whether the witness' testimony is true." Upon the same point, see *Scott v. State*, 64 Ind. 400; *Staser v. Hogan*, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; *People v. Brooks*, 131 N. Y. 321, 30 N. E. 189. The latter case was a prosecution for the crime of arson. One of the questions presented in that appeal was as to whether the hostility of a witness who had testified against the defendant could be shown by independent testimony, without first examining the witness in respect to her hostility and ill feeling. The court, in considering the question, said: "The hostility of a witness toward a party against whom he is called may be proved by any competent evidence. It may be shown by cross-examination of the witness, or witnesses may be called who can swear to facts showing it. There can be no reason for holding that the witness must first be examined as to his hostility, and that then, and not till then, witnesses may be called to contradict him, because it is not a case where the party against whom the witness is called is seeking to discredit him by contradicting him. He is simply seeking to discredit him by showing his hostility and malice; and, as that may be proved by any competent evidence, we see no reason for holding that he must first be examined as to his hostility. And such we think is the drift of the decisions in this state and elsewhere. *Hotchkiss v. Insurance Co.*, 5 Hun (N. Y.) 90; *Starr v. Cragin*, 24 Hun (N. Y.) 177; *People v. Moore*, 15 Wend. (N. Y.) 419; *People v. Thompson*, 41 N. Y. 6; *Schultz v. Railroad Co.*, 89 N. Y. 242; *Ware v. Ware*, 8 Greenl. (Me.) 42, 53; *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Day v. Stickney*, 14 Allen (Mass.) 255; *Martin v. Barnes*, 7 Wis. 239; *Robinson v. Hutchinson*, 31 Vt. 443; *New Portland v. Kingfield*, 55 Me. 172; *Hedge v. Clapp*, 22 Conn. 262, 58 Am. Dec. 424; *Cook v. Brown*, 34 N. H. 460." The state, in the case at bar, by the evidence in question, was merely endeavoring to discredit the testimony of the witness, given by her

in behalf of appellant, by showing her malice or hostility towards the deceased. It is true the latter was not a party to the action, but his murder was the subject of the prosecution. It was not for the purpose of assailing her character or disposition, as counsel insist, for, as before stated, its consideration by the jury was expressly limited by the court solely to the question of her impeachment as a witness. Certainly the evidence, under the circumstances, naturally and in reason would tend to expose or show her animus or hostility as a witness against the state in this particular prosecution. The court did not err in admitting the evidence for the purpose stated. The rulings of the trial court in admitting certain other evidence are criticised by counsel, but the particular evidence called in question cannot be said to be important or influential, and, were it conceded that the admission thereof was erroneous, it could not in reason be asserted, in view of the other evidence in the case, that it in any manner operated to impair or prejudice the substantial rights of appellant.

The case, under the facts and instructions of the court, appears to have been fairly tried and determined upon its merits, and, after a careful consideration of all the questions presented and argued by counsel, we are satisfied that no reversible error is disclosed. The judgment is therefore affirmed.

(170 Ind. 273)

SOUTHERN RY. CO. et al. v. ELLIOTT.¹
(No. 21,038.)

(Supreme Court of Indiana. Dec. 19, 1907.)

1. APPEAL—NECESSARY PARTIES.

Where judgment was rendered against appellant alone, and in favor of its codefendants, the latter were not necessary and proper parties to the appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2. Appeal and Error. § 1803.]

2. SAME—QUESTIONS REVIEWABLE—MOTION FOR NEW TRIAL—GROUNDS.

Where the overruling of a petition to remove a cause to the federal court was not assigned as a ground for a new trial, it was not reviewable on appeal on an independent assignment of error.

3. PLEADING—DEMURRER—SUFFICIENCY.

Where a demurrer on its face showed that each of the defendants demurred separately to each paragraph of the complaint, for that neither paragraph stated facts sufficient to constitute a cause of action, it sufficiently raised the question whether it stated facts sufficient to constitute a cause of action against any one of the defendants.

4. MASTER AND SERVANT—INJURIES TO SERVANT—COMPLAINT.

In an action for injuries to a brakeman while uncoupling an engine from a defective car, a paragraph of the complaint alleging that the car was equipped with old and defective timbers, drawbars, drawheads, etc., and that, when the engine was backed up against the car, the force of the collision caused the drawbars, drawheads, etc., to break, injuring plaintiff, was fatally defective for failure to contain a direct averment, except by recital, that the engine was

¹ Rehearing denied.

actually backed up and against the defective car when plaintiff was engaged in uncoupling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 816-836.]

5. SAME.

The further allegation that it was plaintiff's duty to go between the engine and car to uncouple them, and while so engaged he was, by the carelessness and negligence of the defendant, hurt and crippled, etc., the specific negligence being the use of the car in question, equipped with defective drawbars, etc., was similarly defective for want of a positive averment that defendant backed the engine against the defective car.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 816-836.]

6. EVIDENCE — PRESUMPTIONS—COMMON LAW OF OTHER STATES.

In the absence of proof to the contrary, it will be presumed that the common law is in force in Illinois.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 101; vol. 10, Common Law, § 14.]

7. MASTER AND SERVANT — FELLOW-SERVANT RULE.

The fellow-servant rule is recognized and enforced as a part of the common law.

8. SAME—RAILROADS—ENGINEER AND BRAKEMAN.

Where plaintiff, a brakeman on a freight train, was injured by the alleged negligence of the engineer in backing his engine against a defective car, plaintiff and the engineer were *prima facie* fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 493-514.]

9. SAME—NEGLIGENCE OF MASTER.

Where a brakeman was injured while attempting to uncouple an engine from a defective car, negligence could not be imputed to the railroad company by reason of the fact alone that the car was attached to the freight train on which plaintiff was braking for the purpose of taking it to the shops for repairs.

Appeal from Circuit Court, Dubois County; E. A. Ely, Judge.

Action by Louis W. Elliott against the Southern Railway Company and others. From a judgment for plaintiff against the Southern Railway Company alone, it appeals. Transferred from Appellate Court (81 N. E. 1180) under Burns' Ann. St. 1901, § 1337o. Reversed, with instructions.

A. P. Humphrey, John D. Welman, and M. W. Fields, for appellant. Cox & Armstrong and Solomon H. Esary, for appellee.

JORDAN, J. Appellee instituted this action in the lower court against appellant, the Southern Railway Company, Joseph Ruggles, and the Southern Railway Company of Indiana, to recover damages on account of personal injuries sustained by him while in the service of appellant railroad company. Appellant unsuccessfully petitioned the trial court to remove the cause to the federal court on the ground of diversity of citizenship. Upon the issues joined there was a trial by jury and a general verdict returned against appellant, awarding appellee damages in the sum of \$6,000. Answers also to interrogatories propounded to the jury were returned, along with said verdict. The jury found in

favor of the appellant's codefendants. Appellant moved for a new trial, assigning various reasons therefor. This motion was overruled, and judgment on the verdict was rendered against appellant company. A judgment was rendered in favor of the other defendants for costs.

To reverse the judgment against it, appellant prosecutes what may be considered a vacation appeal, and has assigned the following alleged errors upon which it relies for reversal: First, overruling its petition to remove the cause to the federal court; second, overruling the demurrer to the first and second paragraphs of the complaint; third, overruling the motion for judgment and upon the answers of the jury to the interrogatories; fourth, overruling the motion for new trial. Appellee presents and urges as a threshold proposition that the appeal of appellant must be dismissed because it was taken in vacation, and the codefendants, Joseph Ruggles and the Southern Railway Company of Indiana, have not been made parties to the appeal. While it is true that these latter parties were codefendants of appellant in this action, nevertheless they were not its co-parties to the judgment from which it has appealed. As heretofore shown, the verdict of the jury was against appellant, but in favor of said codefendants. Likewise the judgment of the court was against appellant, but in favor of said codefendants. Therefore, the latter can have no interest whatever in the judgment, which to reverse appellant prosecutes this appeal. They are neither necessary nor proper parties to this appeal. Therefore appellee's contention that the appeal be dismissed is denied. *Easter v. Severin*, 78 Ind. 540; *Berghoff v. McDonald*, 87 Ind. 540; *Lowe v. Turpie*, 147 Ind. 652, 692, 44 N. E. 25, 47 N. E. 150, 37 L. R. A. 233.

The first error discussed by counsel for appellant is that relating to overruling the petition to remove the cause to the federal court. We are, however, precluded from reviewing or considering this question because the ruling of the trial court denying the petition was not assigned as a reason in the motion for a new trial. It cannot be presented by the independent assignment of error. *Southern R. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973. The complaint is in two paragraphs, but each party concedes that the case was tried solely upon the second. Therefore, the first paragraph, so far as this appeal is concerned, may be considered as eliminated from the case.

Appellant's counsel next argue that the second paragraph of the complaint is not sufficient in facts to constitute a cause of action against appellant; and therefore the court erred in overruling the demurrer. Counsel for appellee urge some objections to the demurrer and against the exceptions reserved upon the ruling of the court thereon. The demurrer upon its face shows that each of the defendants for himself demurred separately

and severally to each paragraph of the complaint, for the reason that neither paragraph states facts sufficient to constitute a cause of action. The record recites that "the demurrer is now overruled by the court, to each of which rulings of the court each of the defendants separately at the time excepted." The objections advanced by counsel for appellee are that the demurrer is not good nor in proper form, and that the statement therein that neither paragraph of complaint states facts sufficient to constitute a cause of action was not sufficient to raise the question that it did not state facts sufficient to constitute a cause of action against any one of the defendants. It is further insisted that the record discloses that the demurrer was overruled, but that it does not show which of the demurrers, and that the exception to the ruling must be regarded as a ruling on one of the demurrers only, and the case of *Noonan v. Bell*, 159 Ind. 329, 64 N. E. 909, is cited in support of appellee's argument. There is no merit in appellee's contention. The demurrer was sufficient in form as to challenge the sufficiency of each paragraph of the complaint as to each of the defendants demurring. *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845. The cases of *Noonan v. Bell*, supra, and the *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460, so far as they can be said to sustain the point raised by counsel for appellee, are expressly disapproved or overruled by the case last cited. The second paragraph of the complaint, among other things, alleges that "said railway defendants were railway corporations, duly and legally organized and incorporated, the former under the laws of the state of Virginia and the latter under the laws of the state of Indiana; that these defendants operated a line of steam railway extending from Louisville, Ky., to St. Louis, Mo.; that said line in its course to and from said points passes through the county of Dubois, in the state of Indiana, and through the town of Golden Gate, in the state of Illinois"; that "among the employes working for said railway defendants on the 29th day of April, 1904, the date of the alleged injuries to plaintiff herein, was this plaintiff and the codefendant of said railway, to wit, Joseph Ruggles; that on the day aforesaid the plaintiff was employed by defendant as a brakeman on a freight train, and was at the time of the receipt of his injuries engaged in working upon the freight train run by defendants from East St. Louis, Ill., over and upon their line of railway to Princeton, Ind.; that Joseph Ruggles was employed by said railway defendants as a locomotive engineer, and as such had charge and control of the locomotive engine drawing the train upon which this plaintiff was laboring at the time he received his injuries." The paragraph further alleges that "at Mt. Vernon, in the state of Illinois, said defendants coupled and fastened their train to an old, worn, and defective car for the purpose of

hauling said car to Princeton, to have same repaired; that the drawbars, drawheads, bumpers, rods, and timbers supporting said machinery, on account of the long and continued use thereof in said car, had become and were worn, rotten, decayed, and defective, so much so that, when the engine was backed up to and against said car, the force of said collision caused by said car and said engine coming in contact with each other, on account of the rotten, decayed, and defective condition of said drawbars, drawheads, bumpers, rods, and timbers supporting same, caused said drawbars, drawheads, timbers, rods, and bumpers to break and give way; that, when said drawbars, drawheads, bumpers, and timbers broke and gave way, said engine thereby pressed up to and against said car, thereby catching plaintiff between said engine and car, mashing and permanently crippling and injuring him; that at Golden Gate, in the state of Illinois, it became necessary to uncouple said defective car from said engine; that in making said uncoupling between said engine and car it became and was the duty of this plaintiff to go between said engine and car for the purpose of uncoupling said car from said engine, and while performing his duty in making said uncoupling, and while between said car and engine engaged in making said uncoupling, he was, without any negligence or carelessness whatever upon his part, but by and through the negligence and carelessness of defendant, hurt and permanently crippled for life; that said railway defendants were guilty of carelessness and negligence at said time in using said car with old, rotten, and defective drawbars, drawheads, bumpers, and timbers supporting the same, which said drawbars, drawheads, bumpers, and timbers, on account of their rotten and decayed condition, could not withstand the force and shock of said engine being backed up to and against said car, but, on account and by reason of the rotten, defective, and decayed condition of said drawbars, drawheads, bumpers, and timbers in said car where said engine backed up and against said car, the drawbars, drawheads, bumpers, and timbers broke and gave way, and as a result thereof said car and said engine came together, thereby catching the plaintiff between the same, while he was in the line of his duty engaged at his work, mashing, wounding, and permanently injuring the plaintiff herein."

The further charge is made that "said defendants, at the time plaintiff received his hurt, knew he was between said car and said engine, attempting to uncouple said car from said engine, and they knew that the car which plaintiff was attempting to uncouple from said engine had on it at said time timbers, and well knew that, on account of the rotten, decayed, and defective condition of the same, it could not withstand great force in jamming said engine back and against said car, but, notwithstanding said

knowledge on the part of said defendants, said defendants then and there carelessly and negligently backed said engine up to and against said defective car with great force and speed, and, as a result thereof, on account of the old, rotten, and defective condition of said drawbars, drawheads, timbers, and bumpers supporting the same, they broke and gave way at the time plaintiff was attempting to make said uncoupling, and as a result of said breaking said car and said engine were jammed up together, catching plaintiff between the same, producing the injuries herein complained of; that defendants knew at said time that said drawbars, drawheads, bumpers, and timbers were old, rotten, defective, and decayed, or, if said defendants did not have direct knowledge of the same, the defects existing in said car had been there for such a time that if defendants had exercised ordinary care and inspected said car, as their duty requires them to do, they could have discovered the defective condition of said car; that plaintiff did not know, nor did he have any means of knowing, that said drawbars, drawheads, bumpers, and timbers could not withstand the force of such collision caused by said engine being backed up to and against said car; that plaintiff did not know, nor did he have any means of knowing, that said drawbars, drawheads, bumpers, timbers, and rods were rotten, broken, decayed, and defective." Possibly it may be said that the theory upon which appellee attempts to proceed in the paragraph in question is that negligence may be imputed to the defendants on account of using the car in question equipped, as alleged, with "old, rotten, and defective timbers, drawbars, drawheads," etc., and that such use was the proximate cause of the accident. The charging parts of the pleading in respect to the accident by which appellee was injured may, for convenience, be divided into three parts. The first charge is introduced by the averments that "at Mt. Vernon, in the state of Illinois, defendants coupled to an old, worn, and defective car for the purpose of hauling it to Princeton to have it repaired." In so doing, however, no negligence is attributed to appellant company. The charge, however, is made that the drawbars, drawheads, timbers, etc., of this car, which was being taken to the repair shops, had become "worn, rotten, decayed and defective," etc.; that, "when the engine was backed up to and against said car, the force of the collision caused by the engine and car coming in contact with each other, etc., caused said drawbars, drawheads, etc., to break and give way; that, when said drawbars broke and gave way, the engine thereby pressed up to and against the car, mashing and injuring the plaintiff."

The second charge is that in uncoupling the engine and the car in question it became and was the duty of plaintiff to go between the engine and the car for that purpose, and while so engaged he was, "by and through

the carelessness and negligence of the defendants, hurt and permanently crippled." The specific negligence, however, attributed to defendant is that of using said car with old, rotten, and defective drawbars, drawheads, etc., which, on account of their rotten and decayed condition, they "could not withstand the force and shock of said engine being backed up to and against said car," but, on account thereof, gave way, and the car and engine came together and injured the plaintiff. The specific fact or facts of negligence imputed to the defendants by the latter allegations control the general statement that appellee was injured "by and through the carelessness and negligence of the defendant." *Frain v. Burgett*, 152 Ind. 55, 62, 50 N. E. 873, 52 N. E. 395, and cases there cited.

By the third charge it is averred that at the time plaintiff was injured defendants "knew that he was between said car (i. e., the car which was being hauled to Princeton for repairs) and said engine (i. e., the one which was drawing the car, and which was, as disclosed, in charge of Ruggles, the engineer), and that the defendants knew that the plaintiff was attempting to uncouple said car from the engine," and that they, the defendants, knew that the timbers of this car were rotten, decayed, and defective, but, notwithstanding said knowledge of its condition, "said defendants then and there carelessly and negligently backed said engine up to and against said defective car with great force and speed, and as a result thereof, and on account of the rotten, defective condition of said drawbars, drawheads, timbers, etc., they broke and gave way at the time plaintiff was attempting to make the uncoupling, and he was jammed between said car and engine and sustained the injuries of which he complains." It is further alleged that the defendants at the time had knowledge of the condition of the car, but that the plaintiff had no knowledge of its said condition on his part.

It will be noted that there is no direct or positive averment in the first charging part of the paragraph to show that the engine was actually backed up to and against the defective car at the time plaintiff was engaged in uncoupling, etc. There is but a mere recital "that when the engine backed," etc. This recital cannot serve to perform the office of a positive or direct averment that the engine at the time of the accident "was backed," etc. It is but the equivalent of asserting that whenever the engine was backed, or if it should be backed, etc., the consequences as there stated would follow. For this reason alone, if for no other, it must, under the rules of good pleading, be held that the first charge of the paragraph is fatally defective in stating a cause of action. The second charge may be said to be impressed substantially with the same deficiency and open to the same objections as is the first. It will

be observed that it is there alleged that it was the duty of the plaintiff to go between the engine and the car for the purpose of uncoupling, and, while so engaged, he was, by the carelessness and negligence of the defendants, hurt, crippled, etc. The specific charge of negligence attributed to the defendants, as heretofore stated, is in using the car in question equipped with its rotten and defective drawbars and drawheads, which, as alleged, by reason thereof they "could not withstand the force and shock of said engine being backed up to and against said car," but, on account thereof, they gave way and the car and engine came together and injured plaintiff. There is, however, an entire absence of any direct or positive averment or allegation that the defendants, or any one of them, backed the engine against the defective car. There is only the mere recital by the pleader, apparently by way of argument, to illustrate that the equipments of the car were in such a defective condition that they could not withstand the shock of the engine being backed up to and against the car. Thirdly, the charge that at the time appellee was injured the defendants knew that he was between the car and engine and that said defendants knew of the defective condition of the car, that it could not withstand the force of jamming the engine back and against it, and that "said defendants then and there carelessly and negligently backed said engine with great force up to and against said defective car, thereby catching plaintiff between the car and engine, and injuring him," etc. As shown, the accident by which appellee was injured occurred at a point in the state of Illinois, and, as nothing to the contrary appears, we must assume that the common law is in force in the latter state. Therefore appellant's liability, under the facts as alleged, must be tested by the principles of the common law. By the latter law the fellow-servant rule is recognized and enforced. If the law in force in the state of Illinois at the time appellee was injured did not, under the facts alleged, award him a right of action against appellant, then no cause of action can be said to exist against appellant company. *Baltimore, etc., R. Co. v. Reed*, 158 Ind. 25, 62 N. E. 488, 92 Am. St. Rep. 203, 56 L. R. A. 468; *Baltimore, etc., R. Co. v. Jones*, 158 Ind. 87, 62 N. E. 994.

As declared by the facts averred, Joseph Ruggles, the engineer, and appellee, who was a brakeman, were both at the time of the alleged injury employes of appellant, and each was the fellow servant of the other, serving under a common master. Ruggles, as engineer, it appears was at the time of the accident in charge of and operating the engine in question. Therefore the allegations in the third charge of the paragraph, that the defendants carelessly and negligently backed the engine with great force, etc., shows nothing more under the circumstances than that the alleged negligent act was that of Ruggles

or some other servant of appellant who was at the time operating the engine in controversy. As the negligence alleged in regard to backing the engine with great force, etc., was that of a fellow servant of appellee, prima facie at least, under the rule of the common law, no liability is shown. We judicially know that an incorporated railroad company can operate its locomotive engine and cars only by and through its servants, and, in an action against it by a servant thereof for the recovery of damages for personal injuries sustained while in its employ, where the complaint alleges that the plaintiff was injured by the negligent manner in which the locomotive engine, car, or train of the railroad company was run or operated, the logical presumption arises that the injury complained of was the result of the negligence of a fellow servant of plaintiff. *Indianapolis, etc., R. Co. v. Johnson*, 102 Ind. 352, 356, 26 N. E. 200; *Di Marcho v. Builders' Iron Foundry*, 18 R. I. 514, 27 Atl. 328, 28 Atl. 661. The engineer in charge of the engine which, as averred, was negligently backed, etc., in its operation upon appellant's railroad, could not in any sense be regarded as standing in the relation of master of the appellee. He was under the rule of the common law only a fellow servant of appellee, and for his negligence alone the latter cannot recover in this action against appellant. In support of our holding that neither the first nor the second charge of the paragraph in question sufficiently alleges actionable negligence against appellee, see *City of Logansport v. Kihm*, 159 Ind. 68, 64 N. E. 595, and authorities there cited; *Pittsburgh, etc., R. Co. v. Lichteiser*, 163 Ind. 247, 71 N. E. 218, 660; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245, and cases there cited; *Kentucky & Indiana Bridge, etc., Co. v. Moran* (Ind. Sup.) 80 N. E. 536, and cases there cited. In this latter appeal, in considering the question raised as to the sufficiency of the complaint on demurrer, we said: "In an action at common law by a servant to recover damages against the master, founded upon the failure of the latter to perform his legal duties, to render the complaint sufficient to repel a demurrer, the act done or omitted to be done should be characterized to have been negligently done or to have been negligently omitted, as the case may be. Negligence must at least be shown by the pleading, either by direct or positive averments or from the statement of such facts therein as will clearly raise or create an inference that the injury of which the plaintiff complains is the result or proximate cause of defendant's negligence." Certainly negligence cannot be imputed to appellant company by reason of the fact alone that at Mt. Vernon, Ill., the car in controversy was coupled or attached to the freight train on which appellee was braking for the purpose of taking it to the shops at Princeton to have it repaired. Possibly the very purpose for removing the car to the shops was to repair the de-

fective drawbars, drawheads, bumpers, etc., about which appellee complains. If it was in the condition as alleged in the complaint, it was the duty of the railroad company to have the necessary repairs made before using it in the operation of its railroad. It appears that, in order to discharge this required duty, the car was being hauled to the repair shops, and while en route the engine drawing the train to which it was attached or coupled was handled or operated by the servants of the companies in charge thereof in such a manner as to cause the engine to collide with this disabled car, with such force as resulted in the injury to appellee, who had no knowledge at the time of the condition of said car.

The question which confronts us under the facts is not that the railroad companies were negligent in omitting to notify or warn appellee before the accident of the condition of the car, for no such question as this is presented by the facts alleged in the pleading. The second paragraph of the complaint is clearly insufficient, for the reasons given, to state a cause of action.

The court therefore erred in overruling the demurrer thereto, for which error the judgment is reversed, with instructions to the lower court to sustain said demurrer.

(160 Ind. 508)

FALLIS v. GAS CITY. (No. 20,991.)

(Supreme Court of Indiana. Dec. 17, 1907.)

1. HAWKERS AND PEDDLERS—REGULATIONS—LICENSES AND PERMITS—ORDINANCES—VALIDITY.

Acts 1905, p. 252, c. 129, § 53, subd. 37, authorizes cities to license, tax, regulate, etc., peddlers, etc. Acts 1901, p. 560, c. 244, defining and regulating peddling, defines, in section 1 (Burns Ann. St. 1901, § 7231p), the word "peddler" to mean to sell, or offer to sell, manufactured goods, wares, merchandise, directly to a consumer, either by going from house to house, for the purpose of selling and delivering such goods or for the purpose of taking orders for their future delivery. A city passed an ordinance declaring it unlawful for any one to engage in the business of peddling without a license and defining peddling. Held that, irrespective of the definition in the ordinance, one going from house to house for the purpose of taking orders for teas, coffees, etc., for future delivery, in violation of the ordinance, was properly convicted, since, in empowering cities to exercise the right to regulate and license peddlers, it would be presumed that the Legislature intended to clothe the word "peddler" with the significance given it by statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, *Hawkers and Peddlers*, §§ 7-9, 12.]

2. SAME—"PEDDLERS"—DEFINITION.

Aside from statute, a "peddler" may be defined as any person who, by solicitation or outcry, takes anything from house to house in any manner, and offers to sell the same for money, or barter the thing for any other thing, or whoever goes from house to house for the purpose of taking orders for anything for future delivery to be sold or bartered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, *Hawkers and Peddlers*, §§ 3-6.

For other definitions, see *Words and Phrases*, vol. 6, pp. 5260-5267; vol. 8, p. 7750.]

Appeal from Circuit Court, Grant County; H. J. Paulus, Judge.

Action by the city of Gas City against Frank T. Fallis. Judgment for plaintiff, and the defendant appeals. Affirmed.

Grant A. Dentler, and Geo. M. Elliott, for appellant. John F. Linn, for appellee.

HADLEY, J. What acts constitute a peddler?

Among the powers conferred upon cities and towns by legislative grant is the following: "Thirty-seventh. To license, tax, regulate, suppress, and prohibit hawkers, and itinerant dealers, peddlers, and pawnbrokers, and to revoke any such license." Acts 1905, p. 252, c. 129. Upon the authority of this statute, appellee city enacted an ordinance "to license and restrain hawking, and peddling within the limits of Gas City." The first section declares that it shall be unlawful for any person to engage in the business of hawking or peddling within the city limits without first obtaining a license therefor. The second section is as follows: "For the purpose of this ordinance 'a peddler' shall be held to be any person who, by solicitation, or outcry, takes anything from house to house in any manner, and offers to sell the same for money, or barter the thing for any other thing, or whoever goes from house to house for the purpose of taking orders for anything for future delivery to be sold or bartered." Other sections follow, defining hawking, prescribing the license fees for payment of the execution and issuance of licenses, and providing a penalty of not exceeding \$25 for a violation of any provision of the ordinance. This action, founded thereon, was brought before the mayor of the city, charging that appellant, on the 24th day of April, 1906, within the city limits, did then and there follow the vocation of a peddler, by then and there going from house to house for the purpose of taking orders for teas, coffees, and spices, for future delivery, in violation," etc. In the circuit court the defendant demurred to the complaint for insufficiency of facts, which was overruled, and the cause put at issue, by the general denial. Trial by the court and finding and judgment against appellant for \$5.

Appellant's only contention is that the ordinance is void, because the city council had no authority of law to ordain that the going from house to house for the purpose of taking orders for future delivery of goods shall constitute peddling. It will be granted, as argued by appellant, that the city council had no authority to broaden or enlarge the meaning of the word "peddler" beyond that intended by the Legislature in the enactment of the statute above quoted; and, so far as the validity and scope of the ordinance is concerned, that part of section 2 devoted to declaring what acts shall amount to peddling may be treated as supererogation. So if the

Legislature had been content to rest the statute upon the common and ordinary meaning of the word "peddler," we would then have been required to resort to the usual signification of the word at the time the law was passed to ascertain whether the acts of the defendant brought him within the popular meaning. But we are saved the pains of searching dictionaries and the antecedent usage by a legislative definition that outweighs the dictum of the lexicographers. By an act of the assembly, in force March 12, 1901 (Acts 1901, p. 560, c. 244; section 7231p, Burns' Ann. St. 1901), it is declared that for "the purpose of this act the word 'peddler' is defined as meaning to sell, or offer to sell, manufactured goods, wares, merchandise, directly to a consumer, either by going from house to house, for the purpose of selling and delivering such goods, or for the purpose of taking orders for the future delivery of such goods." The provision quoted appears as section 7 of an act "defining and regulating peddling" and was doubtless inspired by the argument and conclusion reached by Mitchell, J., in pronouncing the opinion of this court in *Graffy v. City of Rushville*, 107 Ind. 506, 8 N. E. 611, 57 Am. Rep. 128. In the case referred to, *Graffy*, having solicited and taken orders from citizens for shirts for future delivery by an Indianapolis manufacturer, was found guilty of a violation of an ordinance in substance the same as the one before us, and which rested upon the statute of 1881, empowering cities "to regulate and to restrain hawking and peddling." In part, it was said: "Any method of selling goods, wares, or merchandise by outcry on the streets, or public places in a city, or by attracting persons to purchase goods exposed for sale at such places, by placards or signals, or by going from house to house selling or offering to sell goods at retail, to individuals not dealers in such commodities, whether the goods be carried along for delivery presently, or whether the sales are made for future delivery, constitutes the person so selling a hawker or peddler within the meaning of the statute. In this way we are brought to the conclusion that the appellant's method of conducting business was within the prohibition against hawking or peddling, without being duly licensed." *Allen v. Sparkhall*, 1 B. & Ald. 100; *King v. Turner*, 4 B. & Ald. 510; *Gregg v. Smith*, L. R. 8 Q. B. 302; *Howard v. Lupton*, L. R. 10 Q. B. 598; *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12. The statutory definition of the word "peddler," above quoted, relates specifically to a license granted upon state authority, but it amounts to a legislative declaration of the meaning of the word as applied to the right to regulate and to license the vocation of peddling, and in empowering cities to exercise the right, and to exact a license from "peddlers," it will be presumed that the Legislature intended to clothe the word with the signification it had solemnly declared it

should have. *Jarvis v. Hitch*, 161 Ind. 217, 220, 67 N. E. 1057. But, aside from the statute, we perceive no reason for departing from the doctrine of the *Graffy* Case.

We find no error.

Judgment affirmed.

(109 Ind. 518)

McADAMS v. BAILEY et al. (No. 21,166.)

(Supreme Court of Indiana. Dec. 18, 1907.)

1. DEEDS—PROPERTY CONVEYED—AFTER-ACQUIRED PROPERTY.

Where a man dies, leaving a widow and a son, and the widow, while in possession of the fee of the one-third of the real estate which she inherited from the deceased, marries the second time, a mere quitclaim deed by the son made during the second marriage, not purporting to convey any particular interest, is ineffectual to convey his possible future interest in the property, in consequence of such second marriage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 330.]

2. CHAMPERTY AND MAINTENANCE—GRANTS OF LAND HELD ADVERSELY.

Such a deed to a stranger was invalid at common law, as tending to provoke maintenance and other contentions.

3. DEEDS—CONVEYANCE OF CONTINGENT ESTATE—VALIDITY.

Courts of equity will uphold specific assignments of mere possibilities, based on a valuable consideration, where the enforcement of the agreement will not contravene their own rules of public policy, the underlying theory being that where there is a duty to convey, the agreement will be given force as an executory contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 16.]

4. ESTOPPEL—BY DEED—TITLE SUBSEQUENTLY ACQUIRED.

Irrespective of the jurisdiction of courts of equity, it has always been possible to convey subsequently acquired interests by the operation of the principle of estoppel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 84, 91½.]

5. SAME—CONVEYANCES WITH COVENANTS.

Although an ordinary quitclaim deed will not estop the grantor from asserting an after-acquired interest, yet a distinct recital in such a deed, showing that the parties proceeded on the theory that a particular interest was thereby conveyed, may be as effectual to create an estoppel as a warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 99, 100.]

6. SAME.

The general rule as to ordinary recitals, that there can be no estoppel where the truth appears in the instrument, does not apply to a distinct undertaking for the transfer of after-acquired property, since, in such an undertaking, an estoppel exists because of the covenant of warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 99.]

7. SAME.

Where the grantor, his mother and stepfather, join in the execution of a deed, purporting to convey, not alone all of the interest by right of inheritance, which the grantor and his mother acquired from his father, but specifically stating that the interest conveyed by the grantor is, in addition to the inherited interest, the particular interest which might accrue to him after the death of his mother in consequence of her second marriage, the grantor is estopped from saying that the title to such particular interest did not pass, since the rule that there is

no estoppel where an interest passes has no application to conveyances intended to pass the whole title, although the grantor has a limited interest which is carried by the conveyance.

8. DEEDS—PROPERTY WHICH MAY BE CONVEYED—EXPECTANCIES.

Although attempted conveyances of bare expectancies by presumptive heirs are narrowly watched by courts of equity, which place the burden on the assignee to repel the inference of constructive fraud, it cannot be affirmed that such courts look with disfavor upon what are construed as executory contracts for the transfer of future interests, where common honesty requires that they should be carried out.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 16.]

9. SAME.

Rev. St. 1852, p. 250, c. 27, § 18, provides that, if a widow marry, she may not alienate the real estate held by her in virtue of her previous marriage, and that should she die during her second marriage such real estate shall go to her children by the previous marriage. The grantor, his mother and stepfather, executed a deed purporting to convey, not alone all of the interest which the grantor and his mother acquired from his father, deceased, but specifically stating that the interest conveyed by the grantor was, in addition to the interest inherited from his father, the particular interest in the property which might accrue to him after the death of his mother in consequence of her second marriage. *Held*, that such particular interest being fixed in law, and not a mere expectancy, the transaction is not an attempted sale by a mere expectant heir, and hence the deed is not void as against public policy.

10. SAME—VALIDITY—FRAUD.

Mere inadequacy of consideration is not a sufficient reason for setting aside the conveyance of a contingent interest in property, or what approximates thereto, although the doctrine is doubtless otherwise as respects sales by expectant heirs of their supposed interest in the lands of living ancestors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Deeds, § 27.]

11. SAME.

That a grantor parted with his expectancy without directly receiving any consideration, or that a parent was the beneficiary of such a transaction while the child was under the dominion of the parent, or that the transaction did not represent the clear purpose of the grantor to make the conveyance complained of, might cause a court of equity to scan the agreement closely, but such circumstances, considered singly or in combination, are not the legal equivalent of fraud.

12. APPEAL—REVIEW—PRESUMPTIONS.

The burden of proving the issue devolved upon a party never shifts, although the burden of producing evidence to satisfy the court or jury may shift during the trial, and if, therefore, in a suit to quiet title, plaintiff's contention being that defendants' rights were obtained through fraud, the trial court has not found enough of the ultimate facts to make out a case of fraud, the Supreme Court can only assume that they were not proved, and that defendants were successful in rebutting all adverse inferences, which might have been drawn as matters of fact, from that which is contained in the special finding.

13. SAME.

In a suit to quiet title, plaintiff's contention being that defendants' rights were obtained through fraud, the mere fact that a finding of certain facts might justify an inference of fraud, or call on the defendants to show a fair contract, will not aid plaintiff on appeal, since the Supreme Court cannot add to a special finding a fact, unless it results as a necessary conclusion from the facts found.

Appeal from Circuit Court, Benton County; Joseph M. Robb, Judge.

Suit to quiet title by Charles V. McAdams against Elizabeth J. Bailey and others. From a judgment for defendants, plaintiff appeals. Affirmed.

See 80 N. E. 171.

Chas. V. McAdams, for appellant. Fraser & Isham, for appellees.

GILLET, J. Appellant was plaintiff below. His action was to quiet title. The questions in the case arise upon a special finding, and, so far as now material, they relate to the ownership of a one-third interest in a tract of real estate, owned by one Elizabeth Weidenhammer in her lifetime. According to the findings she inherited said share from her first husband, James H. Lincoln. Zachariah T. Lincoln was a son by said marriage, and is still in life. Said Elizabeth, while so holding said interest, married one Simon Weidenhammer, and died during the continuance of the latter coverture. Said Zachariah inherited, upon the death of his father, a two-ninths interest in said tract of land, and afterwards contracted to sell his two-ninths interest to his stepfather, said Simon. Subsequently, in the year 1871, the latter and his wife, together with said Zachariah and the latter's wife, executed a warranty deed to Moses Fowler and Samuel Alexander, through whom appellees claim. The granting clause of the deed was of "all the interest, by right of inheritance, which the said grantors acquired from the said James H. Lincoln, deceased, in and to" a certain tract of land, which was particularly described, the description being of the tract in which said Elizabeth and said Zachariah had their respective interests as above stated. Following the granting clause, it was recited in said deed that "the interest hereby conveyed by the said Zachariah T. Lincoln is the equal undivided one-third part of two-thirds of the same, and any other interest which might accrue to said Zachariah T. Lincoln, after the death of said Elizabeth, his mother, in consequence of her second marriage with the said Weidenhammer, and the interest of the said Elizabeth, hereby conveyed, is the equal undivided one-third part of said land, and is all the entire estate except two-thirds of two-thirds due the remaining heirs, being two, of said James H. Lincoln, deceased." Said Simon negotiated the sale evidenced by said deed. He had not purchased said Zachariah's expectancy in the one-third of his father's lands which came to his mother. Said Zachariah had nothing to do with the negotiation of the subsequent sale, except to execute the deed. He executed the same to carry out his contract of sale with said Weidenhammer, and for no other purpose. The grantees paid the reasonable value of the interests which the deed purported to convey. The purchase money was paid to said Simon, and no part of it was

paid to said Zachariah. Said Simon retained of the purchase money the portion representing the two-ninths interest of said Zachariah, and gave to the said Elizabeth the balance thereof. The action was originally commenced by said Zachariah, but during its pendency he made a conveyance to appellant, who was thereupon substituted as plaintiff.

As the fee was in said Elizabeth to the one-third of the real estate which she inherited from her first husband, it does not admit of question that a mere deed of quitclaim by her son, not purporting to convey any particular interest, would have been ineffectual to convey his possible future interest therein. A deed of such an interest to a stranger would have been invalid at the common law, as calculated to provoke maintenance and other contentions. 10 Coke, 47, 48. Courts of equity, however, have, from a very early period, upheld specific assignments of mere possibilities, based on a valuable consideration, where the enforcement of the agreement would not contravene their own rules or public policy, the underlying theory being that, where there is a duty to convey, the agreement will be given force as an executory contract. 3 *Leading Cases in Equity* (Hare & Wallace's note) 307, 308, 343, 362; *Smith-hurst v. Edmonds*, 14 N. J. Eq. 416; *Varick v. Edwards*, Hoff. Ch. (N. Y.) 382; *Emerson v. B. & N. R. Co.*, 67 Me. 387, 24 Am. Rep. 39; *In re Wilson's Estate*, 2 Pa. 325; *East Lewisburg, etc., Co. v. Marsh*, 91 Pa. 96; *Ruple v. Brindley*, 91 Pa. 296; *Rodijkelt v. Andrews*, 74 Ohio, 104, 77 N. E. 747, 5 L. R. A. (N. S.) 564; note to 56 Am. St. 354. In *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9,673, which involved the validity of a mortgage upon machinery, tools, and stock in trade, to be thereafter acquired in connection with a going business, Story, J., said: "Upon the best consideration which I am able to give to the subject, I think it [the mortgage] is good and valid; courts of equity do not, like courts of law, confine themselves to the giving of effect to assignments or rights and interests which are absolutely fixed and in esse. On the contrary, they support assignments, not only of choses in action, but of contingent interests and expectancies, and also of things which have no present actual or potential existence, but rest in mere possibility only. In respect to the latter, it is true that the assignment can have no positive operation to transfer in present property in things not in esse; but it operates by way of present contract, to take effect and attach to the things assigned, when and as soon as they come in esse, and it may be enforced as such a contract in rem in equity." Irrespective, however, of the jurisdiction of courts of equity, it has always been possible to convey subsequently acquired interests by the operation of the principle of estoppel. 3 *Washburn on Real Estate* (6th Ed.) § 1916; *Rawle on Covenants* (4th Ed.) 393; 18 *Viner's Abr. tit. "Release," G*; *Jackson v. Wright*, 14 Johns.

(N. Y.) 193; *Stover v. Eycleshimer*, 46 Barb. (N. Y.) 84; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 111; *Trull v. Eastman*, 3 Metc. (Mass.) 121, 37 Am. Dec. 126; *Habig v. Dodge*, 127 Ind. 31, 25 N. E. 182; *Griffis v. First National Bank* (Ind. Sup.) 81 N. E. 490; *Smith v. Pendell*, 19 Conn. 107, 48 Am. Dec. 146. In the leading case of *Doe v. Oliver*, 5 M. & R. 202, reported in *Smith's Leading Cases*, it is declared that the interest, when it accrues, feeds the estoppel. The fruit and effect of a warranty in a deed is that it concludes the warrantor, so that all his present and future rights, that he hath or may have in the land, are thereby extinct. *Shep. Touch.* 181.

Although, as above indicated, an ordinary quitclaim deed will not estop the grantor from asserting an after-acquired interest, yet a distinct recital in such a deed, showing that the parties proceeded on the theory that a particular interest was thereby conveyed, may be as effectual to create an estoppel as a warranty. *Van Rensselaer v. Kearney*, 11 How. (U. S.) 297, 13 L. Ed. 703; 1 *Jones, Law of Real Property*, § 991. Counsel for appellant, however, insists that there can be no estoppel where the truth appears in the instrument. This is, no doubt, a general principle as applied to ordinary recitals. We question the application of this doctrine to distinct undertakings for the transfer of after-acquired property. We place our ruling, however, not on the effect of the recitals, as such, but on the ground that an estoppel exists because of the covenant of warranty. Lord Coke observes that although estoppels are odious, yet warranties are favored in law, being part of a man's assurance. 2 *Institutes*, 219. It is a mistake to liken an estoppel by deed to an estoppel in pais. It is stated in a note to *Kent's Commentaries* (11th Ed.) p. 283, that "technical estoppels by deed may conclude a party without any reference to the moral qualities of his conduct," citing *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 483, 24 Am. Dec. 51; *Dezell v. Odell*, 3 Hill (N. Y.) 215, 38 Am. Dec. 628. In *Trull v. Eastman*, supra, it was held that a deed between brothers, made with the consent of their father, purporting to convey all of the interest of the grantor in and to the estate of the father, whether the same should fall to the grantor by will or descent, accompanied by a special covenant of nonclaim, operated to rebut or bar the grantor when he afterwards sought to recover his share of the real estate. In *Habig v. Dodge*, supra, the facts were that by warranty deed a man attempted to convey to his brother the former's contingent interest in lands which were held by his stepmother by virtue of her marital right in the lands of the grantor's deceased father, she being a childless second wife. *Mitchell, J.*, speaking for the court, said: "It appears upon the face of the instrument that the grantor assumed to con-

vey and warrant title to a reversionary interest equal to the undivided one-third of the real estate previously set off to the widow. It is evident that the parties dealt upon the footing that the grantor bargained and sold, and that the grantee acquired by the deed, a one-third interest in the land in dispute, subject to the estate or supposed estate of the widow. In equity and good conscience the grantor and all those claiming under him should now be estopped to assert the contrary. See, also, *Clendenning v. Wyatt*, 54 Kan. 523, 38 Pac. 792, 33 L. R. A. 278.

The question under consideration is discussed in *Ayer v. Philadelphia, etc., Co.*, 159 Mass. 84, 34 N. E. 177, where Holmes, J., speaking for the court, said: "The estoppel is determined by the scope of the conventional assertion, not by any question of fraud or actual belief. But the scope of the conventional assertion is determined by the scope of the warranty which contains it. Usually the warranty is of what is granted, and therefore the scope of it is determined by the scope of the description; but this is not necessarily so, and when the warranty says that the grantor is to be taken as assuring you that he owns and will defend you in the unincumbered fee, it does not matter that by the same deed he avows the assertion not to be the fact. The warranty is intended to fix the extent of responsibility assumed, and by that the grantor makes himself answerable for that fact being true. In short, if a man by a deed says, 'I hereby estop myself to deny a fact,' it does not matter that he recites as a preliminary that the fact is not true. The difference between a warranty and an ordinary statement in a deed is that the operation and effect of the latter depend on the whole context of the deed, whereas the warranty is put in for the express purpose of estopping the grantor to the extent of its words. The reason 'why the estoppel is held operative is that such was the obvious intention of the parties.' *Blake v. Tucker*, 12 Vt. 39, 45." In *Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731, this court quoted with approval the following language of the Supreme Court of Missouri: "When a purchaser obtains title by deed without covenants, he of course takes it subject to all defects and incumbrances it may be under at the time of the conveyance. But if he insist upon and obtain covenants for title, he has the right, when obtained, to rely upon them and enforce their performance, or recover damages for their breach. The vendor is not compelled to make covenants when he sells land, but, having done so, he must keep them, or respond in damages for injuries sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed if made." See, also, *Watts v. Fletcher*, 107 Ind. 391, 8 N. E. 111.

It is true that the warranty is usually construed as coextensive with the granting

clause, and therefore a conveyance of all the grantor's interest, while capable of carrying the fee, is ordinarily satisfied by the passing of a present interest, since it would not necessarily be assumed that the grantor was warranting the conveyance of that to which a title could not be made in present. So to hold, would cast on the grantor an unjust obligation. Here, however, the deed goes further, and it purports to convey, not alone all of the interest by right of inheritance, which the grantors acquired from James H. Lincoln, deceased, but it specifically states that the interest conveyed by the grantor under whom appellant claims is, in addition to his two-ninths interest, the particular interest which might accrue to him after the death of his mother in consequence of her second marriage. There can be no doubt in these circumstances that said grantor, as well as appellant, who claims under him, are under the operation of an estoppel. They cannot be heard to say that the title to said contingent interest did not pass, because the former warranted the title to that which was granted, and the deed states that such contingent interest is "hereby conveyed." As was said by the New York Court of Appeals: "The rule found stated in some of the books, that there is no estoppel where an interest passes, according to the modern cases, has no application to conveyances intended to pass the whole title, although the grantor has a limited interest which was carried by the conveyance." *Thompson v. Simpson*, 128 N. Y. 270, 28 N. E. 627.

It is, however, contended by counsel for appellant that the deed is void as against public policy, citing *McClure v. Raben*, 125 Ind. 139, 25 N. E. 179, 9 L. R. A. 477, and s. c. 133 Ind. 507, 33 N. E. 275, 36 Am. St. Rep. 558. Appellant's counsel also rely upon *Chambers v. Chambers*, 139 Ind. 111, 38 N. E. 334, in which it was held that a reversionary interest could only be sold upon a full consideration, and that the adequacy of the consideration must be determined without reference to the value of the particular estate. As to *McClure v. Raben*, supra, it is to be observed that that case had to do with an attempted conveyance of the bare expectancy of a son in the real estate of his mother, the absolute fee being in her. The composite of the decisions in said case is that such conveyances are regarded with disfavor, and that the burden is on the grantee to repel an inference of fraud, by showing a fair transaction in which a full consideration was paid, and that the consent of the ancestor was obtained. It is scarcely necessary to state that the observations of the court in the decisions last referred to are to be limited to the facts before it, and that in such a case as this, in which the interest or right of the son was fixed by the law, the theory that conveyances of bare expectancies are in fraud of the bounty of the ancestor can have no application. It is doubtless true that at

tempted conveyances of bare expectancies by presumptive heirs are narrowly watched by courts of equity, at least when it is necessary to invoke their jurisdiction, and that in such cases the burden is on the assignee to repel the inference of constructive fraud, yet it cannot be affirmed that such courts look with disfavor upon what are construed as executory contracts for the transfer of future interests, where common honesty requires that they should be carried out, for there is a cloud of cases in which courts of chancery, whose affirmative action can only be invoked by considerations of conscience, have ordered the specific performance of such contracts. See *White & Tudor's* and *Hare & Wallace's* Notes to 3 Leading Cases in Equity, 306 and 332; 56 Am. St. Rep. 339. In this case the fee was in the mother, but it was in the nature of a base or determinable fee. In strictness, said Zachariah, as a child by the first marriage, had no interest, since the statute (1 Rev. St. 1852, p. 250, c. 27, § 18) was but a canon of descent. But it is to be observed that in the accomplishment of the general purpose of the law, to transmit the estate to the child or children of the former marriage, the only prohibition therein found is that the widow shall not alienate. No such limitation is found as to the children, and, if of full age, there would be no more reason in public policy for prohibiting their conveyance, by any form of deed which would be effectual in law or equity, than there would be for prohibiting the conveyance of any reversion or remainder of a contingent character. Indeed, the statutory rights of the children under our statute are analogous to the contingent interest of one whose title must take effect as an executory devise, whereunder an interest having a resemblance to a contingent remainder may be supported, although it cannot take effect as such, on the theory that although the freehold may not in the meantime be disposed of, until the happening of the event the title remains in the heir at law. Such an interest is regarded as a possibility coupled with an interest, and alienable as such. 2 Washburn on Real Property, p. 367. Where, however, the contingency lays in the survivorship of the devisee until the happening of the event, it is obvious that he can only alien the contingency which he himself possesses.

Bearing in mind the words and purpose of the statute, it is evident that the attempted conveyance of appellant's grantor, which is here in question, should not be put on the plane of a conveyance by a child who has a mere expectancy that he may receive property by devise or descent from his parent. The difference between the two situations is indicated in *Jackson v. Waldron*, 13 Wend. (N. Y.) 178, wherein Senator Tracy said: "The right or interest which one may have as heir apparent or heir presumptive is very distinguishable from that one has under a devise, which gives him an estate in fee sim-

ple on the contingency that the first devisee dies without issue. For the heir, during the life of the ancestor, not only has no estate, but even if he survived him, he will not necessarily get any—for, the entire and unlimited estate being in another, it is in his mere volition to sell it or devise it to another; in short, the interest of the heir does not differ in its nature from that of an expectant devisee, which is an interest which every one may claim to have in every other's estate. But in the other case, the contingent devisee has a defined interest of expectation, which is independent of the volition or caprice of any other; and, on the happening of a contingency which Providence alone controls, he may come to the enjoyment of the full estate. In two such cases, I say, one can easily recognize the distinction between a mere naked possibility and a possibility coupled with an interest." Our concern, however, need not be to show that the particular assignment was of a possibility coupled with an interest, but it is enough to show that the transaction is without the category of an attempted sale by a mere expectant heir—as to whom there are peculiar rules of proof. The grantor not being in that category, it would seem that the grantees ought not to be put in a worse position, because there was a possibility, than they would have been in were the grantor destitute of interest. 3 Leading Cases in Equity (*Hare & Wallace's* note) 343.

It is true that, as respects assignments by mere expectant heirs, courts of equity have been disposed to hedge them about by rigid rules designed to repel the inference of fraud, and it must be admitted that a disposition has been manifested by the English courts to treat the sale of reversionary interests as falling within the same class. Some of the English judges have taken the broad ground that the consummation of such transactions ought to be made difficult, but the doctrine has met with remonstrance (*Shelly v. Nash*, 3 Madd. 423; *Hinckman v. Smith*, 3 Russell, Ch. 434), and the right to make such sales by auction has been recognized. *Shelly v. Nash*, supra. The English rule was changed as to the requirement of a full consideration by 31 Victoria, c. 4, the act providing that "no purchase made bona fide and without fraud or unfair dealing of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue." Jeremy observes that sales of reversionary interests are not necessarily of a character calculated to excite suspicion (*Jeremy, Equity Jurisprudence*, book 3, pt. 2, c. 3, pages 296, 399), while Judge Story, referring to such sales, states that "the principle and the policy of the rule may both be equally questionable. Sellers of reversions are not necessarily in the power of those with whom they contract, and are not necessarily exposed to imposition and hard terms." 1 Story, *Equity Jurisprudence*, § 338. The question received full consideration up-

on the authorities in *Cribbons v. Markwood*, 13 Grat. (Va.) 495, 67 Am. Dec. 775, and the doctrine of the English courts was there repudiated, the case being one of a conveyance of a vested remainder. It is shown in that case that in some of the English cases the courts have been disposed to place reversioners and remaindermen in the category of expectant heirs as a matter of public policy, in order to keep them dependent upon the ancestor, to the end that the power of the head of the house may be preserved, and that wealth and titular rank may be transmitted together. No such public policy exists in this country, the court declares; our policy being against the locking up of wealth in families from generation to generation, and that therefore it is not necessary for the purchaser to take the burden of making good the transaction. Allen, J., speaking for the court, said: "The inquiry in reference to sales by reversioners or remaindermen should be whether, in the particular case, actual fraud existed. Inadequacy of price, youth, inexperience, indebtedness, distress, are circumstances to be looked to in determining whether the bargain in the particular instance is so unconscionable as to demonstrate some gross imposition, circumvention, or undue influence; and to justify relief on the ground of fraud. In the absence of such proof of actual fraud, I do not think that it is incumbent on the purchaser of such an expectant interest to make good the bargain by showing that a full and adequate consideration was paid." And again: "Whatever principle may be adopted in reference to contracts with expectant heirs, secretly selling the chance of a parent's or some relation's bounty, it seems to me that the actual owner of a vested interest in property, whether in reversion or remainder, should not be reduced to the condition of pupillage from regard to any supposed rule of public policy, or for the purpose of extending to him any particular protection."

Davidson v. Little, 22 Pa. 245, 60 Am. Dec. 81, was a case where a remainderman sold his interest for a disproportionate consideration. Black, C. J., after pointing out the fact that the contract was executed, and that there was a difference between such a case and one where the grantee had to apply for specific performance, said: "But inadequacy alone must be rejected as insufficient to justify the cancellation of a conveyance, except in the case of an heir expectant, who anticipates his inheritance by selling it before he gets it. Inadequacy of price is not fraud."
* * * A man may be as honest in making a profitable bargain as a bad one; and the law does not require him to pay a full price, if the person he deals with is willing to take less. The owner of property may sell it for very little, or give it away for nothing, if he thinks fit; and, however unreasonable his conduct may seem, his will alone is sufficient to avouch the act—*stat pro ratione voluntas*.
* * * The court should have charged the

jury that, if there was no actual fraud committed by the vendee, the conveyance should not be disturbed; that the inadequacy of the price, gross as it was, should be regarded only as evidence of fraud, that this being the case of an executed contract, the inadequacy is not sufficient to prove the fraud without some additional evidence; that all the facts connected with the transaction must be considered together; and if, by this means, it should appear to be honest, the verdict ought to be for the vendee."

Whelen v. Phillips, 151 Pa. 312, 25 Atl. 44, involved the validity of the sale of a legacy which had been bequeathed to a person on the contingency that he outlived his mother, and the court there said: "In England, the words 'expectant heir' originally meant just what the expression naturally signifies—an heir expecting an inheritance through intestacy or devise. The doctrine of 'expectant heir' amounted to nothing more than this, that a person should not, at common law, sell that which did not belong to him, either in possession or by vested right, but which he hoped might be acquired either certainly or contingently in the future. As thus understood, the doctrine was similar to that recognized in this state, viz., that, at common law, a man may not sell or assign that in which he has no interest, and which therefore does not and may not exist; but, in England, as here, in equity a person may be compelled to make good or to treat as valid an assignment of a mere expectancy, of a mere possibility, of something which does not actually exist. As the result of judicial sympathy with the nobility in England the doctrine from time to time expanded until it became so inconsistent with justice as to call for the interposition of Parliament. *Pollock's Prin. Contract*, 549, 556; 2 *Leading Cases in Eq.* (4th Am. Ed.) 1607 et seq. But, without inquiring as to the present status of the law elsewhere, it may be confidently asserted that in this state a person, *sui juris*, owning a contingent remainder in land, or in personal property, may sell the same for such sum as may be agreed upon between himself and the purchaser, provided the former does not stand towards him in a trust relation, and, in making the purchase, acts in good faith." See, also, *Jackson's Estate*, 203 Pa. 33, 52 Atl. 125; *Phillips' Estate*, 205 Pa. 512, 55 Atl. 212; *Jaeschke v. Reinders*, 2 Mo. App. 212; *Bispham's Equity* (7th Ed.) p. 333; note to 56 Am. St. Rep. 354; 5 Am. & Eng. Ency. of Law (2d Ed.) 766. Chancellor Kent declares the general rule respecting ordinary sales that inadequacy of price is not a sufficient ground for setting them aside, unless the inadequacy is so gross and palpable as, of itself, to afford evidence of actual fraud. *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513.

There can be no doubt under the authorities in this country that mere inadequacy of consideration does not afford a sufficient rea-

son for setting aside the conveyance of a contingent interest in property or what approximates thereto, although the doctrine is doubtless otherwise as respects sales by expectant heirs of their supposed interest in the lands of living ancestors. It must be admitted that our holding cannot be in all respects reconciled with *Chambers v. Chambers*, 139 Ind. 111, 38 N. E. 334. In that case the court was influenced to lay down an iron rule as to consideration by reason, as it appears, of some general observations by text-writers, which had for their basis the English rule. Future interests in property, based on contract, devise, or statute, are valuable interests, and it is a mistake to place them in the category of wagering contracts. Imposition may often be practiced on reversioners, and contracts with them are doubtless subject to the scrutiny of courts of equity, but there being no policy in this country to maintain family wealth, and such interests being often the only possession of reversioners, we refuse to hold that a rule as to consideration which would place an embargo upon all such sales should be adopted, or that, there being no fraud in fact, and no undue influence, the court should go to any quixotic length to protect such persons. We have considered whether the case referred to should be distinguished, as might possibly be done, or whether it should be overruled in so far as it places reversioners and persons having an expectancy from a living ancestor in all cases in the same class. Having considered that the case is a solitary one in this state, that more good is likely to come from modifying it than from maintaining a wrong rule, and that no extensive property rights based on said case can be affected by its overthrow, since subsequent deeds of reversions, in the nature of things, cannot often have been taken while the lands were in the adverse possession of others under a prior deed, our conclusion is that said case should be overruled to the extent indicated. *Paul v. Davis*, 100 Ind. 422.

The question remains whether the findings are sufficient to justify a setting aside of the conveyance. It may be admitted that an inference of fraud may in some circumstances grow out of the fact that the grantor parted with his expectancy without directly receiving any consideration. It does not admit of doubt that the fact that a parent was the beneficiary of the transaction might, at least while the child was under the dominion of the parent, cause a court of equity to scan the agreement closely. So, too, the fact that the transaction did not represent the real purpose of the grantor to make the conveyance complained of might be of much importance. It must be affirmed, however, that these circumstances, when considered singly or in combination, are not the legal equivalent of fraud. Appellant was the plaintiff below, and whatever facts are not found must be presumed to have been found against him. *Maxwell v. Wright*, 160 Ind. 515, 67

N. E. 237. In that case it was said, relative to a special finding, that if the "finding leaves some issue or material fact undetermined, such issue or fact will be regarded as not proved by the party having the burden of proof." The burden of proving the issue devolved upon a party never shifts, although the burden of producing evidence to satisfy the court or jury may shift during the trial. *Fay v. Burditt*, 81 Ind. 433, 42 Am. Rep. 142; *Carver v. Carver*, 97 Ind. 497; 4 *Wigmore on Evidence*, § 2489. If, therefore, the court has not found enough of the ultimate facts to make out a case of fraud, we can only assume that they were not proved, and that appellees were successful in rebutting all adverse inferences which might have been drawn, as matters of fact, from that which is contained in the special finding. The mere fact that a finding of certain facts might justify an inference of fraud or call on the defendants to show a fair contract will not aid appellant now, for we cannot add to a special finding a fact unless it results as a necessary conclusion from the facts found. Aside from the facts that the sale was of a reversionary interest, that the consideration was paid to another, and ultimately was turned over to the grantor's mother, there are no facts found to militate against the burden which the appellant assumed when he became a plaintiff in the action, except that the stepfather negotiated the sale, that said Zachariah had nothing to do with the negotiation except to execute the deed, and that he so executed the same to carry out his contract of sale with his stepfather and for no other purpose. The transaction could not be said to have been fraudulent per se, even if the son had made a voluntary deed, upon a nominal consideration, of his interest to his mother. As was said in *Jenkins v. Pye*, 12 Pet. (U. S.) 253, 9 L. Ed. 1070: "To consider a parent disqualified to take a voluntary deed from his child, without consideration, on account of their relationship, is assuming a principle at war with all filial, as well as parental, duty and affection." The finding that the grantor had nothing to do with the negotiation, and that he executed the deed for the sole purpose of carrying out his contract, is not the equivalent of a finding that he was not acquainted with the contents of the deed, which contained an express recital that he was conveying his expectancy, and no excuse appears for his failure to understand the deed, if there was such failure. So far as we are able to say, said grantor may have been fully apprised of the contents of the deed, while yet he executed it for the sole purpose, so far as he was concerned, of carrying out his contract. He may have been indifferent to his expectancy, or, while joining in the deed for the purpose of carrying out his contract, he may have been contented that the deed should contain the further provision because his mother was receiving the purchase money. This brings us to the prop-

osition, as respects the element of the lack of consideration, that the transaction might, as between appellant and his mother, have been in the nature of a family transaction, which is favored in equity. *St. Clair v. Morquell*, 161 Ind. 56, 67 N. E. 693; *Elssler v. Hopfel*, 158 Ind. 82, 62 N. E. 692. In *Bellamy v. Sabine*, 2 Phillips, 424, 439, the court said: "It has often been decided that in such transactions between a father and son the ordinary rules which are applied to the acts of strangers are not to regulate the judgment of this court. In such cases apparent inadequacy of consideration, and the circumstance that the property was reversionary, have little weight. Fraud will indeed vitiate these as well as other transactions, but arrangements between members of the same family, to assist their several objects or relieve their several necessities, are affected by so many peculiar considerations, and are influenced by so many different motives, that they have been wisely withdrawn from the influence of the ordinary rules by which this court is guided in adjudicating between other parties."

We do not know the age of said grantor, or the measure of his business experience, or whether he was in any respect under the dominion of his mother or stepfather. The findings fail to advise us of any of the many conceivable circumstances which might have appeared in evidence tending to show the utmost good faith upon the part of the purchasers. Admitting, for the sake of the argument, that in some way said grantor might have failed to understand the nature of the transaction, yet it is conceivable that it might, nevertheless, have had, from the viewpoint of the grantees, every indicia of a fair bargain. As was said by Ashhurst, J., in *Lickbarrow v. Mason*, 2 Term R. 70: "We may lay it down as a broad general principle that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." There is a great hiatus between the legal effect of the facts found and the ultimate facts which in such a case as this would be necessary to warrant the conclusion that appellant was the owner of the land, and therefore the judgment should be affirmed.

It is so ordered.

(169 Ind. 537)

FERGUSON v. BOYD et al. (No. 21,040.)

(Supreme Court of Indiana. Dec. 19, 1907.)

APPEAL—REVIEW.

Where, in a suit to quiet title, the decree deprived appellant of all interest in the land, he was not entitled to object that the court erroneously quieted title in fee in B. and S., as alleged in their cross-complaint, though S. had but an equitable title, the court being authorized by *Burns' Ann. St. 1901*, § 399, to strike out the name of any party to conform to the proof, and the Supreme Court being required to disregard

defects which might have been cured by amendment below.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, Appeal and Error, §§ 3621, 3622.]

On rehearing. Overruled.

For former opinion, see 79 N. E. 549, 81 N. E. 71.

PER CURIAM. We deem it proper to give expression to our views on one point, because it was not directly passed on in the decision of the case. Complaint 's made that, under the finding and judgment, title is quieted in Boyd and Smith, although their cross-complaint alleged a fee-simple title in both. Even if Smith had but an equitable title, there should not be a reversal. The general finding and decree against appellant, when viewed in the light of the evidence, presumptively leaves him shorn of all interest in the land, and as the court below had authority at any time to strike out the name of any party to conform the pleadings to the proof (*section 399, Burns' Ann. St. 1901*), and, as we are commanded to disregard defects in form and imperfections which might have been amended in the court below, we hold that appellant cannot complain that the court quieted title in both Boyd and Smith, instead of striking out the name of Smith as a plaintiff, and quieting title as to Boyd.

We may further say in conclusion that we are not authorized to disturb the finding upon the evidence. *Hudelson v. Hudelson*, 164 Ind. 694, 74 N. E. 504, and cases cited. As to the transactions antedating the alleged release, we cannot say, in view of the evidence and the presumption of validity which attends the execution of formal evidences of indebtedness, for years unquestioned, fortified by the conclusion of the trial court, that the settlements were wrong, much less that there was an intention to defraud, or that appellant was, in fact, misled to his prejudice when he agreed to surrender. Upon a reconsideration of the evidence, we have to say that, at least, if it be given the strongest construction in favor of appellees which the lower court was legally justified in adopting, there would be more of inequity than equity in a decree in appellant's favor. This alone is enough to uphold the result. *Howard v. Babcock*, 7 Ohio, 73, pt. 2; *Hill v. Nisbet*, 100 Ind. 341; *Ryason v. Dunten*, 164 Ind. 85, 73 N. E. 74; *Boswell v. Coaks* (1884), 27 Ch. Div. 424, 456.

Petition for a rehearing overruled. All concur, except HADLEY, J., not voting.

(77 Ohio St. 214)

PHILLIPS v. STATE.

(Supreme Court of Ohio. Dec. 3, 1907.)

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF JUNK DEALERS.

Sections 4413 and 4414, Rev. St. 1906, which require junk dealers and dealers in second-hand articles of any kind to put up a sign and keep a book containing a description of ar-

ticles purchased and to retain such articles for at least 30 days before disposing of the same, etc., are a necessary and reasonable exercise of the police power, and are therefore constitutional.

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

One Phillips was convicted of receiving old metal and failing to retain the same for 30 days, and brings error. Affirmed.

The plaintiff in error was tried in the police court of the city of Columbus on two affidavits charging him with receiving certain quantities of old metal, and with having failed to retain the same for the period of 30 days after the metal was received. In the police court the accused filed a demurrer, contending that sections 4413 and 4414 of the Revised Statutes of 1906, under which the affidavits are drawn, are unconstitutional. The demurrer was overruled, and the defendant pleaded guilty and was fined in each case. He then prosecuted error to the court of common pleas, and on hearing of the petition in error in said court the judgment was affirmed, and this judgment was afterwards affirmed by the circuit court. The petition in error in this court is prosecuted to reverse the judgments of the several courts below.

D. B. Ulery and W. J. Mahoney, for plaintiff in error. George S. Marshall, City Sol., and Charles E. Carter, Asst. City Sol., for the State.

DAVIS, J. (after stating the facts as above). It is almost an axiom that anything which is reasonable and necessary to secure the peace, safety, morals, and best interests of the commonwealth may be done under the police power; and this implies that private rights exist subject to the public welfare. These principles are plainly recognized in article 14, § 1, of the Constitution of the United States, and article 1, § 19, of the Constitution of Ohio. The federal Constitution provides: "That no state shall deprive any person of life, liberty or property without due process of law." Of course, the converse is understood, that any state may deprive a person of life, liberty, or property in the due process of law. That which is due process of law is so well defined in numerous decisions, both state and federal, that we need not discuss it here. The Constitution of this state provides that "private property shall be held inviolate, but subservient to the public welfare." Therefore, the general power of the Legislature to determine what is necessary for the protection of the public interests being clear, judicial inquiry is necessarily limited to determining whether a particular regulation is reasonable, impartial, and within the limitations of the Constitution. The Legislature is the judge of the mischief and the remedy, and of what shall be state policy, subject to the restrictions just mentioned.

The business of dealing in second-hand articles and junk is one which is peculiarly liable to abuse; and, whether honestly conducted or not, experience has shown that stolen or lost property frequently finds its way to the junk dealer, through the agency of the persons who have unlawfully appropriated it. In view of the fact that it frequently happens that individuals seeking to reclaim their property are suddenly stopped and forever baffled at the door of the junk dealer's shop, the requirements complained of here seem to us to be very fair and moderate.

We do not think it worth the time it would take to distinguish or explain the cases to which we have been referred by the plaintiff in error. Not one of them reaches the point in contention raised by the plaintiff in error here. Some of them are strongly against him.

We find no infirmity in the statute, either in violation of the Constitution or in other respects, and the judgment below is affirmed.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and SPEAR, JJ., concur.

(77 Ohio St. 81)

BARBER v. KNOWLES.

(Supreme Court of Ohio. Nov. 19, 1907.)

1. PROCESS—SERVICE—PRIVILEGES—SUITORS.

A suitor going to, attending, or returning from court, for the purposes of a case to which he is a party, is privileged from service of summons while so going, attending, or returning. *Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 485, 15 Am. St. Rep. 547, approved and followed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 148, 149.]

2. SAME.

The privilege extends to all suitors, whether they be residents or nonresidents of this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 148.]

3. SAME.

The privilege should be allowed with a reasonable latitude. A party going to or returning from court need not take the most direct route. Reasonable deviations or delays should be allowed, provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending, or returning from court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 148.]

(Syllabus by the Court.)

Error to Circuit Court, Montgomery County.

Action by one Barber against one Knowles. On motion, a judgment quashing service of summons was affirmed by the circuit court, and plaintiff brings error. Affirmed.

The defendant in error is a resident of the state of Illinois, and was at the time the summons in this case was served upon him a party to a suit pending in the United States Circuit Court for the southern district of Ohio, at Cincinnati. The said cause in the

circuit court was assigned for trial on the 3d day of October, 1905. The defendant came to Ohio on or about the 1st day of October, 1905, stopping at Greenville for consultation with his counsel, and started to Cincinnati on the 2d day of October by way of Dayton. There are two routes from Greenville to Cincinnati, one by way of Eaton, which is perhaps the most direct, and one by way of Dayton, which is most generally used and is perhaps the most convenient. The defendant was instructed by his counsel that one Kline, a civil engineer, whose home and office were in Dayton, was a necessary witness for him in the trial in the United States court at Cincinnati, and that it would be necessary for the defendant to take certain books and papers, which were in his possession, to Kline at Dayton, and have him make therefrom certain calculations which were necessary in order to save the time of the court in the examination of Kline as a witness in the case. The defendant, therefore, stopped off at Dayton, arriving at Kline's office about 9 o'clock in the morning, and, being occupied with his business there until about 5 o'clock in the evening, leaving Dayton about 6 in the evening for Cincinnati. While the defendant was in Dayton for the purpose aforesaid, he was served with summons in this cause. On the hearing of a motion to quash the service, the court of common pleas sustained the motion, and the judgment of the court of common pleas was affirmed by the circuit court. The plaintiff below prosecutes this proceeding in error to reverse the judgments of both the courts below.

W. A. Hallanan, for plaintiff in error. W. N. Stubbs, for defendant in error.

DAVIS, J. (after stating the facts as above). The statutes of this state (Rev. St. 1892, § 5457) provide that all suitors while going to, attending, or returning from court shall be privileged from arrest; and ever since the decision of *Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483, 15 Am. St. Rep. 547, the statute has been construed as extending the privilege to the service of summons in civil cases.

We do not understand that the counsel for the plaintiff in error questions this construction; but his contention is that the privilege is confined to the time during which the suitor is necessarily occupied in going to, attending, or returning from court; or, in other words, that, in order to claim the exemption, the suitor must go to or return from court by the most direct and speediest route, and that he must not delay in attendance upon the court any longer than is absolutely necessary. We think that such a rigorous application of the law would destroy the privilege, which had its origin in justice to the suitor and in the necessity of protecting the courts from embarrassment in the transaction of

business. It is a rule of interpretation, which is universally recognized, that a statute will not be presumed to derogate from or abrogate the common law. Such a legislative intention must plainly appear. It does not appear here; and therefore we may properly look to the common law for an explanation of the terms of the statute. A very few citations will be sufficient to show that under the common law the privilege is allowed with a reasonable latitude; that a party going to or returning from court need not take the most direct route; that reasonable deviations or delays will be allowed, provided they do not arise in carrying out a purpose entirely distinct from the purpose of going to, attending, or returning from court.

In *Willingham v. Matthews*, 6 Taunt. 356, it appeared that the defendant went from the court, that he passed through streets which were not in the direct way to his home, and that he went into a cutler's shop on one of those streets; and it was argued that it was his duty to go directly home, and not to transact his own business by the way. The court, however, said: "A party is not bound to go the nearest way home; and, if he do not abuse the privilege for the purpose of going about other business of his own, of which no evidence appears on these affidavits, we must say that he is entitled to his discharge." *Pitt v. Coomes* is reported in 5 B. & Ad. 1078, and 3 Nev. & Man. 212. Pitt had left the court in the evening, and had gone directly to his office, where he took refreshments and sorted his papers. After remaining at his office for from one to two hours, he left for his home, but went into a tailor's shop, where an officer arrested him. *Denman, C. J.*, said: "The doctrine of deviation might become very alarming if carried to such an extent that whenever the officer saw the party going one yard out of his way home he might immediately arrest him. * * * A party on his return from a court of justice ought substantially to receive its protection, and to have the benefit of its dignity and quiet till he reaches his home. The case just cited is stronger than this. [*Lightfoot v. Cameron*, 2 W. Bla. 1113.] There the party was dining with his attorney and witnesses when the officer took him; and yet he was held to be protected." *Littledale, J.*, in the same case said: "There is a case where a woman was a witness on a trial at Winchester, which ended at 4 in the afternoon of Friday. She stayed there till Saturday, and at 7 in the evening was arrested as she was going home to Portsmouth; and this court held that she ought to be discharged." *Williams v. Webb*, 5 Scott's N. R. 898, is also very suggestive. The defendant left his residence to go to his office to get some papers which he believed to be necessary in the argument of a motion in court, intending to pursue his way from his office to the court. On the way to his office he was arrested. *Tindal*,

C. J., said: "There is no pretense for saying that this person had not a right to go to his office for his papers. The only question is whether or not he was going out of the way. Upon these affidavits I do not collect that there was any real deviation." *Pitt v. Coomes*, supra, was cited, and Lord Chief Justice Tindal remarked that he could not see any substantial distinction between that case and the one then before the court; and all the other judges concurred. In *Selby v. Hills*, 1 Moore & Scott, 253, also reported in 1 Dowl. Pr. C. 257, Lord Chief Justice Tindal again said: "The only question to be considered is whether the defendant was honestly using his privilege, or whether he only sets it up as a pretense to defeat a creditor. The rule is not to be scanned with too strict an eye. Every reasonable intendment is to be made in favor of a party claiming exemption under it." In *Ricketts et al. v. Gurney*, 7 Price, 699, it appeared that the defendant went from London to Clifton, on the way to trial at Exeter, staying at Clifton two days to procure and sort his papers, and with his lawyer selecting such documents as were necessary to be used in the trial. The defendant was arrested at Clifton; but it was held that he was entitled to the privilege, on the ground that the deviation was for a necessary purpose and the delay no more than reasonable. In *Sidgier v. Birch*, 9 Ves. Jr., 69, it was shown that for the purpose of an examination before a master in chancery it was necessary for the defendant to see a deed which was in the hands of another party, who was hostile to him, and whom, therefore, he did not choose to see except in the presence of his solicitor, and failing to meet his solicitor, after waiting for several hours, was returning home for other necessary papers when he was arrested. Lord Chancellor Eldon discharged the defendant, and said that the question in these cases is always whether the man was bona fide engaged in the business he was called upon to execute.

It is claimed that the defendant in this case, being a nonresident of this state, is not within the privilege; but the statute extends the privilege to "all suitors," nor is it restricted to going to, attending, or returning from any particular court, and apart from the statute the immunity does not depend upon statutory provisions, but arises ex necessitate in the due administration of justice. It does not appear that the defendant made an unreasonable deviation from a direct route to the place of trial, or that his stopping at Dayton was, under the circumstances, unreasonable or unnecessary, or that his tarrying on the way at that place was not in good faith or for any purpose wholly disconnected with the purpose of going to and attending the trial at Cincinnati.

The judgment of the court of common pleas quashing the service which was made upon the defendant was therefore correct; and

the judgment of the circuit court affirming the judgment of the court of common pleas is affirmed

SHAUCK, C. J., and PRICE, CREW, SUMMERS and SPEAR, JJ., concur.

(77 Ohio St. 104)

SEARS et al. v. SEARS et al.

(Supreme Court of Ohio. Nov. 19, 1907.)

1. WILLS—EXECUTION—VALIDITY.

In the interpretation of the statute regulating the execution of wills the intention of the Legislature controls, and a will that is not executed as required by statute is invalid, notwithstanding the intention of the testator.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 249.]

2. SAME—"WRITING."

A will is not invalid because it is partly in print. The word "writing," in section 5916, Rev. St. 1892, includes printing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 226.]

For other definitions, see Words and Phrases, vol. 8, pp. 7538-7541.]

3. SAME—SIGNATURE—PRINTED BLANK.

A will is not signed at the end thereof by the party making the same, when it is written by the party making it upon a printed blank form containing a testimonium clause with blanks for the name of the place and the date of execution, which he fills, and immediately following this a blank line for the signature of the maker, which he leaves blank, although he has written his name in the attestation clause, immediately following the testimonium clause, in a blank left for the name of the testator, and may have intended such act as a signing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 268, 269.]

4. SAME—DIRECTING VERDICT.

On the trial of an action to contest the validity of a will, when it appears on the face of the will that it was not signed at the end thereof as required by statute, it is not error for the trial judge to direct a verdict that the writing is not a valid will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 263, 269, 773.]

(Syllabus by the Court.)

Error to Circuit Court, Cuyahoga County.

Action by one Sears and others against one Sears and others to set aside the probate of a will. Verdict for plaintiffs was reversed in the circuit court, and they bring error. Judgment of circuit court reversed, and that of court of common pleas affirmed.

On the 6th day of June, 1903, Arminda S. Nicholson, of Lakewood, Cuyahoga county, Ohio, wrpte her last will and testament on a printed blank form of will. Following the last item of the will is a blank space the full width of the paper and about six inches in length. Following this blank space is a printed blank testimonium clause, as follows:

"In testimony whereof, I have set my hand to this my last will and testament, at, this day of, in the year of our Lord One Thousand Hundred and"

Then follows a blank line extending about half way across the width of the page for

the signature of the testator. Then there is a heavy line extending clear across the page, and following this heavy line appears the following printed blank attestation clause:

"The foregoing instrument was signed by the said in our presence, and by published and declared as and for last will and testament, and at request, and in presence, and in the presence of each other, we hereunto subscribe our names as attesting witnesses, at, this day of, A. D. 1....

"....., resides at
"....., resides at"

The blanks in this testimonium clause and attestation clause she filled in, and they then read as follows, including the signatures of the two witnesses:

"In testimony whereof, I have set my hand to this my last will and testament, at Lakewood, Ohio, this sixth day of June, in the year of our Lord one thousand nine hundred and three.

".....

"The foregoing instrument was signed by the said Armina S. Nicholson in our presence, and by her published and declared as and for her last will and testament; and at her request, and in her presence, and in the presence of each other, we hereunto subscribe our names as attesting witnesses, at Lakewood, Ohio, this sixth day of June, A. D. 1903.

"J. W. Southern, resides at Lakewood, O."
"Julia K. Southern, resides at Lakewood, O."

On the 30th day of April, 1904, she died, and on the 3d day of May, following, her will was presented to the probate court of Cuyahoga county for admission to probate, and it was admitted to probate by that court. In June, 1904, the plaintiffs in error filed their petition in the court of common pleas of that county, asking that the will be set aside for the reasons, among others, that it was not handwritten or typewritten; that it was not signed by the said Armina S. Nicholson; that it was not signed by her at the end thereof, nor by any person in her presence by her express direction. Answers were filed, and on January 4th, 1905, the court made the following order:

"January 4, 1905. The Court: The motion by the defendants to require the plaintiff to make his petition more definite and certain, and praying for an order directing an issue to be made upon the record in this cause, is heard and refused as to the request to make more definite and certain, and granted as to the request to direct an issue to be made upon the record. Wherefore, it appearing to the court that the plaintiff in this case seeks to set aside a certain paper writing purporting to be the last will and testament of Armina Nicholson, deceased, late of the county of Cuyahoga, Ohio, which has been admitted to probate in said county, according to the statute in such case made and provided, and no issue being made up by the pleadings, it is now ordered that the validity of said will be, and it hereby is, put in issue between the parties hereto, and that

it be ascertained by the verdict of a jury whether said writing is or is not the last will and testament of said Armina Nicholson, deceased."

In October, 1905, the case was tried by a jury. The defendants offered in evidence the will and a certified copy of the order of probate, and rested. The plaintiffs then requested the court to direct the jury to return a verdict that the writing produced as the last will of Armina S. Nicholson is not her valid last will and testament, for the reason that the testimony is insufficient to sustain the alleged will. The defendants then asked leave to withdraw the submission of the case for the purpose of offering additional evidence, and they then offered to prove that the words, "Armina S. Nicholson," in the attestation clause, were the handwriting and signature of Armina S. Nicholson, and that after her death the said will was found among her private papers, in a box, and inside of an envelope upon which was indorsed in her own handwriting the words "Last Will and Testament of Armina S. Nicholson." This testimony the court rejected, and, upon the plaintiffs renewing their motion, the court directed the jury to return a verdict finding that the paper is not the last will and testament of Armina S. Nicholson, and the jury returned a verdict as directed. Motion for a new trial was then filed and overruled, and judgment entered that the paper writing was not the last will and testament of said Armina S. Nicholson. On error the circuit court reversed.

Thomas Beer and S. W. Bennett, for plaintiffs in error. Finley & Gallenger, Carr, Stearns & Chamberlain, Smith, Taft & Arter, M. B. & H. H. Johnson, Hogan & Parmely, Weed, Miller & Nason, R. V. Sears, and Treadway & Marlatt, for defendants in error.

SUMMERS, J. (after stating the facts as above). In this state the right of disposing of property by will is given, and the manner of exercising it is prescribed by statute. The provisions of the Revised Statutes of 1892 bearing upon the questions to be determined may be briefly summarized as follows: Section 5914 prescribes who may make a will. Section 5916, providing how a will shall be executed, is as follows: "Every last will and testament (except nuncupative wills hereinafter provided for) shall be in writing, and may be handwritten or typewritten; and such will shall be signed at the end thereof by the party making the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed, in the presence of such party, by two or more competent witnesses, who saw the testator subscribe, or heard him acknowledge the same." Section 5926 provides, when application has been made to admit a will to probate, that the probate court shall cause the witnesses to such will, and such other witnesses as any person interested in having

the same admitted to probate may desire, to come before it, and that the witnesses shall be examined in open court and their testimony reduced to writing and filed. Section 5929 is as follows: "If it shall appear that such will was duly attested and executed, and that the testator, at the time of executing the same, was of full age and of sound mind and memory, and not under any restraint, the court shall admit the will to probate." Section 5930 provides that when admitted to probate the will shall be filed in the office of the probate judge and recorded, together with the testimony. Section 5933 provides that, if no person interested shall contest the will within two years, the probate shall be forever binding, saving to infants and persons of unsound mind or in captivity a like period after the disabilities are removed. Section 5936 enacts that whenever the probate court shall receive from the clerk of the court of common pleas a certificate that a petition has been filed in the court of common pleas to contest the validity of any will recorded in the probate court, the probate court shall forthwith transmit to the court of common pleas the will, testimony, and all papers relating thereto, with a copy of the order of probate and a certificate under the seal of the court. Section 5958 provides that a person interested in a will admitted to probate may contest the validity thereof in a civil action in the court of common pleas of the county in which such probate was had. Section 5959 provides who shall be parties. Section 5961 provides how an issue shall be made up, whether the writing produced is the last will or codicil of the testator or not, and that this issue shall be tried by a jury, and that the verdict therein shall be conclusive, unless a new trial be granted or the judgment be reversed or vacated. Section 5964 provides that "the party sustaining the will shall be entitled to open and close the evidence and argument; he shall offer the will and probate, and rest; the opposite party shall then offer his evidence; the party sustaining the will shall then offer his other evidence; and rebutting testimony may be offered as in other cases." Section 5962 provides that on the trial of such issue, the order of probate shall be prima facie evidence of the due attestation, execution and validity of the will or codicil.

The first contention is that the will is not a valid will because it is partly in printing. "Part Third" of the Revised Statutes includes section 5916, and section 4947 provides that in the interpretation of part third, unless the context shows that another sense was intended, the word "writing" includes printing. Before the amendment of section 5916, in 1896 (92 Ohio Laws, p. 189), that section did not contain the words "and may be handwritten or typewritten," and the law then was that a will might be written or printed. Counsel contend that since the amendment the context shows that another sense was in-

tended, and that writing means only handwritten or typewritten, and that the effect of the amendment was not merely to authorize a typewritten will, but also to exclude a printed will. Typewriting has come into general use since the revision of the statutes in 1880, and the manifest intention of the Legislature was to authorize its use in addition to handwriting and printing in the making of wills, and not to substitute typewriting for printing; so that a will is not invalid because it is partly in print.

The next question is: Is the will signed at the end thereof by the party making the same? By the act of 1816 (2 Chase's St. p. 929, c. 367) and the act of 1831 (20 Ohio Laws, p. 242) wills were required to be in writing and signed by the party making the same, and not until the act of 1840 (38 Ohio Laws, p. 120) took effect were wills required to be signed at the end thereof. This requirement is assumed to have been suggested by the English statute of wills, passed in 1837, although such a requirement had been previously enacted by statute in New York and in Pennsylvania. The English statute is to be found as St. 1 Vict. c. 26. Section 9 of that act provides that no will shall be valid unless "it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction." In Williams on Executors (7th Am. Ed.) 107, the learned author, speaking of this requirement, says: "The will is required by that act to be signed 'at the foot or end thereof.' The statute of frauds merely requires that the will shall be 'signed'; and it was held that a will in the testator's own handwriting, commencing, 'I, John Styles, do declare this to be my last will,' etc., was sufficiently 'signed,' within that statute, although not subscribed with his name. With a view, perhaps, to prevent future controversy as to whether a will so signed is a complete and perfect instrument, the statute of Victoria required that the signature of the testator shall be at the foot or end of the will. But questions of this kind do not appear to be altogether excluded by the operation of this enactment; and a new ground of contest arose out of it, as to what may be considered a signing of the will at the end or foot thereof. Doubts arose whether a signature by the testator in the body of the testimonium or attestation clause was sufficient, and also whether a signature below the latter clause, when it runs beneath the conclusion of the will, was a compliance with the act. On the question whether the will was well executed, if there was a blank space between the conclusion of the will and the signature of the testator, a lamentably large number of points and decisions occurred. In the earlier cases Sir H. Jenner Fust put a very liberal construction on this part of the act. But afterwards that learned judge, in concurrence with the judicial committee of the Privy Council, felt it necessary to take a more rigid view of this enactment,

on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it; and accordingly probate was refused in a great number of subsequent cases on this objection, and the intention of a great many testators unfortunately defeated. This led to the passing of St. 15 Vict. c. 24."

The amendatory act passed in 1852 (St. 15 Vict. c. 24) specifies with much particularity what shall be, respecting the position of the testator's signature, the foot or end of the will; but, as no similar changes were made here, the provisions of that act cannot aid in the interpretation of our statute. The object of this requirement was the same here as in England—to insure the identity of the instrument, and to prevent fraudulent additions to or alterations of the instrument. *Glancy et al. v. Glancy et al.*, 17 Ohio St. 135; *Baker v. Baker et al.*, 51 Ohio St. 222, 37 N. E. 125. Following the English statute, many of the states enacted similar requirements. In Pennsylvania, the earlier statute of 1833 contains such a requirement, and in *Wineland's Appeal*, 118 Pa. 37, 12 Atl. 301, 4 Am. St. Rep. 571, where a will signed by the testator, but containing a clause immediately following the signature and appointing executors, was under consideration, *Paxson, J.*, says: "Our act of 1833, as well as the statute of Victoria, are in part borrowed from the British statute of frauds, two sections of which have been so evaded by judicial construction as to be practically repealed. We do not propose that the act of 1833 shall meet with the same fate. The Legislature have laid down a rule so plain that it cannot be evaded without a clear violation of its terms. No room is left for judicial construction or interpretation. It says a will must be signed at the end thereof, and that's the end of it."

The statute of New York enacts that every last will and testament of real or personal property, or both, shall be subscribed by the testator at the end of the will. In reviewing the decisions in that state in *Matter of Andrews' Will*, 162 N. Y. 1, 56 N. E. 529, 48 L. R. A. 662, 76 Am. St. Rep. 294, *Bartlett, J.*, says: "In *Sisters of Charity v. Kelly*, 67 N. Y. 409, it was held that the provision of the statute requiring the testator to subscribe 'at the end of the will' means the end of the instrument as a completed whole; and where the name is written in the body of the instrument, with any material portion following the signature, it is not properly subscribed, nor can it be claimed that the portion preceding the signature is valid as a will. In *Matter of O'Neil's Will*, 91 N. Y. 516, a printed blank was used, and the formal commencement was printed on the first page, and the formal termination printed at the foot of the third page. The entire blank space was filled with writing, and, apparently for want of room, a portion of a paragraph containing material provisions was carried over to, and the para-

graph finished at, the top of the fourth page. The two portions were not, however, sought to be connected by means of a reference, or anything indicating their relation to each other. The name of the testator was written at the end of the printed form, and the names of the witnesses written below the formal attestation clause on the third page. This court held that there was no legal subscription of the will, and affirmed the judgment denying probate. In *Matter of Conway*, 124 N. Y. 455, 26 N. E. 1028, 11 L. R. A. 796, a blank form was used, the whole of which was upon one side of the paper. A space was left for the dispositions to be made, preceded by the words: 'I give, devise and bequeath my property as follows.' The blank space was filled up by three complete devises. At the end of the last were underlined, in parentheses, the words 'Carried to back of will.' Upon the back of the sheet was written the word 'Continued.' Following it were various bequests, and then the words, 'Signature on face of the will.' The signature of the testator appeared at the end of the testimonium clause on the face of the paper, and those of the witnesses under the attestation clause. It was held by the Second Division of this court that there was not such a subscription and signing by the testator as required by the statute, and that the will had been improperly admitted to probate. In *Matter of Whitney's Will*, 153 N. Y. 259, 47 N. E. 272, 60 Am. St. Rep. 616, it was held that a will drawn upon a printed blank, covering only one page, and signed by the testator and subscribing witnesses at the foot of the page, is not subscribed by the testator at the end of the will, as required by the statute, when the blank space in the printed form is filled up by subdivisions marked, respectively, 'First' and 'Second,' followed by the words, 'See annexed sheet,' and additional subdivisions, marked, respectively, 'Third' and 'Fourth,' are written on a separate piece of paper attached to the face of the blank, immediately over the first and second subdivisions, by removable metal staples. It was held that the question presented was not an open one in this court, and that the will was not legally subscribed. In *Matter of Blair's Will*, 84 Hun, 581, 32 N. Y. Supp. 845, this court affirmed the judgment of the general term, First Department, on the opinion below, which reversed a decree of the surrogate's court admitting the will to probate. This instrument consisted of eight pages. The testator signed at the bottom of the seventh page, and the witnesses signed at the end of a proper witnessing clause at the top of the eighth page. After the place for the signatures of the witnesses, but before they were actually signed or the will executed, a clause was added directing the executor to sell at private sale a certain piece of real estate and to devote the proceeds of sale to liquidating any deficiency in interest or cash bequests under the will. The will was then

executed, as before stated, and the testator signed the added clause, but the witnesses did not. In *re Blair's Will*, 152 N. Y. 645, 46 N. E. 1145." And in that case (*Matter of Andrews*, supra) it was held that a will, drawn on a printed blank, being one piece of paper folded so as to make a sheet of four leaves, with the attestation clause printed at the top of the second page, and executed at that point, so that the first two pages make a complete will, is not subscribed at the end as required by the statute, where the third page contains further dispositions of property, even though the third page has been marked "2d page" by the draftsman, and the second page has been marked "3d page." In the opinion, Bartlett, J., says: "It was suggested on the argument of this case that the effect of the statute of wills, as strictly construed by this court, is to defeat the intention of many testators, while the fraudulent addition to wills was a crime of rare occurrence. The fallacy of this argument consists in overlooking the fact that the number of frauds prevented by our wise and simple statute can never be known. We might as well ask how many commercial crimes have been prevented by the statute of frauds. * * * It is undoubtedly true that from time to time an honest attempt to execute a last will and testament is defeated by failure to observe some one or more of the statutory requirements. It is better this should happen under a proper construction of the statute, than that the individual case should be permitted to weaken those provisions calculated to protect testators generally from fraudulent alterations of their wills." It is to be observed that in this case the question was re-examined in New York, because the lower courts, while yielding to the authority of the Court of Appeals, had questioned the correctness of its conclusions, and in concluding his opinion the learned judge says: "The defeat of testamentary intention in a few cases is not due to the statute, or the construction of it by the courts, but to the fact that scriveners and other laymen, ignorant of the simple and clear provisions of the statute, are permitted to draw wills. * * * We have to say in conclusion that it is quite possible we have given to this appeal undue importance, involving, as it does, a question of law settled in this court; but we desire to express in the most emphatic manner our approval of the statute of wills as now construed."

In *Soward v. Soward*, 1 Duv. (Ky.) 126, where it is held that a will that was written on a sheet of paper which was folded in the form of a letter and sealed with wax, and then attested by three witnesses, who wrote their names on the outside of it as witnesses at the request of the testator, was not attested as required by statute. Chief Justice Duvall says: "The statute does not more imperatively require two witnesses than it requires them to subscribe their

names to the will; and there would be as much propriety in dispensing with the one as the other, for the purpose of mitigating the hardship of particular cases, resulting generally from the ignorance or carelessness of the testator. Thus, step by step, under the pressure of hard cases, all the forms of the law which were adopted as the surest means of protection against imposition and fraud might, and would, soon become so modified by judicial construction as to lose all their efficacy. 'Care ought to be taken,' says Chief Justice Tindal, 'in interpreting the statute of frauds, that its efficacy shall not be destroyed by admitting one exception after another, each being weaker than that by which it was preceded.'" And in *Smee v. Bryer*, 6 Moore, P. C. 404, Lord Langdale says: "It may happen, even frequently, that genuine wills, namely, wills truly expressing the intentions of the testators, are made without observations of the required forms; and whenever that happens the genuine intention is frustrated by the act of the Legislature, of which the general object is to give effect to the intention. The courts must consider that the Legislature, having regard to all probable circumstances, has thought it best, and has therefore determined, to run the risk of frustrating the intentions sometimes, in preference to the risk of giving effect to or facilitating the formation of spurious wills by the absence of forms. It is supposed, and that authoritatively, that the evil of defeating the intention in some cases by requiring forms is less than the evil probably to arise by giving validity to wills made without any form in all cases."

In the case before us the will is not signed by the testatrix at the end thereof. The testimonium clause is as follows: "In testimony whereof, I have set my hand to this my last will and testament, at Lakewood, Ohio, this sixth day of June, in the year of our Lord one thousand nine hundred and three." The obvious purpose for which this blank line was left was for the signature of the testatrix, and it was intended as the end of the will. The absence of her signature there not only discloses that the will is not signed by her at the end thereof, but also implies that she did not sign it at all. The attestation clause signed by the witnesses recites that the foregoing instrument was signed by the said Armina S. Nicholson in our presence; but this does not change the fact, and in the absence of a signature is without legal effect. If a scrivener had prepared the will, and had written her name where it appears in the attestation clause, her name there would have been merely *descriptio personæ*; and when it is shown that the testatrix was her own scrivener, the natural presumption is that it was so intended, and even if the fact was that the testatrix wrote her name there, intending by that act to sign her will, still her signature would not be at the end of the will,

and her intention could not have the effect of transposing it. The question is, not what did the testatrix intend, but what did she do?

Counsel for defendants in error contend that the record does not present these questions, because the statutes enact that "the party sustaining the will shall offer the will and probate, and rest; the opposite party shall then offer his evidence; the party sustaining the will shall then offer his other evidence; and rebutting evidence may be offered as in other cases"—and, further, that "on the trial of such issue, the order of probate shall be prima facie evidence of the due attestation, execution and validity of the will or codicil," and therefore that the court erred in directing a verdict when the defendant rested, as required by the statute. True, the statute does enact that the order of probate shall be prima facie evidence; but the Legislature did not contemplate that a will not signed, or not signed at the end thereof, or not witnessed, ever would be ordered to be probated, and so the matter is not controlled by the statute. It was assumed that the end of the will was self-evident, and the statute was adopted in order to leave no room for the abuses and litigation that had been invited by the efforts of the courts to give effect to the intentions of testators. When the facts are known, the question whether the will is signed at the end is one of law; and, when the will itself shows that it is not signed or attested as required by the statute, it becomes the duty of the court so to instruct the jury. The statute enacts that the order of probate shall be prima facie evidence, and so it is; but it also enacts that the defendant shall offer the will, which he did, and, it appearing from the will itself that it was not signed at the end thereof, the prima facie case made by the order of probate was overcome. But if it be said that this is technical, and that what the Legislature manifestly intended was that the will and the order of probate should make a prima facie case, then we have only to say that the Legislature could not have intended that it ever should be left to a jury to determine that a will not signed as required by the statute was valid because they found that the testator intended to comply with the statute. Where there is an ambiguity, like that in the will under consideration in *Irwin et al. v. Jacques et al.*, 71 Ohio St. 395, 73 N. E. 683, 69 L. R. A. 422, where there was a dispositive clause written in the margin on the last page of the will, and above the signature of the testator, and in no manner connected with the body of the instrument by any words, marks, or character, as a reference to indicate where the marginal matter is to be read in relation to the other provisions of the will, evidence is necessary in order to determine the end of the will; but where there is no ambiguity that may be explained, but only an omission that cannot be cured, a defendant cannot be

benefited by testimony or prejudiced by its rejection.

The judgment of the circuit court is reversed, and that of the court of common pleas is affirmed.

Reversed.

SHAUCK, C. J., and PRICE and DAVIS, JJ., concur.

(77 Ohio St. 152)

WREDE v. RICHARDSON, County Auditor, et al.

(Supreme Court of Ohio. Nov. 19, 1907.)

1. STATUTES—PRESENTATION TO GOVERNOR—EVIDENCE.

An entry in a record which is kept in the office of the Governor pursuant to a requirement of law, and with his acquiescence used to perpetuate evidence of the presentation to him of bills which have been passed by both Houses of the General Assembly, the entry being made by a subordinate of the Governor in the discharge of duties prescribed by him and showing the presentation of an identified bill on a day named, is competent and sufficient to prove such presentation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 29.]

2. SAME—ENACTMENT—IMPEACHMENT.

The enactment of an officially promulgated statute cannot be impeached by parol evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 383.]

3. SAME.

The Governor not having relinquished the duties of his office in view of a disability recognized by him, and there being no authorized procedure to ascertain that a disability has intervened, it is not competent, upon an issue as to the valid enactment of a statute, to show that upon the day of its presentation to him and for 10 days thereafter he was, by reason of illness, disabled to receive or consider it so as to give effect to the provision of the fifteenth section of the third article of the Constitution that in case of the disability of the Governor the duties of his office shall devolve upon the Lieutenant Governor.

(Syllabus by the Court.)

Error to Superior Court of Cincinnati.

Action by one Wrede against Richardson, county auditor, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The plaintiff, who was engaged in the business of trafficking in intoxicating liquors, filed his petition in the superior court against the defendants, who are the auditor and treasurer, the taxing officers, of Hamilton county, for a decree enjoining them from assessing and collecting a tax upon his business in excess of \$350 for the year commencing May 28, 1906; a tax of that amount being assessable under former legislation of admitted validity, and the excess of \$650 above that sum, which the auditor proposed to assess, having no authority except the act of March 28, 1906 (98 Ohio Laws, p. 99), whose constitutional validity is challenged in the present case upon the ground alleged in the petition that it was never presented to the Governor as required by the amend-

ment to article 2, § 16, of the Constitution adopted in November, 1903. The case proceeded to trial upon an issue as to the presentation to the Governor of the bill after it had passed both Houses of the General Assembly. The court below admitted the record evidence upon the subject of presentation, and excluded all oral evidence offered by the plaintiff to sustain the allegation of his petition that the bill had not been presented to the Governor. It was known in the legislative proceedings as "House Bill No. 24." It was not signed by the Governor, but the superior court found the following facts:

"On consideration thereof the court does find that there appears in the general record of the Governor of Ohio, under date of March 28, 1906, the following entry: 'March 28. H. B. No. 24 presented to Governor March 28. Filed Secretary of State, April 10, '06.' And the court does further find that upon the enrolled copy of said House Bill No. 24, known as the 'Aikin Law,' and published in 98 Ohio Laws, pp. 99 to 101, as the same is deposited in the office of the Secretary of State of Ohio, there appears the following indorsement: 'This bill was presented to the Governor March 28, 1906, and was not signed or returned to the House, wherein it originated, within ten days after being so presented, exclusive of Sundays and the day said bill was presented, and was filed in the office of the Secretary of State April 10, 1906. Lewis B. Houck, Secretary to the Governor.' The court further finds that there appears in a book entitled 'Minute Book of Acts of the General Assembly Messaged to the Governor, with his Action Thereon and Disposition Thereof,' kept in the office of the Governor of Ohio, under date of March 28, 1906, the following entry: 'Mar. 28. H. B. No. 24 became a law on April 10, 1906, lapse of time. April 10. H. M. Shaul.' The court further finds that there appears in the office of the clerk of the Senate of Ohio, in a book entitled 'Governor's Receipt for Bills,' at page 27 thereof, the following: 'Executive Department, Office of the Governor, Columbus, Ohio. Receipt of the following bills is hereby acknowledged: H. B. No. 24, Mr. Aikin. C. C. Lemert, Executive Clerk. Date, March 28, 1906.'

"The court therefore finds that the foregoing record with respect to the presentation of H. B. No. 24 to the Governor of Ohio is regular and free from fraud. The court does therefore exclude and rule out as incompetent and irrelevant all parol evidence offered herein to contradict said entries in the office of the Governor of Ohio, and the indorsement on said bill; and all evidence to show that said entries and indorsement were not individually made by the Governor of Ohio, or to show that no official proceedings were had or taken by the Governor of Ohio during a period of time commencing

March 27, 1906, and ending April 11, 1906; or that during said entire period of time commencing March 27, 1906, and ending April 11, 1906, the Governor of Ohio was disabled by illness from performing any of his official duties, or to show that said enrolled copy of said H. B. No. 24, bearing the signature of the president of the senate and speaker of the House of Representatives, was not personally presented to the Governor of Ohio, or placed in his custody. It is therefore considered, ordered, and adjudged that said House Bill No. 24, known as the 'Aikin Law' (98 Ohio Laws, pp. 99-101), is a valid law of the state of Ohio, and that the provisions of said law were and are in full force and effect. And it is therefore considered, ordered, and adjudged that the petition herein be, and the same is hereby, dismissed, at the costs of the plaintiff, and that the temporary injunction heretofore granted by the court in special term be, and the same is hereby, vacated and dissolved, and the defendants are restored to all things lost by reason thereof. To each and all of which findings, rulings, orders, judgments, and decrees the plaintiff excepts. And thereupon the plaintiff filed his motion in writing, as appears of record, for a new trial, and to set aside the foregoing decision, judgment, and decree, and the court, having considered the same, does now overrule said motion. To all of which the plaintiff excepts. [Duly certified.]

Upon the facts so found the superior court, being of the opinion that the bill had become a law without being signed by the Governor, rendered final judgment for the defendants.

Cohen & Mack, Rufus B. Smith, Albert Bettinger, A. J. Frelberg, Charles A. Groom, and Rowe, Shuey, Matthews & James, for plaintiff in error. Ireton, Schoenle & Poor and Wade H. Ellis, Atty. Gen. (Smith W. Bennett and O. E. Harrison, of counsel), for defendants.

SHAUCK, C. J. (after stating the facts as above). It being admitted that the bill was passed by both Houses of the General Assembly, and that the Governor did not either sign it or return it to the House in which it originated with his objection thereto, its efficacy as a statute depends upon the following provision of the Constitution: "If any bill passed by both Houses of the General Assembly, and presented to the Governor, is not signed and is not returned to the House wherein it originated and within ten days after being so presented, exclusive of Sunday and the day said bill was presented, said bill shall be law as in like manner as if signed." Counsel for the plaintiff conclude that with respect to this bill there was not the presentation to the Governor which this provision of the Constitution obviously requires. Upon analysis of the argument which they advance in support of that conclusion, two general propositions appear: That the record evidence of presentation is not sufficient to show

conformity with the constitutional requirement, and that oral evidence may be introduced to support the allegation that there was not the required presentation. Since the Constitution does not prescribe either the place or manner of presentation, or the evidence by which it should be shown, it seems necessary to consider the purpose for which presentation is required, for it will be safe to assume that the presentation is sufficient if appropriate to that purpose. While the duties of the Governor are mainly of an executive character, to the extent indicated by the constitutional provision quoted, he is admitted to participation in legislation. The three modes in which he may deal with a bill, which has been passed by both branches of the General Assembly and presented to him, alike involve consideration and an exercise of his judgment respecting its merits. The manner and extent of that consideration are left to the determination of the Governor without direction or restriction, except that he may not retain the bill beyond the period of 10 days. We cannot accept any view of the case which assumes that his discretion in the premises is otherwise limited. He may, in any place and at once, give to the bill the force of the law by signing it; or he may within the 10 days return it to the House in which it originated with a statement in writing of his objection thereto; or he may, if he so elects, permit it to become a law at the expiration of 10 days without signifying either approval or objection. The object of the requirement of presentation obviously is to afford to the Governor an opportunity for the considerate exercise of the discretion which is thus vested in him. To say that the object is to enable him to so exercise that discretion is manifestly inaccurate.

Was the presentation of this bill appropriate to the purpose stated? The foregoing statement of the case presents numerous written memorials intended to establish the fact of presentation. Among them is the following entry found in the general record of the Governor: "March 28. H. B. Number 24 presented to Governor March 28. Filed Secretary of State, April 10, 1906." The book in which this entry was made is certainly identified as regularly kept as the Governor's record. It was kept to the knowledge and with the acquiescence of the Governor. It had been received by him from his predecessor in office. It was kept in obedience to the requirement of section 107 of the Revised Statutes of 1892 that "the Governor shall cause to be kept in his office a general record in which shall be entered a brief abstract of the official proceedings of each day." This particular entry was made by a subordinate of the Governor in the discharge of duties to which he had been appointed, and the appointment was in strict conformity with the requirement that "the Governor shall cause" the record to be kept. Of like

character is the entry in the book designated as the "Governor's Receipt for Bills," except that there appears to be no statute requiring it to be kept. Over the signature of the Governor's executive clerk it contains a receipt for this bill on March 28th. These records with respect to the bill are corroborated by the legislative record, and by those of the Secretary of State, who is the custodian of the laws. The executive records referred to were kept in one of several rooms maintained by the state, devoted exclusively to the use of the Governor in the conduct of his official business, and designated as the place for the conduct of that business. They seem to show the presentation required by the Constitution.

Did the trial court err in excluding the oral evidence offered by the plaintiff? That evidence tended to show that the Governor was in his office on the day of his inauguration, January 8, 1906; that he never returned to it, being confined to his residence by an illness which proved mortal on the 18th day of the following June; that in the meantime, when his strength permitted, he received personal visits from his secretary, who conferred with him respecting the business of his office and pending legislation, and placed in his hands bills which had been presented at his office for his approval; that at one of these interviews while this bill was pending, he indicated his approval of its provisions, but that on the 28th day of March, and during the 10 days following, he was unable, by reason of his illness, to receive the bill or to give it any consideration. In some of the cases cited in the brief of plaintiff's counsel, parol evidence was received upon the subject of presentation of bills to the Governor. In some of those cases the Governor himself affirmed that the bill had not been presented to him, and in most of them it appears that both the law and the practice of the Governor left the question of presentation to be determined wholly by evidence in pais. With what propriety evidence of that character was admitted, under such circumstances, we need not consider. Here a record of the fact was made, and this in accordance with not only the requirements of the statute and the custom prevailing in the Governor's office, but in accordance with the policy long established and firmly adhered to requiring that the enactment of officially published statutes shall be impeached only by the records of their enactment. *Miller & Gibson v. State*, 3 Ohio St. 475; *State ex rel. Herron v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829. In this connection it is again important to observe that such manner of presentation had the approval of the Governor, and that it accorded with his discretion. The admission of the Governor to a limited participation in legislation affords neither reason nor occasion for a departure from a policy whose beneficent operation has been long realized. It is clear that if one of the steps now neces-

sarily involved in the enactment of a law may, by evidence in pais, be shown not to have been taken, the entire subject of what the law is is withdrawn from the protection of the rules devised and applied for the purpose of securing certainty where doubt would be intolerable. The prompt aversion of the legal mind from the consideration of evidence in pais to show the invalidity of an officially promulgated statute is justified by a contemplation of the consequences which would follow. Since judgments bind only those who are parties to the record, a conclusion in one case that a statute is valid would be no bar to a contrary conclusion in another, and not only acts to confer civil rights, but those defining and punishing crimes and misdemeanors, might be judicially determined to be void as to one citizen of the state and valid as to another. The Secretary of State is the official custodian of our statute laws, and we have long been familiar with the rule founded upon statutes that his certificate is conclusive as to what that law is. Obviously the recognition of the doctrine advanced by counsel for the plaintiff would involve the repudiation of that rule; and, since no one may be required to challenge the validity of a statute until it is invoked against him, there would arise a condition of endless doubt respecting a subject upon which every consideration requires that there should be immediate and enduring certainty. An interesting case upon the subject is *People v. McCullough*, 210 Ill. 488, 71 N. E. 602, where the court, after considering the testimony of a number of witnesses upon the subject of a presentation of a bill to the Governor and his action thereon, became so impressed with the intolerable mischief inseparable from an inquiry of that character that it resorted to the established doctrine respecting the conclusiveness of the record and based its decision upon that ground. That view is well sustained by *State ex rel. Herron v. Smith*, supra, and numerous cases cited in the brief of counsel for the defendants.

It is suggested that the rejected evidence tended to show that on the 28th of March, and continuously for more than 10 days thereafter, the Governor, owing to his extreme illness, was unable to receive or consider the bill, and that because of his disability the duties of his office devolved upon the Lieutenant Governor according to the provisions of section 15 of article 3 of the Constitution. But the Governor had not voluntarily surrendered the functions of his office, and no provision has been made for determining when a disability intervenes and when it ends. The constitutional provision does not execute itself, and the conduct of the affairs of an office by its occupant cannot be questioned in this manner. A self-contained Lieutenant Governor could not be expected to assume the functions of the Governor upon his own initiative. The judicial department of the government is charged with the duty

of restraining the other co-ordinate departments to the exercise of the authority conferred upon them, but it is not permitted to consider the ability or the care with which such authority is exercised.

According to the well-known rule of this court, the points decided will be found in the syllabus. It may, however, be useful to add that the foregoing observations are intended to be restricted to the requirements of the present case. We do not consider whether, in the absence of the records in the office of the Governor, the fact of presentation to the Governor should not be regarded as established by the legislative journals and the records of the Secretary of State, showing the presentation to the Governor and the receipt from him by the Secretary.

Judgment affirmed.

PRICE, CREW, SUMMERS, and SPEAR, JJ., concur.

(77 Ohio St. 218)

ARDREY et al. v. SHELL.

(Supreme Court of Ohio. Dec. 2, 1907.)

EXECUTOR AND ADMINISTRATOR—NOTICE OF APPOINTMENT—EVIDENCE THEREOF—NOTICE—SECTION 6089, REV. ST.—TWO YEARS' LIMITATION OF ACTIONS BY CREDITORS.

The filing in the probate court of proof of publication of notice of appointment by an executor or administrator, required by section 6089, Rev. St. 1892, is a mode of perpetuating the evidence of such notice, and is for the convenience and protection of the executor or administrator. It forms no part of the notice to creditors required to be given within three months after the giving of bond, and is not for the benefit of creditors. Hence, where such notice is duly given by publication within three months after the giving of bond, although proof of such publication is not filed in the probate court until after the expiration of a year from the giving of the bond, the two years' limitation within which actions may be brought, provided by section 6113, Rev. St. 1892, will begin to run from the date of the giving of the bond.

(Syllabus by the Court.)

Error to Circuit Court, Perry County.

Action by Emma R. Shell against R. G. Ardrey and M. T. Huston. Judgment for defendants was reversed in the circuit court, and they bring error. Judgment of the circuit court reversed, and judgment of common pleas affirmed.

The defendant in error, Emma R. Shell, commenced an action in the court of common pleas of Perry county, October 21, 1904, to recover against the plaintiffs in error, R. G. Ardrey and M. T. Huston, as executors of Sarah Thompson, deceased, upon an account for personal services alleged to have been rendered during the life of the testatrix from May 6, 1898, to August 17, 1899; the claim having been rejected October 20, 1904. Among other defenses interposed was the following: "Defendants say that they were duly appointed executors by the probate court of Perry county, Ohio, of the said estate on the 21st day of June, A. D. 1902; that thereupon and

on said 21st day of June, A. D. 1902, they duly qualified as such executors by entering into a bond to the approval of the said probate court; and further say that they gave due notice of said appointment and qualification as required by law in the New Lexington Tribune, a newspaper printed and of general circulation, in said Perry county, Ohio, for three consecutive weeks, beginning in the issue of said newspaper of the date of June 26th, 1902; and further allege that more than two years have elapsed since the appointment, qualification, and the filing of the bond of the said executors and the presentation of the said alleged account and the rejection of the same by these executors and the commencement of this suit; that the action is barred by lapse of time under the statute of limitations for bringing such action; and that said alleged action did not accrue after the expiration of two years from the time said executors of said estate gave bond according to law." To this the reply alleged that notice of appointment was not given by the executors as required by law; that no return of the alleged notice of appointment or proof of publication thereof was made to the probate court as required by law; that plaintiff had no actual or constructive notice, knowledge or information of the appointment until the — day of —, 1903; and that at the time her cause of action accrued, and for two years thereafter, plaintiff was within the age of minority.

At the trial counsel for plaintiff requested the court to give in charge to the jury the following: "It is admitted in this case that the defendants were appointed executors of the last will of Sarah Thompson, deceased, on the 21st day of June, 1902, and the defendants claim in the first defense of their answer that they gave due notice of such appointment in the New Lexington Tribune, a newspaper printed and of general circulation in this county, for three consecutive weeks, beginning in the issue of said newspaper of the date of June 26, 1902. If you should find that the defendants did publish this notice, as above stated, then I charge you that the law made it their duty to file their affidavit, or the affidavit of the person employed by them to give such notice, in the probate court of this county, of the time, place, and manner of giving such notice, within one year after giving their bond as such executors, and to have such affidavit, with a copy of such notice, recorded in said probate court within one year after giving their said bond; and that if thereupon you should find that the defendants gave such notice, but did not within one year after giving their bond have such affidavit and a copy of said notice filed and recorded, as above stated, then I charge you the two years' limitation pleaded in the second defense of the answer would not apply to this case and would not be a bar to this action"—which charge the court refused to

give, but did charge the jury, among other things, as follows: "If you find from the evidence that the defendants were appointed executors of the last will of Sarah Thompson, deceased, on the 21st day of June, 1902, and that on said 21st day of June, 1902, they duly qualified as such executors by entering into a bond to the approval of the probate court of Perry county, Ohio, and that within three months after their said appointment and qualification, as aforesaid, they caused notice of their said appointment and qualification as such executors to be published in a newspaper, printed and of general circulation in said Perry county, Ohio, for three consecutive weeks, then I charge you as a matter of law that the claim of the plaintiff sued upon in this case is barred by the statute of limitation, and your verdict must be for the defendants. The mere fact that an affidavit by the executors or the publisher of the paper was not made, filed, and recorded, together with a copy of the notice in the probate court within one year after said executors gave bond, would not prevent the statute of limitation from barring the plaintiff's claim. If you find, from the evidence, under the instructions just given you, that the plaintiff's claim is barred by the statute of two years' limitation, then your labors are at an end, and you will return into court your verdict for the defendant."

The trial resulted in a verdict for the defendant. Thereupon the plaintiff prosecuted error to the circuit court, which court reversed the judgment of the common pleas for error in refusing to give the charge requested by plaintiff, and for error in the charge as given. The defendants below seek a reversal of the judgment of the circuit court. Facts are stated in the opinion.

Crossan & Binckley, for plaintiffs in error.
J. E. Powell and L. A. Tussing, for defendant in error.

SPEAR, J. (after stating the facts as above). It appears by the record that the executors were appointed, gave bond, and so qualified as such, June 21, 1902. They thereupon caused to be published notice of their appointment in the New Lexington Tribune, a newspaper published and of general circulation in the county of Perry, for three consecutive weeks, beginning June 26, 1902, and continuing in the issues of July 3d and July 10th following. Proof of this publication was filed in the probate court August 24, 1903, and not before. As mentioned in the statement, the plaintiff's action was commenced October 21, 1904, being two years and four months after the date of the giving of the bond and the due qualification of the executors, but within one year and two months after the filing of the proof of notice in the probate court.

The issue being the two years' statute of limitation, the concrete question is: At what date did the statute begin to run? An answer

to this calls for some examination of the statutes bearing upon the subject. Provision in respect to the giving of notice of appointment is made by sections 6088 and 6089 of the Revised Statutes of 1892, which are: "Every executor or administrator shall, within three months after giving bond for the discharge of his trust, cause notice of his appointment to be published in some newspaper of general circulation in the county in which the letters were issued for three consecutive weeks. An affidavit of the executor or administrator, or of the person employed by him to give such notice, being made, filed and recorded, together with a copy of the notice in the probate court, within one year after giving bond as aforesaid, shall be admitted as evidence of the time, place, and manner in which the notice was given." Further provision relating to proof of notice by section 6126 is to the effect that, if notice shall not be given of the appointment within the three months, or the evidence shall fail to be perpetuated as hereinafter provided, and cannot be made, the court may order and allow such notice to be given at any time afterward, in which case the periods which are limited for the commencement of actions against executors and administrators, and which begin to run as before directed from the date of the administration bond, shall begin to run respectively from the time such order of court is made, if notice be published according thereto. As to actions already accrued, the limitation is provided for by section 6113, which is: "No executor or administrator, after having given notice of his appointment as provided in this chapter, shall be held to answer to the suit of any creditor of the deceased unless it be commenced within two years from the time of his giving bond as aforesaid, excepting in the cases hereinafter mentioned." The exceptions thereafter mentioned relate only to causes of action which accrue after two years from the time of the giving of the bond, and hence are not applicable to the case at bar.

It is apparent that this is a special statute applying to a particular subject-matter. It is further apparent that the general purpose of the statute is to facilitate the settlement of estates of deceased persons, and, in aid of that purpose, to limit the bringing of actions against such estates to the period of two years from the giving of the bond, provided proper notice of appointment is given, and where the notice has not been given within the time directed, or proof of the same cannot be made, the order of the court is made to take the place, in legal effect, as regards the statute of limitations, of the giving of the bond. It is equally apparent, as has been often held (see opinion of Granger, C. J., *Jones v. Jones*, 41 Ohio St. 417), that this statute is "upon a footing somewhat different from the ordinary statute of limitations, behind whose bar the debtor himself may take refuge, and that its provisions

should be construed in furtherance of the main purpose and intent of the entire statute." The circuit court held, and counsel for defendant in error now insist, that proper notice was not given in this case, because proof of the notice of appointment which was published was not filed in the probate court within the time contemplated by section 6089, to wit, within one year after the giving of the bond, and this is the principal point of contention in the case. Its proper solution depends, as we think, upon an ascertainment of the purpose of the notice and the purpose of requiring proof of it to be filed in the probate court. Manifestly, the object intended to be attained by the notice is that creditors, and all interested, may be apprised of the appointment, and thus put upon notice of the necessity of diligence in the preservation of their rights against the estate. How this matter of information to creditors could be materially aided by the presence among the files in the probate court, or on the record, of an affidavit of publication, it is not easy to see, for an examination of the files and record generally in the matter would give to the inquirer full information respecting the appointment, without resorting to the proof of publication. But, besides this, creditors are not presumed to search the files or record of the probate court to ascertain the appointment of executors or administrators. Surely they are not required so to search, and are not guilty of laches if they fail to do it. This being so, it follows, as we think, that the requirement as to the filing and recording of the proof is for the benefit and protection of the executor or administrator, and not for the benefit or enlightenment of creditors. Section 6126 strikes the keynote when it in terms treats the filing of the proof of notice in the probate court as a method of perpetuating evidence, and its declaration is of special significance as throwing light upon the general purpose of that provision of the statute. It is true that section 6089 provides that the proof, being made in the probate court within one year after giving bond, shall be admitted as evidence; but it is nowhere provided that other evidence showing the same fact should not be given, nor that the notice shall be ineffectual if the proof be not made within one year. In other words, the proof to be made in the probate court forms no part of the notice required to be given, and, if not part of the notice, then it follows that the due publication completes the notice, and the imperative words of the statute control: "No executor or administrator, after having given notice of his appointment, shall be held to answer to the suit of any creditor unless it be commenced within two years from the time of giving bond."

The precise question has not been, so far as we are aware, before presented to this court; but our statute on the subject is, in large measure, a reproduction of the statute of Massachusetts, and that statute has been

construed by the Supreme Judicial Court of that state in two cases. Neither is precisely analogous on the facts, but the same principle of law is involved in each. In *Green v. Gill, Exr.*, 8 Mass. 111, the executor offered parol evidence that he had given the notice required by statute, but it did not appear that he had made and filed an affidavit of such notice in the probate office. The court held that the provision as to filing proof in the probate office was for the convenience of the executor or administrator, and that other evidence of the fact was competent. The bar of the statute was maintained. Again, in *Henry v. Estey, Adm'r*, 13 Gray (Mass.) 336, a similar question arose. No affidavit of the administrator that he had given notice of his appointment, as required by statute, had been filed and recorded. Proof was allowed to be given of the fact by the testimony of other witnesses. This was held not to be error; the court remarking that the mode of perpetuating the evidence of such notice by the filing of an affidavit is merely a cumulative provision for the benefit of the administrator, but his failure to do so does not preclude him from resorting to other evidence to establish the fact of notice. These decisions, while not necessarily binding upon the courts of this state, are strongly persuasive in view of two considerations. They are decisions of a court of very high standing and authority, and have material application to the case at bar because of the rule that, where a statute adopted from a sister state has received a settled construction in that state, such construction will in general be followed by the courts of this state. *Favorite v. Booher's Adm'r*, 17 Ohio St. 548; *Ives v. McNicoll*, 59 Ohio St. 402, 53 N. E. 60, 43 L. R. A. 772, 69 Am. St. Rep. 780; *Gale v. Priddy*, 66 Ohio St. 400, 64 N. E. 437.

It is, however, insisted by counsel for defendant in error that the statute did not begin to run against the plaintiff below because of the fact of infancy as set up in her reply. To allow this claim would, we think, be to place an exception in the statute which the General Assembly did not see fit to enact. The language is "any creditor." Courts are not authorized to ingraft exceptions to imperative requirements of a statute, even though the statute itself may seem harsh or unjust. *Favorite v. Booher's Adm'r*, supra; *Holles v. Riddle, Adm'r*, 74 Ohio St. 173, 78 N. E. 219, 113 Am. St. Rep. 946; *Amy v. Wattertown (C. C.)* 22 Fed. 418.

It is further insisted that, because of the fact that one of the two executors was absent from the state a portion of the time just prior to the commencement of the action, time should have been deducted from the two years, and, had that been done, the action would have been begun in time. Whatever gravity might attach to this question under differing circumstances we need not discuss; but, in the case at bar, the plaintiff having had no difficulty in finding within the state,

indeed, as a near neighbor, one of the executors, nor in presenting her claim to him and obtaining adverse action thereon, and having thereupon herself acted upon the rejection thus obtained, and commenced and maintained her action against both, we are of opinion that the absence from the state a portion of the time of one is an immaterial circumstance in the case.

Other objections to the judgment of the court of common pleas are urged. We have considered them, but find no prejudicial error in the record of proceedings in that court. In this connection it may be added that the cross-petition in error of the defendant in error in this case was needless. Where a defendant in error desires a reversal in part of the judgment of the circuit court—that is, a modification of it—a cross-petition in error is proper; but where the defendant in error simply wishes to urge grounds for the reversal of the trial court other than those upon which the judgment of reversal by the circuit court was placed, a cross-petition in error is wholly unnecessary.

Our conclusion is that the failure to file in the probate court proof of the notice of appointment within the year did not prevent the commencement of the running of the statute, and that in holding otherwise the circuit court erred. This conclusion is not required by any previous decision of this court, but, nevertheless, is in accord with the general trend of decisions in cases other than those already cited, viz.: *Gilbert's Adm'r v. Adm'r of Little*, 2 Ohio St. 156; *Delaplane v. Smith*, 38 Ohio St. 413; *Gray v. Case School*, 62 Ohio St. 1, 56 N. E. 484. See, also, *Crowell's Executors & Administrators*, 206; *Schouler on Executors*, § 418.

Judgment of the circuit court reversed, and judgment of the common pleas affirmed.

Reversed.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and DAVIS, JJ., concur.

(77 Ohio St. 238)

STATE v. FENDRICK.

(Supreme Court of Ohio. Dec. 3, 1907.)

JURY—CHALLENGE TO ARRAY.

A police court of a city exercising its jurisdiction to try a person charged with a misdemeanor committed outside of the city limits, but within four miles thereof, does not err in overruling a challenge to the array of jurors; the challenge being upon the ground that they have been drawn wholly from within the limits of the city.

(Syllabus by the Court.)

Error to Circuit Court, Franklin County.

Clara Fendrick was arraigned before the police court of the city of Columbus on charge of a misdemeanor committed in Franklin county, but about 200 feet south of the south corporation line of the city of Columbus. She entered a plea of not guilty. A jury being drawn for the trial of the charge, she chal-

lenged the array upon the ground that she resided, and her offense was alleged to have been committed, beyond the corporation limits of the city, while the jury was drawn wholly from within the limits of the city. Her challenge was overruled, and upon a trial she was found guilty, and an appropriate sentence followed the verdict. Upon her petition in error the court of common pleas affirmed the judgment, and the circuit court reversed the judgments of both the common pleas and the police courts, and the state brings error. Judgment of circuit court reversed and that of common pleas affirmed.

George S. Marshall, City Sol., and Charles E. Carter, Asst. City Sol., for the State. O. D. Saviers, for defendant in error.

SHAUCK, C. J. There appears to be neither doubt nor occasion for it that a valid statute confers upon the police court jurisdiction of the offenses of the character of this if committed within the limits of the city, or within four miles thereof. The circuit court reversed the judgment because it was of the opinion that the challenge to the array of jurors should have been sustained upon the ground that the offense was charged to have been committed without the city, while the jurors were all drawn from within the city. This did not result from chance, because there is no provision for drawing jurors from without the city limits for service in the police court of the city. It being admitted that the police court had jurisdiction of the offense, and that no statute or ordinance required the drawing of jurors from territory without the city limits, the judgment of the circuit court is erroneous, unless some constitutional right of the accused was denied her. The opinion of the circuit court is before us, and it appears to give controlling effect to *Olive v. State*, 11 Neb. 1, 7 N. W. 444, and *Armstrong et al. v. State*, 1 Cold. (Tenn.) 338, in which it was held that the trial district and the jury district must be the same. In following those cases the circuit court rejected the views expressed in *State ex rel. Brown v. Stewart*, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388, and *State v. Robinson*, 14 Minn. 447 (Gil. 333), where the contrary conclusion was reached upon the same question. The conclusion of the circuit court is also in conflict with federal decisions respecting the districts throughout which federal courts have jurisdiction and the districts from which juries must be drawn.

Looking to the reasons involved, unless a constitutional guaranty has been disregarded, there can be no valid objection to the view of the subject taken upon the trial. It is manifest that, if the jury had been drawn from the entire district embraced in the jurisdiction of the police court, the same jury might have been drawn and impaneled. It is equally manifest that, from whatever districts the jurors were drawn, their qualifica-

tions would necessarily be the same, and that the chance result would not have affected the impartiality of the trial. But, since the consideration of equivalents is not permissible where constitutional guarantees are involved, and since such guarantees may not be disregarded because in particular cases they do not appear to be of materiality or importance, we have to inquire whether there is a guarantee of that character by which the present question is affected. The only provision of the Constitution appearing to have any relation whatever to the subject is that of the tenth section of the first article, that the party accused shall have "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The primary purpose of this provision is to fix the place of trial. All that is required as to the jury is that it shall be impartial. As to the place of trial, the substance of the right conferred is that "it shall be in the county or so near thereto that the accused may have the benefit of his own reputation and that of his witnesses, and that he may, with as much certainty and as little expense and delay as are practicable, secure the attendance of his witnesses." *State ex rel. v. McCarty*, Judge, 52 Ohio St. 363, 33 N. E. 1041. The impartiality of the jury is required by the statute under which this panel was drawn. Neither a comprehensive view of the purpose of the guarantee nor a narrow view of the terms used will justify the conclusion that an accused person may not be tried by an impartial jury of the county in which the offense is alleged to have been committed. The judgment of the circuit court is reversed, and that of the common pleas affirmed.

Reversed.

PRICE, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(77 Ohio St. 285)

ATLEY v. CLINTON COUNTY COM'RS et al.

(Supreme Court of Ohio. Dec. 3, 1907.)

1. DRAINS—COUNTY DITCHES—SUPERVISION OF WORK AND PAYMENT FOR CONSTRUCTION—COMMISSIONERS TO FIX COMPENSATION FOR DAMAGES—DETERMINATION OF NECESSITY FOR DITCH—APPEAL.

In proceedings to establish a county ditch by virtue of section 4447, Rev. St. 1906, and subsequent cognate sections, the final order or judgment of the county commissioners contemplated by the last clause of section 4461, from which an appeal may be taken by an aggrieved party, is the order or judgment finally determining that the proposed ditch is necessary and will be conducive to the public health, convenience, or welfare, and that it is the best route, and also determining all claims for compensation and damages, if any are made.

2. SAME—APPEAL—DISMISSAL.

An appeal taken from the finding of the county commissioners that the ditch is necessary, in advance of the time set for the hearing of such claims for compensation and damages, and before they are heard and determined, is

premature, and may be dismissed by the probate court for that reason.

(Syllabus by the Court.)

Error to Circuit Court, Clinton County.

Appeal of Evaline Atley from the finding of the commissioners of Clinton county and others, in proceedings for the construction of a drain. From a judgment of the circuit court, reversing a judgment of the common pleas, reversing a judgment of the probate court, Atley brings error. Affirmed.

Hayes & Swaim and J. M. Morton, for plaintiff in error. J. T. Doan, Pros. Atty., and Smith & Clevenger, for defendants in error.

PRICE, J. On or about the 21st day of January, 1905, William Haley et al. filed with the auditor of Clinton county their petition for the location and construction of a ditch along a route and through the lands therein described. Bond was filed, and notice given to parties interested, as prescribed by statute. This petition was delivered to the commissioners of that county by the auditor, who had fixed the 21st day of February, 1905, as the day of hearings, and on that day, the record says, the commissioners met "at the place of the beginning of the ditch, and adjourned from time to time, and heard all proof offered by any of the parties affected by said improvement, * * * and we went over and along the line of said improvement, and by actual view of the said ditch and the premises along and adjacent thereto and to be drained or benefited thereby, determined the necessity thereof. And we do hereby find that said improvement is necessary, and will be conducive to the public health, convenience, and welfare, and a benefit to the lots and lands along the line thereof by furnishing drainage thereto. And we further find that the route described is the best." A part of the ditch was ordered to be tiled.

A recital of the foregoing proceedings appears on the journal of the commissioners, under date of June 27, 1905. The auditor was ordered to place the proceedings on the journal, and the county surveyor was ordered to go upon the line, to make survey, level, etc., as required by the statute, to make and return a schedule of all lots and lands, corporate roads or railroads that would be benefited, and an apportionment of the estimated cost of locating and constructing said improvement, according to the benefits which would result to each, and to file his report on or before the time fixed for the hearing of the same. It was then ordered that the 10th day of August, 1905, at 10 o'clock a. m., at the auditor's office, be fixed "for the hearing of applications for any appropriations of land taken for said improvement and damages said parties affected by said improvement, or any of them, may sustain thereby, and for the approval of the report of the surveyor."

On the same day that these proceedings were spread upon the journal of the commis-

sioners, to wit, June 27, 1905, the plaintiff in error gave the following notice of appeal: "Now comes Evaline Atley, and gives notice of her intention to appeal from the decision and finding of the commissioners herein that said ditch is necessary and will be conducive to the public health, convenience, and welfare, and that said route is practicable, and also from the order of the commissioners to tile the same, and to each and every part of said order. June 27, 1905. Evaline Atley." This notice of appeal was filed with the auditor on the same day, and the appeal bond was fixed at \$700, which bond was given, and the appeal filed in the probate court of Clinton county on the 15th day of July, 1905, accompanied with a transcript of the proceedings of the commissioners and the original papers, and that court fixed July 19, 1905, at 9 o'clock a. m., as the day and hour for the hearing of all preliminary motions and the examination of all the papers so filed.

On that day, the record recites, "the parties appeared, and the court having examined the papers, do find that said appeal is perfected in due form. And thereupon the court fixes the 27th day of July, 1905, at 8 o'clock a. m., as the time for trial of said case to a jury. And it is ordered that a notice issue to the clerk of the court of common pleas, and the sheriff of the county, to draw 16 names from the jury box to serve as a jury herein, as provided by law * * * until which time this cause stands adjourned." A venire for the jury was issued, returnable July 27, 1905, at 8 o'clock a. m. The jury responded accordingly, and before the beginning of the trial, and on the same day, the commissioners of the county and the petitioners for the ditch moved the court to dismiss said appeal on the ground that "the same was prematurely taken pending and before the final hearing of said matter by the county commissioners." On consideration of said motion the probate court found that the appeal had been prematurely taken, and had not been perfected according to law, and dismissed the same at the costs of the appellant. Thereupon the jury was discharged. The plaintiff in error excepted to the order of dismissal and judgment for costs, and prosecuted error in the court of common pleas, which court reversed the order and judgment of the probate court for error in sustaining the motion to dismiss the said appeal. The commissioners and petitioners for the ditch prosecuted error in the circuit court to reverse said judgment of the court of common pleas, and on hearing the circuit court reversed the judgment of the court of common pleas for error "in reversing the judgment of the probate court, and in holding said appeal was properly and legally taken." The case is here on error for us to determine which of the lower courts committed error.

Mrs. Atley, plaintiff in error, owns certain lands on the line of ditch in question, and through which it would be constructed, and

therefore belonged to that class of landowners who might file claims for compensation and damages; and when the commissioners, on the 27th of June, 1905, found in favor of the improvement—that it was necessary and would be conducive to the public health, convenience, and welfare—they fixed the 10th day of August, 1905, for the hearing of applications for compensation and damages. The plaintiff in error did not await the arrival of that day, but immediately took an appeal, and it ran its course and was dismissed by the probate court on the 27th day of July. The commissioners followed the law—section 4452, Rev. St. 1906—by meeting at the beginning of the ditch on the day appointed for the purpose, and there all interested parties were privileged to be heard, and, after hearing the parties, and any other competent testimony, they viewed the route of the proposed ditch, and found in favor of the improvement, as before stated. We presume the county surveyor performed his duty under the order of the commissioners and as defined by sections 4454 and 4455, Revised Statutes. But Mrs. Atley did not wait for the result of the surveyor's work.

Section 4460 provides that at any time on or before the day set for hearing as provided in section 4452, Rev. St. 1906—August 10th, in this case—"any person or corporation whose lands are taken or affected in any way by such improvement may make application to said commissioners in writing for compensation or damages, and they, or any of them, may make an application in writing for a change or alteration of the line of the ditch through their premises, and a failure to make such application shall be deemed and held to be a waiver of all rights thereto."

Section 4461 provides the procedure in fixing the compensation and damages, and the making of a change or alteration in the line, if such change should be made; also the manner of apportioning the expense of such change or alteration. The last clause of the section reads: "Provided, however, that if any person or corporation aggrieved by any final order or judgment of the commissioners, shall at the final hearing before them, or within such time as may be provided by law, file a written notice of an intention to appeal therefrom, no further proceedings shall be had and no payments shall be made as herein provided, until said proceedings on appeal shall be finally disposed of and determined."

The payments referred to in the foregoing language are the payments of expenses of location, change, or alteration, if any, and the compensation and damages allowed to the landowners who may have applied for the same. When the notice of intention to appeal is legally given, all further proceedings on the ditch are suspended, and no payments of expenses or compensation for damages shall be made until matters appealed are finally disposed of. It is clearly indicated by this

provision that a final order has not been reached until all applications for compensation and damages have been decided, as well as all applications for a change or alteration of the route of the ditch have been determined. If otherwise, why provide that no payments of expenses, compensation, or damages shall be paid until the appeal shall be finally disposed of? If the claims for compensation and damages are fixed and allowed, and there are no changes or alterations requested or made in the line, the questions as to location of the improvement, compensation, and damages are final as to the county commissioners. In this case, the 10th day of August, 1905, was set to hear the claims for compensation and damages, and by virtue of sections 4460 and 4461 written applications for a change or alteration of the line of the ditch were to be heard on the same day. Hence, until that day's proceedings were over, it could not be said that the ditch petitioned for had been certainly located on the line described in the petition, inasmuch as the several landowners had the right to ask changes and alterations of the route through their respective premises. Moreover, the amount allowed as compensation and damages, and the changes and alterations, if any, would largely affect the desire to appeal, and enable the dissatisfied party to determine from what order or part of the proceedings he desired to appeal. None of these matters had been passed on when the plaintiff in error took her appeal, for the day set for that hearing had not arrived. When her appeal was taken and filed, the ditch proceeding was yet in its initial stage. The line or route, on written application by one or more landowners, was subject to subsequent material changes, which could have been heard only on the 10th of August, or an adjourned day, when all claims for changes or alterations, compensation, and damages would be finally settled. Until then, we think there was no final order from which appeal would lie. We do not mean by this statement that any appeal is allowed from the apportionment of the expenses and costs of construction.

There is another event provided for in section 4462: "A person or corporation, party to the proceeding, may file exceptions to the finding of the commissioners that the improvement is necessary or will be conducive to the public health, convenience or welfare, and that the line described is the best route, or to the apportionment, or to any claim for compensation or damages, at any time before the time set for the final hearing of the report and apportionment. The commissioners may hear testimony and examine witnesses upon all questions made by the exceptions, and for that purpose may compel the attendance of the witnesses by subpoena," etc. These exceptions are in the nature of a second challenge of the orders theretofore made as to location of the ditch, and again raises the question whether it will be conducive to the pub-

lic health, convenience, or welfare, and whether the line described is the best route. The exceptions may be taken to the apportionment, or to any claim for compensation or damages. These exceptions, raising one or more of the above questions, may be filed "at any time before the time set for the final hearing of the report and apportionment." The final order we have been considering under the last clause of section 4461 may be held in abeyance by the filing of the exceptions referred to until they are determined. If the commissioners sustain the exceptions to the finding of the commissioners that the improvement is necessary, or will be conducive to the public health, convenience, or welfare, and that the line described is the best route, then the improvement falls on that petition, and no appeal for any reason is necessary. Or the commissioners may overrule the exceptions as to the above points, and sustain them as to claims for compensation or damages. Or these exceptions may be also overruled, and, in such event or events, the parties will know from what decision they may desire to appeal. If no such exceptions are filed as to the necessity of the ditch, and that it will be conducive to the public health, convenience, and welfare, the final order as above considered under the last clause of section 4461 is the final order from which appeals will lie. On the other hand, if the effect of such final order is suspended by the timely filing of exceptions to points decided therein, the decision of such exceptions becomes the final order as to the ground of such exception from which appeal may be taken within the statutory period, if the subject of appeal is within section 4463. We so construe these sections, believing it the duty of dissatisfied parties to exhaust their efforts to have redress before the commissioners by use of exceptions so provided for, before resorting by appeal to another tribunal.

Section 4463, Rev. St. 1906, provides: "Any person or corporation aggrieved thereby [the decisions of the commissioners] may appeal from any final order or judgment of the commissioners made in the proceeding and entered upon their journal, determining either of the following matters, viz.: (1) Whether said ditch will be conducive to the public health, convenience or welfare. (2) Whether the route thereof is practicable. (3) The compensation for land appropriated. (4) The damage claimed to property affected by the improvement." The section proceeds: "And the appellant shall file with the commissioners, at the final hearing before them, a notice in writing of an intention so to do, and specifying therein the matter appealed from. * * * Here again we have the final hearing referred to, and the notice of intention to appeal must specify the matter appealed from. If the appeal may be taken from the original order locating the improvement, in advance of the determination of any changes or alterations, and also in advance of the fixing of the

amounts of compensation and damages, why was it necessary to provide that the notice for the appeal shall specify therein "the matter appealed from"? In such a condition there would be but one matter passed on, and there would be nothing to specify.

In this case the appeal was taken on the day the proceedings locating the ditch were entered in the journal, which was June 27, 1905. We think it was premature. It would be very confusing and mischievous in results if an appeal can be thus taken from the initial proceedings, and when compensation and damages are subsequently allowed or refused, another appeal may be taken, so that the probate court would have separate appeals, to be heard, maybe, at different times by different juries. Such a straggling practice is not within the policy of our ditching statutes, however obscure certain of their provisions may be.

But it is argued that the motion to dismiss the appeal came too late, the day set for hearing the preliminary questions having passed without any attack upon it. The record from the probate court is silent as to what, if anything, was said on that occasion. It is recited in the entry that "the court, having examined the papers, do find that said appeal is perfected in due form." This is all; and then the court fixed the 27th day of July for a trial by jury.

It seems that the question of jurisdiction by appeal was not raised, and the court might find that the appeal had been perfected "in due form," without passing on the question raised subsequently by the motion to dismiss. It is unfortunate that the motion was not filed before the costs incident to procuring a jury had accrued; but we think the right to file the motion was not waived or lost.

Judgment affirmed.

SHAUCK, C. J., and CREW, SUMMERS, SPEAR, and DAVIS, JJ., concur.

(77 Ohio St. 301)

STATE v. RODERICK.

(Supreme Court of Ohio. Dec. 17, 1907.)

1. HOMICIDE—SELF-DEFENSE—CHARACTER OF ACCUSED.

When the person accused in an indictment for murder is defending on the ground of self-defense, he may prove that the deceased was a person of violent and dangerous character, and that such character of the deceased was known to him at the time of the affray.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 391, 392.]

2. SAME.

In general, the mode of proving the violent and dangerous character of the deceased is by showing that such was the general reputation of the deceased in that community and at that time and that such reputation was known to the defendant; but the defendant cannot be permitted to prove, for the purpose of showing reasonable ground for apprehension of bodily injury or loss of his life, particular instances of violence or viciousness on part of the deceased.

which did not concern the defendant and at which the latter was not present and of which he has no personal knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 393.]

(Syllabus by the Court.)

Exceptions from Court of Common Pleas, Franklin County.

One Roderick was indicted for murder. To the admission of certain evidence, the state excepts. Exceptions sustained.

Webber, McCoy, King & Game, for the State. J. S. Walker and Franklin Rubrecht, for defendant.

DAVIS, J. The defendant was indicted for murder in the second degree. Under his plea of not guilty, the defendant admitted that he fired the fatal shot, but claimed that the shooting was in self-defense. The defendant himself testified that the deceased was the aggressor, that he was a man of violent and dangerous character, and that it was known to him that such was the character of the deceased, the defendant, at the time of the alleged murder. He also testified that he was a witness to two manifestations of the deceased's quarrelsome and dangerous disposition. Thereafter certain witnesses for the defendant testified that they had the means of knowing the "general character" of the deceased as a violent and vicious man, and that his character in that respect was bad; and these witnesses, as well as others, who did not qualify as to their knowledge of the general reputation of the deceased in that respect, were permitted, notwithstanding objections on behalf of the state, to testify to particular cases of quarrelsome and violent conduct on the part of the deceased, at none of which was the defendant present or in any way concerned therewith.

It is conceded that in cases of self-defense it is competent for the defendant to prove the violent and dangerous character of the deceased at the time of the commission of the crime, if such character was then known to him. *Marts v. State*, 26 Ohio St. 162. It is also conceded that one of the appropriate methods of proving the character of the deceased in respect to those traits is by proving that such was his "general character" at that time and in that community, using the term "general character" in the sense of general reputation. *Bucklin v. State*, 20 Ohio, 18, 22-24. The plain ground of these rules of evidence is, first, that proof of the vicious character of the deceased, known to the prisoner, places the jury in a position to judge whether the prisoner entertained an honest and reasonable belief in the imminence of bodily harm to himself; and, second, that general reputation, as distinguished from mere isolated rumors, is the final judgment of the public respecting the character of an individual, as his traits and disposition have been repeatedly manifested

through a more or less extended period of time. This view of the law is not in entire harmony with the following remarks which appear in the opinion in the *Marts* Case, supra: "We suppose that evidence of the reputation of the deceased as being a vicious, violent, or dangerous person could only be given after the introduction of testimony tending to show that such was in fact his character, and then only for the purpose of proving that the prisoner had notice of that character. In other words, the dangerous character of the deceased cannot be proved by proof of his reputation, but notice of that character to the prisoner may be shown by proof of such reputation, in connection with proof that the prisoner had the means of knowing that reputation." It will be observed that the question in the *Marts* Case was whether or not the accused might be permitted to introduce evidence of the violent, vicious, and dangerous character of the deceased, and that the mode of the proof of character was not in question in that case, and we may add that the statement of the judge delivering the opinion of the court is clearly opposed to the weight of modern authority, and, it seems to us, to reason also. See *Upthegrove v. State*, 37 Ohio St. 662; 1 *Wigmore on Ev.* §§ 52, 63; 2 *Id.* §§ 1608, 1609, 1610; *State v. Turpin*, 77 N. C. 473, 24 *Am. Rep.* 455; *State v. McIver*, 125 N. C. 645, 34 *S. E.* 439; *People v. Druse*, 103 N. Y. 655, 8 *N. E.* 733, and cases there cited.

But the contention in behalf of the state is that general reputation as to the traits of character involved having been admitted, together with facts within the defendant's personal knowledge, the inquiry must stop there; and that it cannot be extended to narration of particular acts of the deceased, which were not of the *res gestæ*, which did not concern the prisoner and at which he was not present and of which he could have no personal knowledge. This is exactly as we understand the law to be (see numerous cases cited in 5 *Am. & Eng. Ency. Law*, 875, n. 3); but the trial court saw the problem in another light and admitted the testimony. The theory upon which the court admitted testimony as to such particular acts does not very clearly appear; but it seems to have been based on the dictum in the *Marts* Case, to which we have alluded. Accordingly the defendant was permitted to prove the conduct of the deceased on other occasions, as indicating his actual character; and the defendant was allowed to show that he had heard of those instances previous to his own affray with the deceased, in order to show the state of mind under which the defendant acted. Plausible as this reasoning may seem, it has, so far as we know, failed to obtain a substantial footing in any jurisdiction where justice is administered according to the principles of the common law; because, first, reputation to be available as evidence must be common or general repu-

tation, the crystallized estimate which people in general have formed of the individual in the community where he has lived, and reputation does not consist of mere reports or rumors which may be true or false; because, second, to prove that a man was the aggressor in one case does not necessarily prove that he was the aggressor in the case on trial; because, third, the policy of the common law is to keep close to the issue in the case on trial and not to allow the jury to be distracted in the determination of side issues, as numerous as the particular instances of conduct which may be offered in evidence; and because, fourth, while it may be presumed that the general reputation of an individual in the community where he has lived is always susceptible of proof or defense, nobody can be ready at a moment's notice to defend against accusations relating to all the transactions of his life. On this subject the judgments of this court have always been consistent in adhering to the rule that "character can be impeached only by evidence of general reputation and not by evidence of particular acts of misconduct. It should be what people in general say and not what others say." *Snyder v. Commonwealth*, 85 Pa. 519. An apparent conflict exists between *Dewit v. Greenfield*, 5 Ohio, 225, and *Duval v. Davey*, 32 Ohio St. 604. In the latter case the rule stated in the former was regarded as too narrow, viz.: "In all the foregoing cases the inquiry must be confined to the general good or bad character of the party"; but, when the expression "general character" is construed in the light of what was said by the court in *Bucklin v. State*, ut supra, there is really no difference in the two cases.

Exceptions sustained.

SHAUCK, C. J., and PRICE, CREW, SUMMERS, and SPEAR, JJ., concur.

(196 Mass. 584)

QUIMBY v. JAY.

(Supreme Judicial Court of Massachusetts.
Worcester. Dec. 30, 1907.)

1. TRIAL—INSTRUCTIONS—REFUSAL—EFFECT OF EXCEPTION.

An exception to a refusal of rulings is not an exception to instructions given on matters to which the rulings relate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 695.]

2. SAME—REQUESTS FOR RULINGS—TIME FOR MAKING.

In an action for a real estate broker's commission, under superior court rule 48, the court properly refused rulings that the defenses of double employment and of fraud were not open under the pleadings; the requests being first made during defendant's closing argument.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 643.]

3. PLEADING—AMENDMENT—AUTHORITY TO ALLOW.

Under the express terms of Rev. Laws, c. 173, § 48, the superior court may allow plead-

ings to be amended at any time before final judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 653-675.]

4. APPEAL—HARMLESS ERROR—PLEADING—AMENDMENT.

Where a case was tried upon the merits without regard to the insufficiency of the answer, plaintiff may not complain on appeal because defendant was allowed to amend after the trial, and before the allowance of plaintiff's exceptions to the refusal of rulings as to the sufficiency of the answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4106-4109.]

Exceptions from Superior Court, Worcester County; Edward P. Pierce, Judge.

Action by Walter H. Quimby against Herbert Jay. From a verdict for defendant, plaintiff brings exceptions. Exceptions overruled.

Burton W. Potter and Paul Potter, for plaintiff. Webster Thayer, Hollis W. Cobb, and Fred A. Walker, for defendant.

MORTON, J. The objection that the defenses of double employment and of fraud were not open under the pleadings was taken by the plaintiff for the first time during the closing argument for the defendant. Requests for rulings to that effect were then drawn up by the plaintiff and presented to the presiding judge who declined to receive them on the ground that they were too late under Rule 48 of the rules of 1900 of the superior court which was the rule in force at the time of the trial. The plaintiff called the attention of the court to them again at the conclusion of the charge, and the presiding judge stated again that he declined to receive them because presented too late. Thereupon the plaintiff excepted to the refusal of the court to rule as thus requested. No exception was taken to the charge, or to those portions of it which dealt with the questions of fraud and double employment, unless the exception thus taken to the refusal to rule as requested can be so treated. We do not see how it can be. The case differs from that of *Brick v. Bosworth*, 162 Mass. 338, 39 N. E. 36. In that case there not only was an exception taken to the refusal of the court to rule as requested but also "to the rulings of the court as made," which was regarded by this court as saving to the plaintiff an exception to the instructions so far as they were at variance with the rulings requested. Nothing of the kind took place here: The only exception taken was to the refusal to rule as requested. There was no exception to the instructions which were given. If an exception had been taken in any form to the instructions, the plaintiff's rights would have been saved under *Brick v. Bosworth*, supra. Very likely the plaintiff intended by his exception to the refusal to give the rulings asked for to except also to the instructions that were given in regard to the matters to which the rulings related, and supposed that he had

done so. But we must take the case as it stands and we do not see how the exception which was taken can be fairly construed to include an exception to the charge. The presiding judge had a right under the rule to decline to receive the requests and there is nothing to show that the right was improperly exercised.

Before the allowance of the exceptions the defendant moved to amend his answer by setting up fraud and double employment: "The court found that the amendment did not change the issue tried, or any question of evidence raised at the trial, and that the case had been fully and fairly tried upon the merits, and against the plaintiff's objection allowed the amendment and the plaintiff excepted." There can be no doubt of the power of the court to allow an amendment at any time before final judgment. Rev. Laws, c. 173, § 48. The plaintiff objects that there was a violation of rule 5 of the superior court in allowing the amendment without the imposition of a double term fee. We doubt whether that rule applies. See *Burton v. Frye*, 139 Mass. 131, 29 N. E. 476; *Goodrich v. Bodurtha*, 6 Gray, 323; *Brickett v. Davism*, 21 Pick. 404. But the conclusive answer to the plaintiff's exception to the allowance of the amendment is that as the case stands, it must be taken to have been tried upon the merits without regard to the insufficiency of the answer and the amendment could therefore have done the plaintiff no harm. See *Denham v. Bryant*, 189 Mass. 110, 28 N. E. 691.

Exceptions overruled.

(196 Mass. 587)

FLYNN v. CONNECTICUT VALLEY ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Franklin. Dec. 30, 1907.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—QUESTIONS FOR JURY.

In an action for injuries to a street railway employé caused by the absence of a step on the car he was using, *held* that, under the evidence, the questions as to how far he was justified in relying on the promise of the superintendent to have the step repaired, how far the risk was to be regarded as an obvious one and as having been assumed by him, and whether he should have looked, if he did not, before attempting to alight, and whether, if he had looked, he could have failed to notice the absence of the step, were questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1068–1132.]

2. SAME—INSTRUCTIONS.

In an action for injuries to a street railway employé caused by the absence of a step on a car, where it appeared that the superintendent, on his attention being called to the absence of the step by plaintiff, promised to have it replaced at once, an instruction that if plaintiff knew that the step was gone from the car, but forgot it at the time, he was not in the exercise of due care and could not recover, but, if he supposed on reason that the steps were there because of the superintendent's promise to replace them and his reliance thereon, it was then a question of fact for the jury whether at the time he got off he looked to see in such a way

as a reasonably prudent man would do, was not subject to exception by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1180–1194.]

3. SAME.

In an action for injuries to a street railway employé due to the absence of a step on a car, *held* that, under the evidence, whether plaintiff was negligent in attempting to alight from the car while in motion or at a place where the road was banked with snow were questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089–1132.]

4. SAME—NEGLIGENCE OF MASTER.

The act of a street railway company in allowing a step on its work car to remain off, when it knew that the car would be used by its employes, constituted negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 195.]

Exceptions from Superior Court, Franklin County.

Action by Arthur Flynn against the Connecticut Valley Street Railway Company for personal injuries. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Tort for personal injuries to plaintiff, who was injured while alighting from a work car on which he was a passenger. At the time plaintiff was in the employ of defendant as assistant superintendent, and the defect complained of consisted in the absence of a step which had been removed, and not replaced. In the superior court, before Loranus E. Hitchcock, J., there was a verdict for plaintiff, and defendant excepted.

Green & Bennett and Jas. J. Leary, for plaintiff. C. T. Callahan, for defendant.

MORTON, J. The plaintiff fell while in the act of alighting from one of the defendant's cars and received the injuries complained of. A step had been removed from the car, which was a work car and not used in the transportation of passengers, and had not been replaced. It was this which caused the accident. The plaintiff was the assistant superintendent, and there was evidence, we think, tending to show that he was engaged at the time of the accident in the performance of the duties imposed upon him as such assistant superintendent, and was properly using the car for that purpose. It could not be ruled, we think, as matter of law that the plaintiff assumed the risk and was not in the exercise of due care, or that there was no evidence of negligence on the part of the defendant. The first instruction requested by the defendant, that the jury should be directed to return a verdict for the defendant was therefore properly refused. There was evidence tending to show that the plaintiff had called the attention of the superintendent to the absence of the step, and that the superintendent had promised to have it repaired immediately. The plaintiff did not have charge of the repair of the step, and it was no part of his duty to see that it was repaired. And how far he was justified in

relying on the promise of the superintendent to have the step repaired, and how far, taking all the circumstances into account, the risk was to be regarded as an obvious one, and as having been assumed by him were questions especially within the province of the jury, as was also the question whether, in the exercise of due care, he should have looked, if he did not, before attempting to alight, and whether, if he had looked he could have failed to see that there was no step there. These and other matters were submitted by the presiding justice to the jury under instructions of which we think that the defendant cannot justly complain. Amongst other instructions which he gave them, the presiding justice instructed the jury as follows: "If he (the plaintiff) knew that the steps were gone from the car but forgot it at the time, then he was not in the exercise of due care and he could not recover. If on the other hand he supposed and had reason to suppose that the steps were there because of these representations that were made (meaning the alleged promise by the superintendent to have them replaced) and of his reliance upon them, and if he, supposing that they were there, stepped off, it is then a question of fact for you to determine whether at the time he got off from the car he made such observation and looked to see in such a way as a reasonably prudent and careful man would do." This was, to say the least, sufficiently favorable to the defendant. The jury found in answer to a question submitted to them by the court that "the superintendent did say to the plaintiff that he would have the steps put back upon the car right away or words to that effect," and how far, if at all, the plaintiff was justified in the exercise of due care in relying upon this promise was, as already observed, a question for the jury.

It could not be ruled as matter of law, as the defendant in effect asked the court to rule, that the plaintiff was negligent not only in attempting to get off the car while in motion but also in attempting to alight while the car was in motion at a place where the road was banked with snow. It was not, as matter of law, necessarily negligent for him to attempt to alight while the car was in motion. *Corlin v. West End St. Ry. Co.*, 154 Mass. 197, 27 N. E. 1000; *Gordon v. Same*, 175 Mass. 181, 55 N. E. 990; *Block v. Worcester*, 186 Mass. 527, 72 N. E. 77. Whether he was negligent in attempting to alight as he did at the place where he did was a question for the jury.

There was evidence of negligence on the part of the defendant. The jury were warranted in finding that it was expected by the defendant that the car would be used by such of its employes, including the plaintiff, as had occasion in the performance of their duty to use it, and that it was negligently suffered by the defendant to be in the condition in which it was at the time of the accident.

We see no error in the manner in which the presiding justice dealt with the case. Exceptions overruled.

(190 N. Y. 121)

YEOMAN v. McCLENAHAN et al.

(Court of Appeals of New York. Dec. 3, 1907.)

1. APPEAL—STATEMENTS IN ORDER OF REVERSAL—QUESTIONS OF FACT.

The statement of the Appellate Division, in the order of reversal of a judgment, that it was made on the law and the facts, does not necessarily raise any question of fact, unless it appears from the record that some question of fact was involved in the case.

2. PRINCIPAL AND AGENT—WRONGFUL ACT OF AGENT.

Plaintiff had for many years employed P., an attorney, to act for him in loaning money. One of P.'s other clients, who held a mortgage on defendant wife's house, desired to call it in. P. told defendant husband that he would secure a new loan to take up the mortgage, whereupon defendants executed a new mortgage to plaintiff, who gave P. a check for the amount of the loan. Defendant wife had no conversation with P., and gave him no directions in the matter. P. appropriated the money to his own use, and defendants received none of it. *Held*, that P. was plaintiff's agent, and that plaintiff was responsible for his acts, and could not enforce the mortgage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, §§ 599-611.]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Hildo C. Yeoman against William McClenahan and another, impleaded, etc. Judgment for plaintiff (100 N. Y. Supp. 1151, 114 App. Div. 921), and defendants appeal. Reversed.

George V. Brower, for appellants. Cyrus V. Washburn, for respondent.

O'BRIEN, J. This was an action to foreclose a mortgage, and the defense was a want of consideration. The trial court sustained the defense and dismissed the complaint upon findings of fact and law, which precluded any other disposition of the case; but the learned Appellate Division reversed the judgment and granted a new trial, stating that the decision was upon the law and the facts. The statement that the reversal was upon the facts as well as the law has no effect upon this appeal, since it is very plain that there was no conflict in the evidence, or any dispute about the facts, and no opportunity to draw conflicting inferences of fact or law, and hence the reversal must be considered as involving questions of law and not of fact. This court has often decided that the statement in the order of reversal that it was made upon the facts does not necessarily raise any question of fact, unless it appears from the record that some question of fact was involved in the case. *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692; *O'Brien v. East River Bridge Co.*, 161 N. Y. 539, 56 N. E. 74, 48 L. R. A. 122; *Buffalo & L. Land*

Co. v. Bellevue Land & Impr. Co., 165 N. Y. 247, 59 N. E. 5, 51 L. R. A. 951.

That the defendants never received any money or valuable thing as a consideration for the mortgage in question is a fact not open to any dispute and is conceded on all sides. It appears, without any dispute, that the plaintiff intrusted the \$1,500 expressed as the consideration of the mortgage to his own attorney and agent, and that the latter converted it to his own use, and disappeared from the city, and is still a fugitive from justice. The only question that the case presents is one of law, and that is whether, upon the undisputed facts brought out at the trial, it was the plaintiff or the defendants that took the risk of this man's honesty and must bear the loss due to his default. In other words, whether he was the agent of the plaintiff or the defendants when he fraudulently appropriated the money to his own use. The trial court found that he was the plaintiff's agent, and as the money which the plaintiff gave to him to loan never, in whole or in part, reached the defendants, it was held that the plaintiff's complaint should be dismissed. I think that this finding was correct, and no fair view of the evidence will sustain any other conclusion. Hence it becomes necessary to refer to the evidence given at the trial as it appears in the record. The plaintiff was the only witness sworn in his own behalf, and the defendant William McClenahan the only witness for the defense. The two men had never met or ever known each other prior to the transaction in question. They never had any interview or any conversation with each other, and hence it would be quite impossible that a conflict could arise with respect to the part that each played in the transaction, and that part can be stated in a few words from the evidence in the record:

In the month of January, 1903, Mrs. McClenahan was the owner of the house in Bergen street, Brooklyn, upon which it is claimed that the mortgage in question became a lien. She resided in the house with the defendant, her husband, and their three children; the husband working at his trade, that of a carpenter. The plaintiff was evidently a man of means who had been engaged in loaning money for nearly 20 years. During that time he always employed an attorney named Proctor as his agent to transact the business. This agent was an old and trusted employé, and the relations between them were those of attorney and client. The attorney presented to his client, the plaintiff, an application for the loan in question and two other loans, which was in writing, signed by the agent in his own name. The plaintiff concluded to accept the loan in question, and also another loan on another property to the extent of \$2,000. In order to enable the attorney to close up both loans and take the securities, the plaintiff drew his check for \$3,500 to the order of his attorney and deliv-

ered it to him, instructing him to procure a first mortgage on the premises in question, which, of course, involved the necessity and duty on the part of the attorney and agent of paying off and procuring satisfaction of any existing mortgage that was a prior lien on the premises. The attorney proved to be unfaithful to the trust and confidence which the plaintiff reposed in him, since he drew the money on the check and converted it to his own use and subsequently fled from the city. He did not even deliver the bond and mortgage in this case to the plaintiff, but kept them in his own possession, advising his client to allow him to do so, on the ground that he might need them to collect the interest from time to time as it fell due. This is the transaction as stated by the plaintiff himself, and so far there can be no doubt that the trial court was right in holding that the plaintiff should bear the loss resulting from the fraud of his own agent.

But the learned counsel for the plaintiff now contends that, in the process of producing the mortgage in question, the character of Proctor, as the plaintiff's agent and attorney, was so changed and shifted that in some way he became the agent of the defendants. We must therefore listen for a moment to the defendants' version of the transaction, which is in complete harmony with that of the plaintiff's: The defendants never employed Proctor to do anything for them or to act for or to represent them in any way. They came together in this way: It appears that Proctor had other clients than the plaintiff for whom he acted in a similar capacity. One of these clients was a man named Hutcheson, who held a mortgage of \$1,500 on the defendants' house in Bergen street. Proctor sought out the defendant, the husband, and told him that Hutcheson wanted to call in this mortgage. That was the first interview, so far as appears, that he and Proctor had ever had in regard to the transaction in question, and the latter was evidently representing his client Hutcheson. The defendant then said, if that was so, he must look somewhere else for the money. Proctor then said: "You need not, I will get another of my clients to take the mortgage." Some days after this Proctor came to the house and procured the defendants to sign the bond and mortgage in this case for \$1,500. At that time the husband said to him: "What about the satisfaction piece?" The attorney said he could not get that until he took the bond and mortgage back and showed it to his client, the plaintiff, and would then get the \$1,500 and pay off the prior mortgage. He said to the defendant that the mortgage in question was to be a first mortgage, and the directions of the plaintiff were to procure a first mortgage, which involved the duty of the agent to the plaintiff to remove the old one. This is the transaction as related by the defendant, and it seems to me to be impossible to give to Proctor any other character

than the plaintiff's agent, from the beginning to the end of the transaction. The attorney was certainly guilty of a breach of trust and duty. But who could sue him for the money? Clearly, the plaintiff, and no one else. The defendant did not direct or require him to do anything for him, but was a mere passive instrument in a transaction by Proctor himself in order to collect a mortgage for one client and effect a loan of money for another. The relation of attorney and client for 20 years, and the trust and confidence resulting from that relation, were the elements in the case that set the attorney in motion, and the circumstance that the plaintiff made the check payable to his order was the final act which made the fraud possible.

The case has thus far been considered as if William McClenahan was the only party defendant concerned in the transaction or affected by the mortgage, but that is not the fact. His wife was the owner of the property upon which it is claimed the mortgage is a lien. It became a lien upon her property, if at all. She died in July, 1904, about 18 months after the execution of the mortgage, and her children and heirs at law are the only defendants who have any interest in the controversy. These facts appear from the pleadings, findings, and the mortgage itself. One of the children, who is an infant, has appeared by his guardian and has served the usual answer submitting all his rights to the judgment of the court. No one claims, and certainly it does not appear, that the wife who owned the property ever had any conversation with Proctor, or gave him any order or direction. It is impossible to perceive how her estate can be bound by any of his acts, or upon what principle it could be depleted by his default. Her signature to the mortgage has no legal significance, in the absence of any consideration or benefit whatever moving to her or to her estate, or to any one else. There is not the slightest ground disclosed in the record for the claim that Proctor was her agent. The truth is he represented no one in the transaction except his two clients, the plaintiff, and Hutcheson, collecting and discharging a mortgage for the latter, and perfecting a loan upon a first mortgage for the former.

The learned Appellate Division wrote no opinion in the case, and all we can know as to the ground upon which the reversal proceeded is the statement in the record that it was upon the authority of *Henken v. Schwicker*, 174 N. Y. 298, 66 N. E. 971. In that case the defendant, who was the borrower, employed the broker to procure the loan for him, and the broker acted for him and under his directions from the beginning to the end of the transaction. It was the defendant in that case that set the broker in motion, and not the plaintiff, as in the case at bar. The court held that the loss in the case cited should be borne by the party who had employed the defaulting broker. In the pres-

ent case, an attorney who had acted for the plaintiff in the business of loaning money for nearly 20 years had no professional or other relations with the defendant, but acted for two of his clients; that is, for Hutcheson to collect and satisfy an old mortgage, and for the plaintiff to perfect a loan upon a new mortgage to take the place of the old one. The two cases are so dissimilar in their controlling and material facts that the authority of one has no application to the other.

It is finally suggested in behalf of the plaintiff that the old mortgage has been paid off, or at least that it does not appear by the record to be still in force. If it was paid off, it must have been paid by Proctor before his disappearance. Without stopping to inquire upon whom the burden of proof was to show such payment, if material, it is plain that the suggestion has no foundation in fact. In the first place, it was conceded or assumed at the trial, on all sides, that the old mortgage was still in force and a lien, and the findings of the trial court are to that effect. But the plaintiff himself testified that, after Proctor had disappeared, he discovered the fact that the mortgage in this suit was a second mortgage. It could not very well be a second mortgage if the prior mortgage had been paid off, so that the plain meaning of the statement was that the old mortgage was still unpaid.

This case is fairly within the rule in equity that, where one of two innocent persons must suffer from the wrong or fraud of a third party, he must bear the loss whose action enabled the third party to perpetrate the wrong or fraud. The defendants did nothing to enable Proctor to commit the fraud, but the plaintiff placed himself and his money completely in his hands.

The order of the Appellate Division should be reversed, and the judgment of the Special Term affirmed, with costs in both courts.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

Ordered accordingly.

(190 N. Y. 235)

GROTE v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 17, 1907.)

INTEREST—WAIVER—ACCEPTANCE OF PRINCIPAL—RESERVATION OF CLAIM FOR INTEREST—VALIDITY OF CONTRACT.

One who receives the damages awarded for the taking of his land for a public purpose, his claim for interest thereon being reserved by express agreement, to be determined in a subsequent action therefor, may maintain an action for interest on account of default in the payment of the award when it became due; such agreement not being void as contrary to public policy.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Augustus H. Grote against the city of New York. From a judgment of the

Appellate Division (117 App. Div. 768, 102 N. Y. Supp. 977), affirming a judgment of dismissal, plaintiff appeals. Reversed, and new trial granted.

Raphael Link, for appellant. Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel), for respondent.

HAIGHT, J. This action was brought to recover interest at the legal rate upon the amount awarded for the taking of the lands of the plaintiff for park purposes from the time such award became due and payable to the time that the principal sum was paid. The trial court found that the acceptance of the principal sum of the award was a waiver of and a bar to the plaintiff's claim or right to recover interest thereon. The trial court also found as a fact that at the time the principal sum was paid and accepted it was understood and agreed between the parties "that all claims for interest upon the award should be reserved to be determined in a subsequent action to be brought therefor," and that at the time of such payment, in pursuance of such agreement, the defendant inserted in the form of its receipt the following: "Reserving any and all claims for interest on the award."

We have no controversy with the learned Appellate Division with reference to its contention that interest in this case was not recoverable by reason of a contract, but was allowable simply as damages on account of the default of the defendant in paying the award when it became due and payable, or that, when there is a controversy between parties with reference to the amount that should be paid, a tender by the debtor of an amount in full satisfaction of the claim and the acceptance thereof by the creditor bars any right of action on the part of the latter to recover any balance claimed to be due. It consequently follows that, had the plaintiff or his assignor accepted the principal sum awarded as damages without a special agreement reserving the right to recover interest, this action could not be maintained; but here we have an express agreement between the parties that the question as to the right to recover interest should be reserved and determined by an action to be brought by the plaintiff therefor. We are aware of no public policy or rule of law that renders such contracts void, and we think there is no principle or reason why they should not be sustained. The authorities to which the learned Appellate Division calls attention are clearly distinguishable.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, VANN, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.

82 N.E.—69

(190 N. Y. 237)

MORGAN v. CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 17, 1907.)

1. MUNICIPAL CORPORATIONS — OFFICERS — COMMISSIONER OF DEEDS—SERVICES IN TAKING ACKNOWLEDGMENTS — RIGHT TO COMPENSATION.

A messenger in the bureau of buildings in the city of New York, and commissioner of deeds of the city, was entitled to recover for his official services rendered as such commissioner in taking affidavits made by other messengers, unless such services were performed with the understanding that they should be part of his duty as a messenger in the department for which he received a salary.

2. SAME.

A messenger in the bureau of buildings in the city of New York, who was also commissioner of deeds, took the affidavits of other messengers, claiming that he was entitled to compensation from the city. The commissioner of buildings told plaintiff that he had no objection to his making a claim against the city for the services, and no officers of the department ever instructed him to take affidavits as a part of his duties as an employé. *Held*, that the court erred in directing a verdict for defendant.

Appeal from Supreme Court, Appellate Division, First Department.

Action by George Morgan against the city of New York. Judgment for defendant, and plaintiff appeals. Reversed.

See 105 App. Div. 425, 94 N. Y. Supp. 175; 115 App. Div. 893, 101 N. Y. Supp. 1135.

Alfred J. Talley, for appellant. Francis K. Pendleton, Corp. Counsel (Theodore Connolly, of counsel), for respondent.

HAIGHT, J. This action was brought to recover compensation as commissioner of deeds for administering an oath and certifying the same to 27,500 affidavits made by various messengers in the bureau of buildings in the city of New York. The plaintiff was a messenger in that department of the city government, serving under a salary, and he also held the position of commissioner of deeds of the city, authorized to administer oaths and take acknowledgments. He testified that these affidavits were sworn to before him before office hours, and claims that they were no part of his services as a messenger.

In the case of *Merzbach v. Mayor, etc.*, of N. Y., 163 N. Y. 21, 57 N. E. 96, we held that the office of notary public was not incompatible with the position of messenger or librarian in the office of the district attorney of the county of New York, and that a person holding such position may recover his statutory fees for services rendered at the request of the district attorney, unless he has waived his right thereto, either expressly or impliedly. In the case of *McCabe v. City of New York*, 77 App. Div. 637, 79 N. Y. Supp. 170, affirmed 176 N. Y. 587, 68 N. E. 1119, it was held that the plaintiff, who held a position in the building department of the city of New York, for which he received a salary, could not recover compensation from the city for services rendered by him as a commissioner of deeds in taking affidavits, where

It was understood that such services were to be rendered as a part of his clerical duties; and to the same effect is the case of *Benjamin v. City of New York*, 77 App. Div. 62, 78 N. Y. Supp. 1067.

The distinction therefore is sharply drawn. The plaintiff is entitled to recover for his official services rendered as a commissioner of deeds in taking affidavits, unless such services were performed with the understanding that they should be part of his duty as a messenger in the department for which he received a salary. On referring to the testimony given in behalf of the plaintiff, we find evidence tending to show that the plaintiff claimed, all the time throughout the period that the services were rendered, that he was entitled to compensation therefor, and that he kept a written memorandum of the time and title of each case in which he had administered an oath and certified the same. It also appears that he consulted the commissioner of buildings, asking him if he had any objection to his making a claim against the city for such services, and was told by the commissioner that he had no objection, and that the commissioner never instructed him to take affidavits without compensation or as a part of his duties as an employé in the department. Neither does any such instruction appear to have been issued to him by the chief clerk or other officers of the department until the 6th day of November, 1903, at which time the finance department called the attention of the superintendent to the matter, and then he was required to sign a stipulation that thereafter the affidavits would be taken without compensation. All of the services for which he claims to recover were performed before such stipulation was required. We are therefore of the opinion that the case was brought within the principle decided in the *Merzbach Case*, instead of the *McCabe Case*, and that the court below erred in directing a verdict for the defendant.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, VANN, HISCOCK, and CHASE, JJ., concur.

Judgment reversed, etc.

(190 N. Y. 206)

VOLOSKO v. INTERURBAN ST. RY. CO.
(Court of Appeals of New York. Dec. 10, 1907.)

1. APPEAL—CONSTRUCTION OF EVIDENCE ON NONSUIT.

Where a plaintiff is nonsuited, he is entitled to the most favorable inferences that the jury could reasonably draw from the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4024.]

2. STREET RAILWAYS—INJURIES FROM COLLISION—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Plaintiff was struck by a street car while unloading a wagon; the hub thereof being about 6 inches outside the track of the street railway. The car tracks were double, and cars came from one direction only on the track nearest the wagon, and could be seen for 300 feet before reaching that point. Plaintiff knew the tracks were there, but did not look in either direction, nor did he ask the foreman or driver to keep a lookout for him, but he stood on the hub nearest the track at work for 5 or 10 minutes immediately preceding the accident. The wagon had been there for 15 minutes, but no car had passed during that period. Plaintiff stood with his back directly towards the track, and was simply required to look sideways to see the approaching car. *Held* that, as plaintiff used no care, he was guilty of contributory negligence as matter of law, and could not recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 204, 205.]

3. SAME—RIGHT OF WAY OVER TRACKS.

The right to stop a wagon, for the purpose of unloading, near a street railway track, is subordinate to the right of way of the railroad company. It is the duty of a person so unloading a wagon to get out of the way to allow a car to pass, and the duty of the motorman to approach carefully, with his car under control, so that he can stop promptly to prevent an accident. Each has the right to assume that the other will do his duty, but neither has the right to so act that, if the other does not do his duty, a collision will follow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 193.]

4. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EFFECT.

Every person is bound to use reasonable care to avoid known dangers, and, if he fails in this duty to himself, the loss ensuing does not fall on another, whose negligence helps to bring about the result; but he must bear the loss alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 84.]

5. SAME—REASONABLE CARE—QUESTION FOR JURY.

Reasonable care depends on the surrounding circumstances, and what would be reasonable in one situation would not be in another. If one uses some care, the question of contributory negligence is for the jury; but, if he uses no care, it is for the court, except under peculiar circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 333-346.]

Chase, J., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Theodore Volosko against the Interurban Street Railway Company. From a judgment of the Appellate Division (113 App. Div. 747, 99 N. Y. Supp. 484), reversing a judgment of nonsuit, defendant appeals. Reversed, and judgment of nonsuit affirmed.

This action was brought to recover damages alleged to have been sustained by the plaintiff through the negligence of the defendant. At the close of the evidence for the plaintiff he was nonsuited by the trial justice, but on appeal to the Appellate Division the judgment was reversed, and a new trial granted; two of the justices dissenting. The defendant thereupon appealed to this court

and gave the usual stipulation for judgment absolute in case the order of reversal should be affirmed.

Bayard H. Ames and Henry A. Robinson, for appellant. Rudolph Marks, for respondent.

VANN, J. The plaintiff was injured in an accident which occurred on the afternoon of May 12, 1903, near the middle of the block which lies on East Tenth street between Avenues A and B, in the borough of Manhattan. Said block is 600 feet long, and the double tracks of the defendant's electric railroad extend through it with a branch curving around the corner into each of said avenues. The plaintiff was engaged in unloading blocks of marble from a wagon standing north of and parallel to the north rail of the north track. The distance between that rail and the hub of the rear wheel nearest thereto was five or six inches. The plaintiff insisted that the horse hitched to the wagon was facing east, but all the other witnesses swore it was facing west. Some of the blocks were so large that he could not unload them from the rear of the wagon, and, as he was instructed by his employer not to stand on them, he stepped upon the hub of the rear wheel nearest the track, and stood there. The work required him to lean over facing toward the north. At first he was occupied in removing hay wrapped around the marble, but finally he bent over to lift a large block, but before he got hold of it he was struck on the right side by a closed car, projecting over the tracks in the usual way, and injured more or less severely. The car, after turning into Tenth street from Avenue B, ran rapidly, silently, and without warning. The tracks were unobstructed and in plain sight for 300 feet in either direction. The plaintiff could not see the car when it was on the avenue, but it came into full view as it turned around the corner, and it continued in full view until it struck him. He knew the tracks were there, but he looked in neither direction before he got on the hub, nor while he stood there at work for five or ten minutes immediately preceding the accident. The wagon had been there for a quarter of an hour, but no car had passed during that period. The motorman gave no signal until just before the collision, when he rang the bell; but the car did not stop until it was "two houses away from the wagon."

As the plaintiff was nonsuited, he is entitled to the most favorable inferences that the jury could reasonably draw from the evidence, and we have stated the facts on that theory. While the jury would have been authorized to find the defendant guilty of negligence, was the evidence strong enough to permit them to find the plaintiff free from contributory negligence? We think not, because he knew that he was in a place of danger, and it was his duty to exercise some

care for his own safety; yet he took no care whatever. While he had a right to stop his wagon where he did, temporarily, for the purpose of unloading, his rights were subordinate to those of the railroad company, which had the right of way. He had no right to obstruct travel upon the railroad, and it was his duty to get out of the way when a car came along so as to let it pass. Still the motorman had no right to run him down, if he did not get out of the way, for it was his duty to approach carefully, with his car under control, so that he could stop promptly if necessary to prevent an accident. Each party had the right to assume that the other would do his duty, but neither had the right to so act that, if the other did not do his duty, a collision would follow. The plaintiff's work required him to stoop with his back to the track, but there was no evidence tending to show that he could not have glanced both to the right and left to see whether a car was approaching. Whether the car came from the east or west, his side, not his back, was toward it, and he did not have to move his body in order to see it. He knew that he was in a dangerous place, and it was his duty to act accordingly. Every person is bound to use reasonable care to avoid known dangers, and, if he fails in this duty to himself, the loss ensuing does not fall on another, whose negligence helped to bring about the result, for the law does not apportion negligence nor assign to each party responsibility for his own contribution. The one guilty of contributory negligence must bear the loss alone.

The plaintiff had no right to assume that there was no danger because no car had passed for 15 minutes, as the longer the interval without a car the stronger the probability that one would come along at once. He stood for 5 or 10 minutes so near the track of a street railroad as to be within reach of a passing car, without once looking to see or listening to hear whether one was coming, and we think he was guilty of negligence as matter of law, even if his duties required him to stoop over so that looking or listening was not as easy as if he had been in an upright position. He placed himself in a situation of danger, knowing what was likely to occur unless he took care of himself, without exercising any more care than if he had been seated on his own doorstep. After he got the hay out of the way, and just before he stooped to get hold of the heavy stone, he could have straightened up and looked, or he could have looked as he was bending over, and he could have listened while at his work; but he made no more use of his senses to protect himself than if he had none. He neither looked himself nor asked the foreman or driver, who were near by, to keep a lookout for him. The question of contributory negligence has not yet ceased to be one of law in cases of this kind, when there is no evidence whatever on the subject to be considered by

the jury, for the burden of proof is on the plaintiff to show that he was free from negligence. Every permissible inference from the evidence leads to the conclusion that the plaintiff could have seen the car if he had looked, and that with but slight effort he could have looked. It simply involved turning his head slightly in one direction, for the cars from the west did not use the track near which he stood. The law required him to use ordinary care, such as a person of average prudence would use under like circumstances; but he used no care at all.

The plaintiff resists this appeal by citing certain cases which relax the rule governing the subject of contributory negligence as to persons employed to work in the street by the municipal body whose duty it is to keep the streets in repair. *Smith v. Bailey*, 14 App. Div. 283, 43 N. Y. Supp. 856; *O'Connor v. Union Railway Co.*, 67 App. Div. 99, 73 N. Y. Supp. 606. While these cases hold that those engaged in such work are not bound to exercise the same degree of care that would be required of an ordinary pedestrian, still they also hold that such persons must use reasonable care to avoid being run over. Reasonable care depends on the surrounding circumstances, and what would be reasonable in one situation would not be reasonable in another. A laborer working in the street for the public must at times have his back toward approaching vehicles, or he cannot work at all; but he cannot go on blindly without taking any precaution or making any effort to avoid the known danger to which he is exposed. If he uses some care, the case is for the jury; but, if he uses no care, it is for the court, except under peculiar circumstances, which do not exist in this case. Assuming, without deciding, that the plaintiff had the same rights as a street sweeper, for instance, still he could not keep his eyes upon his work all the time, and not look, listen, or observe any caution of any kind for his own safety, without so contributing to the injury he sustained as to defeat a recovery.

As no other question requires discussion, the order of the Appellate Division should be reversed, and the judgment entered upon the nonsuit affirmed, with costs in both courts.

CULLEN, C. J., and GRAY, O'BRIEN, WERNER, and WILLARD BARTLETT, JJ., concur. CHASE, J., dissents.

Ordered accordingly.

(190 N. Y. 543)

PEOPLE v. LADEW.

(Court of Appeals of New York. Dec. 17, 1907.)

On motion for reargument. Motion overruled.

For former opinion, see 82 N. E. 431.

Clarence W. McKay, for motion. Theodore H. Lord, opposed.

WILLARD BARTLETT, J. This motion is based on the misapprehension, which this court has often sought to correct, that because certain points made by counsel have not been discussed in the opinion they must have been overlooked. None of the propositions to which our attention is called on the present motion was overlooked in the consideration of the case which led to a reversal of the judgment. The principal point now urged is that we did not appreciate the effect which ought to be given to chapter 556, p. 983, Laws 1890, as bearing upon the correct interpretation of chapter 427, p. 781, Laws 1855.

Not only was this statute referred to upon the original brief in behalf of the respondent, but the material portions thereof were quoted therein. In our opinion it cannot be regarded as a statute of limitations, for it requires a payment by the occupant of the lands sold for taxes as a condition of the assertion of his rights. The provision at the end of the amended section that a failure to make the prescribed payment within two years after the act takes effect shall make the tax sale absolute can be no more effective in the present case than the similar provision as to the regularity of the proceedings in section 132 of chapter 908, p. 841, Laws 1896.

It is also argued that the court overlooked the proposition duly submitted by the respondent that the occupancy of Alva Dunning, the predecessor in occupancy of the appellant, was at the time of the recording of the tax deed of such character that service of the notice to redeem was unnecessary. Far from having overlooked this proposition, we were of the opinion that it was unsound in view of the facts found by the referee in regard to the nature of the occupation of Murray Island by Dunning. The referee found that in the fall of 1869 Dunning entered into occupancy and possession of the island, erected thereon a dwelling, established there his domicile and home, cultivated the soil thereof, and continued to so reside upon, occupy, cultivate, and from time to time improve the premises, claiming title thereto to the exclusion of all others until he sold and conveyed the same to Charles W. Durant. This was no mere occupation by a squatter without claim of title, but was amply sufficient to constitute Dunning an occupant entitled to the statutory notice to redeem. Dunning was an occupant, claiming to be the owner, and his possession was very different from that of one in whose behalf there was no pretense of ownership or legal interest.

The learned counsel for the respondent is apprehensive that it may be inferred from the language of the opinion that the plaintiff's title is void as to the whole township in which Murray Island is situated, comprising an area of some 25,000 acres; and this inference, it is said, will result in a large num-

ber of actions and long protracted litigation. There is no warrant for any such assumption in the language of the opinion. All that was decided or intended to be decided, so far as the record of the tax deeds is concerned, was that such record was ineffective as against the defendant in this action in reference to the particular land which is the subject of the litigation.

The motion for a reargument should be denied, with \$10 costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, and HISCOCK, JJ., concur.

Motion denied.

(190 N. Y. 128)

In re DISNEY'S WILL.

(Court of Appeals of New York. Dec. 3, 1907.)

1. WILLS — CONSTRUCTION — SURVIVORSHIP — DEATH OF DEVISEE WITHOUT ISSUE.

Testator devised his residuary estate to his mother and sister in equal shares absolutely, and, "in the event of either dying without issue surviving," the portion of the one so dying was given to the survivor. *Held*, that the gift over to the survivor was dependent on the death of either of the devisees without issue during testator's life, and, on the death of the mother leaving issue during testator's lifetime, the survivor did not take the portion devised to the mother.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 1171–1173.]

2. SAME—CONSTRUCTION AGAINST INTESTACY.

Where the language in a will is clear, the court should not evade its meaning by an endeavor to spell out a different intent by resorting to the rule that the testator did not intend to die intestate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 964.]

Appeal from Supreme Court, Appellate Division, First Department.

Application for probate and construction of the will of John A. Disney, deceased. From an order of the Appellate Division (118 App. Div. 378, 103 N. Y. Supp. 391), affirming a decree of the surrogate admitting the will to probate and construing its provisions, parties in interest appeal. Reversed, with directions.

Edward L. Stevens, for appellant. John F. Nelson, for respondent.

HAIGHT, J. John A. Disney died unmarried and without issue, leaving, him surviving, brothers and sisters and descendants of a deceased brother and sister as his heirs at law and next of kin. He left a last will and testament, which was presented for probate, with a request by interested parties that its provisions be construed. The only question brought up for review has reference to the construction placed upon the seventh clause of the will. It is as follows: "All the rest, residue and remainder of my estate, of every kind and nature whatsoever, I do give, devise and bequeath to my mother,

Mary E. Disney, and my sister, Fannie K. Cohn, in equal shares or portions, to have and to hold the same absolutely and forever; and in the event of either dying without issue surviving, I give, devise and bequeath the share or portion of the one so dying to the survivor." Mary E. Disney was the testator's stepmother, and she died before the testator, leaving, her surviving, a daughter and a granddaughter, a child of a deceased daughter. The surrogate held that Fannie K. Cohn, the survivor, took the entire residuary estate, and the Appellate Division by a divided court has affirmed his decree.

It will be observed that the provision of the will in question first gives and devises to the mother and to the sister Fannie the whole of the residuary estate in equal shares, and that they are to hold the same absolutely and forever. Had, therefore, the stepmother survived the death of the testator, she would have taken one-half of the estate absolutely and forever. The provision which follows, to the effect that "in the event of either dying without issue surviving, I give, devise and bequeath the share or portion of the one so dying to the survivor," was evidently inserted by reason of his having in mind that his mother or sister might not survive him, and that he intended that the death referred to therein should be a death occurring during his lifetime. If this be so, then we have the provision giving to the mother and sister the residuary estate absolutely and forever upon his death. But in the event of one dying during his lifetime without issue her surviving, he gave the same to her survivor. To my mind the language used is clear and unambiguous, and leaves but one conclusion; and that is that, inasmuch as the mother did not die without issue her surviving, the contingency provided for in the will did not occur, under which the survivor Fannie was entitled to take the whole. When the language used is as clear and unambiguous as it is in this case, it does not appear to me that we should evade its meaning by an endeavor to spell out a different intent on the part of the testator by resorting to the rule to the effect that the testator did not intend to die intestate, especially when that rule has many exceptions and is only occasionally followed. The subject has received careful consideration in the opinion of Ingraham, J., in the Appellate Division, and we therefore deem further discussion unnecessary.

The order of the Appellate Division should be reversed, and the decree appealed from should be modified in accordance with the views herein expressed, with costs in both courts to all parties who appeared on this appeal, payable out of the estate.

CULLEN, C. J., and O'BRIEN, VANN, HISCOCK, and CHASE, JJ., concur. EDWARD T. BARTLETT, J., not voting.

Ordered accordingly.

(190 N. Y. 132)

LOCKHART v. HAMLIN.

(Court of Appeals of New York. Dec. 3, 1907.)

1. BROKERS—REAL ESTATE AGENTS—ACTION FOR COMMISSIONS—EVIDENCE.

Defendant agreed to pay plaintiff a commission for procuring a tenant for his building. Not being able to find a tenant on the usual terms, plaintiff suggested to defendant that he could secure one A., if defendant would invest money in A.'s business. Defendant answered that, as a last resort, he would invest the money if plaintiff brought the right kind of a man. Plaintiff then arranged an interview between defendant and A., and later a corporation was formed by defendant, A., and others and leased the building. Held that, in an action by plaintiff to recover commissions for finding a tenant, evidence as to plaintiff's conversations with A. in reference to his taking the property was admissible to show that plaintiff's action was the procuring cause of the lease.

2. SAME—QUESTION FOR JURY.

In an action by a broker to recover commissions for leasing defendant's property, evidence held sufficient to go to the jury on the question whether plaintiff's action was the procuring cause of the lease.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 128.]

3. WORK AND LABOR—FAILURE TO ESTABLISH CONTRACT—RECOVERY ON QUANTUM MERUIT—BROKER'S SERVICES.

The fact that in an action by a broker to recover commissions for leasing defendant's property plaintiff did not establish his right to recover on a contract for a specific sum as alleged in his complaint did not preclude him from recovering as upon a quantum meruit for the value of the services which he rendered on defendant's employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, §§ 23-33.]

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Cassius A. Lockhart against William Hamlin. Judgment for defendant (116 App. Div. 921, 101 N. Y. Supp. 1129), and plaintiff appeals. Reversed.

Moses Shire, for appellant. Louis L. Babcock, for respondent.

WILLARD BARTLETT, J. This is an action to recover \$20,000 as compensation for services alleged to have been rendered by the plaintiff to the defendant in procuring a tenant for certain real estate in the city of Buffalo. The plaintiff was nonsuited, on the ground that he failed to prove that his efforts were the "direct procuring cause" of the lease, and that his own version of what occurred between him and the defendant estopped him from claiming any compensation for his services. Further reference will be made to these points hereafter. The trial court directed the plaintiff's exceptions to be heard in the first instance at the Appellate Division, where they were overruled, and judgment was directed in favor of the defendant.

It appeared without dispute upon the trial that the plaintiff and the defendant entered into an agreement, evidenced by written correspondence between them, whereby the plaintiff undertook to procure a tenant for the

property in question, and the defendant promised to pay him \$20,000 for his services in so doing, should the defendant make a lease of the said property on or before May 1, 1904, "to any one brought to the defendant by the plaintiff, or whose coming could be attributed to the efforts of the plaintiff." The plaintiff, after endeavoring to obtain a tenant on the terms specified in this express contract, informed the defendant that he had found it very difficult to get a man with money enough to go into business in the building. He suggested to Mr. Hamlin that he would have to put some money into the business to be carried on there, to which suggestion Mr. Hamlin responded that he had retired from business, and did not care to do that, but would do so if the plaintiff found him the right kind of a tenant. According to the plaintiff's testimony, at this same interview he told the defendant that he believed he could get Mr. John F. Sweeney, one of the most successful men in Buffalo, to go into the building. The defendant asked him how much money he would have to put in, and the plaintiff said, "perhaps \$250,000 or \$300,000," and the defendant finally said to the plaintiff that, "if he could get the right kind of a man he would put in money." After this conversation, the plaintiff went to see Mr. Sweeney, had a conversation with him, and took him to the defendant's house, where a long interview ensued between Mr. Hamlin and Mr. Sweeney in regard to the proposition that Mr. Sweeney should enter into business in the building which Mr. Hamlin desired to rent, and that Mr. Hamlin should put money into the enterprise. Subsequently a corporation was formed under the name of the "Sweeney Company," in which Mr. Sweeney, Mr. Hamlin, and others were interested, and this corporation took a lease of the premises. The plaintiff bases his claim to a recovery in this action upon the making of this lease, which he alleges was due to his efforts to induce Mr. Sweeney to become a tenant and go into business upon the property in question.

"If the plaintiff's case rested upon the written contract alone, it is plain that he could not recover. The status of Mr. Hamlin in that contract was simply that of the landlord of the property. The agreement did not contemplate the advance of any money on his part in order to procure a tenant. The plaintiff, according to his own testimony, tried to procure a tenant, and was unable to do so unless the landlord was willing to invest a considerable sum in such business as a tenant might desire to establish in the premises. If Mr. Hamlin, at the interview when the plaintiff announced his failure in this respect, had declined to go any further in the transaction, except on the conditions specified in the correspondence between him and the plaintiff, there would have been an end of the matter. But, if the plaintiff is to be believed, he did not do this. He said: "As a last resort, if you bring me the right kind of a

man, I would put in the money needed." From this statement the jury, if they believed it, would have been authorized to infer an employment of the plaintiff to continue his efforts to find a tenant and an agreement by implication on the part of the defendant to pay him for his services in so doing, in case he should find a tenant with whom Mr. Hamlin could make a satisfactory arrangement as to the amount which he was to put into the business. It is true that, upon his cross-examination, the plaintiff admitted that Mr. Hamlin, after he had brought Mr. Sweeney to him, did say that, if he was required to put in capital, that ended the plaintiff's arrangement with him; but this statement on the part of the defendant, made after the plaintiff had brought Mr. Sweeney to his home as a prospective tenant, acting upon the previous assurance that he would put in the money needed if the plaintiff brought him the right kind of a man, could not avail to destroy the plaintiff's right to compensation for his services if the defendant afterward accepted Mr. Sweeney as a satisfactory tenant.

The jury also would have been authorized to find from the evidence that the tenancy of the corporation known as the "Sweeney Company" was such a tenancy as was contemplated by the defendant in his interview with the plaintiff, and that it was brought about by the plaintiff's efforts directed toward that end. The plaintiff was not allowed to testify fully on this last point; the trial court having erroneously refused to receive evidence as to his conversations with Mr. Sweeney in reference to his taking the property. Proof of such conversations was admissible, not as evidence of the truth of any of the facts stated therein, but to show that the plaintiff's action was the procuring cause of the lease eventually made. The exception to the exclusion of this evidence was well taken.

Upon all the proof, we think that the learned trial court erred in dismissing the complaint. There was no objection to any of the evidence which was received. It is true that the plaintiff did not establish his right to recover upon a contract for a specific sum as alleged in the complaint, but this did not preclude him from recovering as upon a quantum meruit for the value of the services which he rendered upon the defendant's employment, if that employment was established to the satisfaction of the jury. *Sussdorff v. Schmidt*, 55 N. Y. 319.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, O'BRIEN, VANN, and CHASE, JJ., concur. WERNER, J., absent.

Judgment reversed, etc.

(190 N. Y. 158)

SEELEY v. STEVENS, Superintendent of Public Works.

(Court of Appeals of New York. Dec. 10, 1907.)

1. OFFICERS—PREFERENCE TO VETERANS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Const. art. 5, § 3, gives the superintendent of public works the power to appoint and remove all persons employed in the care and management of canals with certain exceptions. Article 5, § 9, gives preference in appointments and promotions to Civil War veterans. *Held*, that Laws 1890, p. 809, c. 370, § 21, providing that no veteran holding a position by appointment or employment shall be removed from such position or employment except for incompetency or misconduct after hearing upon stated charges, is not in conflict with the constitutional power of the superintendent of public works to remove the canal employes, as the provision of article 5, § 9, giving preference to veterans in appointments and promotions, did not only mean a mere preference in appointment, but also included the right to be retained in the service except for misconduct and incompetency to be declared and found upon charges after hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Officers, §§ 12, 97.]

2. CONSTITUTIONAL LAW—JUDICIAL AUTHORITY—VALIDITY OF STATUTES.

A statute will not be declared to be in conflict with the Constitution unless it is so repugnant thereto that the two enactments cannot stand or be reconciled in any reasonable way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

Gray and Werner, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Application by Frank B. Seeley for a writ of mandamus to compel Frederick C. Stevens, superintendent of public works of the state of New York, to restore the applicant to a position from which he had been removed. From an order denying the application (104 N. Y. Supp. 1145), relator appeals. Reversed, and writ granted.

Irving L'Hommedieu, for appellant.
George E. Pierce, for respondent.

O'BRIEN, J. The relator applied to the Special Term of the Supreme Court for a writ of peremptory mandamus commanding the state superintendent of public works to restore him to a position in that department from which, as he claims, he was unlawfully removed. The relator in his application, in the form of an affidavit, stated the facts upon which he rested his right to the writ. No answer was made to this affidavit, and hence the facts are admitted, since the defendant in legal effect demurred and rested his defense entirely upon questions of law; and so the question is whether upon the conceded facts stated in the relator's affidavit he was as matter of law entitled to the writ. There was no question of discretion involved.

The admitted facts are these, viz.: That the relator is an honorably discharged soldier, having served as such in the Union army during the recent war; that on the 12th of March, 1895, he was appointed superintendent of repairs of one of the sections

of the Erie Canal by the then superintendent of public works, and since that time he has occupied the position and discharged the duties until the 21st day of December, 1900, on which day he was summarily removed from the position by the then superintendent of public works; that prior to his discharge he had notified the superintendent in writing that he was an honorably discharged soldier; and that no charges had been brought against him, and no copy of any charge served on him with an opportunity for a hearing thereon, nor had any hearing been given. Upon these facts he prayed that a peremptory mandamus issue directing and commanding the superintendent, or his successor, to reinstate him in the position from which he says he was unlawfully removed. The defendant, the present superintendent, is the successor of the officer who made the removal, but had nothing to do with the removal, and is simply made a party in order to effectuate the relief which the relator prayed for.

So that the sole question presented by this appeal is whether a veteran soldier, occupying a position by appointment in the department of public works, can be removed therefrom after serving some 11 years without any charges made, notice given, or opportunity to be heard, and no hearing granted. By section 21, c. 370, p. 809, of the Laws of 1899, it is provided that: "No person holding a position by appointment or employment in the state of New York, * * * who is an honorably discharged soldier * * * shall be removed from such position or employment, except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges and with the right to such employee or appointee to review by a writ of certiorari." It cannot be doubted that, if this statute was in full force and operation when the relator was removed from his position, such removal was unlawful. The learned judge at Special Term, in a very clear and concise opinion, stated his reasons for denying the application, and his opinion was adopted by the Appellate Division in affirming the order; one member of the court dissenting in an opinion in which his views were very clearly expressed. So we have the full benefit of the discussion in the courts below with respect to the question presented by this appeal, and the conclusion of both courts was that the statute quoted above was repugnant to the state Constitution and therefore inoperative and void. We must therefore inquire whether the Legislature had the power to enact the statute which forbids the removal of a veteran from his position except upon charges made in writing, notice given, and a hearing granted.

The provision of the state Constitution which it is said condemns this legislation is as follows: "A superintendent of public works shall be appointed by the governor. * * *

* * * The superintendent of public works

shall appoint not more than three assistant superintendents, whose duties shall be prescribed by him, subject to modification by the legislature. * * * All other persons employed in the care and management of the canals, except collectors of tolls and those in the department of the state engineer and surveyor, shall be appointed by the superintendent of public works, and be subject to suspension and removal by him." Article 5, § 3. This provision is found in the present Constitution and was in the Constitution which the present one replaced. But the present Constitution now contains a provision which is new and was absent from all the Constitutions that preceded it. It is as follows: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion shall be made. Laws shall be made to provide for the enforcement of this section." Article 5, § 9. It will be seen, therefore, that the present Constitution not only enacted that veterans should have a preference in appointments and promotions, but directed the Legislature to enact laws for the enforcement of that provision, and the act of 1899 was passed in pursuance of that direction. It was in its general features a re-enactment of a statute passed in 1891. The general statute in regard to the civil service of the state was enacted in 1883, and has since been in full force, with the changes made by the Legislature from time to time. But it was clearly the purpose of the people of the state in adopting the present Constitution to embody the principle that appointments and promotions in the civil service should be made for merit, to be ascertained by competitive examination. The general scope and effect of the constitutional provision in regard to the civil service, as enacted in the present Constitution, was passed upon in this court only a short time after the present Constitution was adopted. *People ex rel. McClelland v. Roberts*, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 390. It had been held in the case of *People ex rel. Killeen v. Angle*, 100 N. Y. 564, 17 N. E. 413, that the then civil service law did not apply to the department of public works, since the Constitution, as it then stood, vested the appointing power in the superintendent. Speaking of the changes made with respect to the civil service by the present Constitution, it was said in the former case that it was "apparent that a new principle far-reaching in its scope

and effect has been firmly embedded in the Constitution." The new principle thus referred to is expressed in the words of the present Constitution which have been quoted; and it was also said that: "The Constitution as it now exists must be read and considered in all its different parts, and each provision must be given its appropriate place in the system and some office to perform, and at the same time all must be so construed as to operate harmoniously. The application of these familiar rules of constitutional construction removes all doubt or difficulty with respect to the question under consideration, and the conclusion must follow that, while the power of appointment and removal is still with the superintendent of public works, it is subject to legislative regulation as to the mode and manner, and is brought within the operation of general laws on that subject."

It is appropriate now to inquire as to what particular provision of the present Constitution has been violated by the passage of the act of 1899, which secured to veterans the right to retain the positions to which they were appointed unless removed for cause after a hearing. There is only one possible answer to this inquiry, and that is that, since the Constitution conferred upon the superintendent of public works the power of appointment and the power of suspension and removal, the Legislature had no authority to enact that a veteran, while still removable by the power that appointed him, was entitled to notice and a hearing upon charges before such removal could be made. It will be observed that the Legislature did not take from the superintendent the power either to appoint, suspend, or remove. It simply provided that the veteran should have the right to be heard before the removal was made. The Constitution provides that the veteran shall be entitled to preference in appointments and promotions irrespective of the place he occupies on the civil service list. But the construction given to this provision by the learned courts below renders it wholly illusory, since the contention is that the superintendent may obey the letter of the Constitution by making the preferential appointment one day and nullify that act by removing him the next day without cause or hearing. If that is the law with respect to veterans in the department of public works, it would seem to be a case where the framers of the Constitution gave the word of promise to the ear, only to break it to the hope.

I do not think that the constitutional mandate to give preference to veterans in all appointments and promotions was such an idle and empty fulmination. This court has often said that the language of the Constitution in regard to appointments in the civil service embodied a broad and far-reaching principle. The principle doubtless was to give at least something like permanency of tenure to ap-

pointees in the civil service, and above all to put an end to the vicious practice which had grown up of changing employes whenever the appointing power was changed without any cause except the unrestrained will of the person who happened for the time being to be at the head of the department. It will be seen that the command of the Constitution applies to all appointees under the state government which includes cities and villages, and hence the provision has the same application to state and city departments. Whatever the true scope and meaning of the words securing preference to veterans may be, it has the same meaning when applied to city or state departments, and this court has given an exposition of the effect and meaning of the words securing a preference for veterans that has a direct application to this case. The head of a city department was bound by law to keep the expenses of the department within the appropriations, and he could do that only by reducing the pay roll and discharging employes, and accordingly he selected 14 for immediate dismissal, and they were dismissed. Among the number was one who happened to be a veteran, but the least efficient person in the whole department, and, of course, one who could be removed with the least prejudice to the public service. This court held that the constitutional provision securing to the veteran preference in appointment also secured to him the right to be retained. It condemned the idea that the Constitution applied only to appointments and promotions. The contention in that case against the veteran was that the Constitution provided only for a preference in appointment and did not, in terms or otherwise, provide that he shall be continued in the public service in preference to other appointees, and that the Legislature could go no farther in securing a permanency of tenure than the very words of the Constitution; but this court held otherwise, as has been stated, and declared that the veteran must be reinstated, although the least efficient of all the staff. It did not deny the power to remove him, but held that the removal could be made only for cause after a hearing in compliance with the statute. This is the language which the court employed in expounding the general scope and meaning of the Constitution in regard to appointments in the civil service.

"While the Legislature cannot enact laws repugnant to this provision of the Constitution, it may legislate further in that direction from time to time if in its judgment it shall seem wise to do so. As it created the civil service system in this state substantially as it now is before there was any constitutional provision on the subject, so it may go on from time to time strengthening it in what experience may prove to be the weak places, provided always that it does not offend against any of the provisions which the people have incorporated into the organic law. And so it was within its pow-

er to place a limit upon the removal of persons employed in the public service as it has done by section 21, in which, in addition to the provisions already mentioned, it is provided that in cities of the first class, if the position held by an honorably discharged soldier shall become unnecessary or be abolished for reasons of economy or otherwise, he shall not be discharged from public service, but shall be transferred to any branch of the city service for such duty in that service as he may be fitted for, receiving the same compensation as before." *Matter of Stutzbach v. Coler*, 108 N. Y. 422, 61 N. E. 697. In this exposition of the true scope and meaning of the words securing a preference to veterans, this court was unanimous, except one member not voting. The decision in this case cannot be reconciled in any reasonable way with the views thus expressed, since it was held that the Constitution intended not only a preference in appointments, but a permanency of tenure, except in cases of misconduct or incompetency, to be declared upon charges made and a hearing had. So it has been held that the Legislature may in all cases prescribe to the appointing power the mode and manner in which the removal must be made. Such regulation does not conflict with the power to remove. It only prescribes the procedure and what shall be done in order to make the removal. The superintendent of public works may remove appointees, but is it not competent for the Legislature to prescribe that the removal shall be evidenced by some writing filed in the department? And, if so, may it not go farther and prescribe that the person selected for removal shall have one, two, or three days' notice, as the case may be, before being deprived of his position? And is it not equally competent for the Legislature to say that he shall be informed in writing of the reasons for removing him and an opportunity to make an explanation and to be heard upon the charge, whatever it may be? Is the power to remove a veteran so sacred and so hedged about by constitutional safeguards that the Legislature cannot provide that in order to effectuate the removal some or all of these things must precede the removal? It seems to me not; and, if it can say that any one of these things shall be done, why not all? Is there such a conflict between the power of removal by the head of the department and the power of the Legislature to prescribe the manner in which the removal shall be made that the statute must be held to be void as repugnant to the Constitution? I think not.

We have in this case two constitutional provisions and a statute passed in pursuance thereof. We are required to give effect to all and such a construction, if possible, that all may operate harmoniously. In order to nullify the statute, we must be able to say that it is so repugnant to and in conflict with the Constitution that the two enactments cannot stand or be reconciled in any reason-

able way. One section of the Constitution gives to the superintendent power to appoint and remove. Another that veterans shall have preference in all appointments, which this court has held to mean not only a mere preference in appointments, but also the right to be retained in the service except for misconduct and incompetency to be declared and found upon written charges after a hearing. *Matter of Stutzbach v. Coler*, supra. And, finally, we have a statute which declares the same principle that this court has held to be embodied in the Constitution in regard to veterans. I am unable to discover the slightest conflict in these several provisions, and hence the statute should be given full force and effect.

I think the learned court below has given too much importance to the words of the Constitution which give to the superintendent the power to remove, since the power of appointment always implies the power of removal, in the absence of some restrictive legislation. *People ex rel. Cline v. Robb*, 126 N. Y. 180, 27 N. E. 287. In the present case, unless the veteran act imposes the restriction, the power exists, even if the word "removal" was stricken from the Constitution.

The order of the Appellate Division and of the Special Term should be reversed, with costs in all courts, and the writ should be granted.

CULLEN, C. J., and VANN, WILLARD BARTLETT, and CHASE, JJ., concur. GRAY and WERNER, JJ., dissent.

Ordered accordingly.

(190 N. Y. 150)

PEOPLE v. BONIFACIO.

(Court of Appeals of New York. Dec. 10, 1907.)

1. CRIMINAL LAW—INSTRUCTIONS—REQUESTS—QUANTUM OF PROOF.

Where, in a prosecution for homicide, the evidence was not circumstantial, but the killing was testified to by an eyewitness, and the guilt of defendant depended upon the credence which the jury gave to such testimony, a request to instruct "that, unless the evidence on both sides excludes every hypothesis except that of guilt, the defendant may be acquitted," was properly refused, where the instructions given by the court correctly instructed the jury as to the quantum and burden of proof, as the request was technically incorrect in calling for an absolute certainty, instead of a reasonable moral certainty, in the exclusion of every hypothesis except guilt, and also because inappropriate to a case not depending wholly on circumstantial evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1883-1888.]

2. SAME—SUFFICIENCY OF EVIDENCE—QUANTUM OF PROOF—WORDS AND PHRASES.

The words "beyond a reasonable doubt" and "to a moral certainty," explanatory of the quantum of proof required to convict in a criminal prosecution, are synonymous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1263, 1266-1268.]

Appeal from Supreme Court, Appellate Division, Third Department.

Giovanni Bonifacio was convicted of murder in the second degree, and appeals. Affirmed.

For opinion below, see 104 N. Y. Supp. 181.

George M. Abbot and William E. Woollard, for appellant. John S. Maxwell, Dist. Atty. (Fox Sponable, of counsel), for the People.

GRAY, J. The defendant was charged in the indictment with the crime of murder in the first degree, for having killed Ralph Di Sciblo, by intentionally and deliberately shooting him with a pistol, on August 7, 1904. His trial resulted in a verdict of murder in the second degree. The Appellate Division, by the unanimous vote of the justices, has affirmed the judgment of conviction and, also, an order, which denied a motion for a new trial, made upon the ground of newly discovered evidence. The defendant has further appealed to this court; but, in so far as his appeal includes the affirmance of the order denying a new trial, the right to a review, in that respect, ceased at the Appellate Division. It was within the discretion of the court below whether to grant the application, or not, and with the exercise of that discretion this court will not interfere. Upon the appeal from the affirmance of the judgment of conviction, all questions of fact, or as to the sufficiency of the evidence, must be regarded as conclusively settled, and there is but one question of any importance, which presents itself for our consideration, and that was raised by an exception to a ruling upon a request to charge. That the deceased was killed by a shot from a pistol drawn by the defendant is not disputed; but whether the shooting was intentional, or in self-defense, or accidental, as the result of a struggle between the two men, formed the issue at the trial. The defendant was one of a gang of laborers, employed upon some highway work, near the city of Amsterdam, in this state, and the deceased kept a store near by. An altercation arose between them concerning a petty indebtedness, owing by the defendant. The testimony for the prosecution tended to establish that the deceased, on the day of the homicide, was insisting upon an immediate payment, and that the defendant should then leave the work. Upon the latter saying that he had no money, the deceased threatened him with personal violence and came towards him. The defendant drew a revolver, and cried out to "step back," or he would shoot. The deceased continued towards him and, when within a few feet of him, was shot. The defendant then ran away, and the deceased pursued him for a short distance, when he fell to the ground and expired. The defendant was caught some miles away from the scene. The evidence for the defendant did not, substantially, differ as to the altercation between the two; but it tended to show that, when the

deceased came forward with threats, he seized hold of the defendant, and that, the latter then drawing his pistol, it went off in the scuffle, or as the result of the deceased's pulling at it. The defendant, in giving his account of the killing, denied any intention in drawing his pistol upon the deceased other than that of frightening him. The trial judge, correctly enough, charged the jurors upon the law, defining and explaining to them the degrees of murder and of manslaughter, and the rule of presumption, and he fairly stated to them the facts of the case. Upon the conclusion of his charge, he was requested by the defendant to charge, further, "that, unless the evidence on both sides as a whole excludes every hypothesis except that of guilt, the defendant may be acquitted." He answered: "I decline to charge in that way. You leave out the word 'reasonable.'" This ruling presents the one question, which justifies some consideration by this court of this case. The jurors had been instructed, in the course of the main charge, that they were to determine whether the defendant had intended to kill the deceased, whether there was any motive shown, and that "in order to convict the defendant the evidence must be sufficient to satisfy them beyond a reasonable doubt that he was guilty." Just before the request in question was made, the trial judge, also, at the defendant's request, had instructed the jurors that "the burden of proof rests upon the prosecution at all stages of the trial and never shifts to the defendant," and that "they must be satisfied on every proposition beyond a reasonable doubt." There can be no hesitation in concluding that the jurors had been carefully and correctly instructed upon a proposition of great importance to the defendant's right, as to the burden and quantum of proof.

Differing from the rule in civil cases, which demands that the case for either party shall be proved by a preponderance of evidence, the rule in criminal cases requires that the people shall establish their case against a defendant beyond a reasonable doubt. "Proof beyond a reasonable doubt" has been well defined to be that which amounts to a moral certainty, as distinguished from an absolute certainty. *Commonwealth v. Costley*, 118 Mass. 1. "Doubt" is a state of mind in which a conclusion cannot be reached upon the question before it. If it is not due to mental inability to co-ordinate facts in evidence, it must arise from the absence of some material fact, or because such a fact has not been sufficiently established by the evidence, and therefore the foundations for a belief are insufficient. The application of the rule of reasonable doubt is necessary in all cases; but, in cases depending wholly upon circumstantial evidence, it is proper to emphasize its application by coupling it with a statement that the circumstances must exclude beyond a reasonable doubt every hypothesis except that of guilt. In *Starkie's*

work on Evidence, it is said that "juries should convict, when they can do so safely and conscientiously, upon circumstantial evidence, which excludes all reasonable doubt" (720); and the rule is laid down by the same author that the circumstances should, to a moral certainty, exclude every hypothesis but the one proposed to be proved (575). The rule is referred to in the opinion of this court in *Ruloff v. People*, 18 N. Y. 179, in the discussion upon the proof in cases where there is no direct proof of the death, or of the act of the defendant alleged to have caused death.

The defendant's request should not have been allowed for two reasons, and the qualified refusal of the trial judge, in my opinion, was rather favorable to the defendant than otherwise, even if incorrect, for it applied a too rigid rule of law to the people's case. The request was, in itself, technically improper, inasmuch as it called for an absolute certainty in the exclusion of any hypothesis except that of guilt. Such a rule would make convictions upon circumstantial evidence impracticable. The law deals rather in considerations of a moral nature, and does not demand absolute certainty. It demands that the evidence shall establish the truth of the fact charged to a reasonable and moral certainty; that is to say, a certainty, which results from the reason being convinced and from the judgment being satisfied. If, after a careful and impartial consideration and comparison of the evidence, the jurors can say that they entertain no reasonable doubt of the defendant's guilt, and therefore are convinced of it, the requirements of the law will be satisfied. See *Commonwealth v. Webster*, 5 Cush. (Mass.) 302, 320, 52 Am. Dec. 711; *Commonwealth v. Costley*, supra; *Hopt v. Utah*, 120 U. S. 430, 439, 7 Sup. Ct. 614, 30 L. Ed. 708. Whether the expression used is "beyond a reasonable doubt," or "to a moral certainty," is immaterial, for they are synonymous, and each simply means that the proof must be such as would satisfy the judgment and consciences of the jurors that the crime charged had been committed by the defendant, and that no other reasonable conclusion was possible. *Hopt v. Utah*, supra. In *People v. Smith*, 162 N. Y., at page 529, 56 N. E., at page 1003, a request to charge that "the evidence must be so strong as to remove every other hypothesis than that of the defendant's guilt" was held to be improper, for the reason that "the rule is that the evidence must, to a moral certainty, or beyond a reasonable doubt, exclude, or remove, every other hypothesis than that of the defendant's guilt." Whether, within the opinion in *People v. Smith*, the qualification by the trial judge of the request, by making it a reasonable hypothesis, which the evidence should exclude, would be, in a proper case, reversible error, I doubt. In *Hopt v. Utah*, supra, the United States Supreme Court approved an instruction that the jurors may reconcile the evi-

dence upon any reasonable hypothesis, and in *Commonwealth v. Costley*, supra, it was said that "proof 'beyond a reasonable doubt' is not beyond all possible and imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support." The distinction made by Judge Landon, in his opinion in *People v. Smith*, between mere "hypothesis" and "reasonable hypothesis" upon the evidence, is somewhat subtle, and I may not quite apprehend it; but it is not material to this case. That case was one where the fact charged was arson committed by the defendant, and was one wholly of circumstantial evidence; while this is not. In the one case, there should be no possibility of confusion arising in the jurors' minds as to the right of the defendant to a verdict that is only arrived at when every reasonable doubt as to the fact charged has been removed by the evidence of circumstances, which, when taken together, leave the hypothesis, or supposition, of guilt the sole one to be reasonably drawn therefrom. In this case, the fact charged was proved by direct evidence, through the testimony of eyewitnesses, and the guilt of the defendant depended upon the credence which the jurors gave to it. There might be doubt as to his intention, but that would be because of his statements, and not from the absence of some material fact. Attempts at definition are more apt to be confusing than helpful, when the term attempted to be defined is, in itself, neither abstrusely expressed, nor, being expressed in ordinary language, is difficult of understanding. The purport of the request we are considering was, plainly enough, an attempt to have defined further, what the trial judge had already sufficiently explained, the "reasonable doubt," which was to be the protection of the accused against a hasty, an arbitrary, or a speculative conclusion upon the facts.

The further reason for denying the request, beyond its technical inaccuracy, is this that it is one more properly made in a case wholly depending upon circumstantial evidence and was quite inappropriate to the facts proved. In *People v. Bennett*, 49 N. Y. 137, a case of circumstantial evidence, Chief Judge Church laid down the rule that, "in determining a question of fact from circumstantial evidence, there are two general rules to be observed: (1) The hypothesis of delinquency, or guilt, should flow naturally from the facts proved and be consistent with them all. (2) The evidence must be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him." In *People v. Fitzgerald*, 156 N. Y. 253, 50 N. E. 846, also a case of circumstantial evidence, Judge O'Brien laid down the same rule, using Chief Judge Church's language. In *People v. Smith*, supra, as already mentioned, the question of the propriety of the request was considered and denied in a case wholly depending upon circumstantial evi-

dence. Now, in this case, the death of the deceased was established by direct evidence. It was proved to be the result of a shot fired from a pistol belonging to, and drawn by, the defendant, and this is not disputed. Whether the wound was inflicted intentionally by the defendant, or by accident in his struggle with the deceased, and whether, if by his hand, it was in self-defense, were questions to be answered upon the testimony given of the occurrence by eyewitnesses and by the defendant. If the jurors believed the witnesses for the prosecution, the defendant warned the deceased to keep away, and, when he continued to approach, without seeking to avoid a conflict by going away, drew a pistol and shot him. If they believed the statements of the defendant and of his witnesses, he did not shoot the deceased; but the pistol, though drawn by him, was pulled out of his hand and was discharged in a struggle with the deceased. Thus, the determination of the issue by the jury, necessarily turned upon their belief in the several statements of the occurrence. There were circumstances to be considered, obviously, because there are always such in every case. But the fact of the killing was not proved inferentially by circumstances. The circumstances attending the killing were proved and were helpful in coloring the principal fact; such as, for instances, the quarrel about defendant's indebtedness, the threats of the deceased and his insisting upon the defendant leaving the work upon which he was employed, and the defendant's running away immediately after the deceased was shot. While, therefore, the defendant was entitled to have the jurors instructed that they must extend to him the benefit of every reasonable doubt upon the evidence, he was not entitled to an instruction that they might acquit "unless the evidence on both sides as a whole excluded every hypothesis except that of guilt." Acquittal was to depend upon the credence they gave to the defendant's version of the occurrence, while the degree of his guilt would depend upon the jurors' view of the surrounding circumstances, in connection with the statements.

I advise an affirmation of the judgment.

CULLEN, C. J., and O'BRIEN, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment of conviction affirmed.

(190 N. Y. 198)

WINTER v. CITY OF NIAGARA FALLS.
(Court of Appeals of New York. Dec. 10, 1907.)

1. MUNICIPAL CORPORATIONS—TORTS—PERSONAL INJURIES—NOTICE—ACTIONS.

Niagara Falls city charter, providing that claims for damages founded on negligence of the city shall be presented to the council within 30 days, or an action therefor shall be barred, is not a statute of limitations, the running of

which is, under Code Civ. Proc. § 396, suspended during infancy of one injured through the negligence of the city, but prescribes a condition precedent to the maintenance of an action, and compliance with it is a fact to be alleged and proved like any other condition precedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1562.]

2. SAME—LIABILITY—STATUTORY REGULATIONS.

Municipal liability for injuries is a matter within the control of the Legislature, and when it is enacted what that liability shall be, and the conditions on which it may be enforced are prescribed, the statutory provisions are controlling.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1545.]

3. SAME.

To require the presentation of a claim against a city within a specified time as a condition precedent to the maintenance of an action is reasonable, and will be enforced, though the provision is not so rigid as to be beyond a construction admitting of a substantial compliance or of an excuse for delay in performance caused by the inability of the claimant to comply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1562.]

4. PLEADING—COMPLAINT—ALLEGATIONS OF PERFORMANCE OF CONDITIONS PRECEDENT.

Omission in the complaint of an averment of performance of a condition precedent, or of an excuse for nonperformance, is fatal on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 124-126.]

5. MUNICIPAL CORPORATIONS—INJURIES—NOTICE—WAIVER.

Niagara Falls city charter provides that claims for damages founded on negligence of the city shall be presented to the council within 30 days, or an action therefor shall be barred, and requires the corporation council to investigate claims for personal injuries. An infant injured through the negligence of the city failed to file a notice thereof within 30 days. While he was in the hospital, the mayor called on him, sympathized with him, and the city paid the bill for hospital services. After the infant had filed a claim, he was subpoenaed by a policeman of the city to appear before officers thereof. He did so and was examined by the city attorney. *Held*, not to constitute a waiver of the city's right to insist that the claim had not been presented in time.

6. SAME—COMPLAINT—SUFFICIENCY.

Where the complaint, in an action against a city for personal injuries sustained by an infant through its negligence, did not allege the presentation of the claim within 30 days, as required by the charter of the city, and did not allege a waiver thereof, nor any facts excusing plaintiff from performance, the complaint was bad on demurrer.

O'Brien and Vann, JJ., dissenting.

Action by Albert J. Winter against the city of Niagara Falls. On a judgment of the Appellate Division (104 N. Y. Supp. 39, 119 App. Div. 586), reversing an interlocutory judgment sustaining a demurrer to the complaint, the case was certified to the Court of Appeals on the question of the sufficiency of the facts stated in the complaint to constitute a cause of action. Question answered in the negative, and judgment of Special Term affirmed.

This action was brought by the plaintiff to recover damages for injuries sustained by him, which are alleged to have been caus-

ed by the negligence of the defendant's servants. The complaint sets forth that the plaintiff, in May, 1901, was driving through one of the streets of the city, when a steam roller, operated by one of its employes, suddenly started, making a great noise, frightened his horse, and caused it to run away. His wagon was overturned, and the injuries complained of were then occasioned. He sets out the nature of the injuries, and alleges that they were caused, solely, by the negligence of the defendant and without any negligence on his part. He alleges that, as the result of his injuries, he was confined in a hospital for a certain length of time, and that, while there, he was "visited by Mr. M. B. Butler, at that time mayor of the defendant, who discussed with the plaintiff the accident, which resulted in his injury, and who stated to the plaintiff that he 'need not worry' and that 'they would pay the bill'"; and that, shortly thereafter, the bill for hospital services was submitted to the common council of the city and paid. The complaint further alleges: That in July, 1904, the plaintiff caused to be filed with the clerk of the city "a notice of intention to commence suit to recover damages" and "a verified petition directed to the common council," setting forth "the nature and extent of plaintiff's claims in consequence of the accident." That "40 days and more have expired since the filing of said petition." That, "after this plaintiff had caused his verified claim to be served upon the common council, he was subpoenaed by a member of the defendant's police force to appear before certain officers of said city, and, in compliance with said subpoena, did so appear, and was then examined as to the cause of action and the injuries herein alleged; said examination being conducted by the city attorney." Lastly, it alleges that the plaintiff, at the time of the accident, "was in his eighteenth year," and "that he arrived at his majority July 17, 1904." The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained at the Special Term; but, upon appeal to the Appellate Division, the interlocutory judgment sustaining the demurrer was reversed, and the case was then certified to this court, upon the question as to the sufficiency of the facts stated in the complaint to constitute a cause of action.

Franklin J. McKenna, for appellant. John T. Ryan, for respondent.

GRAY, J. (after stating the facts as above). Upon the face of this complaint, it appears that more than three years had elapsed after the plaintiff sustained his injuries and before he presented a claim for damages to the defendant; but the majority of the learned justices of the Appellate Division were of the opinion that the defendant had waived compliance with a provision of its charter, which would have barred the action. The charter

of the defendant provided that "all claims for damages founded upon alleged negligence of the city shall be presented to the common council, in writing, within thirty days after the occurrence causing such damages"; that the notice shall state the time, place, cause, nature, and extent of the damages and shall be verified; that "the omission to present any claim in the manner, or within the time, in this section provided shall be a bar to an action against the city therefor"; and that no action or proceeding to recover any claim against the city shall be brought until the expiration of 40 days after the claim shall have been presented before the common council for audit.

Very correctly, the opinion of the court below disposed of the plaintiff's contention that the provision of the charter with respect to the time for presentation of a claim was a statute of limitation, the running of which, within the provisions of Code Civ. Proc. § 396, would be suspended during infancy. It was nothing of the kind, for, as it was observed, the requirement does not relate to the commencement of an action. The statute requires the presentation of a claim to be made within 30 days of the occurrence causing the damage, and it bars an action against the city in the case of an omission to do so. The provision therefore became an essential part of a complainant's cause of action, and compliance with its requirement was a fact to be alleged and proved, like any other condition precedent to the existence of an obligation. *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792; *Curry v. City of Buffalo*, 135 N. Y. 366, 32 N. E. 80; *MacMullen v. City of Middletown*, 187 N. Y. 37, 79 N. E. 863. Municipal liability for injuries is a matter that is within the control of the Legislature, and when it is enacted what that liability shall be, and the conditions upon which it may be enforced are prescribed, the statutory provisions are controlling upon the subject. To require the presentation of a claim within a specified time is quite a reasonable provision, inasmuch as thereby the municipality is afforded a measure of protection against stale claims, or the possible connivance of corrupt officials. It permitted an investigation into the occurrence to be had at a time when the evidence relating to it might more readily be collected. The provision is not so rigid as to be beyond a construction, which admits of a substantial compliance with its requirement, or of an excuse for delay in performance, when caused by the inability of the injured person to comply. *Walden v. City of Jamestown*, 178 N. Y. 213, 70 N. E. 466. In this complaint, however, not only is there no allegation of compliance, but no excuse for the failure to present a claim is alleged. The plaintiff was 18 years of age and, so far as the complaint shows, presumably, was able to cause a claim to be filed, and the statute makes no exception as to persons. The question is not as to the ef-

fect of the plaintiff's infancy upon the running of the statute of limitations. It is, simply, as to the effect upon his cause of action of a failure to present a claim for damages to the city within 30 days after the receipt of the injuries, as the charter required. The question was well discussed below, and I think it needs no further discussion here.

I am not able, however, to agree in the view that the failure of the plaintiff to comply with the requirement of the charter has been waived by the defendant. I am not without doubt upon the question whether a statutory provision of this kind can be waived by the municipal authorities. The liability of the municipality is provided for by a statute and is rested upon the performance of a certain condition. It is declared that an omission to comply with the provision "shall be a bar to an action against the city." If compliance may be waived, it would tend considerably to lessen the protection intended to be accorded to the city; but, without deciding that question, and if we shall assume that it was within the power of the municipal authorities to waive the failure of the plaintiff to present his claim within the time prescribed by the statute, still I find the difficulty in the plaintiff's case to be that the complaint neither expressly alleges a waiver, nor facts, which, taken together, constitute a waiver, on the part of the defendant. It is a familiar rule of law that the omission of an averment of performance of a condition precedent, or an excuse for the nonperformance, is fatal on demurrer. See 1 Chitty on Pleading, *321, *327; *Oakley v. Morton*, 11 N. Y. 25, 62 Am. Dec. 49; *Weeks v. O'Brien*, 141 N. Y. 199, 36 N. E. 185. That performance of the condition precedent, imposed by the statute upon a complainant intending to bring an action against the defendant, could not be pleaded, when this action was commenced, is evident; but, in such a case, it was obligatory either to plead a waiver, or to allege facts which would constitute a waiver, of performance. As already observed, there is no exception made in the statute as to persons under the disability of infancy, and no fact alleged permits an inference that the plaintiff could not have complied with the requirement. The fact that the mayor called upon the plaintiff, while in the hospital, and sympathized with him, or that the bill for hospital services was paid by the city, does not, even remotely, show a waiver of the requirement that any claim for damages against the city should be presented, as provided for in the statute. Neither do the facts that he was "subpoenaed by a member of the defendant's police force to appear before certain officers of the city," that he did so, and that he was examined by the city attorney, constitute a waiver. The allegations in this respect are somewhat vague; but, allowing all force to them, what more do they amount to than that the city attorney, after the

plaintiff filed his claim performed a duty with which he was charged by the statute? Section 489 of the charter provides that "it shall be the duty of the corporation counsel—in which name the office of the city attorney was continued by the amendment of the charter, in 1904—to cause all claims for personal injuries or damages to property to be thoroughly investigated and he shall advise the proper committee of the common council in respect thereto." In examining the plaintiff therefore the corporation counsel simply discharged this duty. It was not for him to say that he might omit to discharge the duty enjoined by the statute upon the incumbent of the office, which he filled, any more than it was possible for him to bind the municipality by his opinion upon the claim. He might, at the most, advise the common council upon the facts. He was not an executive officer. He was only the law adviser, or counsel, of the municipal corporation. Even what he advised the common council is not alleged. That municipal body, alone, could waive the plaintiff's failure to present his claim within the time fixed by the statute (always assuming that it had the power to do so), and it is not alleged that it took any action whatever. With a pleading neither alleging compliance, substantial, or otherwise, with the requirement of the statute, nor alleging a waiver, or any facts excusing the plaintiff from performance, the defendant's demurrer, in my opinion, was properly sustained at the Special Term.

I advise that the question certified to this court should be answered in the negative, that the order appealed from should be reversed, and that the judgment of the Special Term should be affirmed, with costs in all the courts, but without prejudice to the plaintiff's rights to apply for leave to amend his pleading, as he may be advised.

CULLEN, C. J., and WERNER and CHASE, JJ., concur. O'BRIEN and VANN, JJ., dissent. WILLARD BARTLETT, J., not voting.

Ordered accordingly.

(190 N. Y. 259)

FOX et al. v. FITZPATRICK et al.

(Court of Appeals of New York. Dec. 17, 1907.)

1. LOGS AND LOGGING—SALE OF STANDING TIMBER — CONTRACT TO CUT — TITLE TO TREES.

Where F. contracted to sell, and B. to cut and deliver to a mill, certain timber on F.'s farm, and leave to the credit of F. a certain amount per 1,000 feet, title to the trees did not pass to B. until he had fully performed his part of the contract.

2. PARTNERSHIP — SUBJECT-MATTER — INTEREST OF PARTNERS.

Where B., who had a contract with F., whereby he agreed to cut and deliver at a certain mill trees on the land of F., and leave to the credit of F. a certain sum per 1,000 feet, formed a partnership with S. on such terms that

each partner was to have a joint and common interest in the execution of the contract, the agreement was not a sale by B. to S. of his interest in the contract, but simply an interest in the profits to be derived from carrying it out.

3. LOGS AND LOGGING—SALE OF STANDING TIMBER—CONTRACT TO CUT—TITLE TO TREES AND LOGS.

F. contracted with B. to sell all the timber of a certain quality on his farm, and B. agreed to cut and deliver it within one year at the mill of F. & W., and leave a certain sum per 1,000 feet to the credit of F. Before anything was done under the contract, B. agreed to give S. a joint interest in the execution of the contract. Later F. consented to allow B. and S. to deliver the logs to a certain milling company, and they agreed with the milling company to do so, whereupon the milling company advanced F. \$50 on the contract, and some of the logs were delivered. *Held*, that there was a valid contract with the milling company, under which B. and S. were obliged to deliver the logs as they were cut, but under which the milling company acquired no title to the uncut trees, nor to any logs, except as they were delivered.

4. SAME.

B. subsequently assigned his contract with F. to F. & W., who knew of the contract of B. and S. with the milling company. *Held*, that they took it subject to such other contract, and were bound to deliver the logs to the milling company as fast as cut.

5. EQUITY—JURISDICTION—PLEADING.

A party cannot be deprived of his right to a trial by jury, nor subjected to the stringent methods frequently employed to enforce judgments rendered by courts of equity, unless the facts conferring equitable jurisdiction are alleged, proved, and found.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 316.]

6. INJUNCTION—ADEQUATE REMEDY AT LAW—RIGHTS UNDER CONTRACT — SOLVENCY OF PARTIES.

F. contracted with B. to sell all the maple and basswood timber of a certain quality on his farm, and B. agreed to cut and deliver it at the mill of F. & W., and leave \$4 per 1,000 feet to the credit of F. Before anything was done under the contract, B. agreed to give S. a joint interest in the execution of the contract. Later F. consented to allow B. and S. to deliver the logs to a certain milling company, and they agreed with the milling company to do so, whereupon the milling company advanced F. \$50 on the contract, and some of the logs were delivered. Later B., without the knowledge of F. or S., assigned all his interest in the contract to F. & W., who knew at the time that the milling company had already contracted for the logs. In a short time F. & W. began cutting and removing the logs to their mill, whereupon F. and the copartners forming the milling company sued to enjoin them from doing so. B. and S. were insolvent, but F. & W. and the milling company were both solvent. *Held*, that F.'s remedy at law was ample, and he was not entitled to equitable relief, since, if B. and S. violated their contract with the milling company, this gave the latter no cause of action against F., so that he needed no injunction to protect him in that regard, and he could not be injured by the delivery of the logs to the solvent parties, F. & W., to whom he had originally provided they should be delivered; he being entitled only to be paid the sum of \$4 per 1,000 feet on delivery.

7. SAME—REMEDY BY RECOVERY OF DAMAGES.

Nor were the other plaintiffs, the copartners composing the milling company, entitled to an injunction restraining the violation of the contract, since maple and basswood logs are a common kind of property obtainable in the open market, and hence all damages sustained from

any wrongful act of F. & W., were recoverable in an action at law properly brought.

8. SAME—TRUST OR FIDUCIARY RELATION—PERFORMANCE OF NEGATIVE COVENANT.

Under these circumstances, no trust or fiduciary relation existed in reference to the logs, and there was no negative covenant to be performed.

9. SAME — ENFORCEMENT OF CONTRACTS CONCERNING CHATELLE.

The equitable remedy of injunction by judgment, if it is issued to restrain the breach of a contract, is a negative specific enforcement of that contract, and jurisdiction does not attach, unless the contract is one which will be affirmatively specifically enforced, and equity in general will not decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality.

Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by George A. Fox and others against Frank Fitzpatrick and others, impleaded with Ellsworth Sherman, to enjoin defendants from violating a contract. From a judgment of the Appellate Division (100 N. Y. Supp. 1116), affirming a judgment for plaintiffs entered upon the report of a referee, defendants other than Sherman appeal. Reversed, and new trial granted.

The case made by the complaint was in equity, and the only specific relief demanded was for an injunction restraining the defendants from violating a certain contract. The allegation of the plaintiffs that they had no adequate remedy at law was denied by the defendants Fitzpatrick, Weller, and Ball, who did not, however, plead as an affirmative defense that the plaintiffs had such a remedy. At the trial the point was raised by a motion to dismiss both at the close of the evidence for the plaintiffs and at the close of the entire evidence. No question was raised as to misjoinder of parties plaintiff by demurrer or otherwise.

The referee to whom the action was referred found the following facts, in substance: On the 9th of September, 1902, the plaintiff Fox owned a farm near the village of Ellicottville, in this state, upon which a large number of maple and some basswood trees were standing. On that day he entered into a contract with the defendant Ball, of which the material part is as follows, viz.: "Party of the first part (Fox) agrees to sell all the maple and basswood timber that is suitable for making last blocks for \$4.00 per thousand feet now on his farm to party of the second part (Ball). Party of the second part (Ball) agrees to cut and deliver all of said timber within one year from this date to Fitzpatrick & Weller Mill and leave \$4.00 per M. to the cr. of George Fox." When this contract was executed, the defendants Fitzpatrick and Weller were copartners engaged in the manufacture of last blocks in Ellicottville, and the plaintiffs Murpny, Hickey, and McMahon were also copartners carrying on a like business in the same place under the

firm name of "The Ellicottville Milling Company."

Before anything had been done by the defendant Ball toward performing his agreement with Fox, he formed a partnership with the defendant Sherman on such terms that each partner was "to have a joint and common interest in the execution" of said contract. On the 29th of September, 1902, Ball and Sherman asked Fox to consent to a modification of the contract of September 9th so as allow them to deliver the logs to the Ellicottville Milling Company provided they could get a better price therefor. Fox consented, and thereafter, but on the same day, Ball and Sherman agreed with said milling company to deliver the logs to it at \$9.50 per thousand feet. On the same day the milling company advanced to Fox the sum of \$50 "on said contract," and on the day following some of the logs were delivered at its mill. Afterward, but at about the same time, Ball, without the knowledge or consent of either Sherman or Fox, assigned all his interest in the contract of September 9th to Fitzpatrick & Weller, in consideration of \$15 and an agreement on their part to employ him by the day in cutting and hauling said timber to their mill. No provision was made for the measurement of the logs except as they might be measured by Fitzpatrick & Weller, who knew when they took the assignment that the Ellicottville Milling Company had already contracted for the logs. In a short time Fitzpatrick & Weller began cutting and removing the logs to their mill, and were thus engaged when this action was commenced on the 13th of October, 1902. Sherman and Ball were insolvent, and the plaintiffs upon the trial waived all claims to damages for the timber cut by Fitzpatrick & Weller.

After finding these facts, the referee found, as conclusions of law, that the contract of September 29th with the Ellicottville Milling Company was valid and binding, and transferred an interest "in said timber to the Ellicottville Milling Company," and that the subsequent assignment by Ball of his interest in his contract with Fox transferred no title to Fitzpatrick & Weller as against the interest of the Ellicottville Milling Company and the plaintiff Fox. The referee also found that the plaintiffs were entitled to a permanent injunction restraining the defendants Fitzpatrick & Weller from cutting and removing said timber, and the defendants Ball and Sherman from delivering the same except to the Ellicottville Milling Company. The defendants Fitzpatrick, Weller, and Ball filed exceptions to some of the findings of fact and to all of the conclusions of law. The Appellate Division affirmed the judgment entered upon the report of the referee, one of the justices not voting, and the defendants, with the exception of Mr. Sherman, who had not answered, appealed to this court.

Thomas H. Dowd and Henry P. Nevins, for appellants. William G. Laidlaw, for respondents.

VANN, J. (after stating the facts as above). The important question on this appeal is whether the facts found by the referee support his conclusions of law. The action is clearly in equity, and the concrete question is whether, according to the facts found, a court of equity had jurisdiction. There are five periods in the progress of the negotiations between the various parties when rights are alleged to have accrued and it will be convenient to examine the rights and relations of the parties at each of these periods.

1. When the written contract was made between Fox and Ball, title to the trees did not pass to the latter, for he was first to cut and deliver the logs and leave \$4 a thousand with the firm of Fitzpatrick & Weller to the credit of Fox. The entire consideration on the part of Ball was to cut and deliver the trees and pay for them in the manner specified on delivery at the place named. Under these circumstances, title to the trees, even after they had been converted into logs, did not pass to Ball until by such delivery and deposit he had fully performed his part of the contract. The agreement by Fox was to sell, and by Ball to cut, deliver, and deposit, and the sale was not complete until delivery and payment had been made.

2. The arrangement between Ball and Sherman was not a sale by the former to the latter of an interest in the contract for the trees, but was a copartnership agreement verbally made, by which Sherman was given a one-half interest in the execution of that contract. Ball still owned it, and Sherman simply had an interest in the profits to be derived from carrying it out.

3. Fox orally agreed with Ball and Sherman that his contract with Ball should be so modified as to permit delivery of the logs to the Ellicottville Milling Company, instead of to Fitzpatrick & Weller. If this modification was invalid because not in writing, further discussion is unnecessary, for on that basis it is obvious that the plaintiffs have no cause of action against the defendants either in equity or at law. Personally I am of the opinion that the modification does not come within the requirements of the statute of frauds, because the change made did not operate on the trees while standing, and could have no effect until after they had been cut into logs, and thus converted into personal property. *Killmore v. Howlett*, 48 N. Y. 569, 570. Without so deciding, I shall assume that this is the law for the purpose of further discussion.

4. Ball and Sherman agreed to deliver the logs to the Ellicottville Milling Company at \$9.50 per thousand. The milling company advanced to Fox the sum of \$50, and on the next day some of the logs were delivered to it

in accordance with the agreement. Ball and Sherman did not assume to assign the original contract with Fox, which still belonged to Ball, but they agreed to sell to the milling company the logs when cut at \$9.50 per thousand. There was part performance by Ball and Sherman through delivery of some of the logs, and part payment by the milling company through the advance of \$50 to Fox, presumptively with the consent of Ball and Sherman. This was a valid contract which placed Ball and Sherman under obligation to deliver the logs as they were cut to the Ellicottville Milling Company, which, however, acquired no title to the trees when uncut, nor to any logs, except as they were delivered at their mill.

5. Finally, Ball assigned his contract with Fox to Fitzpatrick & Weller. He had a right to assign it, for there was no agreement that he should not; but, as Fitzpatrick & Weller knew of Ball and Sherman's contract with the Ellicottville Milling Company, they took it subject thereto. Even if they had a right to go on Fox's land and cut the trees, they had no right to deliver the logs at their own mill, because they knew there was a valid contract outstanding for the delivery thereof to the Ellicottville Milling Company as fast as they were cut. Their rights were subordinate to those created by the previous contracts of which they had full notice.

Ball and Sherman were insolvent, so that a right of action against them was of no value; but both the milling companies were solvent. The referee failed to find that the plaintiff Fox, or his coplaintiffs, composing the Ellicottville Milling Company, or both together, had no adequate remedy at law, or that they would be irreparably injured by the performance of the acts which they sought to enjoin, or that the damages they would sustain would be difficult to prove. Furthermore, we find no evidence in the record to warrant such a finding, so that none can be implied in support of the judgment.

A party cannot be deprived of his right to a trial by jury, nor subjected to the stringent methods frequently employed to enforce judgments rendered by courts of equity, unless the facts conferring equitable jurisdiction are alleged, proved, and found. In this case such facts, even if sufficiently alleged, were neither proved nor found. If Ball and Sherman violated their contract with the Ellicottville Milling Company, that fact gave the latter no cause of action against Fox, so that he needed no injunction to protect him in that regard. Nor could he be injured by delivery of the logs to the solvent party to whom he had originally provided they should be delivered, and at the same place where he at first agreed that delivery should be made. All he was entitled to, in any event, was the sum of \$4 per thousand on delivery, and this he could recover as well of the original as of the substituted party to whom delivery was to be made. The claim that he might not get

a fair measurement by Fitzpatrick & Weller is answered by the fact that they were the persons who, as he had once agreed, were to do the measuring, and by the undisputed evidence that before the commencement of the action they told him he might select any person he chose to do that work at their expense. His remedy at law was ample, and he did not show himself entitled to equitable relief.

The same is true of the other plaintiffs. Maple and basswood logs are not a peculiar, but a common, kind of property, which the Ellicottville Milling Company could have procured in the open market, and, so far as the evidence shows, without paying more than they had agreed to pay Ball and Sherman. Even if they had to pay more, they could recover the difference of Fitzpatrick & Weller. All damages that they sustained from any wrongful act of that firm they could recover from it in an action at law properly brought. It is suggested that other legal remedies were open; but we need not discuss them, for from no point of view, as we regard the facts found, or such as could reasonably be found from the evidence, did the plaintiffs, either together or separately, have a cause of action in equity against the defendants. The primary rights of all the parties were legal, not equitable, and the legal remedies were adequate to do complete justice. The equitable remedy of injunction by judgment, as distinguished from an injunction by order pendente lite, depends upon the incompleteness and inadequacy of the legal remedy. If it is issued to restrain the breach of a contract, it is "a negative specific enforcement of that contract," and jurisdiction does not attach unless "the contract is one of a class which will be affirmatively specifically enforced." *Pomeroy's Eq. Jur.* (3d Ed.) § 1341. "Equity will not, in general, decree the specific performance of contracts concerning chattels, because their money value recovered as damages will enable the party to purchase others in the market of like kind and quality." *Id.* § 1402. None of the exceptions to this general rule mentioned by the learned author cover specifically or in principle a contract for the sale of trees either when standing or after they are cut into logs, unless the legal damages are "too uncertain and conjectural to constitute an adequate compensation."

No trust or fiduciary relation existed in reference to the logs, and, aside from other radical distinctions, there was no negative covenant to be enforced, as there was in *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149, 65 N. E. 967, upon which the plaintiffs rely.

We think that the plaintiffs failed to show themselves entitled to equitable relief of any character, and that the facts found by the referee do not support his conclusions of law.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and O'BRIEN, EDWARD
T. BARTLETT, HISCOCK, and CHASE, JJ.,
concur. HAIGHT, J., dissents.

Judgment reversed, etc.

(190 N. Y. 211)

BURNS v. BURNS et al.

(Court of Appeals of New York. Dec. 10,
1907.)

**1. INSURANCE — NATURE OF OBLIGATIONS —
HOW DETERMINED.**

The relation between an insured and a life insurance association is one of contract merely, and is expressed by the certificate which embodies their respective rights and obligations.

2. SAME—VALIDITY OF TERMS—WHAT LAW TO GOVERN.

A person insuring his life ordinarily has the right to make any contract that he pleases as to the risk if within the law and the provisions of the by-laws of the company, and may agree that the contract shall be governed by the laws of the state where its home office is situated, though he is not a resident of that state.

3. SAME—CONSTRUCTION OF CONTRACT—BENEFICIARIES—WHAT LAW GOVERNS.

Where a policy of life insurance is payable to the insured's heirs and to be construed according to the laws of a certain state, the policy would be payable to those who would be heirs under the laws of that state, and the general rule that the succession of personal property is governed by the decedent's domicile has no application to such case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 293.]

4. SAME—CHANGE OF FORUM—EFFECT.

The fact that the proceeds of an Ohio life policy are taken to New York state, to abide the result of a suit there, would not change the legal rights of the parties, since it would affect only the forum, and not the relief.

**5. SAME — CONSTRUCTION OF CONTRACT —
"HEIRS."**

Where the by-laws of an insurance company permit insurance in favor of one's heirs, and a policy provides for payment to the insured's heirs, the word "heirs" must be regarded as intended to describe those persons who would take in case of intestacy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1459.

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 8, pp. 7677-7678.]

6. SAME—"HEIRS"—"NEXT OF KIN."

Rev. St. Ohio 1892, § 4176, provides that, when a person dies intestate and leaves no children or their legal representatives, the widow or widower shall be entitled as next of kin to all the personal property, etc., but, if the intestate leaves any children, the widow or widower shall be entitled to the first \$400 and one-third of the remainder of the personal property subject to distribution. A policy of insurance payable to the insured's heirs was by its terms to be governed and construed according to the laws of Ohio. Held that, though in New York "heirs," when applied to successors to personal estate, means next of kin, and "next of kin" does not include a widow, under the policy and laws of Ohio, the widow is entitled to personal property as next of kin, and should share in the insurance with the insured's children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1459.

For other definitions, see Words and Phrases, vol. 4, pp. 3241-3265; vol. 5, pp. 4798-4804; vol. 8, pp. 7677-7678, 7732.]

7. APPEAL — RIGHT OF REVIEW — ACQUISITION IN DECISION.

Where a plaintiff is entitled to more than the amount awarded in the lower court, but she does not appeal, that matter cannot be determined on defendant's appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3577.]

Appeal from Supreme Court, Appellate Division; Fourth Department.

Action by Louise Mee Burns against Edgar W. Burns and others. From a judgment of the Appellate Division (109 App. Div. 98, 95 N. Y. Supp. 797), affirming a judgment for plaintiff, defendants appeal. Affirmed.

Charles F. Tabor and Thomas E. Boyd, for appellants. Adolph Rebadow, for respondent.

GRAY, J. The plaintiff is the widow and the defendants are the children of John C. Burns, and their dispute is over the distribution which should be made of certain life insurance moneys that became payable upon Burns' death. The Knights Templars and Masonic Mutual Aid Association of Cincinnati, an Ohio corporation, upon Burns' application, issued to him its certificate, whereby it "agreed with him to well and truly pay to the heirs of the said John C. Burns the sum of \$3,000 * * * at the office of the association, in the City of Cincinnati, O.," upon the proof required as to his death. The certificate stated that it was "issued and the contract made upon" certain "express conditions and agreements," among which was one that "this contract shall be governed by and construed only according to the laws of the state of Ohio, the place of this contract being agreed to be the home office of the association in the city of Cincinnati, Ohio." By one of the by-laws, which were made part of the contract, it was stated that "the object of the association was to furnish mutual protection and relief to its members and for the payment of stipulated sums of money to the families, heirs, executors and administrators, or assigns, of the deceased members." At the time the certificate issued, the assured and his family, composed of the plaintiff and the defendants, were, and they continued, up to his death, to be, residents of this state. The association does not dispute its liability, and, under an amicable stipulation, the insurance moneys were deposited by it in a bank in this state, to the credit of "the heirs of John C. Burns," to be held until the final determination of this action. Thereupon the action was commenced by the widow, and the sole question which the parties seek to have determined is whether, the policy having been made payable "to the heirs" of Burns, his widow can share in the payment. She proved upon the trial a statute of the state of Ohio contained in section 4176 of the Revised Statutes of 1892, which provided as follows: "When a person dies intestate and leaves no children, or their legal representatives, the widow, or widower, shall be en-

titled, as next of kin, to all the personal property, which is subject to distribution upon settlement of the estate; but if the intestate leaves any children * * * the widow, or widower, shall be entitled to one half of the first \$400, and to one third of the remainder of the personal property subject to distribution." The plaintiff succeeded in recovering a judgment for one-third of the insurance moneys, which has been affirmed at the Appellate Division.

The relation between Burns and the association was one of contract merely. The so-called certificate expressed it and embodied the respective rights and obligations of the parties and of the payees, or beneficiaries. *Uhlman v. N. Y. Life Ins. Co.*, 109 N. Y. 421, 429, 17 N. E. 363, 4 Am. St. Rep. 482. The by-laws conferred upon Burns the right to insure his life for the benefit of his family, his heirs, his personal representatives, or his assigns, and, in doing so, he had the right, notwithstanding his being a nonresident of Ohio, to agree that the contract of insurance should be governed and construed by, and according to, the laws of that state only. A person insuring his life ordinarily has the right to enter into any contract with respect to the risk that he pleases, if the law permits, and Burns had the same right, subject only to the by-laws of his association. In directing that payment should be made to his "heirs," those persons would be determined by the statutes of the state of Ohio and the moneys would be payable to them only under the contract. The fact that the moneys were brought into this state in no wise affected the legal rights of those persons; for that was a disposition of them, which only affected the forum, or place where the remedy was to be sought. Payment anywhere could only be made as the contract had stipulated. It is true that the word "heirs" is used in the certificate, as in the by-law; but it is obvious that the use of the term was inappropriate in connection with the succession to personal property. It must be regarded as not having been used in its strict legal sense, but as intending to describe those persons who would take in case of intestacy. *Walsh v. Walsh*, 66 Hun, 297, 20 N. Y. Supp. 933, affirmed on opinion below, 143 N. Y. 662, 39 N. E. 21; *Bishop v. Grand Lodge E. O. of M. A.*, 112 N. Y. 627, 634, 20 N. E. 562. The general rule is, as the appellant claims, that the succession to personal property is governed by the law of the decedent's domicile; but that rule has no application to a case where, as here, the insurance moneys are distributed solely under a contract of the decedent and independently of any other consideration, except as to any appropriate provision of the laws of Ohio. Reading the statute of Ohio, we find that a widow is entitled as next of kin to take personal property of a decedent. In this state it has been decided that the word "heirs," when applied to the succession to personal estate, means

next of kin, and that "next of kin" does not include a widow. *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1. Where, however, we find that the law of the state where the contract was made, and which the parties to it stipulated, should alone govern in its construction, provides that a widow is entitled to the personal property of an intestate as next of kin, the court was bound to so adjudge the payment of the moneys as that she should share with the children. According to the statute she was entitled to more than exactly the one-third, but, as she has not appealed, that question is not here.

For these reasons, I advise the affirmance of the judgment, with costs.

CULLEN, C. J., and O'BRIEN, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

Judgment affirmed.

(190 N. Y. 167)

HIBBS v. BROWN et al.

(Court of Appeals of New York. Dec. 10, 1907.)

1. BONDS—BONA FIDE HOLDERS.

Defendants conducted a brokerage business. A stranger called at their office, with a request that they buy a bond, payable to bearer, with unmatured interest coupons. At the request of the stranger, they effected a sale of the bond through brokers on the floor of a stock exchange at the market price. The brokers notified defendants of the sale. Defendants paid the stranger the proceeds of the sale which they would receive from the brokers, and forwarded the bond to them. The bond was delivered to an innocent purchaser for value before maturity. *Held*, that defendants acquired possession of the bond and coupons for value under circumstances which did not give them notice of or put them on inquiry against the outstanding rights of the owner, from whom the bond had been stolen.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, § 102.]

2. SAME—COUPONS—NEGOTIABILITY.

A deed of trust securing bonds, to which interest coupons are attached, reserving to a certain portion of the bondholders the right to waive default in payment of the coupons and postpone the time of their payment, does not affect the negotiability of the coupons; the reservation relating to procedure under the trust deed, and not preventing a bondholder from enforcing his general remedies at law for the collection of the obligation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, § 81.]

3. SAME—NEGOTIABILITY OF BONDS.

Bonds of a joint-stock association, issued in its corporate name, under its common seal, by its authorized officers and for its benefit, which are payable to bearer, and which stipulate that no shareholder shall be personally liable as partner or otherwise, and that the same shall be payable solely out of the assets assigned to a trustee under a trust deed securing the bonds, or out of other assets of the association, are negotiable, and the negotiability of the bonds renders the interest coupons attached also negotiable.

Appeal from Supreme Court, Appellate Division, First Department.

Action by William B. Hibbs against Alex-

ander Brown and others. From an order of the Appellate Division (112 App. Div. 214, 98 N. Y. Supp. 853), reversing a judgment and order of the Appellate Term, affirming a judgment of the Municipal Court for plaintiff and ordering a new trial, he appeals. Affirmed, and judgment against plaintiff rendered.

This is an action to replevy some coupons originally attached to a bond issued by the Adams Express Company, and appellant's right to succeed turns on the question whether said bond and coupons were negotiable and acquired by respondents in due course for value.

The controlling facts may be summarized as follows: In January, 1902, the appellant owned a certain bond of the Adams Express Company, to which were attached interest coupons for \$20 each, then unmaturing. The bond was stolen, and on April 23, 1902, with the coupons still attached, was presented by an unknown individual at the office of respondents, who were conducting a brokerage business at Baltimore, Md., with a request that they buy it. This being declined, such person then requested that they sell it for him, and they thereupon wired Brown Bros. in New York to sell it, which was done on the floor of the Stock Exchange to brokers acting for an undisclosed principal, at the market price. Brown Bros. then notified the respondents that the sale had been made, and the latter accepted the bond and coupons, and paid the vendor thereof in cash the entire proceeds of the sale which they were to receive from Brown Bros. The respondents then forwarded the bond and coupons to Brown Bros. in New York, and they were delivered through the brokers who purchased the same to Erico Bros., the clients for whom they were purchased, and who it is conceded were innocent purchasers for full value before maturity. The appellant did not discover the loss of the bond and coupons until July, 1902, and then he notified every bank and trust company in Washington, and also the express company and the Mercantile Trust Company of New York, the trustee at whose office the coupons were payable, to stop payment of the latter, and to identify any person presenting any of them for payment. Erico Bros. presented the coupons for September, 1902, and March, 1903, for payment, and the same were paid notwithstanding the previous notice. In March, 1904, Erico Bros. also presented for payment to the trust company the coupons for September, 1903, and March, 1904, and payment was refused. They then through their brokers through whom they originally made the purchase demanded of the brokers who had sold them for Brown Bros. that they take back the bond and unpaid coupons, and refund the purchase price. Brown Bros. made a similar claim on the respondents, who, by purchasing and delivering another bond of the same issue, settled the claim and received back the bond and

unpaid coupons. When the appellant ascertained these facts, he demanded the bond and coupons on the ground that they had been stolen from him; and, on defendants' refusal to deliver, he brought this action to recover three of the coupons which had been detached from the bond.

The Adams Express Company, which, as before stated, issued the bond, is an unincorporated voluntary association or joint-stock association organized under the laws of this state for the purpose of carrying on an express business, and having a president and other officers, and issuing certificates of stock which represent and whereby are transferred the rights of the respective shareholders. The bond was issued by the express company in and under its association name, and was one of an issue of \$12,000,000, secured by a certain trust indenture conveying and pledging for its payment a large amount of securities and property. It bore interest coupons of the ordinary form payable to bearer, and, except for two clauses to be specifically referred to, may be assumed to have been in the usual form of a corporation negotiable bond payable to bearer or the registered holder. Of the clauses to be particularly noted, one which is especially important provides that "no person or future shareholder, officer, manager or trustee of the express company shall be personally liable as partner or otherwise in respect to this bond or the coupons pertaining thereto, but the same shall be payable solely out of the assets assigned and transferred to the said trust company or out of other assets of the express company." The other clause refers to the deed of trust for a statement of the rights of the bondholders and of the securities and property securing the payment of the bonds. Amongst the provisions of said trust indenture thus referred to and made controlling upon the bondholders are several relating to enforcement of the trust and collection of the bonds which are claimed to confer upon a certain proportion of the bondholders the right to waive default in and postpone payment of interest coupons.

Herbert R. Limburg, for appellant. Scott McLanahan, for respondents.

HISCOCK, J. (after stating the facts as above). The appellant, as the true owner of the stolen coupons of which recovery is sought, in seeking to establish his rights of ownership against the respondents because of the character either of their possession or of the bond which they possess, bases his right to do this upon three propositions, any one of which being decided in his favor entitles him to succeed. These propositions are, first, that the respondents did not become the holders of his bond and coupons for value without notice of any defects; second, that whatever may be the character of the bond as to negotiability the coupons of which recovery is sought are independent instruments

in the hands of respondents and nonnegotiable, and therefore subject to the assertion of appellant's rights, because of the clauses in the trust deed which, by enabling a certain proportion of the bondholders to waive defaults and postpone the time of payment of coupons, prevent the latter from complying with the requirement in negotiable instruments for an unconditional promise to pay on demand or at a fixed and definite time; and, third, that on account of the exemption of the individual members of the Adams Express Company from personal liability, the bond is not issued upon the general credit of the association, but is payable out of a particular fund, to wit, its joint assets, and hence is nonnegotiable and impresses this character upon the coupons. These propositions may be passed upon in the order stated. And, since the members of this court are unanimous in their opinion that we should affirm the decision appealed from upon the first two propositions, I shall not discuss them; but shall limit myself to stating our conclusions thereon.

As regards the first one, we feel entirely clear that respondents did acquire possession of the bond and coupons in suit for value, and under such circumstances as did not give them notice of or put them upon their inquiry against the outstanding rights of appellant, and that they are subject to no weakness of position in this respect.

As regards the second proposition, we think that a consideration of all of the provisions of the trust indenture demonstrates that the clauses relied upon to sustain this contention of appellant only relate to and control procedure under the trust indenture itself for the purpose of enforcing payment of coupons, and do not for any other purposes work or permit a postponement of the time of payment of the coupons, or prevent a bondholder from enforcing his ordinary and general remedies at law for the collection of such obligations.

And thus we come at once to the last proposition, and to the interesting and important question upon which we differ, whether the bonds, of which the one here involved is one, were rendered nonnegotiable because of the clause already quoted exempting members of the Adams Express Company from that personal liability thereon which would ordinarily attach to the individual members of a joint-stock association. I say important question, for certainly it will be an important, and, as it seems to me, an unfortunate, result if an obligor in that which by all of its prominent characteristics is a negotiable instrument can by inserting in some obscure manner a clause cutting off some utterly inconsequential liability secure not only such particular exemption, but, what is vastly more harmful, make apparently negotiable securities in the hands of investors nonnegotiable, and seriously impair their value and security. And it would be rash to assume

that a decision effecting that result in this case would be limited to these bonds, and that there would not be many other issues heretofore offered to and accepted by investors as negotiable which now on account of some trifling exemption or limitation would be stamped as nonnegotiable with resulting impairment of character and value in the hands of the public.

We shall naturally and best start out with our inquiry by spreading before us as a guide and test the definition of negotiable instruments as now expressed in terms of statutory law so far as applicable to this question. The Negotiable Instruments Law (Laws 1897, p. 722, c. 612), § 20, provides that "an instrument to be negotiable must conform to the following requirements: * * *

(2) Must contain an unconditional promise or order to pay a sum certain in money." Section 22 of the same statute describes an unconditional promise to pay as follows: "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, or a particular account to be indebted with the amount, or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional." Section 22, defining an unconditional promise to pay, embodies the rules of the common law and law merchant as they had been established before the passage of any statute upon this point, and we therefore briefly may turn to one or two earlier decisions as casting light upon the true interpretation and meaning of the statute which we have quoted. In *Munger v. Shannon*, 61 N. Y. 251, it was said: "A bill is an order drawn by one person on another to pay a third a certain sum of money absolutely and at all events. Under this definition, the order cannot be paid out of a particular fund, but must be drawn on the general credit of the drawer, though it is no objection, when so drawn, that a particular fund is specified from which the drawee may reimburse himself. * * *

The true test would seem to be whether the drawee is confined to a particular fund, or whether, though a specified account is mentioned, he would have the power to charge the bill up to the general account of the drawer if the designated fund should turn out to be insufficient. In the final analysis of each case it must appear that the alleged bill of exchange is drawn on the general credit of the drawer." This case cited with approval the case of *Dawkes v. De Lorane*, 3 Wils. 207, that "the instrument or writing which constitutes a good bill of exchange is not confined to any certain form or set of words, yet it must have some essential qualities, without which it is no bill of exchange. It must carry with it a personal and certain credit given to the drawer, not confined to credit upon any thing

or fund. It is upon the credit of the person's hand, as on the hand of the drawer, the indorser, or the person who negotiates it. He to whom such bill is made payable or indorsed takes it upon no particular event or contingency, except the failure of the general personal credit of the persons drawing or negotiating the same." It is not claimed that payment of these bonds is limited to the property pledged as security therefor with the trustee, but it is admitted that they may be collected from any and all of the general assets and property of the express company. The only respect in which they are claimed to come in conflict with the prohibition against a negotiable instrument being payable "out of a particular fund" is because of the provision that they may not be collected from the individual property of the members of the association. This subtraction, it is said, makes the remaining property from which they be collected a "particular fund." The decisions which I have quoted state the rule that a negotiable instrument may not be made payable out of a particular fund as the equivalent of the one that it must be "drawn on the general credit of the drawer"; and so, if we fairly can say that, notwithstanding the exemption, the maker of the bonds did pledge its general credit, then it will follow that there has not been that limitation of promise of payment to a particular fund which is prohibited by the statute.

Was the general credit of the obligor pledged? The Adams Express Company was the maker of the bonds. They were issued by it in its artificial, corporate-appearing name, under its common seal, by its authorized executive officers and for its benefit. They expressed the general promise and obligation of the company which thus issued them, and were a claim against it, upon which, as we shall see hereafter, judgment might be obtained or a receiver be appointed of it, and satisfaction obtained out of any or all of its joint business, well-understood assets and property, and which we know aggregated many millions of dollars. Payment was not limited to the pledged securities or to any other part or parcel of the property of the association which made the bonds, but was a charge against the whole thereof. Thus far, therefore, they were entirely similar to the familiar bonds issued by an ordinary corporation which are general claims against it, and which are concededly negotiable; but here it is that we come against the contention that this view of the character of the bonds, however practical and desirable, cannot prevail; that the exemption of the personal liability of the individual members of the association after all works a limitation upon the pledging of the general credit of the company which issued the bonds, and turns all of its assets, from which their payment may be enforced, into a special, limited fund. As the foundation for this contention much care has been devoted to pointing out the difference

between a joint-stock association and a corporation, and to emphasizing the fact that the former is in effect a partnership, and that the individual liability of its members is just as essential a characteristic as it is in the case of a partnership, and that, therefore, it may not be eliminated without materially affecting the contract of the association. Of course, there can be no doubt that a joint-stock association differs from a corporation, or that in its original conception and ultimate analysis it is like a partnership in respect to the individual liability of its members; but, upon the other hand, so many of the attributes and characteristics of a corporation have been impressed upon the modern joint-stock association that in my opinion, for the purposes of the question now before us, we are amply justified in regarding simply the joint, quasi corporate entity, and in saying that an obligation issued in its name upon its general credit, and binding all of its assets, complies with the requirements for a negotiable instrument, even though the practically unimportant individual liability of members is excluded.

We may briefly refer to some of these characteristics which, as I think, have led both courts and laymen to regard joint-stock associations largely as corporate creations, and in ordinary business dealings quite to ignore the feature of individual membership and liability, even though it does exist. They are, like corporations, organized under and regulated by statutes. Laws 1894, p. 412, c. 235. They have, and transact business under, an artificial name. Their capital and ownership is represented by shares of stock transferable at will, and their existence is not dissolved or affected by the death of or transfer of interest by members. They have regular officers in whose names actions may be commenced in behalf of and against the association, and, upon a judgment rendered in the latter case, execution may be issued only against property belonging to the association or to all of its members jointly. Formerly action could not be brought against the individual members of the association until after judgment and execution unsatisfied against the association. Now, although an action may be brought in the first instance against the members, still, if the claimant elects to bring suit against the association, he must then, as formerly, proceed to judgment and execution unsatisfied before instituting other suit against the members. And, as illustrating the complete and separate existence of the association as between it and the individual members, suit may be brought by it against such members. Code, §§ 1919-1924. Based upon such statutory provisions, decisions have been made and opinions written emphasizing their corporate character as distinguished from the ordinary partnership, wherein the individual relationship and liability of the members is universally recognized and of importance. In *Waterbury v. Merchants' Un-*

Adams Express Co., 50 Barb. 157, a case often cited, it was held that a receiver might be appointed of one of them, and it was said with reference to the powers conferred upon them by various statutes: "These are all attributes of a corporation; and, if we look into the books for elementary definitions, we shall find that corporations have no other attributes except the technical one of a common seal to distinguish them from common-law partnership. On the other hand, simple partnerships have none of the attributes or qualities here mentioned. * * * Looking at the substance and nature of things, it is plain that in respect to the absence of a common seal merely these joint-stock associations are like partnerships. In the other and vastly more material respects mentioned they are like corporations, although they are not declared to be such by the legislative acts referred to."

In *Matter of Jones*, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476, it was held that shares in a joint-stock association constituted personal property, and were subject to the transfer tax, irrespective of the character of the property represented thereby, whether real or personal. The court quoted with approval the statement in *Beach* in his work on *Private Corporations* (volume 1, § 167) that "the powers conferred upon them by these enactments are such that for many purposes they are held to be corporations, even though they have nowhere been designated as such." In *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303, it was held that the franchise or business of the United States Express Company, a joint-stock association, was subject to taxation under certain statutes invoked for that purpose. The court, after referring to the powers and characteristics of the company not unlike those possessed by the Adams Express Company, says: "It seems obvious from these articles that the arrangement consummated by them has little in common with a private partnership, for they provide for a permanent investment of capital, the right of succession, the transfer of property by an assignment of the certificate of ownership, and the prosecution of suits in the name of one person. The company has therefore the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality and asserts powers and claims privileges not possessed by individuals or partnerships." In *People ex rel. Winchester v. Coleman*, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183, which was a proceeding by certiorari to review the action of taxing officials in imposing an assessment upon the capital stock of the National Express Company, a joint-stock association, it was said: "It is then asserted that a series of statutes, beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations; * * * that the lines of distinction between the two, however far apart in the beginning, have steadily con-

verged until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated, and no reason remains why joint-stock associations should not be in all respects treated and regarded as corporations. Some of this contention is true. The case of *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, 6 L. R. A. 303, shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations until the difference, if there be one, is obscure, elusive, and difficult to see and describe. * * * The two are alike, but not the same. More or less, they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint-stock association is a corporation, we can say, as we did in *Van Aernam v. Bleistein*, 102 N. Y. 860, 7 N. E. 537, that a joint-stock company is a partnership with some of the powers of a corporation." In *Oliver v. Liverpool, etc., Fire Ins. Co.*, 100 Mass. 531, it was held that an English joint-stock association was subject to a tax assessable against "each fire * * * insurance company incorporated or associated under the laws of any government or state other than one of the United States." While there may be some slight difference between such a joint-stock association and one existing under the laws of this state, what was said by the court is applicable to either. This statement was that: "Joint-stock companies are not pure partnerships, for their members are recognized as an aggregate body; nor are they pure corporations, for their members are more or less liable to contribute to the debts of the collective whole. They are associations of persons intermediate between corporations known to the common law and ordinary partnerships, and partake of the nature of both." * * * And we are all of opinion that when, by legislative authority or sanction, an association is formed capable of acting independently of the rules and principles that govern a simple partnership, it is so far clothed with corporate power that it may be treated for the purposes of taxation as an artificial body." In *State of Minnesota v. Adams Express Co.*, 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225, it was held that the present joint-stock association was so similar in many of its features to a corporation that it would be subject to the provisions of a statute providing for service of process upon a corporation.

Now, while it is true that these statutes conferring upon joint-stock associations the attributes of corporations, and the opinions discussing the similitude of the former to the latter do not destroy the element of individual liability, they do irresistibly force upon us appreciation of the fact that a great association like the Adams Express Company is very unlike an ordinary copartnership, and that it has assumed for ordinary, prac-

tical purposes in its business and contractual relations the features and characteristics of a corporate creation, whereby the joint aggregate entity has been made prominent, and the individual units composing it have been overshadowed and obscured. Amongst other things, as we have seen, this organization in its aggregate capacity and under its artificial name which bears no relation to the identity of its members may not only hold property, transact business, and make contracts, but, what is especially pertinent in this controversy, those contracts may be enforced by proceedings against it which are entirely independent of any liability of individual members. In short, I do not think that we should transgress any proper limits, if we assumed that the public in dealing with the present bonds did so solely upon the faith and credit of the association, the entity which issued them, and without knowledge or thought of the individuals who composed it or their financial responsibility. Under such circumstances, we ought not to sacrifice substance to form and destroy the negotiable character of the bonds because of the exemption of individual liability, unless we are compelled to, either by some controlling principle or authority, and, as I believe, there is neither which commands such a course. The rule defining the requisites of negotiable instruments, though now embodied in a statute, is subject to a reasonable interpretation and construction. While we may not disregard the requirement that such an instrument must not be limited for payment to a particular fund, we may say what facts satisfy this requirement. We cannot, of course, override the terms of a statute when finally interpreted. But we can refrain from giving to those provisions too literal or impractical an interpretation which will work unexpected and undesirable results. We must accept the full test laid down at the commencement, that these bonds must not be made payable out of a particular fund or be issued otherwise than upon the general credit of the maker. But, upon the proofs presented, in my judgment, we are not compelled to say that they are not general charges against the obligor which issued them as fairly and practically created, regulated, and regarded, or that being a claim against all of its assets they are payable out of a particular fund. I think that the authorities which have been cited to sustain the contention that they are vulnerable in these respects, not only do not do so, but that a careful consideration of them and of other authorities in the light of the facts under consideration in each case discloses that none of them has held an instrument to be payable out of a particular fund, and hence nonnegotiable upon any such proofs as appear here. In every case it will be seen that the instrument which was condemned was simply an order upon or assignment of some specific, limited fund or interest, and carried no general liability of the

drawer which made it a charge against his general credit and all of his assets. Under such circumstances, it was held to be an assignment pro tanto, and, of course, as an assignment it was not negotiable. It will not be possible to review any considerable proportion of the cases which have passed upon this question, and, in fact, this is unnecessary, for a few of those decided by this court will sufficiently indicate the circumstances under which an instrument has been regarded as drawn upon a special fund, and therefore a quasi assignment, and not negotiable.

In *Lowery v. Steward*, 25 N. Y. 239, 82 Am. Dec. 346, the order read: "Please pay to the order of Archibald H. Lowery the sum of five hundred 00/100 dollars on account of 24 bales of cotton shipped to you, as per bill of lading, by steamer Colorado, inclosed to you in letter." In *Parker v. City of Syracuse*, 31 N. Y. 376, the order was drawn upon the comptroller of the city in the following terms: "Pay Parker & Wright fourteen hundred and twenty dollars, on plank road and sidewalk accounts and charge to my account. A. L. Scofield." In *Alger v. Scott*, 54 N. Y. 14, the order was drawn by a landlord upon his tenant, reading: "Please pay Mr. John R. Glover \$346.69, and charge same to me, account of rent of house No. 13 Cheever Place." In *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515, an order was given by defendant to plaintiffs reading as follows: "Pay Brill & Russell three hundred dollars and charge the same to our account for labor and materials performed and furnished in the repairs and alterations of the house in which you reside, in the village of Mohawk." In *Ehrichs v. De Mill*, 75 N. Y. 370, the language of the instrument was: "Please pay to F. Ehrichs \$400 and charge the same to my account of grading and paving Lexington Avenue * * * as per contract." It seems as if no extended comment upon these cases were necessary to point out how widely they differ from the one at bar; how clearly each instrument mentioned in them is an order upon, an assignment pro tanto of, a limited fund without any general credit or liability behind it, and how unnatural it would be, upon the other hand, to say that the present obligations, charges against the general, joint credit of the drawer which issued them and enforceable out of its assets, are orders upon or assignments in any sense of a particular fund, even though an individual liability which is practically and equitably a secondary one has been cut off.

Some minor reasons of a somewhat technical nature are urged in support of the claim of nonnegotiability. It is said that section 1919 of the Code of Civil Procedure provides that an action may be maintained against the officials of a joint-stock association to recover upon any cause of action upon which the plaintiff might maintain an action against all of the associates, and it is then

suggested that, if the holder of one of these bonds cannot bring an action against the individual members of the association, he cannot under said section bring an action against the association itself through its officers; that, while an action in equity perhaps might be maintained to reach the pledged securities, no action at law can be maintained upon the bonds, and, this being so, they are not negotiable. I do not regard these objections as well founded. The section referred to is one of several prescribing the procedure by which an action may be brought against the association, as distinguished from its individual members; and the property of the association be reached. The section especially quoted is intended to define the nature and kind of actions which may be so brought, and this it does in general terms by defining them as all which might be brought against the individual members. These bonds ordinarily, and except for special provision, would constitute a claim upon which might be maintained an action against the associates, and this circumstance stamps the cause of action as one which may be prosecuted against the association. It would be somewhat extraordinary to construe the section as meaning that, the character and standing of the claim being thus fixed, the association might then debar the holder from bringing such an action against it by an agreement which it had procured him to make to waive the individual liability, which otherwise might be enforced, and to bring his action against the association. Of course, if this agreement has not produced this result, there is no foundation for the further idea that no action at law can be maintained upon the bonds. If the holder of them has not barred himself from so doing by waiving the individual liability, he may, as we have already seen, bring an action at law against the association, which is entirely independent of, and in fact temporarily at least, a bar to an action against the individuals.

The order appealed from should be affirmed, and judgment absolute rendered against appellant upon his stipulation, with costs.

O'BRIEN, J. The only question in this case is whether the coupons, which are the subject-matter of the action, are upon their face negotiable instruments. I think they are, and my reasons for this conclusion stated as briefly as may be are these: It is admitted that the coupons are a part of and impressed with the same legal character as the bonds themselves from which they were detached. If the bonds are negotiable, so are the coupons. I do not understand that it is seriously claimed that the fact that a fund was set apart and conveyed to a trustee to assure the payment of the bonds as they fell due affected the legal character of these obligations as negotiable instruments so long as the holders were not confined or limited to that fund for payment. It is, I assume, a

very common practice in the modern business world to set aside a fund or to provide for the creation of a sinking fund for the ultimate payment or redemption of bonds; but it was never supposed that this fact would affect their negotiable character. The very purpose of such financial arrangements is to give greater assurance of payment to those who purchase the bonds in the market by adding to their value and credit. The fund is a protection to the holders of the bonds, and in some cases to others who may become liable for their payment in whole or in part. In this case not only the fund set apart, but all the other assets of the company as well, were pledged for the payment of the bonds; and hence the fund only added to their credit and financial value without affecting in the least their negotiable character.

The only question in the case as to which there is any serious dispute is, as I conceive, whether the clause on the face of the bonds, which provides that "no present or future shareholder, officer, manager or trustee of the express company shall be personally liable as partner or otherwise in respect of these bonds or the coupons appertaining thereto," deprives them of the character of negotiable paper. The contention of the plaintiff is that this clause destroys the negotiable quality of the bonds, though payable to the bearer or holder. This clause contains also the statement that the bonds "shall be paid solely out of the assets assigned and transferred to the said trust company or out of the other assets of the express company." So that all the property of the company issuing the bonds was and is available to the holders as the source of payment and satisfaction thereof. I do not think that the obligations of a joint-stock company payable to bearer are rendered nonnegotiable from the fact that the paper upon its face contains a clause which exempts the shareholders and officers from liability so long as the general assets of the company are pledged for payment. But this is the disputed question in the case, and the contrary view is supported by an argument which rests mainly, if not entirely, upon the proposition that joint-stock associations are partnerships, and that the obligations in question are the obligations of the individual shareholders, and that they are liable upon them, jointly and severally, the same as partners. Stating the argument in another way, it comes to this: The bonds in this case are the bonds of a partnership, made in the name of the firm, and, though containing a promise to pay the bearer or holder a specified sum of money in the future upon a day certain, yet the promise is coupled with a condition that none of the partners shall ever be held liable. If the premises upon which the argument is based are correct, it would, I admit, be difficult to resist the conclusion, unless, indeed, it could be held that the conditions might be rejected as utterly inconsistent with and repugnant to the promise, and therefore void.

Adopting the theory that the bonds are the obligations of the shareholders as partners, the repugnancy is quite obvious. But I do not think that the bonds in question are in any proper or legal sense partnership obligations made by the shareholders as partners. Primarily the promise to pay the bearer or holder is not the promise of the shareholders, but of the legal entity represented by the express company as such.

A joint-stock company, whatever else may be said about it, is certainly for most, if not all practical purposes, a legal entity, capable in law of acting and assuming legal obligations quite independent of the shareholders. The idea that these companies occupy some undefined and undefinable ground midway between a partnership and a corporation has practically faded away, and cannot be applied to the question with which we are now concerned. It is not very important to inquire what they were in their origin, but rather what they are now, or at least were when the bonds in question were issued and sold to the public. It seems to be conceded or assumed that, if the express company, at the time of issuing the bonds, had been incorporated by filing the usual certificate for that purpose, the clause exempting the shareholders from liability would not affect their negotiable character. It remains only to consider what sound distinction, if any, can be made between the \$12,000,000 of bonds issued by the express company and the other untold millions of other bonds issued by corporations. They are all negotiable in form; that is to say, payable to order or bearer, as the case may be. Assuming that the shareholders of a corporation are or may be liable for the corporate debts, and that the clause referred to would not affect the negotiable quality of its paper, what reason is there for holding that the clause destroys the negotiable quality of the bonds in question? The proposition that in the one case the bonds import a promise to pay by a corporate body, and in the other the promise of individuals as partners or as a partnership firm, does not seem to me to be reasonable or tenable. The argument in support of that theory would seem to be somewhat strained. The general rules of law that govern partnerships have very little application to joint-stock companies, at least so far as concerns the question now under consideration. The principle of agency which enables one partner to bind all his associates, as well as the firm, has no application to such companies. The death of one or more of the members of the company does not work a dissolution. The doctrine of survivorship, so important as between partners, does not exist as to such companies, and so it would be difficult to state a single general rule of partnership law that in its full extent could be applied to such companies. On the other hand, there are very few of the legal principles that apply to corporations that do not apply in some

form to these companies. They are taxed and perpetuated through the shares of stock as corporations are. They are entitled to assume an artificial name, to sue, and are subject to be sued. They may use a common seal, and through the shares of stock they have perpetual life even in a larger sense than corporations have. Their general powers and duties to the public are practically the same and regulated in the same way as corporations. I need not pursue the comparison any further, nor enlarge upon it, since the learned opinion of my associate, Judge HISCOCK, who has referred to the various judicial views on the subject, pro and con, fully covers that feature of the case.

It is very true that the shareholders of such companies are liable ultimately for the company's obligations, but that does not make such companies partnerships in the sense that their obligations are the contracts or promises of the shareholders. The shareholders of corporations are or may be liable in the same way, but such liability is not, of course, that of partners. The statutes of this state prescribing the method of procedure in suits by and against joint-stock companies (Code Civ. Proc. §§ 1919-1924) do not qualify what has been stated concerning the legal nature of such companies. They embody the distinct idea that the liability of the shareholders is not primary, but secondary, the same as in case of corporations; and, even if these statutes had never been enacted, it is quite likely that the Adams Express Company could, in that artificial name, sue and be sued in the same manner as a corporation, since the state Constitution (article 8, § 3), while enacting that corporations have the right to sue and are subject to be sued the same as natural persons, defines joint-stock companies having any of the powers and privileges not possessed by individuals or partnerships as corporations within the meaning of that section. The main purpose of these provisions of the Code would seem to be the enactment of a mode of procedure which would enable creditors of the company, or parties having a cause of action against it, to exhaust all legal remedies against the company as a legal entity before resorting to the personal liability of the shareholders analogous to similar rules applicable to corporations. It is, I think, very difficult to avoid the conclusion that these companies at this day and in this state possess substantially and practically all the attributes of corporations, and still more difficult to assign any sound reason for any distinction to be made between the negotiable character of the bonds of each when made payable to bearer. These companies are for all practical purposes quasi corporations, and it seems to me are clearly such so far as concerns the negotiable character of its commercial paper or promise to pay a specific sum of money to bearer upon a day certain. If the bonds in their present form had been

stolen from the Adams Express Company by one of its clerks or employes or even a stranger, and they had been put in circulation and passed from hand to hand to the possession of an innocent holder who had purchased them in the market in good faith and for value, and the company had brought suit against him to recover the stolen property, as the plaintiff in this case has, we would then have the same question before us that we have now. It may be safely asserted that, under such circumstances, the company would and ought to fail in the action, and that it would not be permitted to impeach the holder's title to the paper by the fact that upon its face there was a condition discharging the shareholders from liability, and hence were not negotiable instruments. When the important powers and functions which these companies possess and exercise in the business and commercial world are considered, the close analogy between corporations and joint-stock companies is made still more evident. They are not only common carriers of property with world wide connections and ramifications, but deal in money credits and exchanges in practically the same way as banks. They purchase and deliver goods upon the order of local customers in all parts of the country, and even in foreign countries. They have issued millions of securities in the form of bonds payable to bearer that have been sold to the public. It seems to me that it would be at least unwise to discredit these securities by holding that, in consequence of the exemption clause as to the shareholders' liability, the bonds are mere contracts to pay without the quality of negotiability. Such a result, I think, would not be sanctioned by sound policy or sound law, and would be contrary to the intention of every one connected with the transaction either as maker or buyer, since it cannot be supposed that a business man of any sense would have offered to sell in the market, and much less to buy, a partnership obligation payable to bearer, with a condition clause upon its face releasing all the partners from any obligation to pay it.

So far as concerns the question involved in this appeal, the bonds, I think, are not the bonds of the several members of the company as partners, but of a legal entity as such, with an artificial name analogous to a corporation, and they possess all the qualities of corporate bonds payable to bearer. It is quite obvious that in respect to the negotiable quality of the bonds they must be considered and treated in law either as partnership or as corporate obligations. There is no middle ground upon which to rest. The argument that the promise to pay is that of a partnership does not seem to me to be supported by any conclusive reasons, and, if adopted, might destroy a large class of securities held by innocent investors. The general rule, which I fully recognize, no doubt is that in order to give to commercial paper, whether in the

form of bonds or promissory notes, the quality of negotiability, and the legal rights which appertain to such instruments, the promise to pay must be unconditional, and all the assets of the promisor or maker must be pledged to make good the promise according to its terms. The bonds in question, in my opinion, comply with that rule, unless it can be held that the liability of the shareholders of the company can be called assets within the meaning of the rule, and I think it cannot. The assets of the express company, the maker of the bonds in question, consisted of its actual, tangible property over which it had full power of disposition, dominion, and control, and not the liability which the law imposes upon shareholders for the company debts in certain cases and upon certain contingencies. There is no reason that I can perceive for denying to a bona fide holder of one of these bonds any means of defending his title when attacked that the law gives to a like holder of the negotiable paper of an individual or corporation.

I think that the order appealed from is right, and should be affirmed, with costs.

EDWARD T. BARTLETT, J. I concur in the result reached by Judge WERNER'S opinion. I also agree in the main with the grounds stated therein. I am, however, unable to agree with the suggestion that it is unnecessary to treat the exemption clause as nugatory as a matter of public policy. I am of opinion that the personal liability from which the company has sought to absolve its shareholders, officers, managers, and trustees is primary in its character, and beyond the power of the company to interfere with it in any way. To hold otherwise would be subversive of the law of joint-stock associations, and permit them to exercise corporate powers and privileges without legislative sanction or restraint. Declaring legal this attempt to release shareholders and officers from personal liability would result in untold complications and financial disaster. One result would be to deprive creditors of their main security in many instances. The visible assets of an express company, as compared with its bonded and other indebtedness, are in many instances insignificant and of little value. Its business is to deliver packages, parcels, and other light personal property to all parts of the country. Transportation is mainly secured under contracts with the railroad companies. In cities and villages its principal property consists of office fixtures, horses, wagons, harness, etc., realizing little at forced sale. In other words, the express company does not require an expensive plant as do manufacturing and other kinds of business. These are persuasive reasons why, as matter of public policy, the personal liability of members of joint-stock associations should remain unimpaired so long as business is conducted in that manner.

At the present time, in this state, there are four methods by which a man may carry on business: He may proceed as an individual; associate himself as a partner in a firm; become a member of a joint-stock association; assume the responsibilities and enjoy the privileges of a stockholder in a corporation. The members of joint-stock associations enjoy certain benefits and rest under well-defined burdens. The case at bar presents an excellent illustration. Certain individuals, banded together in a great business enterprise, have listed bonds to the extent of \$12,000,000 on the New York Stock Exchange. In other words, they have exercised powers usually vested in corporations. The law permits this for the reason that they are co-partners resting under personal liability, joint and several, for all the debts and obligations of the company, and hold themselves out to the world as such. I am of opinion that public policy requires that all partnerships taking the form of joint-stock associations should rest under the common-law liability of partners so long as they choose to avail themselves of the great privileges and protection inherent to such a mode of transacting business. The joint-stock association is not of statutory origin, as is the corporation, but the creature of the common law. By recent legislation it is required to annually file its written certificate, signed and verified by the president and treasurer, containing certain facts. 2 Rev. St. (Banks' 9th Ed.) p. 1471. The Code of Civil Procedure (sections 1919-1924) has regulated actions by and against unincorporated associations to some extent. It is unnecessary to point out in detail the very great difference between the joint-stock association and a corporation. The association has not appealed to the sovereignty of the state for its right to exist, and is, therefore, free from the visitatorial powers to which corporations are subjected; nor is it amenable to those various commands of the statute, which if disobeyed lead to the imposition of certain liabilities and penalties. The association need not disclose the amount of its capital, or the number of its shares. The corporation is obliged to do so. It is the obvious policy of the state to maintain this distinction, to wit, if men desire to embark in great business ventures, practically exempt from governmental control, they must do so subject to the joint and several liability to pay the debts thereby incurred. If they wish to be freed from that liability, they can secure the same result by forming a corporation and submitting to governmental visitation and control and to various statutory restraints by virtue of which the rights of creditors are protected. Public policy clearly requires that such vast transactions shall be carried on either under corporate restraint or the rigorous common-law rule of joint and several liability for debts. The distinguishing feature of the joint-stock association is the personal liability of its members. Van Aernam

v. Bleistein, 102 N. Y. 860, 7 N. E. 537; People ex rel. Winchester v. Coleman, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; Matter of Jones, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476, and cases cited in above authorities. I am in favor of declaring that a sound public policy dictates that this feature of personal liability is coexistent with the life of the association, and cannot be abrogated by the contract of the parties in interest.

It follows that the clause in the bonds of the Adams Express Company seeking to release the members thereof from personal liability is void, and the bonds and coupons are negotiable instruments.

The order appealed from should be affirmed, and judgment absolute in favor of the defendants and against plaintiff on his stipulation should be entered, with costs.

CULLEN, C. J. I agree with the opinion of Judge WERNER, that, if the clause in the bonds in controversy here relieving the shareholders from personal liability were effective, it would render the bonds nonnegotiable and lead to a reversal of the order below. But I also agree with him that such exemption clause is repugnant to the general tenor of the bonds which are intended to be negotiable and which have been purchased by the public as such, and therefore it should be eliminated and disregarded. Still further I agree with the opinion of Judge EDWARD T. BARTLETT that any provision in the contract of a joint-stock association relieving the shareholders from liability is contrary to public policy and void, since it would enable the shareholders of such associations to obtain all the immunities of stockholders in a corporation without incorporating and subjecting themselves to the restrictions and regulations imposed by law on corporations.

WERNER, J. Although I concur in the result of the decision about to be made, I cannot yield assent to the reasoning upon which it is based. The vital question in this case is whether the bonds from which the coupons in suit were clipped are negotiable instruments or not, and that depends upon several considerations which I will briefly discuss.

These bonds are part of an issue of \$12,000,000 made by the Adams Express Company, which is a joint-stock association, each of whose shareholders is, by the terms of its articles of association and the general law, individually liable for the debts of the company incurred in the transaction of its business. The bonds are made in the name of the company, are payable to bearer, and contain many of, if not all, the stipulations and conditions that are usually found in corporate bonds such as are now concededly in the category of negotiable instruments. Mercer County v. Hackett, 1 Wall. (U. S.) 83, 17 L. Ed. 548, and cases there cited. These bonds also contain another clause that is not

to be found in corporate bonds. They recite that "no present or future shareholder, officer, manager or trustee of the express company shall be personally liable as partner or otherwise in respect of this bond or the coupons appertaining thereto, but the same shall be payable solely out of the assets assigned and transferred to the said trust company (the trustee named in the trust deed), or out of the other assets of the trust company." As this clause is in direct conflict with the general provisions of the law and the express company's articles of association respecting the individual liability of the shareholders of the company, the real question in the case is whether the particular clause is a valid and essential part of the bonds, or whether it can be eliminated as repugnant to the general tenor and purpose of the instruments in which it is found. If the clause is valid, there can scarcely be any logical escape from the conclusion that the bonds are rendered nonnegotiable. If, however, the particular clause can be discarded as void, that will eliminate the only difference of substance between these bonds and other bonds which, by common consent, are classed as negotiable instruments.

The reason why the last-quoted clause of the bonds, if valid, is inconsistent with their negotiability is that they are the obligations of a joint-stock association as distinguished from a corporation, and the stipulation absolving the shareholders of the company from individual liability is a distinct limitation upon the credit which is pledged in the making of the instrument. One of the cardinal qualities of a negotiable instrument is that it must pledge the general credit of the maker. This was one of the universally recognized rules of the law merchant as declared in the English decisions (*Dawkes v. De Lorane*, 3 Wils. 207; *In re Boyse*, L. R. [33 Ch. Div.] 612; *Bank of England v. Vagliano*, L. R. [1891 App. Cas.] 107-145; *McLean v. Clydesdale Co.*, L. R. [9 App. Cas.] 95), and in the decisions of this state (*Munger v. Shannon*, 61 N. Y. 251; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Schmittler v. Simon*, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737). That rule as now tersely stated in our negotiable instruments law may be paraphrased as follows: "An instrument to be negotiable . . . must contain an unconditional promise or order to pay a sum certain in money [subdivision 2, § 20, p. 722, c. 612, Laws 1897], but an order or promise to pay out of a particular fund is not unconditional" (subdivision 2, § 22). The cases referred to, as well as the statute, make it entirely clear that the mere indication of a particular fund from which the maker of an instrument may reimburse himself, or a mere reference to a specified account which is to be debited with the amount called for by the instrument, does not affect its unconditionality, and it is only where the order or promise is to pay out of a particular fund that it is considered con-

ditional in such sense as to destroy the negotiability of the instrument.

The bonds of this issue are payable solely out of the assets assigned and transferred to the trustee or out of the other assets of the express company. If the express company were a corporation, this would clearly be an unconditional promise, for it would be a general pledge of the credit of the maker—a tender of all it had to give in satisfaction of the debt. But the company is concededly not a corporation, although our statutes have invested it with certain corporate attributes. It is unnecessary to enumerate these, since it cannot be disputed that, in respect of the individual liability of the shareholders of a joint-stock company for the company debts, the common-law rule still obtains. Each shareholder is liable precisely as though he were a member of an unlimited partnership. *Townsend v. Goewey*, 19 Wend. 424, 32 Am. Dec. 514; *Dennis v. Kennedy*, 19 Barb. 517; *Wells v. Gates*, 18 Barb. 554; *Cross v. Jackson*, 5 Hill, 478. Although, as we have stated, joint-stock companies have been granted certain privileges and immunities peculiar to corporations, this most distinctive difference between these corporate and noncorporate creatures of the law has been consistently preserved by the Legislature and recognized by the courts. Code Civ. Proc. §§ 1919-1924; *People ex rel. Winchester v. Coleman*, 133 N. Y. 279, 31 N. E. 96, 16 L. R. A. 183; *Van Aernam v. Bleistein*, 102 N. Y. 360, 7 N. E. 537; *Matter of Jones*, 172 N. Y. 575, 65 N. E. 570, 60 L. R. A. 476.

From what has been said, it must follow that, if the clause in the bonds exempting the individual shareholders of the express company from liability is valid, the bonds are nonnegotiable, because they are, in effect, if not in explicit terms, made payable out of a particular fund, so that the promise to pay is not unconditional. The clause under discussion is the only substantial thing that differentiates these bonds from the ordinary corporate bonds which are issued and held by the millions, and are recognized and classed as negotiable instruments. The maker of the bonds is an association having a business name, which it used in making them, having shares of capital stock, indefinite succession, and a number of other characteristics which the lay public associates exclusively with corporations. These considerations lend great force to the suggestion that as a matter of public policy the exemption clause referred to should be treated as nugatory, so that the bonds may be invested with that element of negotiability which may fairly be regarded as one of the principal items of their value, and one of the most important inducements to their current sale and purchase. I deem it unnecessary to go quite so far as that in the case at bar, since I am convinced that the exemption clause is so repugnant to the terms, tenor, and purpose of the bonds that it not only may, but must, be

taken out of the instruments in order to preserve their negotiability, and even their validity. It would be rather difficult to explain upon what theory the obligation of these bonds could be enforced in an action at law if the exemption clause is retained as part of the bonds. The maker cannot be sued in its business name, and the officers which represent it can only be sued upon obligations for which an action could be maintained against all the shareholders. Code Civ. Proc. § 1919. We are presented, in short, with the legal paradox that a written obligation, obviously intended to be negotiable, cannot be enforced in a court of law. This is an anomalous condition so utterly at variance with the manifest purpose of the association in issuing these bonds, and so palpably destructive of the legal rights of the holders thereof, that we could hardly give the exemption clause the effect which its language imports without destroying the validity of the bonds themselves.

Since both the negotiability and the validity of the bonds may be secured by the abrogation of the exemption clause, and since there is nothing in the other terms of the instruments to prevent this manifestly just disposition of the case, I conclude this branch of the discussion with the recommendation that the exemption clause be held void, and that the bonds and coupons be held negotiable. Upon the other questions I agree with the majority.

Holding these views, I think there should be an affirmance of the order of the Appellate Division, and that judgment absolute should be rendered against the appellant, with costs in accordance with his stipulation.

GRAY and HAIGHT, JJ., concur with HISCOCK, J. CULLEN, C. J., concurs in result in memorandum. WERNER, J., reads opinion.

Ordered accordingly.

(190 N. Y. 137)

WILCOX v. CITY OF ROCHESTER.

(Court of Appeals of New York. Dec. 10, 1907.)

1. MUNICIPAL CORPORATIONS — EXERCISE OF GOVERNMENTAL AND QUASI PRIVATE POWERS—TORTS—LIABILITY.

A municipality exercising quasi private or corporate duties is liable for the acts of its officers, but a municipality exercising governmental functions is not liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1568, 1569.]

2. SAME—LIABILITY FOR ACTS OF POLICE OFFICERS.

Under Laws 1898, p. 398, c. 182, § 181, providing that the members of the police force of cities of the second class shall have the powers of constables, etc., a city of the second class exercises a governmental function in the appointment and maintenance of a police force, and it is not liable for the unlawful and neg-

ligent acts of police officers in the discharge of their duties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1568, 1569, 1573.]

3. SAME—MAINTENANCE OF POLICE STATION.

A city exercises a governmental function in maintaining a police station, used in part as a jail for prisoners, as well as in part for the accommodation of its police force, and it is not liable for the negligence of an employé in charge of the elevator therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1577.]

4. SAME—DEFENSE—AVAILABILITY.

The defense that a city is not liable for the negligent acts of an employé in discharge of governmental functions exercised by the city is available, though not pleaded.

Haight, J., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William A. Wilcox against the city of Rochester. From a judgment of the Appellate Division (114 App. Div. 734, 99 N. Y. Supp. 1020), affirming by a divided court a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

William A. Sutherland, for appellant.
George B. Draper, for respondent.

WILLARD BARTLETT, J. The city of Rochester has been held liable in this action for the alleged negligence of the persons having charge of the condition and operation of an elevator in a police station building in that city. The plaintiff was injured by falling to the bottom of the elevator well, through an open door in the elevator shaft. He was a journeyman sheet metal worker in the service of a firm of contractors who were employed to repair the roof of the police station. He had been working upon the roof on the day before the accident, and had been in the elevator two or three times on that day, when the elevator was operated by James A. Smith, who is described as an assistant engineer in the employ of the city. On the morning of the accident, which occurred on June 28, 1904, the plaintiff arrived at the police station, to go to work on the roof, at a few minutes before 8 o'clock. As he entered the front doors of the building, he met Smith, whom he recognized as the man who had been running the elevator when he went up and down. He testifies that Smith was coming from the elevator; the door to the elevator being open. The plaintiff and a fellow workman, evidently acting under the impression that the elevator was in a position to be entered with safety through the open door, proceeded toward the door. The plaintiff stepped through, and, in consequence of the elevator having meantime been moved upward and away from the door by a police telegraph operator, the plaintiff fell into the shaft and down to the bottom, a distance of 10 or 12 feet, sustaining the injuries of which he complains in this

suit. Smith contradicts the plaintiff, so far as the position of the door is concerned, saying, first, that it was shut, but not locked, and then that it was partly open, and that he saw the plaintiff push the door back; but the jury were at liberty to accept the testimony of the plaintiff on this point as in accordance with the fact. Smith's testimony, however, shows that the plaintiff was justified, when he met Smith, in inferring that he had just come down in the elevator and had left the door in the position in which the plaintiff actually found it, whatever that may have been, for Smith testifies that he had been on the elevator prior to meeting the plaintiff; that he left it, he should judge, with the door half way open; that when he met the plaintiff and his companion he supposed that they wanted to go up in the elevator; and that he himself thought the elevator was still there, and had not noticed that it had been removed. Under these circumstances, the trial court and the Appellate Division were not only justified in holding that the alleged contributory negligence was a question for the jury, but they were required so to hold by authority very precisely applicable to the facts of the case at bar. *Tousey v. Roberts*, 114 N. Y. 312, 316, 21 N. E. 399, 11 Am. St. Rep. 655.

The more serious question involved in this appeal is presented by the proposition, urged upon us in behalf of the appellant, that in no event can the city of Rochester be held liable for any alleged neglect on the part of an employé in the police department for operating in any manner an elevator in the police building. The argument is that the defendant, although a municipal corporation, was engaged solely in the discharge of public governmental functions, as distinguished from municipal functions, in the maintenance, management, and repair of the police station, and therefore, under the doctrine of *Maxmillan v. Mayor*, etc., of N. Y., 62 N. Y. 160, 20 Am. Rep. 468, and similar cases, is not responsible for the acts or omissions of those engaged in applying the building to such public purposes of government. This was evidently the view entertained by the learned justice who dissented in the Appellate Division. He wrote no opinion, but simply placed his dissent upon the authority of *Snider v. St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151, where the Supreme Court of Minnesota held, in reference to an elevator accident in the St. Paul city hall, that the duty of providing and maintaining a city hall was a public and governmental use, and therefore the city was not responsible for the negligence of its officers, agents, or servants in the management of such building.

The broad general doctrine of the *Maxmillan* Case, which is certainly not now open to question in the courts of this state, is that "two kinds of duties are imposed on municipal corporations, the one governmental and a branch of the general administration of the

state, the other quasi private or corporate"; and "that in the exercise of the latter duties the municipality is liable for the acts of its officers and agents, while in the former it is not." *Cullen, J.*, in *Lefrois v. County of Monroe*, 162 N. Y. 563, 567, 57 N. E. 185, 186, 50 L. R. A. 206. The question which confronts us, on the branch of this appeal now under consideration, is whether the duty exercised by the city of Rochester, under the general statutes relating to cities of the second class, of maintaining and caring for a police station, is a governmental duty appertaining to the general administration of the state, or a duty imposed and undertaken for the benefit of the municipality as a corporate body. If it falls within the first of these categories, the present action cannot be maintained.

To my mind, it seems perfectly clear that, if there is any logical validity in the distinction laid down in the *Maxmillan* Case and so firmly established by the subsequent decisions of this court, it must be applied in favor of the defendant and appellant here. What powers and duties are there which can be conferred and imposed upon a municipality that more clearly constitute a function of general government than the power and duty to maintain a police force and provide suitable buildings for its occupation and use? The agency which caused the accident out of which the *Maxmillan* Case arose was the driving of an ambulance wagon through the streets of New York by an employé of the commissioners of public charities and corrections. The statutory duties of the department of which the commissioners were the head were to care for paupers, destitute children, lunatics, and certain classes of offenders. This court held that these functions were "acts to be done by them in their capacity as public officers in the discharge of duties imposed upon them by the Legislature for the public benefit"; and that they were not acts done for the city of New York "in what may be called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage as a corporation, though inuring ultimately to the benefit of the public."

The general governmental character of the functions of the police in our cities strikes me as much more apparent than was such character on the part of the commissioners of public charities and corrections in *Maxmillan v. Mayor*, etc., of N. Y., *supra*. For one thing, their powers were strictly local, while in some respects the powers of municipal police officers extend throughout the entire state. On this point it is necessary to refer only to section 181 of the act for the government of cities of the second class, familiarly known to lawyers as the "White Charter" (Laws 1898, p. 398, c. 182), which provides, among other things, as follows: "The members of the police force, excepting the surgeons, in criminal matters, have all the powers of constables under the general laws

of the state; and they also have power and it is their duty to arrest any person by them found violating any of the penal ordinances of the city or laws of the state, and to take such person before the proper city magistrate, to be dealt with in the same manner as if such person had been arrested upon a warrant theretofore duly issued by such magistrate. * * * They shall also have in every part of the state in criminal matters all the powers of constables; and any warrant for search or arrest issued by any magistrate of the state may be executed by them in any part of the state, according to the tenor thereof, without indorsement," etc. Indeed, I think it can hardly be disputed that, so far as relates to the appointment and maintenance of the police force, the city of Rochester exercises a public governmental function, so that it is not responsible for the unlawful or negligent acts of policemen in the discharge of their duties. 2 Dillon's Municipal Corporations (3d Ed.) § 975. The suggestion is made, however, that inasmuch as the alleged negligence in the present action was not the omission of a police officer or member of the police force assuming to act as such, but was done by an employé of the city engaged in the maintenance of a police station, the rule which denies the application of the doctrine of respondeat superior to the torts or negligent acts of police officers does not apply. This proposition simply brings us back to the question whether the safe and proper maintenance of a police station building is not an appropriate, not to say necessary, element in the maintenance of a police force; and, if it is, whether it is not the exercise of a public governmental function. I have already indicated that I think these questions must be answered in the affirmative. The evidence leaves no doubt as to the character of this building. The city engineer, who had been in office several years, and was its custodian, testified: "Since I have had charge of it, it has been occupied as headquarters for the police department and by the police court—nothing else. There are four stories in the building. The police telephone system is on the top story—police patrol and fire alarm. There is a portion of the fire alarm there and the police patrol calls. The third is the women's cells and matron's room. The second floor is the men's cells and the courtroom. The first floor is the assembly hall and the office of the captain and some other officers. The assembly hall is where the policemen assemble and are given their instructions. That is the use to which the building has been put during all the time I have been city engineer, and to no other purpose."

It thus appears that the structure was used in part as a jail for prisoners, as well as in part for the accommodation of the police force of the city of Rochester. The weight of judicial authority in this country is in favor of the doctrine that the maintenance

of a jail is a governmental function (*Lahner v. Williams*, 112 Iowa, 428, 84 N. W. 507; *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; *Le Clef v. City of Concordia*, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; *City of New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *Brown's Adm'r v. Guyandotte*, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121), although a contrary view has been entertained in North Carolina (*Shields v. Durham*, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293), and by a federal judge in the Fourth circuit (*Edwards v. Town of Pocahontas* [C. C.] 47 Fed. 268). I think that the prevailing view is based on sound reason, and that it is equally applicable to a police station, such as this was in Rochester. It was actually applied to a police station in the case of *Kelley v. Cook*, 21 R. I. 29, 41 Atl. 571, where the defendant, city treasurer, was sued as the representative of the city of Woonsocket to recover damages for the negligence of the city in caring for a person who had been unlawfully arrested by a police officer and incarcerated in a police station, and by reason of the city's neglect to provide for him therein was rendered so ill that he died. The court said: "In the temporary care of persons under arrest, the city by its police department is aiding in the enforcement of the laws, and thus discharging a public duty for which it receives no pecuniary benefit, and for the manner in which it discharges this duty it is legally responsible to no one. The police regulations of a city are not made and enforced in the interest of the city in its corporate capacity, but in the interest of the people." I cannot see that any distinction can logically be drawn which will take this case out of the rule which defeated the plaintiff in *Maxmillian v. Mayor*, supra, growing out of the fact that the person or persons whose alleged negligence caused the accident here were not at the time actually endeavoring to exercise any authority over the plaintiff, or with reference to the plaintiff, as officers or members of the police force. If their acts were in aid of the maintenance of the police station, and such maintenance by the municipality was as much the exercise of a public governmental function as was the organization or the regulation or the discipline of the police force itself, then the nonliability of the city depends on the character of the duties thus imposed and assumed, and not at all on the relation to the municipality of those affected by the manner in which such duties may be discharged.

The point is made by the learned counsel for the respondent that the principal question which I have discussed was not raised by the answer. It is a purely legal objection to the plaintiff's right to recover which it was not necessary to plead. The evidence as to the character of the building came in without objection and was uncontroverted. The point

was distinctly raised on the defendant's motion to dismiss, and the ground on which Mr. Justice Nash based his dissent in the court below shows that it must have been considered by the Appellate Division.

I think that the judgment should be reversed, and a new trial granted; costs to abide the event.

HAIGHT, J. (dissenting). This action was brought to recover damages which the plaintiff is alleged to have sustained by reason of his falling down the elevator shaft in the police building in the city of Rochester. It appears that one Smith was in the employ of the city, operating the elevator; that he ran it down to the ground floor, then stepped out, and went to the front door of the building to notify the engineer that the elevator squeaked and needed oiling. He there met the plaintiff and one Murrell, who were engaged in repairing the roof of the building and walked back with them; the plaintiff, being in the lead, stepped inside of the elevator shaft and fell to the cellar floor, receiving the injuries for which this action was brought. It appears that, during the absence of Smith, one Karnes, another employé, a telegraph operator, arrived, entered the elevator, and, as he states, nearly closed the door, leaving a space of about two inches, and then ran the elevator up to one of the floors above. The controversy in this case is as to whether the door of the elevator shaft was open or closed. The testimony of the plaintiff and his companion, Murrell, is to the effect that the door was wide open. All the witnesses on the part of the defendant testify to the effect that it was partially or nearly closed. The trial court charged, as a matter of law, that if the jury found that the door was substantially closed, and that the plaintiff pushed it open and stepped into the well without looking to see whether the car was there, he was negligent and could not recover. But, if the door was open, then it was a question for the jury to determine from the evidence as to whether he used such care and caution as a reasonably prudent and cautious person would have used under the same circumstances in entering or attempting to enter the elevator well, without looking to determine whether the car was there or not. The jury having found a verdict in favor of the plaintiff, we must assume that it found that the door of the elevator shaft was open, and that that issue is disposed of in favor of the plaintiff. The negligence of the defendant's employé thus being established, the only other question that remains is as to whether the plaintiff was guilty of contributory negligence. That question was also submitted to the jury, and the finding was in his favor. I am of the opinion that, under the circumstances disclosed by his testimony and that of his associate, we cannot say as a matter of law that he was guilty of contributory negligence, or that there was no evidence to sustain the

verdict. *Tousey v. Roberts*, 114 N. Y. 312, 316, 21 N. E. 399, 11 Am. St. Rep. 655.

It is now contended that the city of Rochester, in maintaining and operating an elevator in the police building, was engaged solely in the discharge of a public governmental function, distinguishable from a municipal function, and that therefore it is not liable for the negligence of its servants. The duties of policemen, as prescribed by statute, pertain to the executive branch of the government, and the fact that the statute has provided for their appointment by municipal officers does not change the character of their duties, or operate to make the municipality liable for their negligence while engaged in the discharge of such governmental function. It consequently follows that when a policeman, in an endeavor to shoot a mad dog, negligently injures an individual, the municipality is not liable. *McKay v. City of Buffalo*, 9 Hun, 401, affirmed in 74 N. Y. 619. The same rule obtains with reference to the board of health. The preservation of the health of the people of the state and their protection from infectious and contagious diseases is a governmental function, and, although the Legislature has provided for the establishing of local boards through appointment of municipal authorities, when the servants or employés are actually engaged in the discharge of a duty pertaining to the preservation of such health, the municipality is not liable for their negligence or want of skill in the performance of that duty. Consequently, when an employé engaged in the driving of an ambulance wagon negligently struck and caused the death of a person, the city was held not liable. *Maxmillian v. Mayor, etc.*, of N. Y., 62 N. Y. 160, 20 Am. Rep. 468. It will thus be seen that the liability of the municipality depends upon the character of the service in which the servant is engaged. This question was considered in the case of *Woodhull v. Mayor, etc.*, of N. Y., 76 Hun, 390, 28 N. Y. Supp. 120. In that case an action had been brought against the city of New York and the city of Brooklyn, and it was conceded that the defendants owned and were operating a railway across the New York and Brooklyn Bridge and were engaged in carrying passengers for hire. It was the contention of the plaintiff that he had paid his fare to be carried across the bridge, and while in the act of entering one of the cars a policeman, who was there engaged in performing the ordinary duties of a guard, closed the door against his leg, and that he remonstrated against such treatment. Thereupon the policeman entered the car, prevented the plaintiff from leaving it until it arrived at the other end of the bridge, and then arrested him, charged him with assault and battery, and took him before a magistrate, before whom he was tried upon the charge and acquitted. An action for false imprisonment was then brought, and a recovery had, which was sustained in the Gen-

eral Term upon the ground that the policeman was stationed at the door as a trainman or guard, assisting passengers in or out of the cars; that such a service pertained to the municipality, and was not governmental. An appeal was taken to this court, and the judgment reversed, but upon the ground that the action was for false imprisonment, and not for injuries received by reason of the shutting of the door against the plaintiff's leg. It appeared that the policeman had been a patrolman upon the bridge 10 years, charged with the duty of preserving order, and that in making the arrest he was acting in his capacity as such policeman discharging a governmental function, for which the municipality was not liable for his negligence or misconduct; that his act in shutting the door was a separate and distinct act from that of subsequently arresting the plaintiff without proper cause. *Id.*, 150 N. Y. 450, 44 N. E. 1038.

Bearing in mind the distinction, to which attention has been called, we come to the consideration of the circumstances of this case. No claim is made that the elevator was out of repair, or that there was any defect which caused the injury to the plaintiff. The negligence, if any, was the negligence of the employé in leaving the door open when he removed the elevator to an upper floor. Was this employé discharging a governmental function? I think not. Undoubtedly the elevator was a convenience. It enabled the policeman to ride up and down. So were the cars running upon the New York and Brooklyn Bridge a convenience. Policemen could avail themselves of them in going from one place to the other, as well as other street railroads, by which they could ride from their homes to the station house or to the territory which they were required to patrol and guard. But it never before has been suggested that the servants of a municipality or of a corporation, in aiding a policeman in his travels, are exercising a governmental function which would shield it from liability for the negligence of its employés. To carry the rule thus far might, as was suggested in the *Woodhull Case*, permit cities to escape all liability for injuries by reason of the negligence of their servants by appointing them all policemen. We then answered that contention, to the effect that such could not be the case, "for it is very easy to distinguish between the duties of a servant and those of a policeman." It does not appear that the operator was a policeman, nor that he had any other duty to perform which pertained to a governmental function. He was employed and paid by the city, and to my mind he was rendering purely a municipal service, and was not discharging the functions of a governmental officer.

It is also suggested that a room for the detention of prisoners was maintained in the police building, and that the maintain-

ing of a jail or prison is a governmental function. It may be that the keeper of the room of detention is discharging a governmental function, but that question is not involved in this case, and should not therefore now be decided.

The judgment should be affirmed, with costs.

EDWARD T. BARTLETT and HISCOCK, JJ., concur with WILLARD BARTLETT, J. GRAY, J., concurs on second ground stated in opinion. CULLEN, C. J., and WERNER, J., concur in result on the ground only of contributory negligence of the plaintiff. HAIGHT, J., reads dissenting opinion.

Judgment reversed, etc.

MEMORANDUM DECISIONS.

ANDERSEN, Respondent, v. NEW YORK EDISON CO., Appellant. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (113 App. Div. 917, 100 N. Y. Supp. 1104), entered June 18, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence. Roger B. Wood, H. Snowden Marshall, and Frederick E. Fishel, for appellant. Stephen C. Baldwin and Arthur Haviland, for respondent. PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

AVON SPRINGS SANITARIUM CO., Respondent, v. WEED, Appellant. (Court of Appeals of New York. Oct. 22, 1907.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 560, 104 N. Y. Supp. 58), entered May 1, 1907, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action to recover the amount of a subscription for stock. The following question was certified: "Does the complaint herein state facts sufficient to constitute a cause of action?" Edwin A. Nash and William Carter, for appellant. James G. Greene, for respondent.

PER CURIAM. Order reversed and judgment ordered for defendant on the demurrer, with costs in all courts, on dissenting opinion of McLennan, P. J., below. Question certified answered in the negative.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, CHASE, and VANN, JJ., concur. HISCOCK, J., absent.

BAHR, Respondent, v. CLARKE, Appellant. (Court of Appeals of New York. Oct. 8, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (113 App. Div. 890, 100 N. Y. Supp. 1104), entered May 18,

1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for the reformation of a deed and to recover the value of the difference between the amount of land actually conveyed by defendant and the amount called for in the deed executed by him. Theodore E. Hancock, for appellant. Edward Devine, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, VANN, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur.

BAKER, Respondent, v. PACKARD, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (112 App. Div. 543, 98 N. Y. Supp. 804), entered May 5, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover for an alleged breach of contract. Joseph G. Dudley, for appellant. Hiram R. Wood and Horace McGulre, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, and HISCOCK, JJ., concur. WILLARD BARTLETT, J., absent.

BELLINGER, Respondent, v. GERMAN INS. CO. OF FREEPORT, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (113 App. Div. 917, 100 N. Y. Supp. 424), entered June 22, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to recover on a policy of fire insurance. William D. Murray, for appellant. Henry Bacon, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

BERNSTEIN, Respondent, v. FLEET, Appellant. (Court of Appeals of New York. Oct. 8, 1907.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 910, 103 N. Y. Supp. 1116), entered March 22, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. The motion was made upon the grounds that the appeal was not taken in good faith, the exceptions being frivolous, and no question of law being raised which required a determination by the Court of Appeals. A. S. Gilbert, for the motion. James C. Lenny, opposed.

PER CURIAM. Motion denied, with \$10 costs.

BISHOP, Respondent, v. LORGE, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (114 App. Div. 903, 100 N. Y. Supp. 1105), entered June 28, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover on an alleged contract of guaranty. C. Elliott

Minor and Max Stern, for appellant. Samuel Kceler, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, HISCOCK, and WILLARD BARTLETT, JJ., concur. HAIGHT, J., absent.

BLANSETT, Appellant, v. DUFFY, Respondent. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (111 App. Div. 908, 96 N. Y. Supp. 1114), entered January 16, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for an alleged breach of contract. Thomas Hogan, for appellant. Erwin E. Shutt and George D. Reed, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WILLARD BARTLETT, and WERNER, JJ., concur. HISCOCK, J., not sitting.

In re BLATT. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 886, 104 N. Y. Supp. 1122), entered May 10, 1907, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel defendants to certify to a pay roll containing petitioner's name. I. Balch Louis, for appellant Max Blatt. Francis K. Pendleton, Corp. Counsel (Royal E. T. Riggs, Theodore Connolly, and William B. Crowell, of counsel), for respondents William E. Baker and others.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, and CHASE, JJ., concur. O'BRIEN and HISCOCK, JJ., dissent.

BRIGHTON BEACH RACING ASS'N, Appellant, v. HOME INS. CO., Respondent. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (113 App. Div. 728, 99 N. Y. Supp. 219), entered June 22, 1906, affirming a judgment in favor of defendant entered upon a decision of the court on trial without a jury in an action to recover upon a policy of fire insurance. Frank Paine Reilly and Charles H. Hyde, for appellant. George Richards and Alfred B. Nathan, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, HISCOCK, and WILLARD BARTLETT, JJ., concur. HAIGHT, J., absent.

In re CITY OF BUFFALO. (Court of Appeals of New York. Oct. 8, 1907.) Motion to dismiss an appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (116 App. Div. 555, 101 N. Y. Supp. 966), entered December 23, 1906, which reversed an order of Special Term confirming the report of commissioners of appraisal in the above-entitled proceedings. The motion was made upon the grounds that the order was not appealable, that the notice of appeal was too late, and that the application for leave to appeal was not made at

the required term. O. O. Cottle, for the motion. Louis E. Desbecker, opposed.

PER CURIAM. Motion denied, without costs.

In re CITY OF BUFFALO. (Court of Appeals of New York. Oct. 8, 1907.) No opinion. Motion for reargument denied, with \$10 costs. See 189 N. Y. 163, 81 N. E. 954.

CLEMENT, State Commissioner of Excise, et al. v. LUNAN. (Court of Appeals of New York. Oct. 15, 1907.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (116 App. Div. 909, 101 N. Y. Supp. 1116), entered November 13, 1906, which affirmed an order of Special Term granting a motion for a retaxation of costs. The following question was certified: "Does the limitation in section 18 of the liquor tax law (Laws 1897, p. 221, c. 812), as to the amount of recovery, prevent a plaintiff from taxing costs and disbursements and adding same to the verdict when the verdict is for the full penalty of the bond?" Charles S. Mackenzie, Cortland A. Kiernan, and Crowley Wentworth, for appellant Federal Union Surety Co. Frank Hopkins, for respondent Clement.

PER CURIAM. Order affirmed, with costs. Question certified answered in the negative.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, CHASE, and HISCOCK, JJ., concur.

COHEN et al. Respondents, v. CONGREGATION SHEARITH ISRAEL in CITY of NEW YORK, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (114 App. Div. 117, 99 N. Y. Supp. 732), entered June 21, 1906, affirming a judgment in favor of plaintiffs entered upon the report of a referee in an equitable action to restrain defendant from interfering with the removal of the remains of a decedent from its cemetery. Edgar J. Nathan, for appellant. William Victor Goldberg and Victor E. Whitlock, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

In re CONSOLIDATED TELEGRAPH & ELECTRICAL SUBWAY CO. (METZ, Comptroller of the City of New York et al., Respondents.) (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 835, 104 N. Y. Supp. 922), entered June 10, 1907, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendants to note upon the tax books of the city of New York the payment in full of the special franchise tax assessed against the petitioner for the year 1900 and to execute and deliver to it a receipt therefor. Henry J. Hemmens, for appellant. Francis K. Pendleton, Corp. Counsel (George S. Coleman, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, CHASE, and HISCOCK, JJ., concur.

DEERING, Appellant, v. SCHREYER et al., Respondents. (Court of Appeals of New York. Oct. 8, 1907.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (120 App. Div. 872, 105 N. Y. Supp. 1112), entered July 31, 1907, modifying and affirming as modified a judgment in favor of defendants entered upon a decision of the court on trial at Special Term. The motion was made upon the grounds that the action was one to recover for services, that the decision of the Appellate Division was unanimous, and that permission to appeal had not been obtained. Alexander Thain, for the motion. John C. Toole, opposed.

PER CURIAM. Motion denied, without costs.

In re DE FOREST'S ESTATE. (Court of Appeals of New York. Oct. 15, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (119 App. Div. 782, 104 N. Y. Supp. 842), entered May 8, 1907, which affirmed an order of the Rensselaer County Surrogate's Court directing the executors to pay the respondents herein certain sums of money claimed to be due under an agreement made with the testatrix. John H. Burke and John B. Holmes, for appellants. Arthur L. Andrews and Charles F. Bridge, for respondents.

PER CURIAM. Order affirmed, with costs payable out of estate.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, CHASE, and HISCOCK, JJ., concur.

DELILE, Respondent, v. LONG ISLAND REALTY CO. et al., Appellants. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (113 App. Div. 912, 100 N. Y. Supp. 1112), entered June 23, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for the reformation of a deed. Edward L. Frost, for appellants. Edward J. McGuire, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

DOOLEY, Appellant, v. UNION RY. CO. of NEW YORK CITY, Respondent. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (106 App. Div. 397, 94 N. Y. Supp. 635), entered July 22, 1905, which reversed a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial and granted a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence. James A. Douglas and Arnold Gross, for appellant. Bayard H. Ames, Walter H. Wood, and Henry A. Robinson, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, VANN, WILLARD BARTLETT, O'BRIEN, and CHASE, JJ., concur. WERNER, J., absent.

In re EAST ONE HUNDRED and SEVENTY-EIGHTH STREET from CRESTON

AVENUE to RYER AVENUE in CITY of NEW YORK. (Court of Appeals of New York. Oct. 8, 1907.) No opinion. Motion for reargument denied, with \$10 costs. See 188 N. Y. 581, 80 N. E. 1109.

EMERICK, Respondent, v. HACKETT, Appellant. (Court of Appeals of New York. Oct. 8, 1907.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 913, 104 N. Y. Supp. 1127), entered May 1, 1907, affirming a judgment in favor of plaintiff entered upon a decision of the Oswego County Court at a Trial Term. The motion was made upon the ground that the judgment appealed from was unanimous, and that there were no questions of law to be reviewed; the exceptions being frivolous. James T. Clark, for the motion. D. P. Morehouse, opposed.

PER CURIAM. Motion denied, with \$10 costs.

EUGENE C. LEWIS CO., Respondent, v. METROPOLITAN REALTY CO., Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (112 App. Div. 385, 98 N. Y. Supp. 391), entered April 26, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for injuries to chattels alleged to have been caused through defendant's negligence. Charles J. Hardy, for appellant. Willard N. Baylis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

FARGO et al. v. SQUIERS et al. (Court of Appeals of New York. Oct. 15, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 914, 104 N. Y. Supp. 1127), entered May 1, 1907, which affirmed an order of Special Term denying an application to apportion between capital and income certain disbursements of the plaintiffs in connection with the real estate of William G. Fargo, deceased. John Larkin and Ansley Wilcox, for appellants Albree and others. Jacob Stern for respondents Fargo and others. Lyman M. Bass and Louis L. Babcock, for respondents Squiers and others.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, CHASE, and HISCOCK, JJ., concur.

FIRESTONE, Respondent, v. REALTY ASSOCIATES, Appellant. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (112 App. Div. 920, 98 N. Y. Supp. 1102), entered May 4, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover a broker's commission for the sale of real estate. George D. Beattys, for appellant. Charles Melville Weeks, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, HISCOCK, and CHASE, JJ., concur. VANN, J., absent.

FIRST NAT. BANK OF WATERLOO, Respondent, v. ZARTMAN et al., Appellants. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (113 App. Div. 612, 98 N. Y. Supp. 717), entered May 22, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for the reformation of a written agreement. George E. Zartman and Frederick L. Manning, for appellant. J. N. Hammond, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

In re FRANCIS' ESTATE. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (121 App. Div. 129, 105 N. Y. Supp. 643), entered July 13, 1907, which affirmed an order of the Oneida County Surrogate's Court fixing a transfer tax upon the estate of Lydia M. Francis, deceased. William Townsend, for appellants Thomas S. Jones and others. David E. Powers, for respondent State Comptroller.

PER CURIAM. Order affirmed, with costs, on opinion below.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, CHASE, and HISCOCK, JJ., concur.

In re GAFFNEY (BARRY et al., Respondents). (Court of Appeals of New York. Oct. 8, 1907.) No opinion. Motion for reargument denied, with \$10 costs. See 189 N. Y. —, 81 N. E. 1165.

GOLDSMITH et al., Appellants, v. HASKELL, Respondent. (Court of Appeals of New York. Oct. 3, 1907.) Motion for leave to withdraw and motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (120 App. Div. 403, 105 N. Y. Supp. 327), entered July 1, 1907, which reversed an order of Special Term denying a motion to vacate the service of an order of arrest and of the summons and complaint in the above-entitled action. The motions were made upon the grounds that the Court of Appeals had no jurisdiction to review the order appealed from and permission to appeal had not been given. Felix H. Levy, for appellants. Morris J. Hirsch, for respondent.

PER CURIAM. Appeal dismissed, with costs and \$10 costs of motion.

GREEN ISLAND ICE CO., Respondent, v. NORTON, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (105 App. Div. 331, 86 N. Y. Supp. 613, 94 N. Y. Supp. 1147), entered May 12, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for an injunction to restrain the defendant from interfering with the plaintiff's control and possession of a certain field of ice. Benjamin E. De Groot and Thomas F. Powers, for appellant. Frank H. Deal, for respondent. William S. Jackson, Atty. Gen.

(George P. Decker, of counsel), for State of New York, intervening.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur. GRAY, J., absent.

GUEUTAL et al., Appellants, v. GUEUTAL et al., Respondents. (Court of Appeals of New York. Oct. 8, 1907.) Motion for leave to withdraw an appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (116 App. Div. 918, 101 N. Y. Supp. 1123), entered December 4, 1906, which affirmed a judgment of Special Term sustaining a demurrer to and directing a dismissal of the complaint. The motion was made upon the ground that the questions involved were the same as those involved in the case of Jacoby v. Jacoby, 188 N. Y. 124, 80 N. E. 676, decided after the appeal was taken. I. Newton Williams, for the motion. Hamilton R. Squier, opposed.

PER CURIAM. Motion granted, so far as to permit plaintiffs to withdraw appeal on payment within 20 days of all costs that have accrued on appeal. On failure to comply with the terms of this order, the appeal is dismissed, with costs and \$10 costs of motion.

In re GUGGENHEIM'S ESTATE. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (116 App. Div. 914, 101 N. Y. Supp. 1124), entered December 7, 1906, which affirmed an order of the New York County Surrogate's Court assessing a transfer tax on the estate of Meyer Guggenheim, deceased. Edgar M. Leventritt, Harold Nathan, and Ferdinand Shack, for appellants Isaac Guggenheim and others. David B. Hill, for respondent State Comptroller.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

HABIRSHAW v. ISLER et al. (Actions 1, 2, 3.) (Court of Appeals of New York. Oct. 22, 1907.) Appeal in each of the above-entitled proceedings from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 890, 105 N. Y. Supp. 1119), entered May 24, 1907, which affirmed an order of Special Term confirming the report of a referee in surplus money proceedings. William Schuyler Jackson, Atty. Gen. (James A. Donnelly, of counsel), for the People. Lewis C. Grover, George L. Stamm, and John J. Gleason for respondent M. Julia Moffett.

PER CURIAM. Orders affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

In re HALL (ASSESSORS OF TOWN OF MONROE et al., Appellants.) (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (116 App. Div. 729, 102 N. Y. Supp. 5), entered January 11, 1907, which reversed an order of Special Term confirming an assessment on property of the relator and dismissing a writ of certiorari to review the same and annulled such assessment. M. N. Kane, for appellants. George R. Brewster, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, and HISCOCK, JJ., concur. O'BRIEN, VANN, and CHASE, JJ., dissent.

HAND, Respondent, v. EGBERT, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (111 App. Div. 920, 96 N. Y. Supp. 1127), entered January 31, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover the amount of a deposit paid upon a contract which it is alleged defendant failed to perform. Benjamin F. Norris and George W. Titcomb, for appellant. James Crooke McLeer and Harvey O. Dobson, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

HARTLEY, Respondent, v. PIONEER IRON WORKS, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (113 App. Div. 919, 100 N. Y. Supp. 1120), entered June 22, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action by a stockholder to recover certain dividends alleged to be due and unpaid. Albert G. McDonald, for appellant. William N. Dykman, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion on former appeal. 181 N. Y. 73, 73 N. E. 576.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur. HAIGHT, J., absent.

HENDERSON ESTATE CO. et al., Appellants, v. CARROLL ELECTRIC CO., Respondent. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (113 App. Div. 775, 99 N. Y. Supp. 365), entered July 19, 1906, affirming a judgment in favor of defendant entered upon the report of a referee in an action to enjoin an alleged infringement of plaintiffs' riparian rights. Edward S. Rapallo and Willard Parker Butler, for appellants. Allison Butts, John Hackett, and Samuel K. Phillips, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur. GRAY, J., absent.

HILL et al., Respondents, v. REYNOLDS et al., Appellants. (Court of Appeals of New York. Oct. 22, 1907.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (119 App. Div. 689, 104 N. Y. Supp. 303), entered May 18, 1907, which affirmed an order of Special Term granting a motion for an order of reference and appointing a referee to hear and determine the issues involved in the within action. The following question was certified: "Was the Special Term authorized, under section 1013 of the Code of Civil Procedure, to refer the issues in this action to a referee for trial as against the objection of the defendants?" George G. Reynolds, Robert T. Turner, and

Samuel G. H. Turner, for appellants. Irving W. Cole, for respondents.

PER CURIAM. Order reversed, with costs, and motion denied, with \$10 costs, on dissenting opinion of Smith, P. J., below. Question certified answered in the negative.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

HOFF, Appellant, v. ROYAL METAL FURNITURE CO., Respondent. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (117 App. Div. 884, 103 N. Y. Supp. 371), entered March 22, 1907, which affirmed an order of the Municipal Court of the city of New York dismissing a summary proceeding. Charles A. Decker, for appellant. Thaddeus D. Kenneson, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, and CHASE, JJ., concur. HISCOCK, J., absent.

HUTCHINSON, Appellant, v. STERN, Respondent. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (115 App. Div. 791, 101 N. Y. Supp. 145), entered December 6, 1906, which affirmed an order of Special Term striking out a portion of the complaint in an action to recover for an alleged assault. N. F. Breen, for appellant. John Conboy and Leon Kauffman, for respondent.

PER CURIAM. Appeal dismissed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and CHASE, JJ., concur. VANN, J., absent.

JOHNSON, Respondent, v. ROCHESTER RY. CO., Appellant. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (114 App. Div. 916, 100 N. Y. Supp. 1123), entered September 14, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence. Joseph W. Taylor and Charles J. Bissell, for appellant. William F. Lynn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

KUELLING, Respondent, v. RODERICK LEAN MFG. CO., Appellant. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment, entered June 2, 1906, upon an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (113 App. Div. 891, 100 N. Y. Supp. 1125), overruling defendant's exceptions ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for plaintiff on the verdict in an action to recover for personal injuries alleged to have been caused by defendant's wrongful sale of a machine containing concealed dangerous defects. S. D. Bentley, for appellant. Charles Van Voorhis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

LANGDON v. SCHIFF et al. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 888, 105 N. Y. Supp. 1126), entered June 7, 1907, which affirmed an order of Special Term requiring appellant to complete his purchase of land sold at a foreclosure sale. Ralph E. Prime, Jr., for appellant. Charles Coleman Miller, for respondent.

PER CURIAM. Order affirmed, with costs. CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

LAWRENCE BROS., Inc., Respondent, v. HEYLMAN, Appellant. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from a judgment, entered September 12, 1906, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (111 App. Div. 848, 98 N. Y. Supp. 121), which affirmed an interlocutory judgment of Special Term adjudging a conveyance of real estate made by defendant Henry B. Heylman to defendant Harriet A. Heylman to be a mortgage, and that the equity of redemption is subject to the lien of a certain judgment in plaintiff's favor against the said Henry B. Heylman. Richard Krause, for appellant. Ralph Earl Prime, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

In re LEARY et al. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (120 App. Div. 880, 105 N. Y. Supp. 1126), entered June 28, 1907, which affirmed a decree of the New York County Surrogate's Court judicially settling the accounts of the executors of Sylvester N. Leary, deceased. Albert A. Wray, for executors, appellants. David McClure, for appellant Mary C. Leary. L. E. Warren, for respondents Hendricks Bros.

PER CURIAM. Order affirmed, with costs, with leave to apply to the Surrogate's Court to correct the mathematical error in computation.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

LINGKE, Appellant, v. SAMMIS, Respondent. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (115 App. Div. 882, 100 N. Y. Supp. 1126), entered October 3, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court on trial at Special Term in an action to recover an amount deposited on the making of a contract for the sale of certain real property. Joseph Fetterich and Rufus L. Scott, for appellant. Willard N. Baylis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

In re MacRAE et al. (ROGERS et al., Respondents.) (Court of Appeals of New York. Oct. 8, 1907.) No opinion. Motion for reargument denied, with \$10 costs. See 189 N. Y. 142, 81 N. E. 956.

MEEKER, Respondent, v. SMITH et al., Appellants. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (113 App. Div. 893, 98 N. Y. Supp. 1108), entered May 14, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for the death of plaintiff's intestate, alleged to have been caused by the negligence of defendants. Alexander C. Eustace, J. P. Eustace, and David C. Robinson, for appellants. Herbert M. Lovell, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

MONROE, Appellant, v. MATHER-LOVELACE et al., Respondents. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (114 App. Div. 684, 100 N. Y. Supp. 27), entered July 19, 1906, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an action to set aside certain documents relating to the estates of Asaph D. Mather, deceased, Joshua Mather, deceased, and Wesley Mather, deceased, and to obtain an accounting of the three estates. Edwin H. Risley, for appellant. S. M. Lindsley, William S. Mackie, George C. Morehouse, and Charles L. Stone, for respondents.

PER CURIAM. Judgment affirmed, with costs, on the sole ground that, apart from the admission of the judgment roll in the Turner action, the evidence before the trial judge not only warranted, but required, the finding made by him that the personal property of the testator was insufficient to discharge his debts.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, HISCOCK, and CHASE, JJ., concur. VANN, J., absent.

MOOREHEAD, Respondent, v. VAN DYKE, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (114 App. Div. 917, 100 N. Y. Supp. 1130), entered August 2, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover commissions alleging to have been earned by plaintiff in procuring a purchaser for certain real property of defendant. William E. Gowdey for appellant. Henry Escher, Jr., and George F. Elliott, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur. HAIGHT, J., absent.

MULVEY, Respondent, v. TIDE WATER BLDG. CO. et al., Appellants. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial De-

partment (114 App. Div. 526, 99 N. Y. Supp. 1114), entered July 12, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused by defendant's negligence. Frank Verner Johnson, for appellants. Emanuel S. Cahn, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, HISCOCK, and CHASE, JJ., concur. VANN, J., absent.

MURDOCK, Respondent, v. GOULD, Appellant. (Court of Appeals of New York. Oct. 29, 1907.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 883, 105 N. Y. Supp. 1132), entered June 28, 1907, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. The motion was made upon the grounds that the action was one to recover for breach of contract for services, that the judgment of the Appellate Division was unanimous, and permission to appeal had not been given. Frederic R. Kellogg, for the motion. Nicoll, Anable & Lindsay, opposed.

PER CURIAM. Motion denied, with \$10 costs.

In re NAYLOR'S ESTATE. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (121 App. Div. 738, 105 N. Y. Supp. 667), entered July 15, 1907, which affirmed an order of the New York County Surrogate's Court assessing the transfer tax upon the estate of Joseph Naylor, deceased. John H. Post, for appellants. Walter R. Mason and others. Thomas B. Casey and John S. Jenkins, for respondent State Comptroller.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, and CHASE, JJ., concur. HISCOCK, J., absent.

NEW YORK MORTGAGE & SECURITY CO., Respondent, v. MOORE et al., Appellants. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (115 App. Div. 882, 100 N. Y. Supp. 1132), entered October 2, 1906, modifying and affirming as modified a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action for the foreclosure of a mortgage. Hector M. Hitchings, for appellants. James A. Deering and Clarence L. Barber, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

NEW YORK MUTUAL SAVINGS & LOAN ASS'N, Respondent, v. WESTCHESTER FIRE INS. CO., Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (110 App. Div. 760, 97 N. Y. Supp. 436), entered January 26, 1906, reversing a judgment in favor of defendant entered upon the report of a referee, and granting a new trial in an action to recover on a policy of fire insurance.

Edgar J. Nathan and Raymond Reubenstein, for appellant. George Richards and Woodson R. Oglesby, for respondent.

PER CURIAM. Order affirmed and judgment absolute ordered against appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur. HAIGHT, J., absent.

NOBLE, Respondent, v. E. F. BLACKFORD CO., Appellant. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (115 App. Div. 896, 101 N. Y. Supp. 1135), entered October 17, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for goods sold and delivered. P. M. French, for appellant. Isaac Adler, for respondent.

PER CURIAM. Judgment reversed and new trial granted, costs to abide event, on the ground that the trial court erred in admitting evidence that no complaint had been made as to the character of the hoops sold and furnished to other customers of the plaintiff.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WIL-LARD BARTLETT, and HISCOCK, JJ., concur.

OIL WELL SUPPLY CO., Respondent, v. PHCENIX IRON WORKS CO., Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (111 App. Div. 909, 97 N. Y. Supp. 1142), entered June 29, 1906, affirming a judgment in favor of plaintiff entered upon the report of a referee in an action to recover on an alleged contract for labor and materials furnished. George N. Burt, for appellant. H. L. Howe, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur. GRAY, J., absent.

OPPENHEIM, Respondent, v. McGOVERN, Appellant. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (115 App. Div. 135, 100 N. Y. Supp. 712), entered October 24, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury in an action to recover money paid on a contract for the purchase of certain real property. John P. Everett, for appellant. Morton Stein, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WIL-LARD BARTLETT, and HISCOCK, JJ., concur.

PALMER et al., Respondents, v. LARCH-MONT HORSE RY. CO. et al., Appellants. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (112 App. Div. 341, 98 N. Y. Supp. 567), entered May 12, 1906, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion

for a new trial in an action to recover for the death of plaintiffs' intestate, alleged to have been caused by defendants' negligence. Frederick W. Sherman, for appellants. Thomas D. Adams and Arthur C. Palmer, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WIL-LARD BARTLETT, and HISCOCK, JJ., concur.

PEOPLE, Respondent, v. BROWNE, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 793, 103 N. Y. Supp. 903), entered April 19, 1907, which affirmed a judgment of the Court of General Sessions in the county of New York rendered upon a verdict convicting the defendant of the crime of forgery in the first degree. Clark L. Jordan, for appellant. William Travers Jerome, Dist. Atty. (E. Crosby Kindleberger, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

PEOPLE, Respondent, v. HOFFMAN, Appellant. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 862, 103 N. Y. Supp. 1000), entered April 24, 1907, which affirmed a judgment of the Court of Special Sessions convicting the defendant of the crime of maintaining a public nuisance. August P. Wagener, for appellant. William Travers Jerome, Dist. Atty. (E. Crosby Kindleberger, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed on opinion below.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PEOPLE, Respondent, v. LYON et al., Appellants. (Court of Appeals of New York. Oct. 15, 1907.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 361, 104 N. Y. Supp. 319), entered May 10, 1907, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint in an action for the removal of defendants as directors of a certain corporation. The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?" Thaddeus D. Kenneson, for appellants. W. E. Kisselburgh, Jr., for the People.

PER CURIAM. Order affirmed, with costs. Question certified answered in the affirmative.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PEOPLE, Respondent, v. MARKOWITZ, Appellant. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 841, 104 N. Y. Supp. 872), entered June 7, 1907, which affirmed a judgment of the Court of Special Sessions convicting the defendant of a violation of section 675 of the Penal Code. Max Schleimer, for appellant.

William Travers Jerome, Dist. Atty. (E. Crosby Kindleberger, of counsel), for the People.

PER CURIAM. Judgment of conviction affirmed.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PEOPLE v. NEW YORK BUILDING-LOAN BANKING CO., In re PRESTON. (Court of Appeals of New York. Oct. 15, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 830, 104 N. Y. Supp. 892), entered June 7, 1907, which affirmed an order of Special Term confirming the report of a referee in a special proceeding for the taking and stating of the accounts of the receiver of an insolvent corporation. Frederick B. Woodruff, Frederic W. Hinrichs, and Charles C. Cormany, for appellants Ehret and others. Howard Chipp and Charles W. Dayton, Jr., for respondents Preston and others.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. BARNEY, Appellant, v. WHALEN, State Secretary, Respondent. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (119 App. Div. 749, 104 N. Y. Supp. 555), entered May 13, 1907, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to file a certificate of incorporation. Julien T. Davies, Joseph S. Auerbach, and Charles H. Tuttle, for appellant. William S. Jackson, Atty. Gen. (Frank White, of counsel), for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. BOARD OF HEALTH OF VILLAGE OF FRIENDSHIP, Appellant, v. FRIES, Respondent. (Court of Appeals of New York. Oct. 15, 1907.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (109 App. Div. 358, 96 N. Y. Supp. 327), entered November 22, 1905, which reversed an interlocutory judgment of Special Term overruling a demurrer to an alternative writ of mandamus, and sustained such demurrer in an action to compel the abatement of an alleged nuisance. The following question was certified: "Was mandamus authorized to enforce the direction or order of the relator, board of health of the village of Friendship, requiring the defendant, George W. Fries, to abate or remove the nuisance complained of?" James T. Ward, for appellant. A. L. Elliott, for respondent.

PER CURIAM. Order affirmed, with costs; question certified answered in the negative, on opinion below.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, and CHASE, JJ., concur. HISCOCK, J., not sitting.

PEOPLE ex rel. BROWN et al., Respondents, v. METZ, Comptroller of City of New York, Appellant. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court

in the First Judicial Department (119 App. Div. 271, 104 N. Y. Supp. 649), entered May 24, 1907, which reversed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the defendant to convey to the relators the right, title, and interest of the city of New York in certain lands and granted said motion. Francis K. Pendleton, Corp. Counsel (Theodore Connolly, John P. Dunn, and Thomas C. Blake, of counsel), for appellant. John C. Toole and James A. Deering, for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. MORRELL, Appellant, v. DOLD, Respondent. (Court of Appeals of New York. Oct. 15, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 888, 105 N. Y. Supp. 1137), entered May 31, 1907, which affirmed an order of Special Term dismissing a writ of habeas corpus. Leonard F. Fish, for appellant. Charles E. Lydecker, for respondent.

PER CURIAM. Order affirmed.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. MORRELL, Appellant, v. DOLD, Respondent. (Court of Appeals of New York. Nov. 1, 1907.) No opinion. Motion for reargument denied, without costs. See 189 N. Y. —, supra.

PEOPLE ex rel. O'DONNELL, Appellant, v. McCLELLAN et al., Board of Estimate and Apportionment of City of New York, Respondents. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 868, 103 N. Y. Supp. 1138), entered April 19, 1907, which affirmed an order of Special Term denying a motion for a peremptory writ of mandamus to compel the appointment of the relator as a court attendant in the Magistrate's Court in the city of New York. Thornton J. Theall, for appellant. Francis K. Pendleton, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondents.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PEOPLE ex rel. THOMPSON, Appellant, v. SECOR et al., Westchester County Sup'rs, Respondents. (Court of Appeals of New York. Oct. 8, 1907.) No opinion. Motion for reargument denied, with \$10 costs. See 189 N. Y. —, 81 N. E. 1173.

PEOPLE ex rel. UNION & ADVERTISER CO., Appellant, v. STALLKNECHT et al., Respondents. (Court of Appeals of New York. June 14, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (119 App. Div. 917, 105 N. Y. Supp. 1138) entered May 15, 1907, which dismissed a writ of certiorari and confirmed the action of the defendants in designating a Democratic newspaper to publish the Session Laws and concurrent resolutions of the Legislature in Monroe county. James S. Havens, for appellant. George D. Forsyth, for respondents.

PER CURIAM. Order reversed and determination of respondents annulled, with costs to the plaintiff against the respondents, the supervisors of the county of Monroe, on the ground that according to the uncontroverted allegations of the petition the Labor Journal was not, regard being had to the advocacy by such paper of the principles of the Democratic party and its support of the state and national nominees thereof, and to its regular and general circulation in the towns of the county of Monroe, a proper paper to publish the Session Laws and concurrent resolutions of the Legislature for 1907.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WERNER, and HISCOCK, JJ., concur. **HAIGHT, J.,** not voting.

PEOPLE ex rel. WESTMINSTER HEIGHTS CO., Respondent, v. **COLER, President of Borough of Brooklyn, Appellant, et al.** (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (121 App. Div. 293, 105 N. Y. Supp. 887), entered July 22, 1907, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the president of the borough of Brooklyn to issue a permit for the opening of the surface of the street and the construction of a double track surface railway on Nostrand avenue in said borough. **Francis K. Pendleton, Corp. Counsel (James D. Bell, of counsel),** for appellant. **Martin W. Littleton,** for respondent.

PER CURIAM. Order reversed and proceedings dismissed, with costs in all courts, upon the ground that the relator has no standing to maintain them.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

PIRONG, Respondent, v. SOLVAY PROCESS CO., Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (113 App. Div. 890, 100 N. Y. Supp. 1138), entered May 19, 1906, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover for personal injuries alleged to have been caused through defendant's negligence. **Louis L. Waters,** for appellant. **Frank C. Sargent and John W. Reynolds,** for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

PIZER, Respondent, v. HERZIG, Appellant, et al. (Court of Appeals of New York. Oct. 8, 1907.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (120 App. Div. 102, 105 N. Y. Supp. 38), entered June 14, 1907, which reversed a judgment in favor of defendant entered upon a decision of the court on trial at Special Term and granted a new trial. The motion was made upon the grounds that the Court of Appeals was without jurisdiction to review the appeal, which is not taken from a final order or judgment, but from an order of reversal granting a new trial upon questions of fact. **Max Schleimer,** for the motion. **Irving L. Ernst,** opposed.

PER CURIAM. Motion denied, without costs.

PLANT, Respondent, v. BAHR, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (110 App. Div. 922, 98 N. Y. Supp. 1142), entered December 16, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial in an action to recover an amount alleged to be due as commission upon an exchange of real estate. **Edward Devine,** for appellant. **Thomas Hogan,** for respondent.

PER CURIAM. Judgment affirmed, with costs, on authority of *Fisher Co. v. Woods*, 187 N. Y. 90, 79 N. E. 836.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur.

PRINCE et al., Respondents, v. HOME INS. CO., Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (114 App. Div. 911, 100 N. Y. Supp. 1138), entered July 21, 1906, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial, in an action to recover upon a policy of fire insurance. **George Richards,** for appellant. **William D. Murray and Alfred D. Lind,** for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

ROSENBERG v. WILSON et al. (Court of Appeals of New York. Oct. 15, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (120 App. Div. 554, 104 N. Y. Supp. 1087), entered June 11, 1907, which modified and affirmed as modified an order of Special Term decreeing distribution in surplus money proceedings. **William D. Gaillard,** for appellant. **Yorke Allen,** for respondent Wilson.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

ROWE, Respondent, v. WHITE, Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (112 App. Div. 688, 98 N. Y. Supp. 729), entered May 9, 1906, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover certain moneys received by defendant as a dividend upon certain stock alleged to have been owned by plaintiff's assignor at the time the dividend was declared. **R. Floyd Clarke,** for appellant. **Frank W. Brown,** for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur.

In re SANDROCK'S ESTATE. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (120 App. Div. —, 105 N. Y. Supp. 1141), entered June 12, 1907, which affirmed a decree of the Erie County Surrogate's Court removing the appellant herein as executor of the estate

of Anastasia Sandrock, deceased. Adelbert Moot, Helen Z. M. Rodgers, and James C. Beecher, for appellant Henry W. Burt. George P. Keating, Louis L. Babcock, and Samuel M. Welch, for respondents Michael F. Fallon and others.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, VANN, HISCOCK, and CHASE, JJ., concur. HAIGHT, J., not voting.

SHANKLIN, Appellant, v. BROWN et al., Respondents. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (102 App. Div. 473, 92 N. Y. Supp. 860), entered August 19, 1905, affirming a judgment in favor of defendants entered upon a verdict directed by the court and an order denying a motion for a new trial in an action to recover for an alleged breach of contract. Philo P. Safford, for appellant. John Burlinson Coleman, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, VANN, WILLARD BARTLETT, and HISCOCK, JJ., concur. HAIGHT, J., absent.

SHARPLES, Appellant, v. ANGELL, Respondent. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (112 App. Div. 906, 98 N. Y. Supp. 1114), entered March 17, 1906, affirming a judgment in favor of defendant entered upon a verdict and an order denying a motion for a new trial in an action to recover on contract. J. T. Gridley, for appellant. F. W. Clifford, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, HISCOCK, and CHASE, JJ., concur. VANN, J., absent.

SLOAN, Respondent, v. BEARD, Appellant. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (114 App. Div. 920, 100 N. Y. Supp. 1143), entered September 20, 1906, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term in an action to compel specific performance of a clause in a lease giving the lessee the privilege of purchasing the demised premises. Alexander S. Andrews, Ralph S. Hull, and John Larkin, for appellant. J. Stewart Ross, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, WILLARD BARTLETT, and HISCOCK, JJ., concur.

SMITH, Appellant, v. LONG ISLAND R. CO., Respondent. (Court of Appeals of New York. Oct. 29, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (113 App. Div. 922, 100 N. Y. Supp. 1143), entered June 30, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term in an action to recover for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Edward J. McCrossin,

for appellant. William C. Beecher and Joseph F. Keany, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, HISCOCK, and CHASE, JJ., concur. VANN, J., absent.

In re TOWN OF LIVINGSTON. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (120 App. Div. —, 105 N. Y. Supp. 1145), entered July 8, 1907, which affirmed an order of the Columbia County Court requiring the town clerk of the town of Livingston to call a special town meeting for the resubmission of local option questions. Samuel H. Salisbury and Russell Headley, for appellant. Harold Wilson, Jr., for respondent.

PER CURIAM. Order affirmed, with costs, upon the ground that the statutory provision requiring notice to be published of the submission of the questions of local option at a town meeting is mandatory.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

In re VANDERBILT AVENUE WEST IN CITY OF NEW YORK. (RANSFORD, Respondent.) (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (119 App. Div. 882, 104 N. Y. Supp. 1133), entered May 24, 1907, which affirmed an order of Special Term confirming the report of commissioners of estimate and assessment in the above-entitled proceeding. Francis K. Pendleton, Corp. Counsel (Theodore Connolly, John P. Dunn, and Thomas C. Blake, of counsel), for appellant. S. Livingston Samuels, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

THE VILLAGE OF WAVERLY, Respondent, v. WAVERLY WATER CO. et al., Appellants. (Court of Appeals of New York. Oct. 22, 1907.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (117 App. Div. 336, 101 N. Y. Supp. 1070), entered January 17, 1907, which reversed an order of Special Term dismissing a proceeding in condemnation to acquire the property rights and franchises of the defendant Waverly Water Company. The following question was certified: "Was it necessary for the plaintiff, before beginning this action, to take the proceedings, and to comply with chapter 723, p. 2022, Laws N. Y. 1905, and to procure the consent of the state water supply commission, as in said act required?" Frederick E. Hawkes, Frederick Collin, and J. B. Floyd, for appellants. Frank A. Bell, Myron N. Tompkins, and Randolph Horton, for respondent.

PER CURIAM. Order affirmed, with costs, and question certified answered in the negative on opinion below.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, and CHASE, JJ., concur. HISCOCK, J., absent.

In re VOKE et al. (WINTER, Appellant.) (Court of Appeals of New York. Oct. 8, 1907.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (118 App. Div. 917, 103 N. Y. Supp. 1145), entered March

19, 1907, which affirmed an order of Special Term directing distribution of certain surplus moneys arising upon the foreclosure of a mortgage. The motion was made upon the ground that the appellant had failed to perfect the appeal by filing the required undertaking. George Barrow, for the motion. Martin F. Dillon, opposed.

PER CURIAM. Motion granted and appeal dismissed, with costs, and \$10 costs of motion.

WARD, Respondent, v. TERRY & TENCH CONS. CO., Appellant. (Court of Appeals of New York. Oct. 15, 1907.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 80, 102 N. Y. Supp. 1066), entered March 15, 1907, which modified and affirmed as modified an order of Special Term granting a motion for leave to amend the summons and complaint in an action to recover for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. The following question was certified: "Did the court have power, under the facts disclosed by the papers on appeal herein filed in this court, to make the order heretofore made and entered herein in the office of the clerk of the county of New York on the 9th day of November, 1906?" William J. Moran and Frank Verner Johnson, for appellant. I. Newton Williams, for respondent.

PER CURIAM. Order affirmed, with costs. Question certified answered in the affirmative.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

WASHINGTON TRUST CO. OF CITY OF NEW YORK v. BALDWIN et al. (Court of Appeals of New York. Oct. 15, 1907.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (118 App. Div. 186, 102 N. Y. Supp. 1105), entered March 8, 1907, which reversed an order of Special Term granting a motion to revive and continue an action against the executor of a sole defendant and denied said motion. The following question was certified: "Was the plaintiff entitled as a matter of right to a revival of the action notwithstanding the motion to revive was not made until more than nine years after the death of the defendant and the appointment and qualification of the executor of his will?" W. O. Percy, for appellant. Maunsell B. Field, for respondent Baldwin.

PER CURIAM. Order affirmed, with costs. Question certified answered in the negative.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

WHITING, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (110 App. Div. 916, 96 N. Y. Supp. 1150), entered January 23, 1906, affirming a judgment in favor of defendant entered upon a dismissal of the complaint in an action to recover for personal injuries alleged to have been caused by defendant's negligence. John E. O'Brien, for appellant. Robert A. Kutschback and Charles C. Paulding, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur. EDWARD T. BARTLETT, J., dissents. GRAY, J., not sitting.

WISOTZKEY, Respondent, v. NIAGARA FIRE INS. CO., Appellant. (Court of Appeals of New York. Oct. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (112 App. Div. 590, 98 N. Y. Supp. 760), entered May 11, 1906, affirming a judgment in favor of plaintiff, entered upon the report of a referee in an action to recover upon a policy of fire insurance. Horace McGuire, for appellant. F. A. Robbins, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, VANN, WERNER, and HISCOCK, JJ., concur.

In re WOOD'S ESTATE. (Court of Appeals of New York. Oct. 22, 1907.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (115 App. Div. 893, 101 N. Y. Supp. 1149), entered October 26, 1906, which affirmed an order of Special Term confirming the report of a referee in an action for an accounting. William W. Mumford, Origen S. Seymour, Leonidas Dennis, and Robert Gray, for appellants. Charles De Hart Brower, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, VANN, HISCOCK, and CHASE, JJ., concur.

YORK, Appellant, v. SEARLES et al., Respondents. (Court of Appeals of New York. Nov. 1, 1907.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (97 App. Div. 331, 90 N. Y. Supp. 37), entered October 24, 1904, affirming a judgment in favor of defendants entered upon a dismissal of the complaint by the court on trial at Special Term in an equitable action to have plaintiff decreed the owner of certain stock under certain contracts and to restrain the defendants from selling the same. Lucius E. Judson, for appellant. George W. Schurman, Richard E. Dwight, and Edward J. Patterson, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, EDWARD T. BARTLETT, HAIGHT, WERNER, and HISCOCK, JJ., concur. WILLARD BARTLETT, J., not sitting.

BEDFORD BUFF STONE CO. v. ANDERSON. (No. 6,469.) (Appellate Court of Indiana. Dec. 12, 1907.) Appeal from Circuit Court, Lawrence County; Jas. B. Wilson, Judge. Action by Arthur Anderson, by next friend, against the Bedford Buff Stone Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed. Elmer E. Stevenson and Brooks & Brooks, for appellant. W. E. Clark, for appellee.

PER CURIAM. The appellee has filed a confession of error. In accordance therewith, the judgment is reversed and the cause remanded, with instructions to sustain appellant's demurrer to the complaint and for further proceedings.

CHICAGO, I. & L. RY. CO. v. HOSTETTER. (No. 5,911.)¹ (Appellate Court of Indiana. Dec. 13, 1907.) Appeal from Circuit Court, Montgomery County; Jere West, Judge. Action by Newton J. Hostetter against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed. E. C. Field, H. R. Kurrie,

¹ Judgment, reversed on appeal to Supreme Court, 84 N. E. 534. Rehearing denied.

and Thomas & Foley, for appellant. N. C. Stover and Crane & McCabe, for appellee.

PER CURIAM. Upon the questions presented by the record in this cause the law is with the appellee. The judgment is therefore affirmed.

EVANSVILLE & T. H. R. CO. v. YEAGER. (No. 6,162.)¹ (Appellate Court of Indiana. Dec. 20, 1907.) Appeal from Circuit Court, Posey County; A. M. Welborn, Judge. Action between the Evansville & Terre Haute Railroad Company and Elmer Yeager. On appeal to the Appellate Court by the Evansville & Terre Haute Railroad Company, the case is transferred to the Supreme Court. Jno. E. Iglehart, Edwin Taylor, E. H. Iglehart, and G. V. Mesias, for appellant. H. F. Clements and F. P. Leonard, for appellee.

PER CURIAM. This cause being submitted to the entire court and four judges not concurring in the result, the case is hereby transferred to the Supreme Court under section 15 of the act approved March 12, 1901. Acts 1901, p. 569, c. 247.

LAKE ERIE & W. R. CO. v. PARKER et al. (No. 5,912.) (Appellate Court of Indiana. Oct. 29, 1907.) Appeal from Circuit Court, Hamilton County; Ira W. Christian, Judge. Action by Mina Jane Parker and others against the Lake Erie & Western Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed, with instructions to grant a new trial. Jno. B. Cockrum, Shirts & Fertig, and Hawkins, Smith & Hawkins, for appellant. Dan Waugh, Kane & Kane, and Nash & Teter, for appellee.

HADLEY, J. This is a companion case with *L. E. & W. R. Co. v. McFall*, 165 Ind. 574, 76 N. E. 400, *L. E. & W. R. Co. v. Ford* (Ind. Sup.) 78 N. E. 969, and *L. E. & W. R. Co. v. Hobbs* (Ind. App.) 81 N. E. 90; all growing out of the same conflagration. The first and second paragraphs of the complaint in this case contain substantially the same averments as the first and second paragraphs of the cases cited, and upon the authority of those cases the demurrers thereto were properly overruled. Objection is also made to the fourth and sixth instructions given by the court at request of appellee. These instructions are identical with

the fifth and sixth instructions set out in the case of *L. E. & W. R. Co. v. Ford*, supra, and which the Supreme Court held to be reversible error. Upon the authority of that case the giving of the sixth instruction was error. Other questions are presented, but they will not necessarily arise on another trial, and therefore are not considered. Cause reversed, with instructions to grant a new trial.

COMSTOCK, C. J., and ROBY, RABB, and MYERS, JJ., concur. WATSON, P. J., absent.

PERE MARQUETTE R. CO. v. STRANGE. (No. 5,946.)² (Appellate Court of Indiana. Dec. 20, 1907.) Appeal from Circuit Court, La Porte County; Jno. C. Richter, Judge. Action by Jeter G. Strange against the Pere Marquette Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed. Elam & Feiler, for appellant. Theron Miller, F. E. Osborn, and Wm. A. McVey, for appellee.

PER CURIAM. Upon examination of this case, the judgment of the trial court is affirmed.

WALTERS v. SHEARER et al. (No. 5,917.) (Appellate Court of Indiana. Nov. 20, 1907.) Appeal from Circuit Court, Miami County; Jos. N. Tillett, Judge. Ejectment by John Walters against Benjamin F. Shearer and another. From a judgment for plaintiff for possession, subject to liens declared in favor of defendants, plaintiff appeals. Affirmed. Lawrence & Rhodes, for appellant. Reasoner & Ward, for appellees.

PER CURIAM. This was an action brought by appellant against appellees for ejectment. Appellees answered setting up liens, also a cross-complaint, asking for foreclosure of a bond for a deed, to have title quieted and other proper relief, trial by court and finding for appellant that he have possession, and finding for appellee Shearer that he have judgment for balance of purchase money and money expended upon the property, and to discharge liens thereon, said judgments being declared liens on the real estate in question. We have carefully examined the record, including the evidence offered. The finding and judgment of the court are clearly in accord therewith and the equities of the parties thereto. We find no reversible error in the record. Judgment affirmed.

¹ Transferred to Supreme Court, 83 N. E. 742.

² Appealed to Supreme Court. 84 N. E. 819. Rehearing denied, 85 N. E. 1026.

